THE DIGEST

OF

ONTARIO CASE LAW

BEING

THE REPORTED CASES

DETERMINED IN THE COURTS OF THE NOW

PROVINCE OF ONTARIO

FROM

THE COMMENCEMENT OF TRINITY TERM, 1823, TO THE END OF THE YEAR 1900,

TOGETHER WITH

CASES IN THE SUPREME AND EXCHEQUER COURTS OF CANADA AND CANADIAN CASES IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, CARTWRIGHT'S CASES ON THE B. N. A. ACT, AND A COLLECTION OF CASES FROM THE LAW JOURNALS OF THE PROVINCE, WITH TABLES OF CASES CONTAINED IN THE DIGEST AND OF CASES AFFIRMED, REVERSED, FOLLOWED, OVER-RULED OR SPECIALLY CONSIDERED.

COMPILED BY ORDER OF
THE LAW SOCIETY OF UPPER CANADA

BY

J. F. SMITH, K.C., E. B. BROWN,
R. S. CASSELS, AND T. T. ROLPH,

BARRISTERS-AT-LAW.

VOL. I.

CONTAINING THE TITLES

ABANDONMENT TO EVICTION.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1902

KA67
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D4
v. 1

Entered according to the Act of the Parliament of Canada, in the year of our Lord one thousand nine hundred and two, by The Law Society of Upper Canada, in the office of the Minister of Agriculture.

TABLE OF ABBREVIATIONS

OF THE PRINCIPAL CANADIAN REFERENCES.

A. J. Act..... Administration of Justice Act (Ontario).
A. R..... Appeal Reports (Ontario).
B. C. .....British Columbia.
B. N. A. Act.....British North America Act.
(C.)..... Province of Canada.
Cart.....Cartwright's Cases on the British North America Act, 1867.
Cassels' Dig.....Cassels' Supreme Court of Canada Digest.
C. C. or C. C. L. C....Civil Code (Quebec).
C. C. P. or C. P. C....Code of Civil Procedure (Quebec).
C. L. P. Act.....Common Law Procedure Act.
C. L. J.....Upper Canada Law Journal, N. S., and Canada Law Journal.
C. L. T..... Canadian Law Times (Ontario).
C. L. T. Occ. N.....Canadian Law Times Occasional Notes (Ontario).
Ch. Ch..... Chancery Chamber Reports (Ontario).
Ch. D. ..... Chancery Division.
Code.....Criminal Code of Canada, 1892.
C. L. Ch.....Common Law Chamber Reports (Ontario).
C. P.....Common Pleas Reports (Ontario).
C. P. D.....Common Pleas Division.
Con. Rule .....Consolidated Rules of Practice.
C. S. B. C..... Consolidated Statutes of British Columbia.
C. S. C... ..... Consolidated Statutes of Canada, 1859.
C. S. L. C..... Consolidated Statutes of Lower Canada.
C. S. N. B.....Consolidated Statutes of New Brunswick.
C. S. U. C. .....Consolidated Statutes of Upper Canada, 1859.
(D.)..... Dominion of Canada.
Dorion .....Decisions de la Cour D'Appel (Quebec), Queen's Bench Reports.
Dra..... Draper's Reports (Ontario).
E. & A. .....Upper Canada Error and Appeal Reports.
E. C. .....Election Cases (Ontario).
E. T. .....Easter Term.
Ex. C. R.....Exchequer Court of Canada Reports.
G. O. .....General Orders of the Court of Chancery (Ontario).
Gr. ..... Grant's Chancery Reports (Ontario).
Hannay .....Reports of Cases in the Supreme Court of New Brunswick (N. B. R. vols. 12, 13).
H. E. C. ..... Hodgins' Election Cases (Ontario).
H. T. .....Hilary Term.

TABLE OF ABBREVIATIONS.

(Imp.).....Imperial Statute.
L. C. Jur.....Lower Canada Jurist.
L. C. G. .....Local Courts Gazette (Upper Canada Law Journal).
L. J. .....Upper Canada Law Journal.
(M.) or Man.....Province of Manitoba.
Man. L. R. .....Manitoba Law Reports.
(M. C.) .....Municipal Code (Quebec).
M. T. .....Michaelmas Term.
N. B. Rep. .....New Brunswick Reports.
N. S. Rep. .....Nova Scotia Reports.
N. W. T. Rep. .....North-West Territories Reports.
(O.) .....Province of Ontario.
O. J. Act .....Ontario Judicature Act.
O. R. .....Ontario Reports.
O. S. .....Old Series of King's and Queen's Bench Reports (Ontario).
P. E. I. .....Prince Edward Island.
Pr.....Practice Reports (Ontario).
Pugs.....Pugsley's Reports (New Brunswick, 14, 15, 16).
Pugs & Burb. .....Pugsley & Burbidge Reports (New Brunswick, 17-20).
Q. B. D. .....Queen's Bench Division.
Q. L. R. .....Quebec Law Reports.
Q. R. Q. B. .....Quebec Reports, Queen's Bench.
R. G. .....Regulæ Generales (Ontario).
R. & H. Dig. .....Robinson & Harrison's Digest (Ontario).
R. & J. Dig.....Robinson & Joseph's Digest (Ontario).
R. S. C. .....Revised Statutes of Canada, 1886.
R. S. O. 1877.....Revised Statutes of Ontario, 1877.
R. S. O. 1887.....Revised Statutes of Ontario, 1887.
R. S. O. 1897.....Revised Statutes of Ontario, 1897.
R. S. Q.....Revised Statutes of Quebec.
R. S. N. S. 4th ser....Revised Statutes of Nova Scotia, 4th series.
R. S. N. S. 5th ser....Revised Statutes of Nova Scotia, 5th series.
Rev. Leg. .....Revue Légale (Quebec).
Russ. Eq. Reps.....Russells' Equity Decisions (Nova Scotia).
Russ. & Ches.....Russell & Chesley's Reports (N. S. R. 10-12).
Russ. & Geld.....Russell & Geldert's Reports (N. S. R. 13 to 32).
S. C. R.....Supreme Court of Canada Reports.
Stephens' Dig. .....Quebec Law Digest by Stephens.
Stevens' Dig. .....Stevens' Digest, (New Brunswick).
Tay. .....Taylor's Reports (Ontario).
T. T. .....Trinity Term.
U. C. R. .....Queen's Bench Reports (Ontario).
U. S. R.....United States Supreme Court Reports.

The Digest

OF

ONTARIO CASE LAW.

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I. New Agreement.

1. *Between the Same Parties.*

Agreement not Completed.]—A plea to an action on an agreement alleged that defendant entered into a new agreement with the plaintiff, that defendant would pay a certain sum, and secure the same by his indorsed note, and that the plaintiff accepted same upon certain terms, and alleged a tender of such note by defendant, and a refusal by plaintiff: —Held, bad, on the ground that the delivery of the note was an essential part of the consideration: that the plaintiff was not bound by the agreement until he had accepted the note; and therefore he had retracted before he became bound. *Stewart* v. *Hawson*, 7 C. P. 168.

Agreement not Completed.]—A. having taken a likeness for B. agrees to take in payment $20 in cash, and a cognovit for $70 payable at a future date. After receipt of the $20 and tender of the cognovit, defendant refused to deliver the picture. The plaintiff brought replevin:—Held, that the agreement

for payment was a waiver of the right of lien, but did not amount to an accord and satisfaction. *Dempsey* v. *Carson*, 11 C. P. 462.

Bond—*Legacy.*]—Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his land to his brothers on condition that they should pay to his mother £12 10s. per annum and pay all his just debts, and made them his executors:—Held, that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

Collateral Security.]—Held, that the deed as set out in the pleadings in this case shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes sued on. *Bank of British North America* v. *Sherwood*, 6 U. C. R. 552.

Composition by Parol.] — Defendants admitted the plaintiff's demand, but set up as a defence an agreement after action between them and their creditors, the plaintiff being one, by which the creditors agreed to take certain property of defendants, which was to be managed by assignees appointed by the creditors; and that they were ready and willing to make such assignment, but that sufficient time had not yet been allowed to complete the same. The plaintiff replied, that he and the other creditors did not agree to take the assignment, &c., in satisfaction of their respective debts, nor that the plaintiff was not to proceed against defendants for his debts:—Held, that a composition where lands are not concerned, or an assignment of goods, which would not fall within the Statute of Frauds, is valid by parol: that it was no objection that the satisfaction had not been given at the time of the plea: that an agreement as an accord was good by parol, though acceptance was not shewn, there being no default on the part of the debtors: and that the plea after verdict must be held good, because it was in the nature of the circumstances that the mutual promises were (provisionally) a satisfaction for the debt. *Brookskill* v. *Metcalf*, 2 C. P. 431.

Delivery of Goods — Semble, that a plaintiff may, after breach of a simple contract, legally agree to take a new agreement to deliver goods, &c., in full satisfaction of the former promise, and of the damages accruing from the breach. But goods agreed to be accepted in satisfaction must be actually delivered; readiness to deliver will not do. *Thomas* v. *Mallory*, 6 U. C. R. 521.

Lease—*Breach.*]—After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of the action on the lease. *McIntyre* v. *City of Kingston*, 4 U. C. R. 471.

Lease — *Surrender.*] — Quære, whether a surrender, besides necessarily discharging all undue rents, may not also be pleaded equitably by way of accord and satisfaction of rents over due *Bradfield* v. *Hopkins*, 16 C. P. 298.

Loan.]—A loan of money cannot be pleaded in satisfaction and discharge of a bond and condition. *Prindle* v. *McCan*, 4 U. C. R. 228.

Mortgage — *Agreement to Convey Other Land.*]—M. executed a mortgage in Y.'s favour for £30, over lot No. 11, he then also holding a lease renewable in perpetuity of lot A. at a rental of £4 per annum. The rent being in arrear, judgment was obtained and execution issued by the lessor against M. therefor; Y. then agreed with M. to pay this execution, M. to assign to him the lease of lot A.; and further, it was agreed that if the lessors "will give to the party of the first part (Y.) a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and release a mortgage," &c., being that above mentioned. Y. afterwards obtained a conveyance from the lessors of lot A., but it did not appear that such was made for the sum contemplated at the time of the agreement between Y. and M. Y. afterwards pressed for payment of the mortgage debt, when M. made excuses for delay, and did not rely on the agreement as a bar to Y.'s claim. Y. having commenced an action of ejectment on his mortgage, M.'s bill to stay it and to have the agreement and subsequent purchase by Y. construed into a satisfaction of the mortgage debt, was dismissed with costs. *McKenzie* v. *Yielding*, 11 Gr. 406.

Mortgage—*Release of Equity.*]—Defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed that in default he would give up the property, and plaintiff should sell it to pay himself, and give the overplus, if any, to defendant, and at the same time defendant gave the plaintiff his notes for the purchase money, which were not to be acted on if the property were given up. On default the property was given up and sold by plaintiff for less than the mortgage money, and an action was then brought on one of the notes to recover the difference:—Held, that it would not lie, the notes having been satisfied by the surrender of the property, according to the agreement. *Smith* v. *Judson*, 4 O. S. 134.

Security for Smaller Sum.] — The acceptance of a conveyance by way of mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage, is a satisfaction of the simple contract debt for the larger amount. *Allen* v. *Alexander*, 11 C. P. 441.

Substituted Mode of Payment.]—On the 26th June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st July, and it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 27th June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance, the amount of the cheque being included. His cheque was never presented for payment, nor was any notice of dishonour given. The cheque of P. was presented and paid. Some time after the suspension of the private bankers, and after some negotiations between P. and M. as to the payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "Please take

judgment when you think best against F. and L. (the private bankers), to include the amount of your cheque for $575 to me, upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter." M. then went on with his action, and entered judgment, but nothing was recovered:—Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment, and did not operate as an accord and satisfaction. *Blackley* v. *McCabe*, 16 A. R. 295.

Trust—*Subsequent Conveyance.*]—A man by an informal instrument assigned to a trustee all his estate and effects, on condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200:—Held, that the trustee could not set this up as a part satisfaction of the $400 mentioned in the first deed, and that declarations of the father made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew that the conveyance was made and intended to be in part satisfaction of the sum so secured to the son. *Mulholland* v. *Merriam*, 20 Gr. 152.

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2. *By Stranger.*

Agreement not Completed.]—Covenant on a mortgage. Plea, that defendant conveyed to the plaintiff his equity of redemption in the land mortgaged, which the plaintiff accepted in satisfaction of the claim. It appeared that when the plaintiff commenced this action, defendant offered to convey the land in full satisfaction of the debt, but the plaintiff declined. Plaintiff's attorney afterwards, hearing that one G. would buy the land and pay the mortgage, told the plaintiff, who said it was all the same to him from whom the money came, and at G.'s wish the deed was made by defendant to the plaintiff instead of to G., and left with the attorney. Afterwards, however, it appeared that G., had referred to another lot owned by defendant, and he refused, therefore, to carry out the agreement:—Held, that the plea was not proved. *Haar* v. *Henley*, 18 U. C. R. 494.

Damages—*Settlement by Third Person.*]—To an action against attorneys for negligence in not registering a mortgage from D. for £750 to plaintiffs within a reasonable time, and so permitting a subsequent mortgage to be registered before it, the defendants pleaded that after breach the plaintiff accepted another mortgage from D. on other land of D. for £750 in full satisfaction and discharge of defendants' promise, and all damages accrued to the plaintiffs from the breach thereof:—Held, a good plea, it being no objection that the accord was by a third person, a stranger to the action. *Lynch* v. *Wilson*, 22 U. C. R. 226.

II. PAYMENT.

Agreement to Purchase Land Leased—*Satisfaction of Rent by Payment of Purchase Money.*]—*See Forge* v. *Reynolds*, 18 C. P. 110.

Damages.]—Payment to a person injured by an accident on a railway of the sum of ten dollars, and a receipt signed by him for "the sum of ten dollars, such sum being in lieu of all claims I might have against said company on account of an injury received on the 6th day of May, 1893," may constitute accord and satisfaction. Judgment in 26 O. R. 19 reversed. *Haist* v. *Grand Trunk R. W. Co.*, 22 A. R. 504.

Judgment.]—Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order as payment "in full," and the solicitor indorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance. Day v. McLea, 22 Q. B. D. 610, applied. Section 53, ss. 7, Judicature Act, as to part performance of an obligation in satisfaction, considered. *Mason* v. *Johnston*, 20 A. R. 412.

Payment not Completed.]—Plaintiff holding defendant's note (not negotiable) payable on demand, for £500, in transactions with one R. (a partner of defendant), gave it to R., taking in return his note for £1,000, for this and other transactions. In dissolving partnership, it was agreed that this £1,000, or note of R.'s should be paid by defendant. R., being subsequently called upon for payment, obtained defendant's cheque for £500, and returned defendant's original note for £500 to plaintiff in payment of the note for £1,000. Upon an action brought for the amount of the note of £500, the defendant pleaded satisfaction thereof by taking R.'s note for £1,000:—Held, that the facts did not amount to a payment, and that defendant was liable. *Booth* v. *Ridley*, 8 C. P. 464.

Settlement of Action.]—The plaintiffs sued the defendants for $150, money lent, to which the defendants pleaded a set-off against L. in satisfaction. It appeared that the defendants having built a house for L., cross-demands arose out of the contract, and their solicitors negotiated for a settlement: that the $150 was mentioned, and L.'s solicitor offered to pay $650 in full of all matters, taking this $150 into account as a credit to L. The defendants refused to take less than $700, and sued L., whose solicitor, before he was aware of the suit, paid $650, and afterwards paid $50 into court, which was taken out. The jury were asked whether L. or his attorney agreed absolutely to allow the $150 as a payment on the contract, or only for the sake of a settlement, which was not arrived at: to which the defendants objected, that if the negotiations proceeded on the supposition that the $150 was to be so allowed, and L. afterwards paid the $700 on a different understanding, he was bound so to state at the time:—Held, that the direction was right, and a verdict for the plaintiff was upheld. *Young* v. *Taylor*, 25 U. C. R. 583.

Smaller Sum.]—Declaration on common counts, claiming under one promise £500, and laying the damages at £200. Plea, payment of £250 in full satisfaction of the said promise, and also of all damages by reason of the non-performance thereof:—Held, bad. *Thompson* v. *Armstrong*, 3 U. C. R. 153.

Smaller Sum.]—The plaintiff declared in debt for £1,000 upon three counts, £500 work done, £100 money paid, and £400 account stated. Plea, that the plaintiff agreed under seal to build a house for defendants according to specifications; that any extra work should be done under, and valued by their architect; that certain extra work was done and valued by him, as provided, at £355; that "such extra work is the cause of action in the declaration alleged, and for which this action was brought;" and that before action they paid to the plaintiff the said sum of £355," "in full satisfaction and discharge of the said extra work, and of all damages and demands in respect thereof, being the said causes of action in the declaration mentioned:"—Held, plea bad, as amounting to a less sum being pleaded in satisfaction of a greater. *Ritchey* v. *Bank of Montreal*, 4 U. C. R. 222.

Smaller Sum.]—Declaration on common counts, laying the damages at £200. Plea, accord and satisfaction by payment of £3:—Held, bad. *O'Beirne* v. *Gowin*, 5 U. C. R. 582.

Smaller Sum.]—Plea of payment and acceptance of a less in satisfaction of a larger sum, held, bad:—Quære, whether a plea that the demand was unliquidated and disputed, and that it was agreed that plaintiff should receive a less sum in satisfaction of his alleged cause of action, could be supported. *Holmes* v. *McDonell*, 12 U. C. R. 469.

Third Person.]—S. conveyed lands to R. with full covenants. R. conveyed by a similar deed to plaintiff. S. died leaving a wife, who demanded her dower. R. paid plaintiff a certain sum in accord and satisfaction:—Held, that payment in accord and satisfaction by R., and acceptance, discharged plaintiff's claim against defendant, executor of S. *Cuthbert* v. *Street*, 9 C. P. 115.

III. Promissory Notes and Bills of Exchange.

Bill of Exchange Taken.]—Declaration on a special contract under seal, by which plaintiff was to do all the work on an extension of defendants' railway, alleging non-payment for work done, &c. Plea, as to $15,000, parcel, &c., that before action, at plaintiff's request, defendants delivered to plaintiff their acceptance of his bill of exchange for said sum, which bill was current at the commencement of the suit, and was afterwards paid:—Held, on demurrer, plea good, following Henry v. Earl, 8 M. & W. 228, and Homer v. Denham, 1? Q. B. 813 *n*. *Shanly* v. *Midland R. W. Co*, 33 U. C. R. 604.

Damages.]—Where an action is for tort, and the damages in the discretion of the jury:—Semble, that a promissory note may be taken in satisfaction; the principle that a less sum of money cannot be taken in satisfaction of a greater not applying. *Lane* v. *Kingsmill*, 6 U. C. R. 579.

Dishonour of Notes.]—Assumpsit for goods sold and delivered, and on account stated. Plea, that before suit defendant made and delivered three negotiable notes to the plaintiffs, "who then accepted and received the same in full satisfaction and discharge of the sum of money and cause of action in the said declaration mentioned." Replication, that the notes were dishonoured at maturity, and still remain in plaintiffs' hands unpaid. Held, bad, for the plaintiffs, having accepted the notes in full satisfaction and discharge of the original causes of action, had lost their remedy upon the latter. *Loomer* v. *Marks*, 11 U. C. R. 16.

Note not Accepted.]—Action for goods sold. It appeared that defendant, on application for payment, sent to the plaintiff his own note, with two indorsers; the plaintiff wrote acknowledging that it was received, and "placed to your credit, with thanks; the indorsers are not known to us, but on your stating that each one is good for the amount, we accept the note in settlement of your account to date." At the maturity of the note, defendant wrote expressing regret at his inability to meet it, and requesting plaintiff to draw upon him, and that he could hold the note until payment of the draft; he subsequently telegraphed him that he would remit in a few days:—Held, a question, on the evidence, for a Judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not, and it having been found that he had not, the court refused to interfere. *Greenwood* v. *Foley*, 22 C. P. 352.

Note not Indorsed.]—First count, for goods sold and delivered, &c., second count, on a promissory note made by B. & S. payable to defendant or order, and by defendant indorsed and delivered to plaintiffs. Plea, that before action defendant "delivered the note in second count mentioned to the plaintiffs in full satisfaction and discharge of the cause of action in the said first count mentioned, and the plaintiffs then accepted and received the said note in full satisfaction and discharge of the said money, and the causes of action in respect thereof in the first count mentioned." Demurrer, because the note in question was payable to the order of defendant, and the plea does not aver that he indorsed it to plaintiffs:—Held, plea good, as the delivery and acceptance by plaintiffs of the note in question, though not indorsed, was, under the authority of Hanscombe v. Macdonald, 4 C. P. 199, a good answer to the action. *Jacques* v. *Beaty*, 13 C. P. 327.

Note for Arrears of Rent.]—Defendant leased to F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendant on account of rent, for which defendant gave receipts as for premises leased to F. On plea of rien en arrière from F.:—Held, that the plaintiff could not insist upon the taking of the note as a discharge of the rent due from F. *McLeod* v. *Darch*, 7 C. P. 35.

Note of One Joint Debtor.]—The note of one of two joint debtors is no satisfaction of the debt:—Held, plea bad on that ground, and as attempting to shew liability to a third party, an indorsee, when the note as pleaded was evidently not negotiable. *Leonard* v. *Atcheson*, 7 U. C. R. 32.

Note of One Partner.]—To an action against two partners for wharfage and warehouse-room of goods, defendants pleaded the

delivery and acceptance of the promissory note of one of them in satisfaction. At the trial the plaintiffs' book-keeper said that he presented the account, and took the note made by one defendant in settlement, writing at the foot of the account, "received payment by note." The Judge thereupon directed a verdict for defendants:—Held, that the plea was good, but that it should have been left to the jury to find whether the note was accepted by the plaintiffs in satisfaction. *Port Darlington Harbour Co.* v. *Squair*, 18 U. C. R. 533.

Note of Third Person.]—The delivery and acceptance of the negotiable promissory notes of a third person in satisfaction, though for a less sum in amount, is a good satisfaction. *Hanscombe* v. *Macdonald*, 4 C. P. 190.

Suspension of Remedy.]—A mortgage was made for £1,196, payable by instalments of which the third instalment was paid. For the first two instalments the mortgagor gave two promissory notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R B. W. his notes for £200 at four months and £200 at eight months from the first of June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following indorsement was made on the mortgage: "Received from R. B. W. two notes of hand, indorsed by L., for £200 each to complete the two first payments on the within mortgage." The notes were not paid at maturity, and in a suit by the assignee of the mortgagee to foreclose in default of payment of the first two instalments:—Held, that the right to recover upon the mortgage was only suspended and not discharged by the taking of the notes. *Gibb* v. *Warren*, 7 Gr. 496.

IV. Special Pleas.

Account Stated.]—The pleas set up an account stated between plaintiff and defendant, and an acceptance by plaintiff of defendant's agreement to pay the sum found due:—Held, that the plaintiff, in his replication, might traverse both the accounting and the acceptance by plaintiff in satisfaction. *Light* v. *Woodstock and Lake Erie R. W. Co.*, 15 U. C. R. 201.

Agreement After Breach.]—Action on the common counts. Plea, that after the promises, and before this suit, it was agreed that defendant should sell to plaintiffs, and plaintiffs then and there bought of defendant, twenty shares of certain stock, which defendant should hold for plaintiffs' use, and transfer to them when required; and that the plaintiffs should then and there accept defendant's said agreement, and the said shares so to be transferred, in full satisfaction of the said promises: that in pursuance of, and ever since such agreement, defendant had held, and still holds, such shares for the plaintiffs, and hath been and is ready to transfer them when required:—Held, plea bad, because it was not shewn whether the alleged agreement was before or after the breach of the promise sued on. *Ross* v. *Heron*, 12 U. C. R. 467.

Agreement Not Accepted.]—Plea, satisfaction and discharge, "by delivering to the plaintiff, according to agreement, a certain promissory note," &c.:—Held, bad, for not averring that the plaintiff accepted the note in satisfaction. *Brown* v. *Jones*, 17 U. C. R. 50.

Agreement Not Completed.]—Action on defendants' covenant to make a sufficient crossing on plaintiff's land. Defendants pleaded a former action on the same covenant, alleging that after issue joined therein it was agreed that defendants should pay and the plaintiff accepted £125, in full satisfaction of the cause of action, and that the £125 was thereupon paid and accepted, &c.; to which the plaintiff replied, traversing the payment and acceptance in satisfaction, &c. The plaintiff wished to shew that, besides paying the £125, defendants were to make the ditch to the lake:—Held, that under the replication the only question in issue was the payment of the £125, not the agreement to accept it in satisfaction. *Utter* v. *Great Western R. W. Co.*, 17 U. C. R. 392.

Agreement Not Completed.]—Declaration, that on an accounting between them defendant's indebtedness to plaintiff was fixed at a certain sum, to be paid off as stipulated, one of which payments defendant undertook to make to A. & Co., to whom plaintiff was liable, it being also agreed that plaintiff should towards that liability provide an additional sum by a day named, to be repaid by defendant to him; and further, that any error in said accounting should be corrected, and plaintiff should give up to defendant all notes and securities belonging to defendant, which plaintiff before and at the time of the accounting held, except, &c. Breach, that although a reasonable time had elapsed, &c., defendant had not paid A. & Co. Plea—after alleging that the sum agreed to be paid to A. & Co. was composed of various notes made by defendant to plaintiff—that after said accounting, and before action, plaintiff indorsed said notes to A. & Co., in settlement of their claim, of which A. & Co., had given defendant notice:—Held, plea bad, as not shewing that the notes, which had been indorsed away, had been given for the cause of action declared on. *Jones* v. *Cameron*, 16 C. P. 271.

Agreement Not Completed.]—To an action by husband and wife on a note for $800 made to the wife before marriage, defendant pleaded that the wife was formerly the widow of one C., to whom defendant had been indebted in $400; that she subsequently took out letters of administration to his personal estate; and that afterwards the defendant became indebted to her in $200; that the note declared on was for these two sums; and that after its maturity, with the knowledge and assent of her husband and co-plaintiff, she agreed with defendant to accept from him a conveyance in fee of certain lands in full satisfaction and discharge of her claim on said note; that defendant accordingly executed a proper deed of said lands to her, duly registered, and tendered the same to her before action, and that she never expressed any dissent from said agreement until after said tender:—Held, on demurrer, a bad plea: 1. As not averring that there was no marriage settlement, so as to bring the case under

the provisions of C. S. U. C. c. 73. 2. Because the accord and satisfaction attempted to be set up being, as to two-thirds of the amount, in respect of a sum due to the wife in her representative character, was not pleaded as having been made with her husband. 3. Because what was pleaded was the agreement to accept a deed in satisfaction, but the acceptance in satisfaction was not only not pleaded, but was shewn by the plea not to have taken place. *Balsam* v. *Robinson*, 19 C. P. 263.

Confusion of Dates.]—Plea of satisfaction held bad, on special demurrer, for inconsistency of dates. *Phelan* v. *Fraser*, 11 U. C. R. 94.

Covenant.]—Accord with satisfaction:—Held, to be a good plea in covenant. *Bayard* v. *Partridge*, Tay. 558.

Damages.]—Case, for injury to plaintiff's reversionary interest in land leased by him to defendant. Plea, that it was agreed between them that if defendant would agree to pay him £62 15s. for the use of certain premises of his for one year, the plaintiff would accept such agreement in full satisfaction of the grievances complained of; that in pursuance of such agreement defendant agreed to pay, and plaintiff then accepted the said agreement in such satisfaction as aforesaid:—Held, a good plea of accord and satisfaction. *Clark* v. *King*, 13 U. C. R. 185.

Deed—*Breach.*]—Accord and satisfaction cannot be pleaded to a deed before breach. *Robinson* v. *Flanigan*, 22 U. C. R. 417.

New Firm.]—Declaration against R. & H. for goods sold. Plea by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership; that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim; and that the plaintiff, being aware of this arrangement, took the note of the new firm R. & W., for his debt:—Held, a good plea. *Watts* v. *Robinson*, 32 U. C. R. 362.

The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea; and that in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H.:—Held, good, *Ib.*

The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W.:—Held, clearly good. *Ib.*

New Note Substituted.] — Declaration by administratrix of A. on a note for $140, made by defendant, payable to A., or bearer. Plea, that at the making of the note, defendant owed A. $150, and said note was by mistake made for $140; that to correct the error, defendant immediately made a second note for $150 at A.'s request, who received it in full satisfaction of the note sued on, which was inadvertently left with A., and after his death came into the plaintiff's hands; that the plaintiff also got the note for $150, which she transferred to one F., who sued defendant on it, in the Division Court, which is still pending:—Held, on demurrer, a good plea, notwithstanding that the $150 note was not averred to be negotiable. *McHenry* v. *Crysdale*, 25 U. C. R. 460.

Note after Breach.]—Action on a policy of insurance, alleging a total loss by fire, and that defendants had by resolution admitted the claim at £500, and promised to pay it. Plea, that after the accruing of the cause of action declared upon, it was agreed between defendants and the plaintiff, that the plaintiff should draw upon one C., requiring him to pay to the plaintiff's order £500 at the Bank of Upper Canada, at Niagara, and that the plaintiff would accept and receive C.'s acceptance of said bill in full satisfaction and discharge of the said cause of action; that the plaintiff accordingly drew and C. accepted such bill; and the plaintiff then received the same from defendants in full satisfaction of said cause of action, and afterwards indorsed the same to the said bank, who then held the same. The plaintiff replied that neither defendants nor C. paid the bill, and that the bank before this suit delivered the same to the plaintiff, who still held it:—Held, on demurrer, plea good, for it alleged a simple contract given in satisfaction, not of an undertaking under seal before breach, but of the "cause of action," or damages accrued after, which did not arise from the deed only, but from the fire and compliance with the conditions of the policy:—Held, also, replication clearly bad. *Brown* v. *Erie and Ontario Insurance Co.*, 21 U. C. R. 425.

Note Taken.]—Assumpsit on a note for £75. Plea, as to £50, another note taken on account, indorsed by plaintiffs and outstanding. Replication held bad in form, on special demurrer. *Thompson* v. *Wilson*, 1 C. P. 57.

Note Taken.] — To an action for goods sold and delivered, defendant pleaded in effect, that upon an accounting $80 and no more was found due on such accounts; and it was then agreed that defendant should, and he did deliver to plaintiff, who then accepted and received from defendant a certain note for $80, in full satisfaction and discharge of the several causes of action, and of all the plaintiff's costs of suit:—Held, a good plea in accord and satisfaction. *Freeman* v. *McCarthy*, 19 C. P. 229.

Offer Not Accepted.] — Declaration by P.'s administrator on a note made by defendant, payable to P. Defendant pleaded, by way of accord and satisfaction, a certain proposition made to the plaintiff and D. as curators of P.'s estate in Montreal, which was, in effect, that one R. would indorse defendant's notes for 17s. 6d. in the £, payable at certain dates, on getting a full discharge; and the defendant averred that the plaintiff and D. as such creditors "agreed to and accepted the terms of the said proposition," and defendant made and R. indorsed his notes accordingly, and delivered the same to the agent of the said curators in full satisfaction and discharge, and as a composition of the causes of action sued for:—Held, plea bad, for not averring either that the notes or the agreement were accepted in satisfaction or discharge. *Macfarlane* v. *Ryan*, 24 U. C. R. 474.

Part Payment.]—Covenant for non-payment of £300 by instalments. Pleas, as to £50 parcel, &c., payment and acceptance of £50 in full satisfaction thereof:—Held, good. *Fralick* v. *Huffman*, 5 U. C. R. 562.

Patent — *Agreement to Manufacture.*] — The plaintiffs sold to defendant by deed the right to manufacture and sell their patent right for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one-half of a royalty of twenty-five cents on each seat, and further, to supply McK. & Co. with at least 200 seats per month at 95c. each, pursuant to an agreement between them and the plaintiffs, paying on these a royalty of 20c. to the plaintiffs. There were other covenants by defendant to manufacture in a workmanlike manner, &c., and to make use of all means to introduce the seats and make them known. The declaration set out the deed, and assigned breaches of all the covenants. The third plea was, that after breach it was agreed between the plaintiffs and defendant that they should release each other from the performance of their respective covenants, and all rights of action in respect thereof, and in consideration thereof defendant agreed to manufacture thenceforth only so many seats as would supply the demand, and the plaintiffs accepted such agreement in satisfaction of the cause of action declared on:—Held, bad, as pleaded to the whole cause of action, whereas it could only be an answer to the breaches of the covenant and not to the covenant itself, for it shewed no release, but only an agreement for one, and no satisfaction by deed; and because the satisfaction was insufficient, the new agreement being merely to manufacture a less number of the same article in the same way, and on the same terms. *McGiverin* v. *Turnbull*, 32 U. C. R. 407.

Satisfaction After Breach.] — Declaration: that the plaintiffs, by deed, dated 18th April, 1874, covenanted to keep their mill in running order, using due diligence, during the season of 1874; to saw, cull, draw, and pile all the pine lumber required to be cut thereat, as they might be instructed, and to draw the logs from a named point, the plaintiffs to give three days' notice of their requirement to have the logs delivered at said point; and the defendant covenanted that if, after the said notice, the said logs were not so delivered, he would pay the cost of the mill hands kept idle in consequence, but such cost not to commence until the expiration of the three days' notice. And the plaintiffs averred that defendant failed to deliver logs after three full days' notice, whereby the hands were kept idle, &c. Fourth plea: that before the alleged breaches, the defendant gave the plaintiffs notice that he did not require any further logs cut or sawed at the mill during the season of 1874. Fifth plea, on equitable grounds, setting out, in substance, a parol agreement, under which the plaintiffs elected and agreed to saw certain logs known as the Boyd logs and other logs, not included in the first agreement, for their own benefit and profit, but on the express agreement and condition that the defendant should not be liable for the costs and charges of the men being kept idle, pending the delay; and that the plaintiffs accordingly sawed the said logs on these terms; but the plea did not aver positively the acceptance of the substituted agreement, or the performance of it in satisfaction, &c.:—Held, on demurrer, fourth plea bad, for under the agreement defendant was not authorized of his own mere motion to put an end to it. Held, also, fifth plea good, as amounting to a satisfaction after breach, though it would have been more proper to have averred in express terms an acceptance in satisfaction, &c. *Dimcoodie* v. *Smith*, 25 C. P. 361.

Seduction—*Agreement to Support Child.*] —Declaration in seduction, by the father. Plea, in effect, that after the seduction it was agreed between plaintiff and defendant that if defendant would agree to support the child at his own costs, &c., plaintiff would accept the same in full satisfaction and discharge; and that defendant did agree so to do, and plaintiff accepted said agreement in full satisfaction, &c.:—Held, on demurrer, plea good, as setting out an agreement on defendant's part, for which a sufficient consideration appeared in his undertaking a liability which he was not bound to assume, and that defendant was not obliged to shew that he had actually performed his agreement, as this was unnecessary to support the accord set up by the plea. *McHugh v. Grear*, 18 C. P. 448.

Settlement of Action.]—The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between plaintiffs and T., one of the now defendants, pending such suit, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for the security for costs which the plaintiffs had been ordered to give in said suit, and pay all costs incurred or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all the moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs sued defendants on the last-mentioned covenant; and to a plea setting out the transaction, which was held void for champerty and maintenance, the plaintiffs replied, on equitable grounds, that in the Chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the hearing the cause was compromised, and a decree made by agreement, by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties, and by the court, as valid. Remarks by A. Wilson, J., as to the effect of this replication. *Carr* v. *Tannahill*, 30 U. C. R. 217.

Transfer of Property.]—In an action on the common counts, defendant A. pleaded that it was agreed between the plaintiff B., and the defendant A., and a third party, C., that C. should sell to B. all the claim, title and right of pre-emption which C. had to certain land, and that C. should execute a deed at B.'s request to D. in satisfaction of B.'s claim, and then averred that C. did, by the procurement of A., at B.'s request, execute a deed to D. of all the title C. had to the land:—Held, plea bad, in not averring that A. had a certain right and interest in the land, and of a certain value, and that the conveyance to D. was accepted in satisfaction. *Fralick* v. *Lafferty*, 3 U. C. R. 159.

Transfer of Property.]—Plea, that on, &c., defendant made to the infant son of the

plaintiff a good and sufficient deed in fee of certain land, which the plaintiff accepted in full satisfaction, &c.:—Semble, that it should have been averred that defendant had some interest in the land conveyed in satisfaction. *Phelan* v. *Fraser*, 11 U. C. R. 94.

Transfer of Property.]—Sci. fa. upon a judgment for $2,000 against defendant as administrator of M. on a bond in that sum, conditioned for the payment of $1,200 by instalments, with a suggestion that two instalments were due and unpaid. Plea, on equitable grounds, that before the sci. fa. issued it was agreed between the plaintiff and defendant, with several others the heirs at law of M., that they should convey to the plaintiff their interest in certain land of which as such heirs they were seized in fee, that the consideration therefor should be $2,000, and their interest should be treated as so much in cash, which should be applied as a payment by the estate of M. to the plaintiff; that the defendant and others accordingly conveyed their interest in the land to the plaintiff; and the plaintiff accepted such conveyance as representing $2,000, and credited the estate of M. with the sum: that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amount then due and accruing due was less than $2,000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance:—Held, on demurrer, that the plea shewed a good defence. *Whiteford* v. *McLeod*, 28 U. C. R. 349.

Transfer of Shares.]—To an action on the common counts by plaintiffs as executors, defendant pleaded, on equitable grounds, that defendant and testator were partners in the purchase of certain lands in the United States of America, and also in some shares in a certain railway company for which they were to pay in equal proportions and were to share equally in the profits and losses, and that being so interested, it was after the death of the testator agreed between plaintiff and defendant that if defendant would assume and pay the calls on the railway shares, take the stock as his own, and relieve the plaintiff from all liability thereon, no claim should be made upon him for the balance due on the lands, but that plaintiffs should pay the same, and the payments so made should become a first charge upon the lands. The plea then averred performance of the agreement on the defendant's part:—Held, on demurrer, a good plea both as a legal and equitable defence, and that, if it was necessary to the validity of the agreement that there should have been a writing, it must be assumed on demurrer that there was one. *Clarke* v. *Carroll*, 17 C. P. 538.

Trespass.]—In trespass q. cl. fr. defendant pleaded a reference after action, and payment and acceptance of 5s. in pursuance of the award, in full satisfaction of the damages and costs:—Held, a good plea of accord and satisfaction, all about the reference being surplusage. *Hall* v. *Warner*, 2 U. C. R. 392.

ACCOUNT.

See Limitation of Actions, IV. 1—Mortgage, VIII.—Parliament, I.—Partnership, XI. 2 (a)—Practice—Practice in Equity before the Judicature Act, XIV. 3 (a)—Trusts and Trustees, V. (1), VII. 4 (a).

ACCOUNT STATED.

See Evidence, XV. 1.

ACCRETION.

See Water and Watercourses, I.

ACKNOWLEDGMENT.

See Limitation of Actions, II. 2, IV. 2.

ADEMPTION.

See Will, IV. 13 (e).

ADMINISTRATION.

See Executors and Administrators, I.

ADMINISTRATION BOND.

See Executors and Administrators, VIII. 2.

ADMINISTRATION OF JUSTICE ACT.

See Pleading—Pleading at Law Before the Judicature Act, VII.—Practice—Practice at Law Before the Judicature Act, I. 10—Practice in Equity Before the Judicature Act, II.

ADMINISTRATOR AD LITEM.

See Executors and Administrators, II.

ADMIRALTY.

See Ship.

ADMISSIONS.

See Criminal Law, VI. 3—Evidence, II.

ADMIT, NOTICE TO.

See Practice—Practice at Law Before the Judicature Act, IX.

ADULTERATION OF FOODS.

See Constitutional Law, II. 2.

ADULTERY.

See DOWER, III. 1.

ADVANCEMENT.

See INFANT, IV., V. 1.

ADVERSE POSSESSION.

See LIMITATION OF ACTIONS, II. 4.

AFFIDAVIT.

See ARREST, II. 2 (a)—ATTACHMENT OF DEBTS, III.—BILLS OF SALE, IV. 2, 3—EVIDENCE, III.

AGENT.

See BANKS AND BANKING, I.—BILLS OF EXCHANGE, VIII.—COMPANY, IV.—INSURANCE, III. 1—LIMITATION OF ACTIONS, VII.—MONEY, II. 12—MORTGAGE, VII. 1—PARLIAMENT, I. 2—PRINCIPAL AND AGENT—RAILWAY, XVIII.—SET-OFF, I. 1—SOLICITOR, II.—SPECIFIC PERFORMANCE, V. 17 — TRUSTS AND TRUSTEES, VII. 4 (b)—WARRANTY, III.

AGISTMENT.

See ANIMALS.

AGREEMENT.

See CONTRACT—LANDLORD AND TENANT, III. —SPECIFIC PERFORMANCE, II., III., IV., V., VI., VII.—VENDOR AND PURCHASER, I. 3.

AGREEMENT TO BEQUEATH PROPERTY.

See SPECIFIC PERFORMANCE, VII.

AID TO RAILWAY.

See RAILWAY, I.

AIR.

See NUISANCE, V.

ALDERMAN.

See JUSTICE OF THE PEACE, II. 1—MUNICIPAL CORPORATIONS, XVIII.

ALIEN.

An alien may take, hold, and transmit property of any kind (except shares in a British ship), as if a natural born British subject. See R. S. C. 1886 c. 113, also R. S. O. 1897 c. 118.

The following are cases dealing with the title of aliens to land, which it is unnecessary to set out in full:—*Wallace* v. *Adamson*, 10 C. P. 338; *Doe d. Macdonald* v. *Cleveland*, 6 O. S. 117; *Irwin* v. *McBride*, 23 U. C. R. 540; *Leatherman* v. *Trow*, 15 C. P. 578; *Wood* v. *Campbell*, 3 U. C. R. 269; *Dehart* v. *Dehart*, 26 C. P. 489; *Doe d. O'Connor* v. *Maloney*, 9 U. C. R. 251; *Murray* v. *Heron*, 7 Gr. 147; *Iler* v. *Elliott*, 32 U. C. R. 434; *Rumrell* v. *Henderson*, 22 C. P. 180; *Doe d. Chandler* v. *Tessier*, 6 U. C. R. 216; *Doe d. Richardson* v. *Dickson*, 2 O. S. 292; *Wallace* v. *Hewitt*, 20 U. C. R. 87; *Montgomery* v. *Graham*, 31 U. C. R. 57; *Doe d. Patterson* v. *Davis*—*Doe d. Patterson* v. *Dewitt*, 5 O. S. 494; *Doe d. Robinson* v. *Clarke*, 1 U. C. R. 37; *Doe d. Hay* v. *Hunt*, 11 U. C. R. 367.

Creditor.]—In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with Ontario creditors.

Re Kloebe, 28 Ch. D. 175, followed.

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

Insolvency.]—Quære, is a foreigner liable to the insolvent laws, being neither resident nor domiciled in Canada? *Mellon* v. *Nicholls*, 27 U. C. R. 167.

Interpleader.]—Held, in interpleader, that the claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562.

Levying War — *Autrefois Acquit.*] — The prisoner being indicted under C. S. U. C. c. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit:—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner being insufficient as against a subject; and the prisoner, therefore, was not in legal peril on the first indictment. *Regina* v. *McGrath*, 26 U. C. R. 385.

Levying War—*Evidence.*]—The prisoner was convicted upon an indictment under C. S. U. C. c. 98, containing three counts, each charging him as a citizen of the United States. He was charged with levying war, and being in arms against Her Majesty. The Crown rested on the prisoner's statement

that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States, but:—Held, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence. *Regina* v. *McMahon*, 26 U. C. R. 195.

Levying War—*Evidence.*]—In this case, the charge being the same as the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf who proved that he was born within the Queen's allegiance:—Held, that the Crown might waive the right of allegiance and try him as an American citizen, which he claimed to be. The fact of the invaders coming from the United States, would be prima facie evidence of their being citizens or subjects thereof. *Regina* v. *Lynch*, 26 U. C. R. 208.

Mortgage — *Discharge.*] — A foreign administrator cannot effectually release a mortgage on land in this province. Payment to him and a release by the heirs are not sufficient to entitle the owners to a certificate of title free from incumbrances under the Act for Quieting Titles. *In re Thorpe*, 14 Gr. 76.

Mortgage of Ship.]—The mortgagee of a British ship is not an owner within the meaning of Imperial statute 17 & 18 Vict. c. 104, and there is no provision in that statute to prevent an alien being a mortgagee. *Comstock* v. *Harris*, 13 O. R. 407.

Naturalization.]—On an application to prevent certificates of naturalization being issued by the Court of General Sessions of the Peace, to C. W., J. F., and B. K., under 31 Vict. c. 66 (D.), the grounds of opposition were, 1. That the time of residence was not stated in the affidavit of residence; 2. That the certificate of the justices of the peace, read on the first day of the court, did not shew that the requisite oaths of allegiance had been taken by the applicants. 3. That initial letters only were used in the heading of the affidavits, and not the full names of the applicants. These objections were overruled. *In re Webster*, 7 C. L. J. 39.

Payment Out of Court.]—Payment to foreign guardian or trustee. *See* INFANT, II. 3—PAYMENT, II. 3.

Trade-mark.]—The right at common law of an alien friend in respect to trade-marks stands on the same ground as that of a subject. *Davis* v. *Kennedy*, 13 Gr. 523.

See CONSTITUTIONAL LAW, II. 20—PARLIAMENT, I. 12 (e).

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, III.

ALIMONY.

See FOREIGN LAW—HUSBAND AND WIFE, I.

AMALGAMATION.

See COMPANY, V.—RAILWAYS, II.

AMENDMENT.

See ARREST, II. 2 (b)—CRIMINAL LAW, VIII. 1—EJECTMENT, VI. 1—EXECUTION, V. 1—FRAUD AND MISREPRESENTATION, III. 3 (b)—JUDGMENT, I.—PARTIES, I.—PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, II. —PLEADING IN EQUITY BEFORE THE JUDICATURE ACT, II., III.—PLEADING SINCE THE JUDICATURE ACT, II.—PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, I. 1—TRIAL, I.

ANIMALS.

I. CASES OF GENERAL APPLICATION, 20.

II. CATTLE, 21.

III. DOG, 21.

IV. HORSE, 21.

V. SHEEP, 24.

VI. WILD ANIMALS, 24.

I. CASES OF GENERAL APPLICATION.

Bailment—*Increase.*]—In the case of a gratuitous loan all the increase and offspring of the loan, and everything accessional to it (in this case a pair of mares, offspring of a mare loaned, and portion of a set of harness acquired as payment for the use of oxen), belong to the lender, and must be returned at the determination of the loan, and are not subject to seizure under execution against the bailee. *Dillaree* v. *Doyle*, 43 U. C. R. 442.

Bills of Sale.]—Effect of Bills of Sale Act, R. S. O. 1877 c. 119, where animal conveyed by one of two owners. See *Gunn* v. *Burgess*, 5 O. R. 685.

Conversion—*Increase.*]—In April, 1846, plaintiff's mares strayed to defendant's farm, who advertised them, and no owner appearing, he began to use them about a year afterwards. In July, 1846, the same mares, being supposed to be on the plaintiff's pasture, were sold by the sheriff, under an execution against plaintiff, to one Scott, who never obtained possession of them, but hearing, in 1852, that they had foaled and were in defendant's possession, made a written demand on defendant for them and their progeny in September of that year. A year afterwards S. made over his interest to the plaintiff as a gift, without any consideration or delivery. In 1855 the plaintiff made a demand on defendant for the mares and colts, which was refused, and he brought trover:—Held, that the measure of damages in trover is the value of the property at the time of conversion, and consequently that even if the plaintiff had not been barred by the statute of limitations he had no claim to be the owner of the animals subsequently bred from the mares. *Scott* v. *McAlpine*, 6 C. P. 302.

Scienter.]—Held, that upon a count in case, for injuries done by defendant's bull, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had once admitted that his bull had done the injury, and offered the plaintiff $10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in Thomas v. Morgan, 2 Cr. M. & R. 496. *Mason* v. *Morgan*, 24 U. C. R. 328.

Scienter.]—W. brought an action for injuries to her daughter committed by a dog owned or harboured by the defendant V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shewn that the dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house, going every day to V.'s place of business with him, or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial:—Held, that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities and that a nonsuit was wrong. *Vaughan* v. *Wood*, 18 S. C. R. 703.

II. Cattle.

Trespass.] — Trespass is maintainable against the owner of a bull which has broken into the plaintiff's close and there killed his mare, the defendant being present or aware of the act. *Mason* v. *Morgan*, 24 U. C. R. 328.

III. Dog.

Municipal Control.] — The corporation of the city of Toronto have power from time to time, at their discretion, to make by-laws by which dogs found running at large within the limits and liberties of the said city, after proclamation of such by-laws, may be shot. *McKenzie* v. *Campbell*, 1 U. C. R. 241.

IV. Horse.

Agistment.]—Plaintiff sold two horses to defendant, who sent them back as not agreeing with an alleged warranty. The plaintiff gave him repeated notice to take them again, or that she should charge him for their keep. Defendant, in answer, insisted that he had a right to return them. The plaintiff having sued upon common counts for agistment and pasturage, the jury found that the horses belonged to defendant:—Held, that the plaintiff could not recover, for the mere fact of ownership would not make defendant liable, and the evidence as to his conduct, &c., tended to negative any implied request or promise to pay. *Halliday* v. *White*, 23 U. C. R. 593.

Agistment—*Negligence.*]—The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant, but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—Held, that the plaintiff had, on proof of these facts, given sufficient prima facie evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a nonsuit was set aside. *Pearce* v. *Sheppard*, 24 O. R. 167.

Blacksmith's Lien.]—Quære, as to a farrier's right of lien on a horse for services rendered. *Nicolls* v. *Duncan*, 11 U. C. R. 382.

Conversion.]—A. lent a horse to B. for a special purpose, and while B. was using him consistently with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A. having seen the horse, refused to take him, and went to B.'s residence (20 miles from where the horse was left), and demanded him back sound as received:—Held, that B.'s non-delivery of the horse after such demand, did not furnish evidence of a conversion, and that A. could not sustain trover. *Wells* v. *Crew*, 5 O. S. 209.

Damages for Immoderate Driving.]—Where in assumpsit for the immoderate riding of a mare loaned to the defendant, and not returning her, with a breach that she was not restored to plaintiff, but was so injured that she died, the defendant pleaded one plea as to returning her only, the plea was held a good answer to that part of the breach it professed to cover. *Campbell* v. *Boulton*, 2 U. C. R. 202.

Damages for Immoderate Driving.]—Action against a bailee for killing a horse hired to him by careless driving, and breaking the buggy and harness, and not returning them. Pleas: 3. That the horse was a runaway horse, and the damage occasioned thereby: 4. That the plaintiff hired the horse knowing him to be a runaway, and that he ran away without the fault of the defendant: 5 That defendant did offer to return the buggy and harness after they were broken:—Held, pleas bad. *McKay* v. *Cameron*, 6 U. C. R. 340.

Damages—*Innkeeper's Negligence.*]—The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of deferdant's servant in tying it up in the stall:—Held, that the plaintiff might maintain an action therefor. *Walker* v. *Sharpe*, 31 U. C. R. 340.

Damages—*Negligence.*]—Defendant, having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan:—Held, not a case in which there should be a nonsuit on the ground that the evidence was consistent either with the existence or non-existence of negligence, but that the question was for the jury. Cotten v. Wood, 8 C.

B. N. S. 568, and Jackson v. Hyde, 28 U. C. R. 294, distinguished. *Henderson* v. *Barnes*, 32 U. C. R. 176.

Exemption.]—A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is a "chattel" within the meaning of the Exemption Act, 23 Vict. c. 25, s. 4, s.-s. 6, and is, therefore, not liable to seizure for debt. *Davidson* v. *Reynolds*, 16 C. P. 140.

Exemption.]—A person serving with or attached to a militia cavalry troop as quartermaster is an officer thereof, and his horse protected from distress under s. 31 of 18 Vict. c. 77. *Darcy* v. *Cartwright*, 20 C. P. 1.

Hiring.]—The plaintiff charged defendant with taking his mare on loan, and using her improperly, whereby she died; and defendant pleaded that he obtained the mare on a contract for hire, not on loan:—Held, a good answer. *Robertson* v. *Brown*, 1 U. C. R. 345.

Horse Race.]—See *Davis* v. *Hewitt*, 9 O. R. 435.

Horse-thief.]—Reward for apprehension of horse-thief under 36 Vict. c. 48, s. 396 (O.). See *In re Robinson*, 7 P. R. 239.

Innkeeper's Lien.]—Lien of innkeeper for keep of horses. See *Dixon* v. *Dalby*, 11 U. C. R. 79.

Railway Act.]—The word "cattle" in C. S. C. c. 66, s. 13, applies to horses. *McAlpine* v. *Grand Trunk R. W. Co.*, 38 U. C. R. 446.

Stolen Horse—*Trespass.*]—When a horse was stolen from the plaintiff and bought by defendant at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and defendant immediately retook it:—Held, that the plaintiff had a right to retake it, no property having passed to defendant by the sale; and that, although it was in his possession only for a moment, yet the property revested in him, and he could maintain trespass against the defendant for the retaking. *Bowman* v. *Yielding*, M. T. 3 Vict.

Vicious Horse—*Pleading.*]—Declaration that defendant was possessed of a wild, vicious, and mischievous horse, and it was unsafe and improper to permit the said horse to go or run at large on any public highway, yet defendant wrongfully and negligently permitted and suffered the horse, so being vicious, &c., to go at large on the public highway, where the plaintiff then lawfully was, whereby the horse ran at and jumped upon the plaintiff, and broke his leg:—Held, bad, for knowledge of the animal's nature was not averred, and the allowing it to be at large on the highway was not a breach of any duty due from defendant to plaintiff. *Chase* v. *McDonald*, 25 C. P. 129.

Warranty—*Damages.*]—Defendant sold plaintiff a stallion, warranting him to be a good coverer and foal-getter. The horse turned out worthless as a foal-getter, and the jury gave £150 damages. The Court, although considering the damages too high, refused a new trial. *Natrass* v. *Nightingale*, 7 C. P. 266. See, also, *County of Simcoe Agricultural Society* v. *Wade*, 12 U. C. R. 614; *Craig* v. *Miller*, 22 C. P. 348.

Warranty — *Delay.*] — A. and B. exchanged horses, and B. gave A. a note for difference in the exchange; A. sold the horse he got from B. almost immediately, and after two years, during which nothing appeared to have been done by either party, B. was sued upon the note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

Warranty—*Pleading.*]—In an action on the case on the warranty of a horse, the plea of not guilty puts the warranty in issue. *Honeywell* v. *Davis*, 2 U. C. R. 63.

V. Sheep.

"Giving of Sheep to Double"—*Statute of Frauds.*]—The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side. And, therefore, where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant under which the latter was to deliver double the number to the plaintiff at the expiration of three years:—Held, that the contract was not within the statute. *Trimble* v. *Lanktree*, 25 O. R. 169.

Protection of Sheep Act — *Town.*] — Held, that 32 Vict. c. 31 (O.), which requires municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they have thereby sustained, is not confined to county municipalities and to municipalities within their jurisdiction, but applies also to towns which have withdrawn from the jurisdiction of the county. *Williams* v. *Town of Port Hope*, 27 C. P. 548.

Protection of Sheep Act.]—The owner of sheep killed or injured by a dog can, under R. S. O. 1887 c. 214, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep. It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed:—Held, that the saving provision of s. 87 of R. S. C. 1886 c. 178 should be applied; and the order nisi to quash the conviction was discharged. *Regina* v. *Perrin*, 16 O. R. 446.

Protection of Sheep Act—*Procedure.*]—The right of action given by R. S. O. 1887 c. 214, s. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the County Court, it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages, if an apportionment be required. *Fox* v. *Williamson*, 20 A. R. 610.

VI. Wild Animals.

Damages — *Separate Estate.*] — Liability of wife of owner of an animal feræ naturæ

for damages caused by its escape from premises forming part of her separate estate. See *Shaw* v. *McCreary*, 19 O. R. 39.

Right to Kill.]—The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs and defendant, and allowed to run at large upon the land:—Held, that the deer was feræ naturæ, and, having been shot by the defendant on his own land, belonged to him:—Held, also, that neither the Act incorporating the plaintiffs 29 & 30 Vict. c. 122, nor R. S. O. 1887 c. 221, s. 10, vested the absolute property in the deer in the plaintiffs. *Re Long Point Co.* v. *Anderson*, 19 O. R. 487. Reversed on the question of prohibition: 18 A. R. 401.

See — CARRIERS, III. — MUNICIPAL CORPORATIONS, III.—RAILWAY, XII.

ANNUITY.

Annuity Acts.] — Quære, whether the English Annuity Acts are in force here; but if so, a bill to enforce an annuity deed need not allege the enrolment of a memorial as required by those Acts; and a defendant cannot at the hearing take an objection for want of such enrolment, unless he has set up such defence by his answer. *Emmons* v. *Crooks*, 1 Gr. 159.

Apportionment.] — An annuity payable annually during the annuitant's life is not apportionable, so that his administrator can recover nothing if the annuitant die within the year. *Ausman* v. *Montgomery*, 5 C. P. 364.

Apportionment.] — In consideration of $12,000 paid by plaintiff's testator to the defendants, they, by an instrument in writing, agreed to pay him $1,800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void;"—Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. 1887 c. 143, s. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within s. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator. *Cuthbert* v. *North American Life Assurance Co.*, 24 O. R. 511.

Attachment.] — A testator having bequeathed £500 per annum, payable out of the rents of his real and personal estate indiscriminately, for the support of his widow and family, (the widow having become sole executrix), his separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like; and—Semble, that where there is no process whereby such a fund can be reached, this court has power under 22 Vict. c. 22, s. 288, to apply a remedy; as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Gr. 486.

Condition.]—T. C. S. devised his estate of Clark Hill, with the islands, lands and grounds appertaining, to his nephew M.—M.'s grandmother, by her will, directed her executors to pay him $2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill, and the islands connected therewith;"—Held, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated, the arbitrators properly excluded the consideration of any contemplated loss by M. of this annuity. *In re Macklem and Commissioners of Niagara Falls Park*, 14 A. R. 20.

A failure by M. to reside and occupy, would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate, which must be by his own act or default; the vis major of a binding statute could not work a forfeiture. Upon the evidence the court refused to interfere with the amount of compensation awarded. *Ib.*

Interest.]—No interest is allowable in respect of arrears of an annuity. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

Interest.]—On the 18th October, 1866, the owner of real estate granted an annuity thereout of $40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a puisne incumbrancer who had duly registered his conveyance. *Crone* v. *Crone*, 27 Gr. 425.

Interest.]—Interest on, as against assignee in insolvency. See *Snarr* v. *Badenach*, 10 O. R. 131.

Personal Liability.]—Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to have assumed a personal liability to pay the amount which will be enforced by the court. *Carter* v. *Carter*, 26 Gr. 232.

Prior Mortgage.]—The owner of property mortgaged it, and then died, having devised one-half of the property to one son, and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:—Held, that if

she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 16 Gr. 239; *S. C.*, 17 Gr. 251.

See WILL, IV. 3.

ANSWER.

See PLEADING—PLEADING IN EQUITY BEFORE THE JUDICATURE ACT, II.

APPEAL.

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IX. PRACTICE AND PROCEDURE.

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I. APPEAL GENERALLY.

Abatement.]—An administrator will not be allowed to revive a judgment in favour of his intestate, pending an appeal to the Court of the Governor-in-Council, or the King and Privy Council, in the original action, although it be proved by affidavit that the plaintiff, in whose favour judgment was given in the court below, died after judgment, and before the allowance of the appeal to the King in Council, though after the allowance of that to the Governor and Council. *Washburn* v. *Powell*, 2 O. S. 463.

Accounts.]—Decree directing accounts to be taken varied on appeal. Construction of decree in appeal and duty of master under it. *Gilbert* v. *Jarvis*, 20 Gr. 478.

Amount Involved.] — Although the Supreme Court cannot refuse to hear an appeal in a case where only $22 is involved, yet the bringing of appeals for such trifling amounts is objectionable, and should not be encouraged. *McDonald* v. *Gilbert*, 16 S. C. R. 700.

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

Arbitration.]—Where an action in the division court by a school teacher against the trustees was referred by order of the Judge, with the consent of parties:—Held, that the arbitrator's decision could not be appealed from under 16 Vict. c. 185, s. 24. *Chief Superintendent of Schools, Appellant, In re Milne and Sylvester*, 18 U. C. R. 538.

Arbitration—*Stated Case.*]—On a reference at nisi prius the order required the arbitrator, at the request of either party, to state any special facts for the court, which was thereupon empowered to alter or amend the verdict as it might think proper. The arbitrator having stated a case, the court made a rule thereon:—Held, that no appeal would lie, and that as judgment had not been entered, error could not be brought. *Mills* v. *King*, 14 C. P. 223; *S. C.*, 3 E. & A. 129.

Consent Order.]—There can be no appeal from an order appearing on its face to be made by consent, unless by leave of the court or Judge making it, even though the appeal is on the ground that no consent was given: R. S. O. 1897 c. 51, s. 72. *Re Justin*, 18 P. R. 125.

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

And where the defendants received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused. *Ferguson* v. *County of Elgin*, 15 P. R. 389.

Conventional Forum.]—On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court with power to draw inferences of fact, and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit:—Held, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator and its decision was not open to review on appeal, as it would have been if the judgment had been given in the regular course of judicial procedure in the court. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

Counsel's Duty.]—Where upon the argument of an appeal the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the court refused to wade through the mass of pleading which had been filed in the court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of

the court below upon such pleadings. *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Court of Chancery.]—The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties. An appeal from an order directing the taxation of a solicitor's bill against his client in a particular mode, was therefore dismissed with costs. *In re Freeman*, 2 E. & A. 109.

Demurrer—*Amendment not Made.*]—The judgment in the court below (32 C. P. 131) overruled a demurrer on the assumption that a plea had been amended according to leave given, but as the appeal book did not shew the amendment to have been made, the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff was allowed with costs. *Boswell* v. *Sutherland*, 8 A. R. 233.

English Decisions.]—When a decision of the Court of Appeal in England is at variance with one of the Court of Appeal in this Province, the latter should be followed here, as the former court is not the court of ultimate appeal for the Province. Sutton v. Sutton, 22 Ch. D. 511, not followed. *MacDonald* v. *McDonald*, 11 O. R. 187. See *McDonald* v. *Elliott*, 12 O. R. 98.

Entering Verdict.]—Where leave was reserved at the trial to move to set aside the verdict, and to enter a verdict for the plaintiff:—Held, that the Court of Appeal could order such verdict to be entered. *Herbert* v. *Park*, 25 C. P. 57.

Equal Division.]—The court being equally divided, the judgment of the court below was not altered. *McLeod* v. *New Brunswick R. W. Co.*, 5 S. C. R. 281.

Equal Division.]—The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice, which on appeal to this court was affirmed, the court being equally divided (8 A. R. 31). A second writ of habeas corpus was thereupon obtained, and the prisoner brought before the Common Pleas Division, when he was again remanded, whereupon he again appealed to this court, which appeal was dismissed with costs, as under such circumstances a second appeal could not be entertained. *In re Hall*, 8 A. R. 135. See *S. C.*, 32 C. P. 498.

Per Burton and Patterson, JJ.A. The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, although in the particular case the appellate court is the court of last resort. *Ib.*

The effect of an equal division in this court, as in a court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and the judgment below remains undisturbed, but is not considered as a binding authority. *Ib.*

Per Patterson, J. A. By the effect of the Judicature Act, a decision of any one division is a decision of the High Court; this matter had therefore been already disposed of on the former appeal. *Ib.*

Equal Division.]—The Court of Appeal for Ontario, composed of four Judges, pronounced judgment in an appeal before the court, two of the Judges being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at:—Held, that the appellate court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four Judges had been equally divided in opinion, in which case the appeal would have been properly dismissed. *Booth* v. *Ratte*, 21 S. C. R. 637.

Habeas Corpus.]—Remarks as to the inconvenience, if not danger, of making the writ of habeas corpus a mere method of appealing from other tribunals on points more of practice than affecting the merits. *In re Munn*, 25 U. C. R. 24.

Habeas Corpus.]—The Act 29 & 30 Vict. c. 45, apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *In re Hall*, 8 A. R. 135.

Interest.]—Where the Court of Appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Court of Chancery; at all events, in cases in which, though interest is usually given, it is not a matter of strict legal right, but of discretion. *Box* v. *Provincial Ins. Co.*, 19 Gr. 48.

Interest.] — Interest when judgment is given in appeal for respondent in a personal action. See *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Interim Injunction.]—Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie. *McLeod* v. *Noble*, 24 A. R. 459.

Interlocutory Order — *Arrest.*] — Upon an appeal by the plaintiff from an order of the Judge of a county court, in an action in that court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay:—Held, that the court had, by Rule 1041, jurisdiction to discharge or vary the order, as explained in Elliott v. McCuaig, 13 P. R. 416. *McVeain* v. *Ridler*, 17 P. R. 353.

Interpleader.]—An appeal will lie from the judgment on an interpleader issue. *Wilson* v. *Kerr*, 18 U. C. R. 470.

Interpleader—*Summary Order.*]—Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff, and claimed by a brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under Rule 1111, decided the question in favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure:—Held, that the execution creditors had the right to appeal against this order. *Rondot* v. *Monetary Times Printing Co.*, 19 P. R. 23.

Joint Appeal.]—Where defendants appealed jointly, and the court thought that all except one were entitled to be relieved from the decree, they reversed it, notwithstanding that as to one appellant the evidence was sufficient to establish the will under which the plaintiff claimed. *Black* v. *Black*, 2 E. & A. 419.

Jurisdiction of Dominion Parliament.]—Quære, can the Dominion Parliament give an appeal in a case in which the Legislature of a Province has expressly denied it. *Danjou* v. *Marquis*, 3 S. C. R. 251.

Law and Equity.]—The Court of Error and Appeal sits as a court of law or equity according as the case comes from common law or chancery. *Smith* v. *Norton*, 7 L. J. 283.

Lis Pendens—*Refusal to Vacate.*]—No appeal lies, by virtue of s. 99 of the Judicature Act, R. S. O. 1897 c. 51, or otherwise, from an order of a Master or Judge dismissing a motion made under s. 98 for an order vacating a certificate of lis pendens. *Hodge* v. *Hallamore*, 18 P. R. 447.

Malicious Prosecution.] — Action for malicious prosecution, alleging a determination of the proceedings. Plea, that an appeal from such decision is still pending:—Held, good. *Griffith* v. *Ward*, 20 U. C. R. 31.

Misunderstanding at the Trial.]—The appeal in this case was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial. *Holliday* v. *Ontario Farmers' Mutual Fire Insurance Co.*, 33 U. C. R. 558.

Party Not Appealing.] — Although a person affected by a decree does not appeal from it, the court upon the appeal of another party may give such relief as the court may think the parties entitled to. *Sampson* v. *McArthur*, 8 Gr. 72.

Presumption of Correctness.] — The general rule is, that the judgment of the court appealed against stands, unless the appellate court can say that it is clearly wrong. *Keena* v. *O'Hara*, 16 C. P. 435.

Provincial Arbitration.]—In an award made under the provisions of the Acts 54 & 55 Vict. c. 6, s. 16 (D.), 54 Vict. c. 2, s. 6 (O.), and 54 Vict. c. 4, s. 6 (Q.), there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question of law. *Province of Ontario* v. *Province of Quebec and Dominion of Canada—In re Common School Funds and Lands*, 30 S. C. R. 306.

Special Case.]—The plaintiff having commenced an action in the County Court, at the trial a bill of exceptions was tendered, and it was then agreed that the pleadings and evidence should be stated as a special case for the Queen's Bench, on which the court might order a verdict for plaintiff or defendants, or, at the election of the plaintiff, a nonsuit or new trial, the court to draw inferences as a jury. This was argued as a special case in the Queen's Bench, and judgment given for the plaintiff, whereupon the defendants brought error. In the copy of the judgment roll transmitted, immediately after the pleadings and venire, the evidence was set out, and then a statement of the contention on either side and a formal entry of judgment for the plaintiff. The Court of Appeal refused to entertain the case, holding that if it was to be looked upon as an informal appeal from the County Court to the Queen's Bench, it was not a special case within ss. 150 or 157 of the C. L. P. Act, upon which error could be brought: that if it was to be treated as a cause in the Queen's Bench, then the agreement of the parties to the special case, and a Judge's order allowing it, should have appeared on the roll, the facts and not the evidence only should have been stated, and the agreement of the parties should have been absolute, not giving the plaintiff an option to take a nonsuit or new trial instead of being bound by the judgment. *Holmes* v. *Grand Trunk R. W. Co.*, 29 U. C. R. 294.

Special Leave on One Ground — *No Right to Raise Others.*]—Where special leave to appeal is granted on the ground that the appellant desires to raise a particular question of great and general importance, he cannot be permitted at the hearing to say that no such question arises, and to argue that the case turns upon a question of fact on which the court below was in error. Accordingly the appellant town corporation was precluded from contending that, as matter of fact, the assessment in question had been confined to the land occupied by the road. *Town of St. Johns* v. *Central Vermont R. W. Co.*, 14 App. Cas. 590.

Vacation — *Judge — Arrest.*] — A Judge when applied to in vacation, under 4 Will. IV. c. 10, s. 4, for the commitment of a debtor on the limits to close custody, disposes of the case without the power of appeal by declining to interfere. *Shaw* v. *Nickerson*—*Gilespie* v. *Nickerson*, 7 U. C. R. 541.

II. Abandonment and Waiver.

Acquiescence in Judgment.] — In an action in which the constitutionality of 36 Vict. c. 81 (O.) was raised by the defendant, the Attorney-General for the Province of Quebec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench (appeal side), but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench in the principal action the defendant claimed the right to have the judgment of the Superior Court on the intervention reviewed:—Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned, the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this court. *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Acquiescence in Judgment.] — By a judgment of the Court of Queen's Bench the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appeal-

ing expired the attorney ad litem for the defendant delivered the shares to the plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:—Held, that the appeal would lie. *Société Canadienne-Française de Construction de Montreal* v. *Davelay*, 20 S. C. R. 449.

Acquiescence in Order.] — The Divisional Court varied an order of a Judge ordering a father to take proceedings by petition instead of by habeas corpus for the custody of his children by making the habeas corpus to run concurrently with the petition:—Held, that the father had waived his right to appeal from the order directing the filing of the petition by having complied with such order. *Re Smart Infants*, 12 P. R. 635; *S. C., ib.* 312, 435.

Acting on Order.]—If a party appeals from a judgment in his favour claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and obtains the relief granted thereby, he will be deemed to have abandoned his appeal, which will be quashed at the instance of the respondent on a motion for that purpose. *International Wrecking Co.* v. *Lobb*, 12 P. R. 207.

Acting on Judgment.]—Right of appeal held to be waived. *Videau* v. *Westover*, 29 O. R. 1.

Compliance Under Protest.] — Compliance with an order for security for costs by giving security under protest, and with notice to the opposite party that it was under protest, and proceeding in the action:—Held, not such an acceptance of or acquiescence in the order as to waive the right of appeal. *Duffy* v. *Donovan*, 14 P. R. 139.

Cross-appeal—*Enforcement of Order.*]—A respondent in an appeal to the Court of Appeal who desires to vary the decision appealed against, is in the same position as if he were an appellant, and whatever would be an answer to his contention if he had brought an independent appeal would also be an answer to the same contention when urged by way of cross-appeal. And where, before the hearing of an appeal, the respondent moved in Chambers for an order allowing him to enforce the order appealed against, without prejudice to his cross-appeal:—Held, that it was not for a Judge in Chambers, in advance of the appeal, to determine a question which might arise on the appeal itself, viz., whether the enforcement of the order would be an answer to the cross-appeal. *Re Charles Stark Co.*, 15 P. R. 451.

Extension of Time for Compliance.]—By an order of a Judge in Chambers (12 P. R. 275), a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend upon paying into court or securing $700 within a month. The defendant moved for and obtained an order extending the time for paying the money, and then appealed from part of the order refusing to set aside the judgment for irregularity:—Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it. *Pierce* v. *Palmer*, 12 P. R. 398.

Nonsuit—*Waiver.*] — Where the verdict had been taken subject to the opinion of the court, and the respondents attended before a Judge to settle the case for appeal:—Held, that they were precluded from objecting that the case was not appealable. Held, however, that in this case the court below must be taken to have decided as upon a motion to enter a nonsuit, and that the right of appeal was clear. *Boulton* v. *Smith*, 18 U. C. R. 458.

Part of Order.]—Where two appeals in respect of matters wholly separate and distinct were disposed of by one order:—Held, that a party might appeal from the decision in respect of one of the appeals, while taking advantage of the decision in respect of the other. *Clarke* v. *Creighton*, 14 P. R. 100.

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

Undertaking Not to Appeal.]—A judgment of the High Court of Justice contained an undertaking by the plaintiff not to appeal therefrom; notwithstanding which the plaintiff filed and served notice of appeal to the Court of Appeal, and also filed the usual bond for security for costs:—Held, that the action was not removed out of the High Court of Justice into the Court of Appeal; the notice and bond were irregular and unwarrantable proceedings, and the High Court, being still seized of the case, could interfere, by virtue of its inherent jurisdiction, to set them aside. *Donovan* v. *Haldane*, 14 P. R. 106.

III. Appeal Against Findings of Fact.

Burden of Proof.]—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not

interfere with the finding. *Sénécal* v. *Central Vermont R. W. Co.*, 26 S. C. R. 641.

Contempt.]—While a power resides in any court or Judge to commit for contempt, it is the power or privilege of such court or Judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke and Heermans*, 7 U. C. R. 223.

Controverted Elections.]—The judgment of the court below in an election case will not be reversed unless clearly wrong. *Berthier Election (Dom.)*—*Genereux* v. *Cuthbert*, 9 S. C. R. 102; *Montcalm Election (Dom.)*—*Magnan* v. *Dugas*, *ib.* 93; *Prescott Election (Ont.)*—*Cunningham* v. *Hagar*, 1 E. C. 88.

Credit of Witness.]—Appellate courts will not, except under special circumstances, interfere with the finding as to questions of fact depending on the veracity and credit of witnesses. *Halton Election*—*Harris* v. *Barber*, 11 L. J. 275.

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

Evidence by Commission.]—Where the witnesses have not been heard in the presence of the Judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial Judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. *Malzard* v. *Hart*, 27 S. C R. 510.

Expropriation Proceedings — *Interfering with Amount Awarded.*]—*See* ARBITRATION AND AWARD.

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

Inferences from Evidence.]—It is a point fairly open to inquiry in a court of appeal whether or not, as in this case, the inferences drawn from the evidence by the Judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher* v. *Taylor*, 5 S. C. R. 368.

Inferences from Evidence.]—It is the duty of an appellate court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. *Russell* v. *Lefrancois*, 8 S. C. R. 335.

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

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

Jury.]—Held, that though the findings of the jury were not satisfactory upon the evidence, a second court of appeal would not interfere with them. *Grand Trunk R. W. Co.* v. *Weegar*, 23 S. C. R. 422.

Local Judge in Admiralty.]—On appeal from a judgment of a local Judge in Admiralty under s. 14 of the Admiralty Act, 1891, (54 & 55 Vict. c. 29), the court will not interfere with a finding of fact by the local Judge unless it is satisfied beyond a reasonable doubt that the evidence does not warrant such finding. *Landry* v. *Ray*, 4 Ex. C. R. 280.

Mixed Law and Fact.]—Remarks upon reversing the findings of a Judge or jury upon a question of fact or of mixed law and fact. *Scribner* v. *Kinloch*, 12 A. R. 367.

Maritime Law—*Collision.*]—In this case there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the local Judge in Admiralty in favour of the defendants. The burden of proof in each case being upon the plaintiff, and there being evidence to support the findings, the court on appeal declined to interfere with the same. *Inchmaree S.S. Co.* v. *The "Astrid,"* 6 Ex. C. R. 218.

Penal Statutes.]—In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi-criminal trial has acquitted the respondent, the appellate court will not reverse the finding. *North Ontario Election (Ont.)*—*McCaskill* v. *Paxton*, H. E. C. 304.

Presumption of Correctness.]—When a judgment appealed from is wholly founded upon questions of fact, the Supreme Court of Canada will not reverse it unless convinced beyond all reasonable doubt that such judgment is clearly erroneous. *Arpin* v. *The Queen*, 14 S. C. R. 736.

Recorder's Court—*Grounds of Judgment.*]—Defendant was convicted at the recorder's court, on contradictory evidence, for obstructing a highway, the result of the verdict being to shew that he and several others whose houses and greenhouses had been standing for sixty years were encroaching upon the street. A new trial having been refused, on appeal only the evidence was returned to the Court of Queen's Bench, with a copy of the rule nisi. The court under these circumstances, considering the importance of the case, and that the grounds of the judgment below were not given to them, directed a new trial, contrary to the usual

rule, which was affirmed, that such appeals will not be entertained upon questions of evidence. *Regina* v. *McLean*, 22 U. C. R. 443.

Second Appellate Court.]—The rule generally followed by the Court of Appeal is not to review the finding of the Judge of first instance, where his decision depends upon a balance of testimony; still, if the court in banc upon an application to it has reversed that finding, this court must be satisfied upon appeal, that the court in banc was wrong before it will interfere with that judgment. *Hale* v. *Kennedy*, 8 A. R. 157.

Second Appellate Court.]—Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous. *Demers* v. *Montreal Steam Laundry Co.*, 27 S. C. R. 537.

Trial Judge.]—A court of appeal should not reverse the finding upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the Judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. *Ryan* v. *Ryan*, 5 S. C. R. 405.

Trial Judge.]—Where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be reversed in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Grasett* v. *Carter*, 10 S. C. R. 105; *Cook* v. *Patterson*, 10 A. R. 645; *Halton Election (Ont.)*—*Bussell* v. *Barber*, H. E. C. 283.

Trial Judge.]—The Judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. The appellate court, while not differing from the Judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence, allowed the appeal and reversed the decision of the court below. *Cameron* v. *Bickford*, 11 A. R. 52. Reversed by the Privy Council. Not reported.

Trial Judge.]—T., a solicitor, brought an action against the officers of the Liberal-Conservative Association of the east riding of Northumberland for services alleged to have been rendered as their solicitor and counsel in the matter of an election petition against the return of the member for the riding in the Legislative Assembly of Ontario. At the trial of the action the plaintiff swore that he was duly appointed solicitor to carry on the election petition by resolution passed at a meeting of the association, and that in consequence of such resolution he acted as such solicitor in the conduct of the petition. The defence to the action was that no such appointment was made, or if it was, that the plaintiff agreed to render his services gratuitously, and the evidence given for the defendants was that the plaintiff offered his services free of charge, and that it was decided to protest the election in consequence of such offer. The trial Judge held that no retainer of the plaintiff was proved, and dismissed the action. His decision was reversed by the Queen's Bench Division, and their decision in its turn was reversed by the Court of Appeal and the judgment of the trial Judge restored:—Held, that the question being purely one of fact which the trial Judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous, but, on the contrary the weight of evidence being in its favour, his judgment should not be interfered with on appeal. *Titus* v. *Colville*, 18 S. C. R. 709.

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

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

Two Courts.]—*See* also *Seeton* v. *King*, 18 S. C. R. 712.

Two Courts—*Gross Injustice.*]—Although there may be concurrent findings on questions of fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary. *City of Montreal* v. *Cadieux*, 29 S. C. R. 616.

Two Courts.]—Where there does not appear to have been manifest error in the findings of the courts below they will not be disturbed on appeal. *Paradis* v. *Municipality of Limoilou*, 30 S. C. R. 405.

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

Witness discredited by Trial Judge.]—*See Grant* v. *British Canadian Lumber Co.*, 18 S. C. R. 708.

IV. Appeal on Question of Costs.

By-law in Question in Action Repealed.]—After the rendering of judgment refusing to quash a by-law, the by-law in question was repealed:—Held, that the only matter in dispute between the parties being a mere question of costs, the Supreme Court would not entertain the appeal. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Defendant Ordered to Pay all Costs.]—Where a defendant is ordered to pay the costs of the action, but no further relief is given by the judgment, an appeal from the judgment is not an appeal for costs within the meaning of s. 65, O. J. Act. A judg-

ment ordering the defendant to pay the whole costs of the action cannot be supported unless the plaintiff is entitled to bring the action. Dick v. Yates, 18 Ch. D. 76, followed. Judgment below, 20 O. R. 547, affirmed. *Fleming* v. *City of Toronto*, 19 A. R. 318.

Erroneous Principle.]—An appeal lies to a Divisional Court from the order of a trial Judge who has awarded costs on a wrong principle. *McCausland* v. *Quebec Fire Ins. Co.*, 25 O. R. 350.

Erroneous Principle.]—The court will not interfere with the discretion exercised as to costs, unless the Judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case. Young v. Thomas, [1892] 2 Ch. 134, followed. *Campbell* v. *Wheler*, 17 P. R. 289.

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

Lapse of Time.]—Held, that as the valuation roll sought to be set aside in this case has been duly homologated and not appealed against within the delay provided in Art. 3061 (M.C.) the only matter in dispute between the parties was a mere question of costs, and therefore the court would not entertain the appeal. Moir v. Village of Huntingdon, 19 S. C. R. 363, followed. Webster v. Sherbrooke, 24 S. C. R. 52, distinguished. *McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 55.

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

V. Appeal on Question of Judicial Discretion.

Absolute Discretion.] — Appeal dismissed at the hearing on the ground that an appeal will not lie from a decision resting only upon the discretion of the court below, and not upon matters of law. *Cinq Mars* v. *Moodie*, 15 U. C. R. 601, n.

Absolute Discretion.]—There is no appeal from a decision on a question which is by the practice purely within the discretion of the Judge. *Chard* v. *Meyers*, 3 Ch. Ch. 120.

Amendment—*Parties.*] — An action was brought against two defendants, one of whom suffered judgment by default: the plaintiff proceeded against the other, claiming by virtue of an assignment from the first of his cause of action against the second, which was in the nature of a claim for indemnity against liability for the claim on which the judgment by default had been suffered. At the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a Divisional Court, an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend, and further evidence was to be taken, if necessary:—Held, not a mere discretionary order, but one from which an appeal lay. Hately v. Merchants' Despatch Transportation Co., 12 A. R. 640, followed. *Boultbee* v. *Cochran*, 17 P. R. 9. See *Williams* v. *Leonard*, 26 S. C. R. 406.

Costs.]—It is not intended by Rule 1170 (*a*), that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from. *Campbell* v. *Wheler*, 17 P. R. 289.

Damages.]—In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the Judge (the exercise of a discretion on his part being in the nature of the case required), an appellate court will not interfere with the discretion such Judge has exercised in determining the amount of damages. *Levi* v. *Reed*, 6 S. C. R. 482.

Damages.]—A court of appeal should not interfere with damages awarded by a judgment under consideration in appeal unless they appear to have been calculated upon a wrong principle or arrived at without regard to considerations which ought to govern a tribunal in awarding damages. It is not sufficient if the Judges in appeal sitting as Judges in the first instance might have given, as some of the Judges in the court below in this case were disposed to give, larger damages. *Mayor of City of Montreal* v. *Hall*, 12 S. C. R. 74.

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

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

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

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

Injunction.]—As to interfering with discretion of Judge on an application for an interlocutory injunction. See *Hathaway* v. *Doig*, 6 A. R. 264.

Municipal Election.] — Semble, that whether the court or a Judge before whom the relator brings his case, will go further than declare the election of the defendant void, and will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal. *Regina ex rel. Clark* v. *McMullen*, 9 U. C. R. 467.

New Trial.]—Under C. S. U. C. c. 13, s. 26, there is no appeal to the Court of Error

and Appeal, where a new trial is granted in the court below on a matter of discretion only; and an appeal in such case was, under s. 10, quashed with costs. *Hall* v. *Hamilton*, 24 C. P. 302.

New Trial.]—The plaintiff, being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial:—Held, that the Court of Appeal could not interfere. *Robinson* v. *Hall*, 6 A. R. 534.

New Trial.]—The court will not hear an appeal where the court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence. *Eureka Woollen Mills Co.* v. *Moss*, 11 S. C. R. 91.

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

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

Renewal of Writ.]—A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a Master in Chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the Master to have the service and last renewal set aside, which application was granted and the order setting aside said service and renewal was affirmed on appeal by a Judge in Chambers and by the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the Master, holding that the Master had jurisdiction to review his own order; that plaintiffs had not shewn good reasons, under Rule 238 (a), for extending the time for service; and the ruling of the Master having been approved by a Judge in Chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding:—Held, that for the reasons given in the Court of Appeal the appeal to this court must fail and be dismissed with costs. *Howland* v. *Dominion Bank*, 22 S. C. R. 130.

Renewal of Writ.]—The renewal of a writ of summons after its expiration is matter of judicial discretion, and when a County Court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations, and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a Divisional Court, on appeal from the judgment in the action, refused to entertain an objection to the validity of the writ. *Butler* v. *McMicken*, 32 O. R. 422.

Stamps.]—It appeared that the plaintiffs acquired knowledge of the particular defect in the obliteration of the stamps on the note sued on during the argument in the court below, but that no application to re-stamp the note had been made until after the judgment of the court had been pronounced, when it was refused:—Semble, that the judgment of the court below on such a question is not appealable. *Banque Nationale* v. *Sparks*, 2 A. R. 112.

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

Trustee's Compensation.] — What is proper compensation to be allowed to a trustee for his management of a trust estate is a matter of opinion, and even if, in granting the allowance, the court below may have erred on the side of liberality, that alone is not sufficient ground for reversing the judgment. Where the Master had allowed $125, which the court, on appeal, increased to $250, the Court of Appeal refused to interfere. *McDonald* v. *Davidson*, 6 A. R. 320.

When Interfered With.] — Semble, where an appeal is made from the exercise of discretion by a Judge, the court should not review such discretion. *Neill* v. *Travellers' Ins. Co.*, 9 A. R. 54; *Regina* v. *Richardson*, 8 O. R. 651; *South Victoria Election (Ont.)* —*Roaden* v. *McIntyre*, 1 E. C. 182; *Kennedy* v. *Braithwaite*, *ib.* 195.

When Interfered With.]—A court of appeal ought not to differ from a court below on matters of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. *Jones* v. *Tuck*, 11 S. C. R. 197.

VI. Appeal on Question of Practice or Procedure.

Practice.]—A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a venditioni exponas issued by the Superior Court of Montreal, to which court the record in a contestation of an opposition had been removed from the Superior Court of the district of Iberville, under Article 188, C. C. P., was regular:—Held, that on a question of practice such as this the court would not interfere. Mayor of Montreal v. Brown, 2 App. Cas. 184, followed. *Arpin* v. *Merchants Bank of Canada*, 24 S. C. R. 142.

Practice.]—The Supreme Court will not interfere on a question of practice and procedure. *Macdonald* v. *Ferdais*, 22 S. C. R. 299.

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

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

Substantial Rights.]— The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights, or the decision appealed from may cause grave injustice. Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for folle enchère it was ordered that the property described in the procès verbal of seizure should be resold, no reference being made to the part withdrawn. The Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and further, because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for folle enchère:—Held, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error. *Lambe* v. *Armstrong*, 27 S. C. R. 309.

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

VII. Error.

Proceedings in error in civil cases were abolished by the Ontario Judicature Act, 1881, 44 Vict. c. 5 (O.), Rule 472. The following are cases under the former practice: *McNalley* v. *Stephens*, Tay. 263; *Pope* v. *Reilly*, 29 U. C. R. 478, 495; *Dickson* v. *Ward*, 2 E. & A. 275; *Thomas* v. *Hilmer*, 4 U. C. R. 527; *Grand Trunk R. W. Co.* v. *Amey*, 20 C. P. 6; *Barnes* v. *Cox*, 16 C. P. 230.

VIII. New Grounds or Further Evidence.

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

Controverted Election.]—No new evidence will be received by the court on the examination of a decision of a Judge in Chambers as to a contested election. *Regina ex rel. Clark* v. *McMullen*, 9 U. C. R. 467.

Controverted Election.]—The petitioner was not allowed to urge before the court a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial of the petition. *South Ontario Election—Farwell* v. *Brown*, H. E. C. 420; *sub nom. Farewell* v. *Brown*, 12 C. L. J. 216.

Costs.]—The appeal being allowed in this case on a ground not taken in the court below or assigned as a reason of appeal, the court refused the appellant his costs in appeal. *Page* v. *Austin*, 7 A. R. 1; *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464; *Garrett* v. *Roberts*, 10 A. R. 650.

Costs.]—The plaintiffs had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the memorial; and the effect of that judgment seemed not to have been pressed in the court below, and was not urged before this court until the second argument. Under the circumstances the appeal was dismissed without costs. *VanVelsor* v. *Hughson*, 9 A. R. 390.

County Court Appeal.]—Under Rule 498 the court may entertain an application to admit new evidence in a proper case on a County Court appeal, notwithstanding R. S. O. 1897 c. 55, s. 51, s.-s. 3, under which such an application must be made before the county court, and this although the time for applying for a new trial had expired. *Butler* v. *McMicken*, 32 O. R. 422.

Delay.]—A cause had been carried down to trial in 1879, when it was postponed at the instance of defendants, and a trial took place in 1889, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants thereupon appealed to this court, and when the appeal came on to be heard (in 1892) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence it appeared consisted mainly of entries in the books of the defendants. The court, being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray* v. *Canada Central R. W. Co.*, 7 A. R. 646.

Document.]—Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal. *Lionais* v. *Molsons Bank*, 10 S. C. R. 427; followed in *Exchange Bank of Canada* v. *Gilman*, 17 S. C. R. 108.

Election in Court Below.]—At the trial the plaintiff put in two chattel mortgages, and the first being objected to for want of refiling, he relied upon the second only, both at the trial and on the argument in term. That mortgage was held to be invalid; and the Court of Appeal concurring in the decision, and thinking the plaintiff's case not one to be favoured, refused to allow him to rely upon

the first mortgage. *Boulton* v. *Smith*, 18 U. C. R. 458.

Election in Court Below.]—On the appeal the defendants urged, amongst other grounds, one not taken in the rule nisi or raised by the pleadings, namely, that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend and raise such defence, counsel for the defendants declined to do so:—Held, that the defence could not be raised on appeal. *Lash* v. *Meriden Britannia Co.*, 8 A. R. 680.

Election in Court Below.] — The case having been disposed of in the court below on an immaterial issue, and the appellants having chosen to rest their case upon a point which the Judge found against them, the appeal was dismissed. *McKenzie* v. *Dancey*, 12 A. R. 317.

Expense.]—On appeal from a decree in Chancery, leave to adduce further evidence was refused where the expense would be wholly disproportionate to the value of the subject matter in litigation. *Craig* v. *Craig*, 2 A. R. 583.

Formal Evidence.] — The court on the argument allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factories Act. *Dean* v. *Ontario Cotton Mills Co.*, 14 O. R. 119.

Formal Evidence.]—On the argument of an appeal to a divisional court from the decision of the trial Judge where a by-law of the city of Toronto had been proved at the trial, but evidence was not given of the registration of the same, evidence tendered on the argument of the appeal shewing the fact and date of the registration of the by-law was admitted. *Burfoot* v. *DuMoulin*, 21 O. R. 583.

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

General Rule.]—Remarks on the reception of further evidence by appellate courts. *Merchants' Bank* v. *Lucas*, 12 P. R. 526.

Irregularity in Procedure.] — Held, that the plaintiff could not object to the appeal as irregular, on the ground that, having been begun by both defendants, it was continued by only one. *Arscott* v. *Lilley*, 14 A. R. 283.

Judges' Notes—*Additions after notice of Appeal.*] — Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the Judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents improperly form part of the case on appeal and should not be considered by the appellate court. *Mayhew* v. *Stone*, 26 S. C. R. 58.

New Case.]—On an appeal in a suit seeking to have the defendant declared a trustee of lands, it appeared that the evidence, if implicitly relied on, tended to make defendant a mortgagee rather than a trustee. A motion was then made to amend the bill in order to make that case; the Court of Appeal, however, refused the application as not being an exercise of sound discretion to permit the amendment at that stage of the suit. *McManus* v. *McManus*, 24 Gr. 118.

New Evidence.] — New evidence was allowed to be used upon appeal under Con. Rule 585, and the decision of a Judge in Chambers (13 P. R. 388), was reversed thereupon. The discovery of the new evidence after a sitting of the Divisional Court had passed was received as an excuse for delay. *Leach* v. *Grand Trunk R. W. Co.* (2), 13 P. R. 467.

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

Notice Not Given.]—Quære, whether, on the argument, exceptions can be taken of which no notice has been given. *Smith* v. *Muirhead*, 13 U. C. R. 9.

Questions Not Discussed.]—The Legislature did not by 33 Vict. c. 7, s. 6 (O.), intend the court to decide upon the evidence questions not discussed before or decided by the Judge at the trial. *Lawrie* v. *Rathbun*, 28 U. C. R. 255.

Questions Not Raised.]—As to giving effect in appeal to questions not raised in the court below. See *Gray* v. *Richford*, 1 A. R. 112. See also *S. C.*, 2 S. C. R. 431.

Rejection of Evidence.]—In an action on a policy of insurance against fire on a stock of goods the verdict for the plaintiff was moved against on the grounds of its being against the weight of evidence and of improper exclusion of evidence. The first ground was mainly urged in regard to the amount of damages. As to the second ground the evidence tendered related to the fact that a quantity of unburnt matches and shavings had been found near the part of the premises in which the fire occurred where the bulk of the goods were alleged to have been burnt. The evidence was rejected by the trial Judge for the reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full court below it was for the first time urged that it was admissible as shewing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full court:—Held, that the decision of the court below should be affirmed. *Royal Insurance Co.* v. *Duffus*, 18 S. C. R. 711.

Reservation of Rights.]—It was contended by the plaintiffs before the Divisional Court that the defendants were members of a de facto corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial. The court treated this contention as not having been

raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised. *Platt* v. *Waddell—Townsend* v. *Waddell*, 18 O. R. 539; *Union St. Joseph de Montreal* v. *Lapierre*, 4 S. C. R. 164.

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

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

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

IX. Practice and Procedure.

1. *Costs of Appeal.*

Administration — *Indemnity.*] — Held, that the bank, the respondents to this appeal, being the parties having the carriage of the proceedings in the Master's office and supporting the judgment of the Master for the general benefit of the creditors, of whom they were one, should be reimbursed the costs of the appellant out of the estate, but not so as to prejudice the rights of the appellant. *Re Hague—Traders' Bank* v. *Murray*, 14 O. R. 660.

Appeal Too Late.]—When the court refused to hear an appeal, and ordered it to be struck out, because it had not been set down for argument within the time allowed by 34 Vict. c. 11, s. 4 (O.):—Held, that the respondent, who had appeared to answer the appeal, was entitled to his costs, for the appellant should have applied earlier for an extension of the time; and that the court had jurisdiction to grant costs, though the appeal had not been heard. Semble, that the respondent should have stated the lapse of time as one of his reasons against the appeal. *Royal Canadian Bank* v. *Stevenson*, 22 C. P. 562.

Authority Binding Court Below.]—The appeal in this case was allowed without costs, as the bill had been filed on the authority of Boale v. Dickson, 13 C. P. 337, which was properly followed by the court below, but was overruled by this court. *McLaren* v. *Caldwell*, 6 A. R. 456.

Authorities Not Cited Below.]—The appeal from a county court being allowed upon authorities not brought to the attention of the court below, no costs were given. *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 616.

Both Parties in Fault.]—As the defendant had offered to give the plaintiff a decree for a charge on the land, which was all she was held entitled to, she was ordered to pay the costs up to and inclusive of the decree; but the appellant, not having taken the objection which was given effect to in his reasons of appeal, was refused the costs of the appeal. *Armstrong* v. *McAlpine*, 4 A. R. 290.

Conflicting Decisions.] — Where the Courts of Queen's Bench and Common Pleas had given opposing judgments on the same question, this court, on affirming one of these judgments, dismissed the appeal without costs. *Sexton* v. *Paxton*, 2 E. & A. 219.

Consent Appeal.]—Three persons entered into several contracts in the name of one of the three, for the construction of portions of a railway, without any written agreement as to the share of each in the contracts, and a bill was filed by one to have an account taken, claiming a larger share in the profits than the Master allowed him by his report, from which all parties appealed; and by arrangement the court below affirmed the finding of the Master with a view to appeal. The court, on affirming the order below, refused the costs of the appeal to either party. *Nichols* v. *McDonald*, 8 Gr. 106.

Costs of Court Below.]—On appeal to the Court of Appeal the judgments of the Court of Chancery in favour of the plaintiffs respectively were affirmed with costs of appeal; and the defendants appealed to the Supreme Court. In the first case that court gave leave to the defendants (appellants) to amend their answer, saying nothing as to costs, and, upon such amendment being made, declared that the award upon which the bill had been filed should be null and void, but said nothing about costs. In the second case the Supreme Court ordered a new trial to be had between the parties, without costs to either party. The plaintiffs, having obtained orders of the Court of Chancery making the certificates of the Court of Appeal of the judgments in appeal orders of the Court of Chancery, issued executions thereon for the costs awarded in appeal:—Held, that the plaintiffs were not entitled to the costs of the appeal to the Court of Appeal; and the executions were set aside. *Norvall* v. *Canada Southern R. W. Co.*, *Cunningham* v. *Canada Southern R. W. Co.*, 9 P. R. 339.

Discretion.]—Where the judgment was varied on a matter of discretion, no costs of appeal were given. *Campbell* v. *Prince*, 5 A. R. 390.

Divided Success.]—An appeal from a County Court having partially succeeded and partially failed, no costs were given. *Shepley* v. *Hurd*, 3 A. R. 549.

Divided Success.]—The appeal of one of the defendants, a bank, was allowed and the bill against them dismissed, but, as they set up a claim in their original answer which was urged on appeal and could not be maintained, they were held not entitled to their costs of defence or of the appeal *Bailey* v. *Jellett*, 9 A. R. 187.

Divided Success.]—Held, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court she should get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of apportionment, no costs should

be given or received. *Gough* v. *Bench*, 6 O. R. 699.

Division of Opinion.]—Appeal dismissed without costs where the members of the court were all of the opinion for different reasons, that the order below was wrong, but did not agree as to the extent it should be modified or reversed. *Schroeder* v. *Rooney*, 11 A. R. 673.

Equal Division.]—The Court of Appeal being equally divided, the appeal was dismissed with costs. *McKenzie* v. *Kittridge*, 27 C. P. 66.

Equal Division.] — The court being equally divided, the appeal was dismissed, without costs, one member of the court, who was against the plaintiff on the merits, being of opinion there should have been a new trial. *Moore* v. *Connecticut Mutual Fire Ins. Co.*, 3 A. R. 230.

Equal Division.]—An appeal from the court of common pleas which ordered a nonsuit after verdict for the plaintiff (31 C. P. 344), the court being equally divided, was dismissed with costs. *Neill* v. *Travellers Ins. Co.*, 7 A. R. 570.

Equal Division.]—The plaintiff appealed from the decision of the common pleas division (12 P. R. 535) as to costs, and on the 5th March, 1889, judgment was given dismissing the appeal without costs, the Judges of the court of appeal being divided in opinion. *Livernois* v. *Bailey*, 13 P. R. 62.

Form of Order for Costs.]—Costs of appeal are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation. *Re Monteith—Merchants Bank* v. *Monteith*, 11 P. R. 361.

General Rule.]—The court on allowing an appeal gave the costs of it to the appellant. *Herbert* v. *Park*, 25 C. P. 57.

No Direction as to Costs.]—Costs where judgment of court below is reversed, but no directions given as to the costs of appeal. *Menzies* v. *Ridley*, 2 Gr. 544.

Objection Not Taken Below.]—Where an appellant omitted to take an objection in the court below, the court of appeal, on allowing an appeal on that ground, refused him his costs of appeal. *Garrett* v. *Roberts*, 10 A. R. 650.

Payment into Court—*Costs out of Fund —Revision.*]—A sum of money was paid into court as security upon the defendants' appeal to the court of appeal, which was afterwards abandoned. By a consent order it was provided that the plaintiff's costs should be paid out of this money after taxation:—Held, that this money was a fund in court within the meaning of Con. rule 1207, and there should be a revision of the taxation of costs. *Cousineau* v. *City of London Fire Ins. Co.*, 13 P. R. 36.

Quashing.] — Where an appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash. *O'Sullivan* v. *Lake*, 16 S. C. R. 636.

Quashing.]—Where the action abated by death of the plaintiff so that there was no cause before the court appealed to, the appeal was quashed without costs. *White* v. *Parker*, 16 S. C. R. 699.

Set-off.]—A decree had been made giving the plaintiffs relief, and ordering defendants to pay the costs, which were not paid. The plaintiffs appealed from a portion of the decree, which appeal was dismissed with costs, to be paid to one of the respondents; and thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly. *Bank of Upper Canada* v. *Thomas*, 10 Gr. 653.

Stay.]—Security for costs of appeal, as well as those of court below, must be given before proceedings in the court below will be stayed pending an appeal. *Heward* v. *Heward*, 2 Ch. Ch. 245.

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2. *Leave to Appeal.*

Acquiescence.]—A rule nisi for new trial was moved, among other grounds, for misdirection, and refused upon that ground. The plaintiff having taken and argued it upon other grounds, the court would not grant leave to appeal from the refusal. *Bricker* v. *Ancell*, 23 U. C. R. 481.

Bona Fide Intention—*Misapprehension as to Practice—Time Extended.*]—*Johnston* v. *Town of Petrolia*, 17 P. R. 332; *Sievewright* v. *Leys*, 9 P. R. 200.

Bona Fide Intention—*Expense Incurred —Security Given—Time Extended.*]—*D'Ivry* v. *World Newspaper Co.*, 17 P. R. 543.

Bona Fide Mistake — *Acquiescence of Respondent—Time Extended.*]—*Langdon* v. *Robertson*, 12 P. R. 139.

Change in Rules—*Judgment not Entered —Novel Question.*]—By paragraph 7 of the schedule to the Law Courts Act, 1896, s. 73 of the Judicature Act, 1895, was amended so as to enable a divisional court and the court of appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained:—Held, that the amendment applied to pending actions. Watton v. Watton, L. R. 1 P. & M. 227, followed. 2. That where at the time the amending Act was passed the judgment of the court had been pronounced, but had not been entered, the action was still pending. Holland v. Fox, 3 E. & B. 977, and In re Clagett's Estate, 20 Ch. D. 637, followed. Leave granted to appeal to the court of appeal from an order of a divisional court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the court, the injury for which he sued being a serious one and there being no authority upon the question of law decided by the divisional court. *Spence* v. *Grand Trunk R. W. Co.*, 17 P. R. 172.

Conflicting Decisions.] — Leave was given to appeal from the decision (12 O. R. 492), because of the importance of the question and of conflicting decisions. An appeal now lies to a divisional court from a discre-

tionary order, by virtue of 49 Vict. c. 16, s. 39 (O.), but that enactment has not altered the rule that a very strong case must be made out to induce the court to reverse such an order. *Powell* v. *Peck*, 12 P. R. 34.

Construction of Statute.]—Where the question affected matters arising in the exercise of statutory powers, and was of general interest, leave was given to appeal, although less than $200 was at stake. *O'Donohoe* v. *Whitty*, 2 O. R. 424.

See, also, *S. C.*, 9 P. R. 361.

Cross-appeal—*Ignorance of Appellant's Intention—Time Extended.*]—*Re Lake Superior Native Copper Co.*, 11 P. R. 36.

Defendants Lying by—*Mistake.*]—Two defendants (legatees) in an administration suit appealed from the master's report, and succeeded in charging the plaintiff, an executor, with their shares of a sum of $4,000, which had been lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these, in September, 1887, after their co-defendants' appeal had been successful, moved for leave to appeal and to extend the time, their excuse for the delay being that they had supposed the appeal of their co-defendants would enure to their benefit:—Held, that the time should be extended, and these defendants let in to appeal, upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed; although the $4,000 was lost to the estate by his innocent mistake, and that he had acted as he did under the instructions of the testator. Langdon v. Robertson, 12 P. R. 139, followed. Birs v. Betty, 6 Madd. 390, distinguished. *Re Gabourie, Casey* v. *Gabourie*, 12 P. R. 252.

Delay Explained.]—A transferee of a judgment debtor was allowed to appeal from the order for his examination under 49 Vict. c. 16, s. 12 (O.), after the time for appealing had expired, his delay being satisfactorily explained. *Blakeley* v. *Blaase*, 12 P. R. 565.

Delay without Special Excuse—*Time not Extended.*]—*Miller* v. *Brown*, 9 P. R. 542; *Wilby* v. *Standard Fire Ins. Co.*, 10 P. R. 34, 40.

Executor—*Construction of Will—Security for Costs—Status of Legatees as Appellants.*]—Under Con. rule 938 (a), an executor applied in chambers and obtained a determination of a question affecting the rights of legatees under the will, which involved its construction; but, upon appeal by residuary legatees, the order in chambers was reversed by a divisional court, which put a different construction upon the will:—Held, that the judgment of the divisional court was a sufficient protection to the executor, and any appeal to the court of appeal must be at his risk, as to costs; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs. The legatees interested then applied for leave to appeal from the decision of the divisional court, and to dispense with security. It was objected that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under the rule:—Held, that the question was one which a master, in taking the accounts and making the inquiries directed to be taken, would have jurisdiction to deal with; and if it should become necessary incidentally to place a construction on the will, he had jurisdiction to do so; and that the test of jurisdiction under the rule was whether the question was one which, before the existence of the rule, could have been determined under a judgment for the administration of an estate or execution of a trust. Leave to appeal granted and the security required reduced below the usual amount. *Re Sherlock*, 18 P. R. 6.

Gross Delay.]—Judgment was given against defendant in H. T., 1861, on demurrer and special case. On granting leave to appeal the chief justice intimated that defendant's remedy, if any, would be in chancery. Defendant then sued there, and having failed applied for leave to give notice of appeal, notwithstanding the lapse of three years. The application was refused. Such leave may be given under C. S. U. C. c. 13, s. 24, after fourteen days from the decision complained of have elapsed. *Regina* v. *Miller*, 23 U. C. R. 206.

Important Point of Practice—*Undertaking to Pay Respondent's Costs—Leave Granted.*]—*Greey* v. *Siddall*, 12 P. R. 557.

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

Judgment Below Clearly Right.]—Leave to appeal from the decision of a divisional court refused, that decision appearing to be in accordance with well-established practice. *Walker* v. *Gurney-Tilden Co. (Limited)*, 18 P. R. 471.

Order Giving Leave to Appeal.]—An order giving leave to appeal is an order from which an appeal does not lie; and leave to appeal from such an order will not be granted. Re Sarnia Oil Co., 15 P. R. 347, Ex. p. Stevenson, [1892] 1 Q. B. 394, 609, and Kay v. Briggs, 22 Q. B. D. 343, followed. *Re Central Bank of Canada*, 17 P. R. 395.

Oversight of Clerk.]—Where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642 (Con. rule 849), the referee refused to extend the time for appealing, and on appeal his ruling was upheld. *Dunnard* v. *McLeod*, 8 P. R. 343.

Refusal by Court Below—*No Special Circumstances.*]—Leave to appeal to the court of appeal from an order of a divisional court affirming an order of a Judge in chambers, which set aside an order of a referee in chambers, whereby the proceedings in the action were stayed pending the determination of an action in England brought by some of the present defendants, and to which the present plaintiffs were defendants, was refused by a Judge of the Court of Appeal, where such leave had previously been refused by the court whose decision was complained of, there being good grounds for supporting it and no special circumstances existing which s. 77 of the Judicature Act makes essential, and there were no special reasons for treating the

case as exceptional. *Great North-West Central R. W. Co* v. *Stevens*, 18 P. R. 392.

Rejection of Evidence.]—Where evidence offered at a trial and rejected affected only the amount of damages, which were small, the court refused leave to appeal. *Myers* v. *Currie*, 9 L. J. 152.

Rescinding Leave.]—Where a defendant delayed to proceed in appeal for an unreasonable time, the court ordered the leave to be rescinded, unless he should within a month settle a case for appeal. *Clissold* v. *Machell*, 25 U. C. R. 546.

Second Appeal — *No Special Circumstances.*]—Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a divisional court, an application for leave for a further appeal was dismissed:—Held, that under s. 71 (4) (e) of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party. *Re Reddock and City of Toronto*, 19 P. R. 247.

Settling Practice—*Alternative Grounds for Decision.*]—A divisional court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (19 P. R. 145), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so:—Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal will not be given merely to settle a point of practice the decision of which would not affect the judgment complained of. And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment. *Appleby* v. *Turner*, 19 P. R. 175.

Slip of Solicitor.]—The solicitor for the defendants (except L.) had given due notice of appeal, but through inadvertence set down the appeal on behalf of the defendants the gravel road company only. Under the circumstances stated in the judgment, the other defendants were allowed to set down their appeal. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15.

Unnecessary Action.] — The court refused the plaintiffs leave to appeal from the decision of a divisional court, 18 P. R. 1, affirming an order staying proceedings in this action, deeming that the action was unnecessary. *City of Toronto* v. *Canadian Pacific R. W. Co.*, 18 P. R. 451.

Winding-up Act — *Successive Applications—Novel Question.*]—Orders having been made in the matter of the winding-up of an insolvent bank for payment of certain moneys out of court to the executors of the purchaser from the liquidator of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under ss. 40 and 41 of the Winding-up Act, R. S. C. c. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into court of such moneys; or, in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out. Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition:—Held, that a Judge of the High Court had power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out. And, under all circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one and the amount involved considerable. *Re Central Bank of Canada*, 17 P. R. 370.

Winding-up Proceedings — *Leave to Appeal.*]—*See* COMPANY, X. 6 (a).

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3. *Notice of Appeal.*

Effect.]—The appellants in their notice under the 27th appeal rule, merely stated that the judgment was erroneous as being against law and evidence, and because the jury were misdirected. The court held this insufficient, and ordered that execution might issue. Quære, however, whether the order was necessary, as such notice could not take effect as a supersedeas. *Torrance* v. *McPherson*, 11 U. C. R. 200.

Effect.] — Having regard to the analogy of statutes which limit the period within which action shall be brought, the words "appeal brought" in s. 108, R. S. C. c. 43 (the Indian Act) would mean "appeal commenced," for under those statutes an action is held to be "brought" when it is commenced. The meaning of appealing is giving notice to your adversary of your intention to appeal by serving him with a notice of appeal. *Regina* v. *McGauley*, 12 P. R. 259.

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4. *Payment Out of Court.*

Money in Court.]—Paying money out of court pending appeal. *Hill* v. *Rutherford*, 1 Ch. Ch. 121.

Money in Court.]—Where a party appealed and paid into court the amount of costs taxed to a defendant in the court below, in lieu of giving a bond, and the appeal was allowed with costs, costs of the court below being reserved:—Held, that the party appealing was entitled to an order for payment out of money so paid in, notwithstanding defendant had given notice of appeal to the Supreme Court. *Crossman* v. *Shears*, 15 C. L. J. 111.

Money in Court.]—By the terms of a consent order, a sum of money was to be retained in court to abide the result of such proceedings as the plaintiffs might be advised to take to assert and enforce their rights and remedies with respect to a claim made by them, and such proceedings were to be commenced within four months. Substantially the sum of money was to represent that which the plaintiffs claimed, and they were to have it if their claim proved a valid one. The plaintiffs brought this action to enforce their claim, and carried it to the Court of Appeal, where it was dismissed. They then commenced an appeal to the Supreme Court of Canada:—Held, that this appeal was one of the proceedings, or part of such proceedings, as the plaintiffs were at liberty to take under the order, and until its determination, the money should not be paid out. *City of Toronto* v. *Toronto Street R. W. Co.*, 15 P. R. 358.

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5. Powers of the Court.

Entering Verdict.] — Where leave was reserved at the trial to move to set aside the verdict and enter a verdict for the plaintiff:—Held, that the Court of Appeal could order such verdict to be entered. *Herbert* v. *Park*, 25 C. P. 57.

Entering Verdict.]—The Judge, who tried the case without a jury, found a verdict for defendants. The Court of Queen's Bench held that defendants were liable, but as damages had not been assessed they ordered a new trial. The Court of Appeal, without deciding that it would have disturbed the finding at the trial:—Held, that no sufficient reason was shewn for reversing the decision of the Queen's Bench, which was the immediate subject of the appeal; but, the court below should have assessed the damages, and this the appellate court now did, and varied the rule by directing a verdict to be entered for the amount. *Denny* v. *Montreal Telegraph Co.*, 3 A. R. 628.

Inferences of Fact.]—Power to draw inferences of fact, when given by consent, is not confined to the court below, but extends to the Court of Appeal. *Hood* v. *Commissioners of Harbour of Toronto*, 37 U. C. R. 72.

Mistake.]—The Judge, who tried the case without a jury, really found a verdict for defendant, as appeared from his notes, but a nonsuit was entered. The court below made a rule absolute to enter a verdict for the plaintiff, although no leave was reserved, and no consent was given:—Held, that the Court of Appeal had power to correct the entry by the Judge's notes, or vary the rule. *McEdwards* v. *Palmer*, 2 A. R. 439.

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6. Security for Costs.

Allowance.]—It is not necessary to move for the allowance of the bond. If not moved against within fourteen days from notice of filing given, it stands allowed. *Read* v. *Smith*, 2 Ch. Ch. 326.

Allowance.]—The practice as to the perfecting of security to stay execution on appealing from the Court of Chancery is different from the practice on appeals at law. In Chancery no motion is necessary to allow the security; the onus of moving against the security being on the party objecting to it. *Heenan* v. *Dewar*, 3 Ch. Ch. 199.

Amount.]—Judgment having been given for the plaintiff; on motion to allow an appeal bond in a penalty of £100 it was objected that no appeal would lie, and that the bond should be not merely for costs, but to secure the judgment:—Held, that these objections must be decided by the court above. Semble, however, that it was sufficient in amount, the case being one in which, under C. S. U. C. c. 13, s. 16, s.-s. 4, there was no stay of execution. *Gossage* v. *Canadian Land and Emigration Co.*, 24 U. C. R. 452.

Amount—*Two Appeals.*]—An application for leave to pay into court $400 as security for costs of an appeal from a certificate of title under the Quieting Titles Act having been granted by the referee ex parte, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone, it was held that the order was bad, as these facts should have been made known to the referee, and the order under such circumstances made upon notice. *Re Howland*, 4 Ch. Ch. 16.

Bond—*Affidavits in Answer.*]—A party opposing the allowance of a surety's bond for security for costs of an appeal, may read affidavits in opposition to the surety's affidavit of justification. *Campbell* v. *Royal Canadian Bank*, 6 P. R. 45.

Bond—*Affidavit of Justification.*]—In the case of bonds for carrying a case to the Court of Appeal, an affidavit of justification is necessary under the order of the Court of Error and Appeal No. 8. *Donelly* v. *Jones*, 4 Ch. Ch. 48.

Bond—*Condition—Affidavit of Execution—Affidavit of Justification.*]—The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void; otherwise to remain in full force and effect:"—Held, that the bond was not irregular. 2. The affidavit of execution of such a bond need not be entitled in the cause. 3. A surety in such a bond, when justifying in the sum sworn to "over and above what will pay all my just debts," need not add "and every other sum for which I am now bail." *Molsons Bank* v. *Cooper*, 17 P. R. 153.

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

Bond—*Defect.*]—A bond filed as security for costs of an appeal to the Supreme Court

of Canada was disallowed on the ground of substantial error in the form—"by" instead of "binds" in the operative part. Jamieson v. London and Canadian L. & A. Co., 18 P. R. 413, followed. *Young* v. *Tucker*, 18 P. R. 449.

Bond—*Intituling.*]—The bond and the affidavits of execution and justification were all entitled in the name of the original plaintiffs, one of whom had died, and both were named as obligees in the bond:—Held, irregular. *McFarlane* v. *Dickson*, 1 Ch. Ch. 377.

Bond—*Intituling.*]—An appeal bond is properly intituled in the cause in the court below. *Campbell* v. *Royal Canadian Bank*, 6 P. R. 43.

Bond—*Intituling.*]—The bond should be styled in the Court of Error and Appeal. The style of the cause in the court below, if adopted, should be the style in full, and the parties should be described as they become appellants and respondents, but they may be given in the same order as in the style of the original cause. *Weir* v. *Matheson*, 2 Ch. Ch. 73.

Bond—*Objections, How Made.*]—Where a bond for security for costs, or for the due prosecution of an appeal, is filed in an outer county, all objections to it or to the solvency of the sureties should be decided by the Master of that county. *Brigham* v. *Smith*, 1 Ch. Ch. 334.

Bond—*Stamps.*]—An appeal bond and the affidavit of execution thereof are separate documents, and must be stamped as such when filed. The recent Act respecting law stamps has made no alteration in the practice of the court as to the mode of computing the proper amount of fees. *Macbeth* v. *Smart*, 1 Ch. Ch. 269.

Interest.]—Recovery back of money paid into court including costs as security for appeal—Interest. See *Citizens' Ins. Co.* v. *Parsons*, 32 C. P. 492.

Mortgage Actions.]—C. S. U. C. c. 13, s. 16, s.-s. 4, as to giving additional security pending appeal, does not apply to mortgage cases. *Bank of Upper Canada* v. *Pottroff*, 8 L. J. 328.

Payment into Court.]—After the security for the costs of an appeal to the Court of Appeal from the Court of Chancery has been perfected by bond, the latter court has power to allow a deposit of money in court to be substituted therefor. *Townships of Chatham and Dover East* v. *Erie and Huron R. W. Co.*, 7 P. R. 399.

Rescinding Allowance.]—Where security has been allowed under C. S. U. C. c. 13, s. 35, without objection, the court will not rescind the allowance for want of the proceedings required by ss. 33 and 34. The neglect by appellant to take the proceedings mentioned in ss. 36 and 37, is no ground for rescinding the allowance. *Rowe* v. *Jarvis*, 14 C. P. 244.

Surety—*Solicitor.*]—It is irregular for a solicitor to become security for costs of appeal for his client. *Beckitt* v. *Wragg*, 1 Ch. Ch. 5.

Surety.]—There should be two sufficient sureties, and if one die or become insolvent, another will be ordered to be substituted. Brigham v. Smith, 1 Ch. Ch. 334, overruled on this point. *Saunders* v. *Furnivall*, 2 Ch. Ch. 159.

Surety.]—Where the statutory requirements are observed with respect to bonds given upon appeal, the bonds will not be disallowed on the ground that the sureties are "standing sureties" of the appellants, in the absence of satisfactory evidence of their insufficiency. *Norval* v. *Canada Southern R. W. Co.*, (and three other cases), 7 P. R. 313.

Surety.]—An application for further security for costs of appeal on the ground of the insolvency of one or more of the sureties should be made to the court appealed from. *Lumsden* v. *Davis*, 10 P. R. 10.

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7. Staying Proceedings.

Amount Involved.]—Bills of costs amounting to $250.10 were on a taxation reduced to $187.10. The plaintiff contended that he was not liable to pay as much as $187.10, if any sum, and applied to the Master in Chambers for an order to stay an execution for $187.10 pending an appeal to the Court of Appeal, under s. 33 O. J. Act. This order was refused, and on appeal it was held that what was "in controversy on appeal" was a sum less than $200, and therefore that the order of the Master was right. *O'Donohoe* v. *Whitty*, 9 P. R. 361.

Appeal Too Late.]—A motion to stay proceedings pending an appeal may be made before filing a petition of appeal. But the applicant for a stay must be in a position to appeal. When, therefore, the appeal was from an interlocutory order, and it had become too late to give notice and get in the appeal within six months, the application was refused. *Bridgman* v. *Smith*, 3 Ch. Ch. 313.

Before Leave.]—The court refused to rescind the stay of proceedings on the execution, although no notice of the grounds of appeal had been served or formal leave to appeal asked, all parties having understood that the case would be appealed. *Grant* v. *Great Western R. W. Co.*, 8 C. P. 348.

Contempt.]—A defendant in equity having appealed from an order directing his committal for breach of an injunction, a stay of proceedings under the order pending the appeal was refused. *Gamble* v. *Howland*, 3 Gr. 281.

Contempt.]—A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor* v. *McDonald*, 11 P. R. 518.

Execution.]—Where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required in s. 2 of R. S. O. 1887

c. 41:—Held, that the order of a Judge of the Court of Appeal, under s. 5, allowing the security should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded:—Held, also, that the plaintiffs not having given security to stay execution for the costs in the courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by s. 4 of the Act:—Held, also, that if an order for payment out of the High Court of money therein, awaiting the result of the litigation, was "execution" within the meaning of s. 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the Court of Appeal had no jurisdiction to stay proceedings in the court below; and it was for the High Court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

Execution.]—Staying execution pending appeal. See *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15.

Foreign Appeal.]—An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in statu quo were annexed to the order. *Huntingdon* v. *Attrill*, 12 P. R. 36.

General Rule.]—It is not usual to stay proceedings under a decree pending an appeal, and under the facts of this case it was refused. *Heward* v. *Heward*, 2 Ch. Ch. 242.

Injunction.]—The 27th section of the Court of Appeal Act, R. S. O. 1877 c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren v. Caldwell*, 29 Gr. 458.

Interim Stay.]—A rule nisi for a new trial having been discharged, defendant gave notice of appeal, and obtained an order to stay proceedings until the appeal bond should be entered into by the defendant, or until there should be a rule or order allowing the plaintiff to proceed. The appeal bond was marked "allowed" by a Judge in Chambers, after which the plaintiff entered judgment on his verdict. On motion to set aside this judgment:—Held, that the order ceased to stay proceedings after the appeal bond had been allowed; that such allowance was a supersedeas of execution only; and that the judgment, therefore, should be allowed to stand, subject to the decision in appeal. *Robinson* v. *Gordon*, 24 U. C. R. 285.

Interlocutory Appeal.] — The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross-action. *Conmee* v. *Canadian Pacific R. W. Co.*, 11 P. R. 356.

Mandatory Order.]—By an order of the Court of Error and Appeal, the Hamilton and Milton Road Company were ordered to remove a bridge constructed by them which impeded the navigation of the Desjardins Canal, against which the road company appealed to the Queen in Council:—Held, that under the statute, the circumstance of the road company having perfected the security required by the orders of the Privy Council, was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge; and the road company having applied to this court for a stay of proceedings under the order, pending their appeal to the Privy Council, both motions were refused, but under the circumstances without costs to either party. *Dundas* v. *Hamilton and Milton Road Co.*, 19 Gr. 455.

Manifold Judgment.] — The defendant in appealing to the Court of Appeal from a manifold judgment of the High Court in an action for specific performance, directing the execution by him of a conveyance, the delivery of documents, etc., and also the payment of a sum for costs of the action, gave security for the costs of the Court of Appeal and for payment of the costs of the action, but did not execute the conveyance, deposit the documents in court, or otherwise comply with the judgment or the provisions of Rule 804, s.-ss. 1, 2, 3:—Held, that upon the perfecting of the security, there was a stay of execution, amounting to a supersedeas, as to the costs of the action, by virtue of s.-s. 4 of Rule 804, although the defendant had done nothing with respect to the parts of the judgment falling under the other sub-sections; and garnishing proceedings taken for the purpose of collecting such costs were not sustainable. *Vigeon* v. *Northcote*, 15 P. R. 171.

New Trial.]—The plaintiff was permitted to proceed with a new trial pending an appeal, where he shewed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald* v. *Murray*, 9 P. R. 464.

Notice of Motion.]—On a motion for a stay of execution pending an appeal it is not necessary to give fourteen days' notice. The ordinary notice is sufficient. *Heenan* v. *Dewar*, 3 Ch. Ch. 199.

Payment Before Stay.]—Where costs collected by the sheriff had been posted on the evening of the 27th November, addressed to the plaintiff's solicitor, but not received by him till after the defendants had moved for a stay of proceedings pending their appeal:—Held, that the money was constructively in the possession of the plaintiff's solicitor as soon as it had been duly mailed, and therefore a motion to refund was refused, with costs. *McDonell* v. *McKay*, 2 Ch. Ch. 354.

Reasons of Appeal Not Served.] — Where an appellant who had given the statutory notice of appeal to the Court of Appeal, but had not served his reasons, moved to stay execution under R. S. O. 1877 c. 38, ss. 27, 28, the court examined the pleadings to ascertain whether the appeal was frivolous, but ordered the appellant to pay the costs of application. *Norval* v. *Canada Southern R. W. Co.*, 7 P. R. 462.

Rehearing.]—On motion to stay proceedings pending rehearing, the court will follow the practice laid down in the Error and Appeal Act with reference to staying proceedings pending an appeal to the Court of Error and Appeal. *Campbell* v. *Edwards*, 6 P. R. 159.

Replevin.]—Defendants having succeeded in replevin for a schooner, the plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, so that defendants might not in the meantime obtain a return of the vessel. The court, however, refused to interfere. *Scott* v. *Carveth*, 20 U. C. R. 435.

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

Security.]—Security for the costs in appeal, as well as below, will be required before proceedings below will be stayed pending an appeal. *Heward* v. *Heward*, 2 Ch. Ch. 245.

Security.]—The decree ordered payment of a sum of money by a railway company, and in default that a receiver should be appointed; from which the company gave notice of appeal, and moved to stay the appointment of the receiver and the enforcement of the debt until after judgment in appeal. The court refused the application unless security was given for payment of the debt in case the decree should be affirmed; and in any event ordered defendants to pay the plaintiff the costs of the motion. *Fox* v. *Toronto and Nipissing R. W. Co.*, 26 Gr. 352.

Security—*Ex parte Application.*]—A stay of proceedings will not be granted pending an appeal unless security is given for the costs of appeal as well as for those in the court below. Applications for a stay should not be made ex parte. *Grand Trunk R. W. Co.* v. *Ontario and Quebec R. W. Co.*, 9 P. R. 420.

Seizure Made.]—Where a fi. fa. has been acted upon before the writ of appeal has been allowed, there can be no stay of execution. The sheriff must sell and pay the money into court to abide the event of the appeal. *Gilmour* v. *Hall*, 10 U. C. R. 508.

Stay by Injunction.]—Interim injunction granted to stay proceedings at law pending the decision of the Court of Appeal. *Cotton* v. *Corby*, 7 Gr. 50.

Stay by Injunction.]—Pending an appeal from the Court of Chancery, an injunction was granted restraining a mortgagee from proceeding to the sale of the mortgaged premises under a power of sale contained in a deed. *Commercial Bank* v. *Bank of Upper Canada*, 1 Ch. Ch. 64.

Stay by Injunction.]—An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an appellate court on points already decided in other cases, against his contention, in courts of first instance. *Wyld* v. *McMaster*, 4 O. R. 717.

Suspending Decree.]—The court has full power, notwithstanding the Error and Appeal Act, 1857, to suspend the operation of its decree, so as to allow an appeal. *Cotton* v. *Corby*, 5 L. J. 67.

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8. *Time for Appeal and Extension of Time.*

Application After Expiration of Time—*Illness of Solicitor—Public Duties.*]—Where sufficient grounds are disclosed the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by s. 51 of the Exchequer Court Act (as amended by 53 Vict. c. 35, s. 1), may be extended after such prescribed time has expired. [The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.] (2.) The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired. (3) Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clarke* v. *The Queen*, 3 Ex. C. R. 1. See the next case.

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

pugn on such appeal the judgment pronounced in 1887:—Held, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute; and the extension of time granted by the Exchequer Court on its face only referred to an appeal from the judgment pronounced in 1891. *The Queen* v. *Clarke*, 21 S. C. R. 656.

Application Before Time Expires.]—The fact of an application to extend the time for appealing being made before the expiry of a year from the decree on rehearing, was looked on as a cogent reason for extending the time. *Tyler* v. *Webb*, 3 Ch. Ch. 33.

Chambers Order.] — Where time to appeal to the Court of Error and Appeal from an order made in Chambers would expire before such appeal could be heard, a Judge in Chambers cannot extend the time. *Wiman* v. *Bradstreet*, 3 C. L. J. 102.

Change in Rules.]—Section 26 of R. S. O. 1877 c. 38, which came into force on the 1st January, 1878, provides that notice of appeal must be given within one month from the judgment complained of, or within such further time as the court appealed from or a Judge thereof may allow. Where a notice of appeal from a decree pronounced on the 1st November, 1877, was served under this section after office hours on the 31st January, 1878, the appeal bond having been filed on the 14th, and it was not shewn that the opposite party was prejudiced by the delay, or that the defence was not a meritorious one:—Held, assuming the Act to apply, that an application to allow the notice should be granted. Semble, however, that the above section would not apply where judgment has been pronounced before the coming into operation of the Act. *Rose* v. *Hickey*, 7 P. R. 390.

Crown.]—Where an application was made by the Crown for an extension of time for leave to appeal a long time after the period prescribed therefor in s. 51 of 50 & 51 Vict. c. 16 (as amended by 53 Vict. c. 35), had expired, and the material read in support of such application did not disclose any special grounds or reasons why an extension should be granted, the application was refused. *MacLean* v. *The Queen*, 4 Ex. C. R. 257.

Decree on Rehearing.]—Where a cause has been reheard and the original decree affirmed, an appeal must be brought within a year from the original decree, or a special application for leave to appeal made. *Macfarlane* v. *Dickson*, 1 Ch. Ch. 377; *S. C.*, 2 Ch. Ch. 38.

Delay Accounted For.] — Such leave, after the time has elapsed, will not be granted if the delay is not properly accounted for. *Bullen* v. *Renwick*, 1 Ch. Ch. 204; *Denison* v. *Denison*, 2 Ch. Ch. 333; *Duff* v. *Barrett*, 3 Ch. Ch. 318.

Discretion.]—In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to section 101 of the Judicature Act and Rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to a divisional court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Con. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court, on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do:—Held, that the appeal not having been brought within one month from the date of the report, as required by Con. Rule 848, was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which this court would not interfere. *Township of Colchester South* v. *Valad*, 24 S. C. R. 622.

General Rule—*Merits.*]—Upon an application to extend the time for an appeal, to do justice in the particular case is above all other considerations; and the expression "the justice of the case" means the justice of the case upon the undisputed facts of it. And where the plaintiff, desiring to appeal to the Court of Appeal from the judgment below 19 O. R. 639, was two months and twelve days late in filing his appeal bond, and offered no sufficient excuse for his delay, but asked to have the time extended as an indulgence, and it appeared that if the plaintiff were to succeed in his contention in the case, he would obtain and have at the expense of the defendant more than he could have had under his contract:—Held, that the justice of the case was against the plaintiff; and that an order of the Master in Chambers extending the time for appealing, though a discretionary order, was so clearly wrong that it should be reversed. *Abell* v. *Morrison*, 14 P. R. 210.

Gross Delay.]—The court, although reluctant to shut out a party from the privilege of appealing, will not give leave to appeal after a long lapse of time, and where numerous sittings of the Court of Appeal have been held since the judgment. *Davidson* v. *Boomer*, 3 Ch. Ch. 375.

Judgment Not Drawn Up—*Bonâ Fide Intention to Appeal.*]—The judgment at the trial was pronounced on the 19th June, 1885, but was not drawn up and settled till the 11th September. The sittings of the Chancery Divisional Court (to which the defendant wished to appeal) began on the 3rd September:—Held, that the time for appealing under Rule 523, began to run from the 19th June, and that it was not extended by the neglect to draw up the judgment, although, as the judgment was not drawn up, the cause could not be set down under Rule 522. But, as there was a bonâ fide intention to appeal, instructions had been given, the defendant lived abroad, in Texas, the judgment was complex, and there were only twelve days exclusive of vacation during which it could have been settled, leave to set the cause down was granted on payment of costs. *Hickey* v. *Stover*, 11 P. R. 88.

Long Vacation.]—Upon the true construction of Rule 484, the period of long vacation is not to be reckoned in the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal:—Semble, also, that under the circumstances of this case, if the notice had been late, the time would have been extended under Rule 485. *Hespeler* v. *Campbell*, 14 P. R. 18.

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

Merits.]—The decision appealed from was given on the 14th, and the notice of appeal on the 26th November, the first day of Michaelmas sittings being the 17th November:—Semble, that this was an appeal from a Judge, and not a substantive motion to rescind his order, and if so, and Rule 414 was to govern, the appeal was too late, but:—Held, even so, that the court would extend the time, as the merits were with the appellant. *McLaren* v. *Marks*, 10 P. R. 451.

Oversight of Solicitor.]—Application to extend the time for giving notice of intention to appeal, on the ground that the attorney for the party desiring to appeal had omitted to give the required notice within the prescribed fourteen days. There had been a delay of a month in making the application:—Held, that the mere statement of an unexplained "oversight" on the part of the attorney was an insufficient reason for granting the leave, though it might be otherwise if there were an important question of law involved, as to which there was a conflict between the courts. *Gordon* v. *Great Western R. W. Co.*, 6 P. R. 300.

Precautionary Motion.]—The Rules applicable to appeals from the High Court to the Court of Appeal are to be applied, as far as possible, to appeals from reports of the Drainage Referee under the Drainage Act, 57 Vict. c. 56 (O.), and the Christmas vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made. Where the respondents' solicitors, by letter, insisted that the appeal was not regularly or properly brought, the appellants were justified in making a motion to extend the time for taking certain steps or to confirm the proceedings taken, and were entitled to the costs of such motion, although it was, strictly speaking, unnecessary, because the proceedings were found to be regular. *Re Township of Raleigh and Township of Harwich*, 18 P. R. 73.

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

Special Facts.]—Leave to appeal given under special circumstances, after the time had elapsed. *Bank of Upper Canada* v. *Wallace*, 2 Ch. Ch. 169; *Box* v. *Provincial Insurance Co.*, 2 Ch. Ch. 397; *Butler* v. *Church*, 3 Ch. Ch. 91.

Style of Cause.]—On an application for leave to appeal from the Court of Chancery, the proceedings were held to be rightly styled as in the Court of Chancery, although security for appealing had been perfected. *Tyler* v. *Webb*, 3 Ch. Ch. 33.

Technicalities.]—A party seeking leave to appeal after the time limited for appeal has expired, must account satisfactorily for the delay, and shew some reasonable grounds why such an indulgence should be granted. A party will not be aided by the court in setting up a technical defence to defeat a claim just in itself. Where leave to appeal, after the usual time, was asked under circumstances which, in an ordinary case, would have been sufficient to sustain the application, but the case sought to be made by the appellant was strictissimi juris, and with the view of defeating an equitable claim, the motion was refused with costs. *Gilbert* v. *Jarvis*, 2 Ch. Ch. 259.

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9. *Miscellaneous Cases.*

Appeal Books.]—Unnecessary length of appeal books remarked upon. *Parsons* v. *Standard Ins. Co.*, 4 A. R. 326.

Different Courts.]—It appeared that the Despatch Company, defendants herein, had given notice of appeal to the Court of Appeal, before the other defendants appealed to a divisional court:—Held, where there is a general judgment against several defendants, Rule 510 does not permit them to sever and appeal to different courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground the appeal should be dismissed. *Hately* v. *Merchants' Despatch Co.*, 4 O. R. 723.

Enforcing Judgment.]—Semble, a motion to make a decree of the Court of Appeal an order of the Court of Chancery may be made in Chambers if the order is to be in the terms of the decree, but if further directions or new terms are necessary to carry out the decree in appeal, the motion should be to the court. *Weir* v. *Matheson*, 2 Ch. Ch. 10.

Equal Division.]—The court being equally divided, the rule to enter a verdict for the plaintiff dropped, and the verdict for defendant stood; but to enable the case to be appealed, the rule was directed to be discharged. *Miller* v. *Reid*, 20 C. P. 576. See also *Ryan* v. *Ryan*, 29 C. P. 449.

Next Friend.]—Where a married woman defended a suit in Chancery without a next friend, it was held that the husband and wife could appeal to this court without any next friend. *Butler* v. *Church*, 18 Gr. 190.

Precedents.]—Ianson v. Paxton, 23 C. P. 439, and its effect as a judgment of the Court of Appeal, commented upon. *Fisken* v. *Meehan*, 40 U. C. R. 146.

Quashing.]—Where there is no right of appeal the respondent is not bound to move before the hearing to quash the proceedings. *In re Freeman*, 2 E. & A. 109.

Quieting Titles Act.]—An appeal from the decision of the referee, under the Act for Quieting Titles may be to a single Judge *Armour* v. *Smith*, 16 Gr. 380.

Quieting Titles Act.]—As to the practice on appeal under this Act. See *Re Howland*, 4 Ch. Ch. 58; *S. C., ib.* 90.

Subsequent Costs.]—The Court of Error and Appeal reversed an order of the Court of Chancery, and directed a petition to be dismissed with costs:—Held, that this did not entitle the appellants to costs of proceedings in the court below, subsequent to the order which was reversed. *Re Goodhue*, 6 P. R. 87.

Taxation.]—The proper mode of appealing from the Master's certificate of taxation is by motion, not by petition. *In re Ponton*, 15 Gr. 355.

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

Writ.]—No writ of error or appeal is required. Section 32 of C. S. U. C. c. 13, abolishes it notwithstanding s. 64 affirming the orders of the court until altered. Where judgment of non pros. is authorized by s. 39, it is not necessary to obtain leave of the court to sign it. The statute and orders enable the respondent to press the case to a hearing. *Rowe* v. *Jarvis*, 14 C. P. 244.

See ARBITRATION AND AWARD, I.—ASSESSMENT AND TAXES, I.—BANKRUPTCY AND INSOLVENCY, VI. 8 (a)—COMPANY, X. 6 (a)—COSTS, I., VIII. 2—COUNTY COURTS, IV. 2—CRIMINAL LAW, VIII. 2—DIVISION COURTS, I.—INTERPLEADER, II. 2—NEW TRIAL, VII. 2.—PARLIAMENT, I. 11 (a) — PARTIES, III.—PRACTICE—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XIV. 1—PRACTICE SINCE THE JUDICATURE ACT, VI. 2, VIII. 2 (a), 4 (a), 6 (a), IX. 5 (a)—PRIVY COUNCIL, I. — QUIETING TITLES ACT, VIII. — SESSIONS, II., III.—SOLICITOR, VI. 4 (a)—SUPREME COURT OF CANADA, I., II., III., IV., V., VI.—SURROGATE COURTS, I.

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APPOINTMENT.

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ARBITRATION AND AWARD.

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I. Appeal from Award and Altering Award.

Consent Reference.]—A reference was by decree of the court made to W., one of the local masters in his individual, not official capacity; the decree expressing the same to be by consent, and that the award should be appealable in the same manner as a master's report; the reference being of all matters in the suit and also of questions in difference between two defendants:—Held, notwithstanding such consent, that the award could not be appealed from, and could only be moved against for cause in the same manner as an award of any other arbitrator; 39 Vict. c. 28 and 40 Vict. c. 8 (O.) not applying to suits in the court of chancery. *Burns* v. *Chamberlin*, 25 Gr. 148.

Consent Reference.]—The order of reference made by the presiding Judge at the assizes was: "Upon the consent of the parties I do order and direct that the matters in dispute between the plaintiff and defendant upon the issues joined in this action be referred," &c. It was urged that the action being one which involved the investigation of long accounts, the reference must be deemed to have been made compulsorily, and the consent to have been merely to the arbitrator named. It appeared that, as a matter of fact, the learned Judge exercised no discretion, but, on the parties announcing their consent, he made the order; and at the time suggested the insertion of a clause authorizing an appeal, if such were desired, but it was not required:—Held, that the reference was a consent reference, and there was no appeal. *Webster* v. *Haggart*, 9 O. R, 27.

Consent Reference.]—Held, affirming the decision in 46 U. C. R. 235, that an appeal will lie from an award made pursuant to a consent reference at nisi prius under s. 205, C. L. P. Act. *McEwan* v. *McLeod*, 9 A. R. 259.

Consent Reference.]—By consent of the parties an action was referred to the arbitration of a county court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O. 1877 c. 50, s. 189. The arbitrator gave an award in favour of the plaintiffs; a divisional court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the court of appeal held that there was an appeal on the merits but upheld the award. Held, affirming this judgment, that the arbitrator was justified in awarding the amount he did to the plaintiffs. *Bickford* v. *Canada Southern R. W. Co.*, 14 S. C. R. 743.

Damages.]—On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine canal to land situated on said canal, the arbitrators awarded H. $9,216 in full and final settlement of all claims. On an appeal taken to the exchequer court by H. this amount was increased to $15,990, including $5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement, and the Judge reserved the right to H. to claim for future damages from that date:—Held, reversing the judgment of the exchequer court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present, and future damages, and that the evidence did not justify any increase of the amount awarded. Gwynne, J., was of opinion that under 42 Vict. c. 8, s. 38, the supreme court had power (although the Crown did not appeal to the exchequer court) to review the award of the arbitrators, and that in this case $1,000 would be an ample compensation for any injury that the claimant's land could be said to have sustained, which upon the evidence could be attributed to the work of the enlargement of the canal. *Regina* v. *Hubert*, 14 S. C. R. 737.

Damages—*Conflicting Evidence.*]—Where the evidence is conflicting as to whether damage or benefit has resulted to the party affected, by raising or lowering a street in front of his land, the court will not interfere with an award merely because it may think the weight of evidence to be against the view taken by the arbitrators. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

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

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

Expropriation.]—Where the official arbitrators in making their award have not proceeded upon a wrong principle, nor arrived at an estimate of value not warranted by the evidence, the court ought not to dis-

turb such award. Re Macklem and Niagara Falls Park, 14 A. R. 20, and Re Bush, 14 A. R. 63, followed. *Fellowes* v. *The Queen*, 2 Ex. C. R. 428.

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

Full Court—*Single Judge.*]—Under 39 Vict. c. 28, s. 7 (O.), as amended by 40 Vict. c. 8 (O.), the appeal from the award of an arbitrator is directed to be made to the court in which the action was begun, and may be heard before a single Judge of either of the superior courts of common law, in or out of term, and the practice to be observed on any such appeal, shall be the practice now observed on appeal from a report of a master in chancery, &c. An appeal having been made to a single Judge under the above section:—Held, that a further appeal to the full court in term would not lie, and that the reference to the practice on appeal from the master's report affected only the procedure to be observed on such appeal, and could not give any further right of appeal. Remarks as to the effect of the new right of appeal given by these Acts, and the extension of it contemplated by 40 Vict. c. 7 (O.). *Manufacturers and Merchants' Fire Ins. Co.* v. *Atwood*, 28 C. P. 21.

Full Court—*Single Judge.*]—Section 3 of 41 Vict. c. 6 (O.) declares that the Legislature is not by that Act or 40 Vict. c. 6 (O.), to be deemed to have adopted the construction which may by judicial construction or otherwise have been placed upon the language of any statutes included amongst the revised statutes:—Held, notwithstanding this enactment, that s. 192 of R. S. O. 1877 c. 50, being not only in words but in effect the same as s. 7 of 39 Vict. c. 28 (O.), repealed but re-enacted by it, must receive the same construction as was placed upon the repealed enactment by the last case, and therefore that there could be no re-hearing by the court by way of appeal from the decision on an award made by a single Judge under the repealed enactment. *Crain v. Trustees of Collegiate Institute of the City of Ottawa*, 43 U. C. R. 498.

Increasing Award.]—In a matter of expropriation of land for the Intercolonial Railway, the award of the arbitrators was increased by the Judge of the exchequer court from $4,155 to $10,842.25, after additional witnesses had been examined by the Judge:—Held, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. *Regina* v. *Charland*, 16 S. C. R. 721.

Increasing Award.]—To warrant an interference with an award of value necessarily largely speculative, an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence in this case this court restored the amount of compensation awarded by the official arbitrators, and reversed the judgment of the exchequer court which had increased it. *Regina* v. *Paradis*, *Regina* v. *Beaulieu*, 16 S. C. R. 716.

Increasing Award.]—In an arbitration within ss. 401 and 404 of the Consolidated Municipal Act, 55 Vict. c. 42 (O.), a Judge to whom an appeal is taken against the award can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs. *In re Christie and Toronto Junction*, 24 O. R. 443, 22 A. R. 21, 25 S. C. R. 551.

Municipal Corporation—*Compensation—Time.*]—An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation is an award which does not require adoption by the council, but is subject to an appeal to the high court, as provided by R. S. O. 1897 c. 223, s. 465; and the practice as to the appeal is governed by R. S. O. 1897 c. 62, ss. 31, 34, 47. Where it is not shewn that such an award has been filed or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail. *Re McLellan and Township of Chinguacousy*, 18 P. R. 246.

New Grounds.]—In Nova Scotia, where the rule nisi to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal. *Oakes* v. *City of Halifax*, 4 S. C. R. 640.

No Agreement for Appeal.]—In an action on a fire insurance policy, the Judge at the trial, by the consent of the parties, directed a reference, which did not contain any agreement allowing an appeal on the merits:—Held, that an appeal would not lie. *Walker* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 30 C. P. 211.

No Agreement not to Appeal.]—The plaintiff sued defendant on a bond, conditioned not to commence business as an hotelkeeper within three years in a certain township. At the assizes the case and all matters in difference in connection with it were referred. A verdict was taken for the penalty subject to the award, and a memorandum of reference indorsed on the record, signed by the attorneys. By this minute power was given to the arbitrator to examine the parties and their witnesses, certify for costs, and amend the pleadings; but it contained no agreement not to bring error, and no rule of reference had been drawn up. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract:—Held, no rule of reference having been drawn up, that it could not be assumed that defendant had referred on the ordinary condition not to bring error:—Held, also, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade, it was necessary to shew a consideration, and none appeared in the declaration. *Dawes* v. *Wilkinson*, 19 U. C. R. 604.

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

Practice Court—*Court of Appeal.*]—An appeal lies from a judgment of the practice court to the court of appeal on a rule to set aside an award. *Carrol* v. *Stratford*, 7 P. R. 11.

Railway Act—*Amount.*]—In a case of an award in expropriation proceedings under the Railway Act, R. S. C. c. 109, it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. The Supreme Court of Canada refused to interfere. *Benning* v. *Atlantic and N. W. R. W. Co.*, 20 S. C. R. 177.

Railway Act—*Forum—Time.*]—An appeal under s. 161 of the Railway Act, 51 Vict. c. 29 (D.) from an award need not be brought on for hearing within a month from notice of the award, an effective notice of appeal, given in good faith, within the month, is sufficient. Such an appeal should be brought on for hearing before a single Judge in court, not before a divisional court. *In re Potter and Central Counties R. W. Co.*, 16 P. R. 16.

Railway Act—*Forum—Transfer to Proper Court.*]—The proper forum for the hearing of an appeal from an award under the Dominion Railway Act is a Judge in court, and not a divisional court: the provision of Rule 117 respecting proceedings directed by any statute to be taken before the court, and in which the decision of the court is final, is not applicable to an appeal of this kind. In re Potter and Central Counties R. W. Co., 16 P. R. 16, approved. Where an appeal was brought in the wrong court, an order was made under Rule 784 transferring it to the proper court, upon payment of costs. *Re Montreal and Ottawa R. W. Co. and Ogilvie*, 18 P. R. 120.

Submission Not Giving Right of Appeal.]—Where a voluntary submission to arbitration contained a provision that the agreement might be made a rule of court, and that the court might be moved to set aside or refer back the award:—Held, that this conferred no right of appeal under R. S. O. 1877 c. 50, s. 191, which, under s. 205, could only be conferred by the terms of the submission. *In re Township of York and Willson*, 8 P. R. 313.

Time.]—In the case of a voluntary nisi prius submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. 1877 c. 50, ss. 191, 192, and 193, and the time for appealing from the award runs from the date of filing. McEwan v. McLeod, 9 A. R. 239, followed. *Shepherd* v. *Canadian Pacific R. W. Co.*, 11 P. R. 517.

II. Arbitrator.

1. *Disqualification.*

Attorney of Party.]—The arbitrator appointed by one of the parties having refused to act, he appointed a new arbitrator, who formerly acted as his attorney, but not in this suit:—Held, that the submission must be revoked. *Tully* v. *Chamberlain*, 9 C. L. J. 237.

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

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

Contract—*Superintendent of Work.*]—By a contract between plaintiff and a city municipality for additions and improvements to its system of waterworks, it was provided that all differences, &c., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work:—Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator; and, on the evidence, that no cause existed to restrain him from proceeding with the reference. *McNamee* v. *City of Toronto*, 24 O. R. 313.

Counsel.]—Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing coun-

sel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or for the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation: —Held, that there was no such relation between him and the corporation as might give rise to bias or shew an interest which would invalidate the award. Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293, distinguished. *Re Christie and Town of Toronto Junction*, 24 O. R. 443, 22 A. R. 21, 25 S. C. R. 551.

Improper Appointment—*Restraining from Acting.*]—Before a submission has been made a rule of court, a court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration. *Direct Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648, 8 A. R. 416.

Insurance.]—Proceedings under R. S. O. 1887 c. 167, s. 114 (16), for the ascertainment of the amount of a loss under a fire policy, are proceedings in the nature of an arbitration and not of a valuation merely. Arbitrators must be indifferent, and an award made by arbitrators, one of whom was at the time of arbitration sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void. *Vineberg* v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293.

Interested Valuator—*Waiver.*]—By the terms of a written agreement on the sale of goods by the plaintiff to the defendant, the price was to be ascertained by three indifferent valuators, one to be appointed by the plaintiff, one by the defendant, and a third by the two so chosen, and in case of breach of the agreement the sum of $200 was to be recovered as liquidated damages. The valuators appointed by the parties were not indifferent, one being defendant's son, the other the plaintiff's brother-in-law, but they were accepted by the parties as unobjectionable, and a valuation was made. The vendor sued the purchaser to recover the $200, for breach of the agreement in not appointing an indifferent valuator: — Held, that having accepted the valuator so appointed as unobjectionable, he could not recover. *Black* v. *Mottashed*, 28 C. P. 259.

Offer of Solicitorship.] — The finding and certificate were set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendant company, and had after the finding accepted it, and was thus disqualified from acting. *Conmee* v. *Canadian Pacific R. W. Co.*, 16 O. R. 639.

Solicitor.] — The high court has power to prevent a non-indifferent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply for leave to revoke the submission if another arbitrator be not substituted. Malmesbury R. W. Co. v. Budd, 2 Ch. D. 113, and Beddow v. Beddow, 9 Ch. D. 89, followed. A barrister and solicitor who had acted as counsel for the husband on an indictment and trial for obstructing an alleged highway claimed by his wife to be her property, and who had written a letter concerning the matter as solicitor for both husband and wife, was restrained from acting as arbitrator in an arbitration between the wife and the municipal corporation in which the highway was situate. Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293, followed. *Township of Burford* v. *Chambers*, 25 O. R. 663.

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2. *Duties and Powers.*

Altering Award.]—An arbitrator's authority ceases after he has executed an award, and he has no power to alter or amend such award. *Helps* v. *Roblin*, 6 C. P. 42.

Amendment.]—Power to amend by adding plaintiff. See *Wright* v. *Creighton*, 30 C. P. 5.

Amendment.]—An action on a bond for the performance by defendant P. of his duties as collector, was referred at nisi prius, with the same power to the arbitrator as the Judge had to amend the pleadings, and under this he allowed pleas to be added, one of which raised the defence that the sureties were relieved by an extension of time given for the collection, which question he referred to the court, with others:—Held, that the objection should not have been allowed by the arbitrator. *Todd* v. *Perry*, 20 U. C. R. 649.

Blank Filled in After Execution.]—Arbitrators under the School Act executed an award, the description of the lot not being fully inserted, but a blank being left therefor, which was afterwards filled in, and the word "lot" altered into "gore:"—Held, that the award was bad. *Ryland* v. *King*, 12 C. P. 198.

Certifying for Costs.]—Where an order of reference gave the arbitrator "all the powers as to amendment and otherwise of a Judge sitting at nisi prius:"—Held, that he could certify for costs, and not having done so, the Judge in chambers refused an order for full costs to be taxed. *Little* v. *Lines*, 7 P. R. 197.

Costs.]—Where upon an arbitration under s. 385 et seq. of the Municipal Act, 1892, the arbitrators made their award and directed that the costs should be paid by the landowners, but did not fix the amount nor direct on what scale they should be taxed, as required by s. 389:—Held, that there was no authority for their taxation either upon the high court or the county court scale. But semble, that upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs. *Re Village of Preston and Klotz*, 16 P. R. 318.

Delegating Authority.] — Award held bad for delegating to third parties, in awarding a division of property by persons to be selected by plaintiff and defendant. *Harrington* v. *Edison*, 11 U. C. R. 114.

Exceeding Authority.] — Where the Crown lands department, in deciding to allow one of two applicants to purchase land, directed that the amount properly payable by him to the other should be ascertained by arbitration; and the arbitrators found a

certain sum due, but directed, in the event of the payee failing to deliver up possession to the other in two months, that $400 should be deducted from this amount:—Held, beyond their authority: their duty being simply to find the amount payable. *Barnes* v. *Boomer*, 40 U. C. R. 532.

Exceeding Authority.]—Upon a reference of all matters in difference between the parties:—Held, that an award directing the delivery of a certain promissory note was, under the special circumstances, not an excess of authority. *Lund* v. *Smith*, 10 C. P. 445.

Exceeding Jurisdiction.]—Under a submission giving no power to award a verdict, the award was, "I am of opinion that the defendants are entitled to the verdict in this cause, and, by the authority vested in me as arbitrator, confirm this opinion, and decide the case accordingly:"—Held, that the award might be upheld as an informal expression of opinion in favour of defendants, there being no express direction to enter a verdict. *Creighton* v. *Brown*, 1 P. R. 331.

Exceeding Jurisdiction — *Lump Sum.*] —Action for injury to a water-course and mill-privilege. At the trial the cause and all matters in difference between the parties were referred, and the arbitrators were specially authorized to determine the value of the property alleged to be injured, as well as to award damages. A verdict was taken for £1,000; which it was agreed should stand as security for such value, as well as for any damages awarded, and should be reduced or increased according to the award. The arbitrators awarded that the plaintiff was entitled to a verdict, and assessed the damages in the cause at £500, and ordered the verdict to be reduced to that sum:—Held, that under the terms of the reference the verdict might stand as security for any damages in the power of the arbitrators to award, and therefore for those given, though the arbitrators took into consideration injuries caused before the first day laid in the declaration, and which perhaps, strictly, could not have been recovered for in the cause. (The award itself was clearly not bad on this ground):—Semble, that in the absence of any express agreement in the submission, it would be unnecessary to distinguish how much was awarded in respect of matters in difference in the cause, and how much for other matters. *Williams* v. *Squair*, 10 U. C. R. 24.

Exceeding Jurisdiction—*Severable Provisions.*]—A submission, after reciting that differences had arisen between plaintiff and defendant respecting, among other matters, the title to a lot of land, referred the matters in dispute to certain parties named. The arbitrators awarded that "as to the right and interest of the parties respectively" in the land, &c., defendant should pay to plaintiff $400 in full compensation for improvements made by plaintiff, and in full consideration and for the discharge of all his claims to and against the said land, the said $400 to be paid to defendant in three equal instalments, fixing the periods for payment and directing how the second and third instalments should be secured; and that so soon as the $400 had been fully paid, or secured as aforesaid, the plaintiff should give up possession of the land to defendant. The award then proceeded to provide that if defendant should not pay the first instalment on the 15th January, 1865, or secure the second and third instalments, he (defendant) should, on said 15th January, convey to plaintiff in fee all his right to said land, and that the plaintiff should, in consideration, pay two several annuities—one of $80 to defendant for life, and another of $20 to defendant's wife, during coverture, for her separate use, with certain directions as to increasing his or her annuity, according as the one survived the other, and as to the occupying a house on the land free of rent, &c.:—Held, that the alternative direction in the award in the event of defendant not paying was in excess of the arbitrators' powers, as they were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to direct that a portion of the money which was to be paid to defendant for it, should be appropriated to his wife without his consent; but that the other alternative, being an express direction to pay by a certain time and in a certain way, and being separable from the rest, might be upheld and enforced. *Bond* v. *Bond*, 15 C. P. 613.

Exceeding Jurisdiction.] — By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant on or before the 20th March then next, for which the defendant covenanted to pay so much per log. It was provided that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks. By a submission under seal, reciting this agreement and that differences existed in respect thereof and of the advances made thereon by defendant to plaintiffs; all such differences were referred to arbitration. The arbitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, $896. To an action on this award, defendants pleaded no award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that, owing to the snow, the plaintiffs could not proceed with the work, and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the cost of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference:—Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiff for work done under the verbal agreement, which was not within the submission: that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action. *Tully* v. *Chamberlain*, 31 U. C. R. 299.

Future Compensation.] — In proceedings under 16 Vict. *c.* 190 to ascertain the amount to be paid for materials for the construction of a road, the arbitrators cannot confer upon the company a prospective right by awarding an amount as a compensation for materials to be taken at a future time. *Gibson* v. *Cleghorn*, 7 Gr. 83.

The arbitrators awarded damages for materials taken generally, not for the purpose of the road only:—Held, ultra vires. *Ib.*

Imposing Conditions.] — Defendants gave plaintiff and her husband a bond in £500, conditioned that if plaintiff should survive her husband, they would maintain her in her house during her life, &c. An action brought on this contract was referred. The arbitrators awarded that defendants should pay plaintiff £500, on or before the 20th November, 1852, in full of the causes of action in the suit, and of all matters in dispute referred: and further, that the plaintiff should not enforce payment of said £500, provided defendants should respectively give the plaintiff good security on real estate for the payment to her of the following sums, that is to say, setting out certain mortgages to be given by each defendant on or before 1st December, 1852. Plaintiff declared on this in debt, as an award "that the defendants should pay to the plaintiff £500 on or before the 20th November, 1853." Defendants denied the award as stated; and in another plea set it out and alleged that it was void, as beyond the authority of the arbitrators:—Held, that there was no absolute claim to the money on the 20th November, as stated in the declaration, but the right of action was suspended until the 1st December, and would then depend on the execution of the mortgages as directed:—Held, also, that the award was void, as the arbitrators had exceeded their power in giving damages not recoverable in the cause, and in imposing conditions beyond their authority. *Hill* v. *Hill*, 11 U. C. R. 262.

Indemnity.]—The submission referred the cause and all matters in difference to A., C., and G., or any two of them. C. and G. made an award reducing the verdict taken, and directed that the plaintiff on request should execute a bond in a certain penalty conditioned to indemnify defendant against two suits specified:—Held, that the award of indemnity was authorized. *In re Anderson* v. *Cotton*, 2 P. R. 109.

Injury to Land—*Retaining Wall—Interim Damage.*]—An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipal corporation to maintain a retaining wall. The arbitrator has power to include in his award compensation to the landowner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access. *Re Burnett and Town of Durham*, 31 O. R. 262.

Interest.]—Under a submission "to determine which of the several items of claim the estate of Mrs. B. is bound as matter of law to pay:"—Held, that the arbitrator was authorized to consider the liability for interest, although he could not correctly find the amount due. *Armstrong* v. *Cayley*, 2 Ch. Ch. 128.

Interest.]—In an action on an award it appeared that the plaintiff in April gave in a statement of his claim, with interest up to that time, at twelve per cent., the usual rate allowed in the dealings between the parties. Time was allowed defendant to prove his defence; and in making their award on the 6th October, the arbitrators added interest at the same rate up to the 1st September, on the sum claimed in April for principal and interest:—Held, that they had power to do this, and to award interest on the amount until paid. *Stewart* v. *Webster*, 20 U. C. R. 469.

Interest—*Lands Injuriously Affected.*]—Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. Judgment below, 29 O. R. 685, reversed. *In re Leak and City of Toronto*, 26 A. R. 351, 30 S. C. R. 321.

Majority.]—Where the submission as to some of the questions expressly states that the majority may award, this power, though not repeated throughout, extends to all matters referred upon which the arbitrators cannot agree. *Thirkell* v. *Strachan*, 4 U. C. R. 136.

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

Mistake—*Second Award.*]—The arbitrators, having discovered a mistake in the amount awarded, destroyed their award and executed another. The court set the second award aside. *Benson* v. *Lore*, 1 U. C. R. 398.

Municipal Act — *Special Findings.*] — Arbitration on erection of town into city. Making award retrospective and giving time for payment: — Held, authorized. Limiting the continuance of the award, and authorizing a ratable division of expenses instead of settling a sum to be paid:—Held, not authorized. *In re County of Middlesex and City of London*, 14 U. C. R. 334.

Not Bound by Strict Rules of Law.] —Semble, that upon a general reference at nisi prius, the arbitrators may, as to the amount of the verdict, be governed by matters in favour of defendant which could not have been brought in question at the trial. Also, that where the verdict is intended to be a final settlement between the parties, they may consider matters not embraced within the technical statement of the causes of action on the record, when advanced on the part of the plaintiff. *Watson* v. *Toronto Gas Co.*, 5 U. C. R. 523.

Not Bound by Strict Rules of Law.] —An action against a railway company for penning back water, and thus preventing the use of plaintiff's mills, having been referred, the arbitrators awarded £375 damages: — Held, that it could not be assumed from the fact that the annual rental of the plaintiff's mills was only £250, that the damages had been given for more than six months before the suit; and semble, that arbitrators, when not restrained by the submission, are not bound as Judges are in a court of law. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.

Note to be Given.]—Arbitrators may order that notes be given in satisfaction of the sum awarded. *Thirkell* v. *Strachan*, 4 U. C. R. 136.

Note to be Given.]—An award directing that two defendants should give to plaintiff a good indorsed negotiable promissory note for the sum found due:—Held, unauthorized. *George* v. *Smith*, 4 C. P. 291.

Such an award means that they shall give their own note, negotiable, with an indorser; a note made by one payable to and indorsed by the other, will not suffice. *Ib.*

Official Arbitrators.]—By a rule of court made on 7th March, 1888, it was ordered that, unless it was otherwise specially ordered, any matter pending before the official arbitrators when the Exchequer Court Act (50 & 51 Vict. c. 16) came into force that had been heard or partly heard by such arbitrators, should be continued before them as official referees and that their report thereon should be made to the court in like manner as if such matter had been referred to them by the court under the 26th section of the Act. Prior to the making of this rule a claim had been referred by the Minister of Railways and Canals to the official arbitrators for investigation and award. This claim, however, was proceeded with and heard before two of such arbitrators only, and a report thereon in favour of the claimant was made by them to the court:—Held, that the hearing of the claim by two of the official arbitrators was not a hearing within the meaning of the rule, and that judgment could not be entered on the report. *Rioux* v. *The Queen*, 2 Ex. C. R. 91.

Partnership Accounts—*Declaration of Lien.*]—Arbitrators upon a reference to settle disputes between parties, found the balance due from the firm to one of the partners, and declared in the award that this balance was a lien upon the assets to be paid out of them specifically:—Held, that they had the power to give this direction, and the partner in question had power to sell to satisfy the lien out of the specific property applicable of which he was joint owner. *Redick* v. *Skelton*, 18 O. R. 100.

Payment to Stranger.]—C. had sued B. on a contract by which he agreed to build for B. a dam, B. to find certain materials. On a reference of all differences relating to this contract:—Held, that the arbitrators might consider claims by B. against C. arising out of the contract; but that a direction to pay money to E., a stranger to the reference, could not be upheld. *In re Campbell* v. *Brown*, 2 P. R. 291.

Public Rights—*Joint Award*]—Held, by the arbitrators appointed under R. S. A. Act, 1867, s. 142, that as that Act confers powers on the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and a joint award is therefore unnecessary. *In re Provinces of Ontario and Quebec and Dominion of Canada*, 6 C. L. J. 212.

Questions of Law.]—Where the reference was, "with power to the arbitrator, if either party requires it," to submit questions of law to the court:—Held, enabling only, not compulsory. *Kesteven* v. *Gooderham*, 20 U. C. R. 500.

Questions of Law.]—The reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence:"—Held, that this rendered it imperative on the arbitrators to state for the court any legal point raised, and to distinguish, if required, the subjects for which they awarded in plaintiff's favour, if any legal question was raised applicable thereto. *Ross* v. *County of Bruce*, 21 C. P. 41.

The arbitrators having neglected their duty in this respect, the court refused to refer the matter back to them, and set aside the award. *Ross* v. *County of Bruce*, 21 C. P. 548.

Reconsidering Award.]—Held, under the facts of this case, that arbitrators acting under the School Act had no power to resume consideration of the matter, and issue a warrant to levy, after having once made the award. *VanBuren* v. *Ball*, 19 U. C. R. 635.

Set-off.]—Held, that under the circumstances of this case the arbitrator was justified in allowing as a set-off the judgment of defendant against the plaintiff and another, as against any claim that plaintiff had against defendant. *Latta* v. *Wallbridge*, 7 L. J. 207.

Special Act — *Damages — Interest.*] — Arbitration as to land taken and damages done by water commissioners of Ottawa under 35 Vict. c. 80, s. 4 (O.)—Power of arbitrators to give damages and award interest on compensation money. See *Re Collins and Water Commissioners of Ottawa*, 42 U. C. R. 378.

Special Agreement—*Action Pending to Reform it.*]—By a consent judgment in an action between members of a certain pool association for the sale of lubricating oil, it was provided that "all matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members * * relative to the said agreement" (sc., the original agreement of association), "or any alleged breach or non-observance thereof, or of any of the rules or regulations made, or to be made, by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbitration as therein specified. Acting under the agreement, the board had fixed a sum of three cents per gallon to be paid to the association by the parties thereto, on the sale of any lubricating oil. A dispute now arose on the motion of one of the members as to whether the three cents per gallon were payable on sales made by one member of the association to another, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease:—Held, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement, and the rules made under it, and it was no objection that in the course of the reference it might be necessary to procure an injunction, which an arbitrator could not grant:—Semble, if it should be established to his satisfaction that the parties ought to be relieved from certain things covered by the agreement, the arbitrator might so

relieve them:—Held, also, that the mere fact of an action to reform the agreement having been brought and being pending, did not paralyze the power of the arbitrator. Willesford v. Watson, L. R. 14 Eq. 572, followed. Piercy v. Young, 14 Ch. D. 200, commented on. *Woodward* v. *McDonald*, 13 O. R. 671.

Special Submission — *Costs—Severable Provisions.*]—A submission to arbitration recited that a controversy existed between A. W., J. W., and M. in relation to the amounts due and paid on a certain mortgage made by M. to a loaning company, and as to the proportion of said mortgage paid by the said parties to the company, and submitted this controversy to the arbitrators; and the parties covenanted with each other to observe the award. The arbitrators awarded that M. had paid the company the amount he agreed with A. W. to pay on the mortgage, and had overpaid his proportion by $627, in which sum A. W. was indebted to him; and that A. W. should pay that sum to him on or before the 1st June, 1882; and should also pay the costs of the reference, viz., $35. Nothing was said about J. W.:—Held, (1) that the arbitrators had not exceeded their powers in directing payment by A. W.; (2) that the award was not bad for omitting to mention J. W., this being equivalent to an award that there was nothing due by him:—Held, that the finding as to costs was unauthorized, but was severable from the rest of the award. *Whitely* v. *MacMahon*, 32 C. P. 453.

Specific Claims.]—Where there was an agreement to submit to arbitration all controversies between the parties, and the submission provided that, inter alia, a number of specific claims were to be dealt with, and also all things connected with the matter, it was held that a general award of a sum due, accompanied by an affidavit that all the claims had been inquired into, was sufficient. *McGreevey* v. *The Queen*, 19 S. C. R. 180.

Stating Case.]—Upon a special case stated by an arbitrator, in an action for converting the machinery, &c., of plaintiff's foundry, the court refused to stay proceedings on condition of defendant restoring the machinery, &c., taken by him, and held to be fixtures; 1. because they considered it not to be a case in which they could properly take that course; and, 2. because submitted merely to obtain their opinion on certain legal questions, they had no power to make such an order. *Goodcrham* v. *Denholm*, 18 U. C. R. 203, 214.

Stating Case.]—When questions of law arise in the course of arbitration proceedings any party thereto may apply to the arbitrator under s. 41 of the Arbitration Act, R. S. O. 1897 c. 62, to state a case for the opinion of the court, and in the event of his refusal may apply to the court to compel him to do so. The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal. On the merits the judgment below refusing to order the arbitrator to state a case, was affirmed. *In re Jenison and Kakabeka Falls Land and Electric Co.*, 25 A. R. 361.

Time for Payment.] — Where a reference is general, as of a contract and all matters relating to it, arbitrators can name a day for paying the money; but it is different where only a cause is to be decided upon. *Addison* v. *Corbey*, 11 U. C. R. 433.

Time for Payment.]—Held, in an action between school trustees and teacher, that the arbitrators exceeded their powers in awarding payment within thirty days. *VanBuren* v. *Bull*, 19 U. C. R. 633.

Time for Payment—*Severable Provision.*]—The sum awarded was directed to be paid forthwith, whereas the statute under which the reference was made allowed a year from the award, or from any rule of court ordering payment:—Held, that this part of the award, which was clearly bad, might be separated from the rest. *In re City of Toronto* v. *Leak*, 23 U. C. R. 223.

Time for Payment—*Costs — Severable Provisions.*]—Where the reference was only for the purpose of ascertaining and awarding the damages sustained by the plaintiff by a fire negligently set by the defendant, and the defendant agreed to pay the amount awarded; and it was provided that the costs of the arbitrators and award, &c., should be paid by the party entitled thereto, in whose favour the award should be made:—Held, that the arbitrators had no power to give a month for payment of the sum awarded, or to direct that the defendant should pay the costs, but that these directions were severable from the rest of the award, and might be rejected. In such a case the proper course is to discharge generally a rule to set aside the award, not to make it absolute in part. *Re Eglesion and Taylor*, 45 U. C. R. 479.

Time for Payment—*Entry of Satisfaction.*]—G. recovered a judgment against M. and C., upon a note made by them. One J. was also said to have been interested with them, and liable for the debt it represented, though not actually a party to it. It was also said that he was in effect a partner with G. in the transaction. M. made large payments on the judgment, but C. paid nothing. Upon a reference of certain matters in dispute between J. and M., it was left to the arbitrator, amongst other things, to determine whether or not M. or J., or which of them, was liable, or to what extent, in respect of the judgment or the promissory note whereon the judgment was recovered, and to make any orders which the arbitrators should think proper to settle the liabilities of the said parties in respect thereof. The arbitrators awarded that J., as between him and M., was liable to pay all the balance of money still unpaid upon the judgment, and that J. should pay and satisfy the same within one calendar month, and should cause the said judgment and writs of execution to be satisfied and discharged, and satisfaction to be entered on the roll of the said judgment:—Held, that the latter part of the award (which was objected to) was authorized. *In re McLean v. Jones*, 2 C. L. J. 206.

Two Awards.]—Action against a municipal corporation upon an award in favour of the plaintiff for land taken from him for a road. It appeared that the plaintiff named one arbitrator, H., and the reeve another,

S.; and they being unable to agree upon a third, the county Judge appointed one B. B. and H. on the 30th June signed the award sued on, giving £40 to the plaintiff. Afterwards the council called another meeting of the arbitrators, when all three attended, and B. and S. afterwards executed another instrument as their award, by which the plaintiff was to have only £3 10s.:—Held, that the first award was good, and the plaintiff entitled to recover upon it: that under 16 Vict. c. 181, s. 33, it was sufficiently published when it was signed by the arbitrators; that defendants having appointed an arbitrator, it was unnecessary to prove any by-law for opening the road; that an action was clearly maintainable upon such an award; and that it was no objection to the declaration that it was upon a submission to three arbitrators while two only executed the award, for the statute authorizes two to act. *Harpel* v. *Township of Portland*, 17 U. C. R. 455.

See also sub-titles, Award, *post* 90; Reference Back, *post* 127; Setting Aside Award, *post* 151.

3. *Proceedings Before.*

Ex Parte Proceedings.]—Held, that upon the facts in the case, the arbitrator was justified in proceeding ex parte. *Proctor* v. *Jarvis*, 15 U. C. R. 187.

Ex Parte Proceedings—*Notice Required—Wilful Absence.*]—Before an arbitrator proceeds ex parte, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and it clearly should be shewn that the absence of the party notified is wilful; nor should he proceed ex parte, unless the notice conveys the information that ex parte proceedings will be taken if the party served does not attend, nor if a reasonable excuse is given for such non-attendance. The party prosecuting the arbitration ought to take care that all proper notices are served on the opposite party, and should be able to shew, if he desire to proceed ex parte, that the other party has been properly notified, and that he wilfully absents himself. A party, therefore, who had not fulfilled his duty in this respect, was ordered to pay costs, and the case was referred back. *In re Potter* v. *Krupp*, 5 P. R. 197.

Ex Parte Proceedings—*Notice Required.*]—In an arbitration on an order made at nisi prius, the plaintiff's attorney obtained an appointment from the arbitrator for the 17th November, 1875, and sent a notice to plaintiff with subpœnas for his witnesses, but it was not received in time by the plaintiff, so that his witnesses who lived at a distance could not attend, and the attorney obtained an adjournment to the afternoon of the second day, when he still was not ready. The defendant, who was there with his witnesses brought from a considerable distance, objected to any further adjournment except on payment of costs, which plaintiff's attorney refused. The attorney refused to remain and hear defendant's evidence, though informed that the arbitration would be proceeded with, and the witnesses for the defence were then examined in his absence. Subsequently an opportunity was offered him of putting in his own evidence, and the award delayed a month for that purpose, but he did nothing, and the award was then made without his evidence:—Held, that before proceeding ex parte, the proper course is to give formal notice that the arbitration will proceed peremptorily at a time named, and as this was not done here the award was set aside, but only on payment of all costs by plaintiff. *Ward* v. *McAlpine*, 25 C. P. 119.

Majority—*Notice of Meeting—Consent.*]—When parties submit matters in difference to arbitrators to be decided by them or any two of them, all the arbitrators must be notified of their appointment and of the time of sitting. *In re McCluny and Mortley*, 6 L. J. 92.

If one of three arbitrators refuse to act the remaining two may proceed without him at any stage. *Ib.*

If two of the arbitrators award by consent in the absence of the third arbitrator, neither of the litigants can object afterwards. *Ib.*

Notice of Meeting.]—Where a cause has been referred, notice of the sitting of the arbitrators must be given to the attorney in the cause, not the party. *Allan* v. *Brown*, Tay. 335.

4. *Third Arbitrator and Umpire.*

Appointment.]—Appointment of third arbitrator by Judge under C. L. P. Act, on a reference to be held "in the usual manner." See *Rowe* v. *Colton*, 3 L. J. 116.

Appointment.]—Under a submission by four persons to two arbitrators, "and should they not agree, to choose an umpire:"—Held, that the umpire should have been appointed by the parties, not by the arbitrators. *O'Dougherty* v. *Fretwell*, 11 U. C. R. 65.

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

Appointment Not in Writing.]—Appointment of umpire need not be in writing, if the reference does not in terms require it. *Ray* v. *Durand*, 1 C. L. Ch. 27.

Appointment Not in Writing.]—A submission was to K. and M., and such person as they should appoint. The affidavits were contradictory as to the fact of a verbal appointment of C., and there was no appointment in writing proved; but it was sworn that he was chosen by defendant, as one of two proposed by plaintiff, and that he sat with the others and voted in defendant's presence without objection. The court refused to interfere against an award by C. and K. *Osborne* v. *Wright*, 12 U. C. R. 65.

Form of Submission—*Third Arbitrator not Executing Award.*]—To an action for wrongful dismissal, and on the common

counts, defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., and such third person as "the said arbitrators" should appoint, "so that the said arbitrators or umpire" make his or their award * * by, &c., or such further day as "the arbitrators, or any two of them," might enlarge to. Before entering upon their duties, S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, but professed, in the body of it, to be the award of the three:—Held, that E. was a third arbitrator, not an umpire; that the word "umpire," in the submission, must be rejected as surplusage; and the award was invalid, not having been made by all three arbitrators. *Willson* v. *York*, 46 U. C. R. 289.

Must Hear Evidence.]—After the arbitrators and umpire had heard the plaintiff's witnesses, the defendants refused to give their evidence, and their arbitrator would not concur in the award. The umpire, in consequence, gave notice to defendants to produce their witnesses, but the time which he gave was too short, and he awarded on the evidence already heard. The court set the award aside. *Proudfoot* v. *Trotter*, 6 O. S. 163.

Must Hear Evidence and Arguments.]—Where a case is referred to the award of two persons, and in case of disagreement to the decision of a third, either as an umpire or as a third arbitrator, the parties have the right to insist that such third person shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made. *In re Soules* v. *Morton*, 4 P. R. 249.

Opinion—*Signing Award.*]—Where arbitrators disagree in some items, and during the investigation call in an umpire to give his opinion thereon, and adopt it as their own, he need not sign the award. *In re Cayley and McMullen*, 3 U. C. R. 124.

Prior Disagreement.]—Where under a submission it was provided that arbitrators should appoint an umpire in case of disagreement, their appointing such an umpire was held, on motion to make the award a rule of court, sufficient evidence of their having disagreed, without any allegation of that fact on affidavit. *White* v. *Kirby*, 2 Ch. Ch. 452.

Prior Judgment of Two Arbitrators Necessary.]—The reference was to two arbitrators, with power for them to appoint an umpire, who was to make an award if the two disagreed; an umpire was accordingly appointed; and, the arbitrators differing, the umpire made an award:—Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference, as a condition precedent to the umpire's authority coming into force, as well as their free judgment in the appointment of the umpire; and that one of the arbitrators holding private conferences with one of the parties was sufficient to avoid the award of the umpire. *In re Lawson* v. *Hutchinson*, 19 Gr. 84.

Special Bond.]—Construction of submission bond, as to whether the umpire therein named had the power simply to report upon the state of certain premises, or, further than this, to estimate their value and make an award thereupon. *McGill* v. *Proudfoot*, 4 U. C. R. 40.

Time for Appointing—*Delegation of Authority to Appoint.*]—One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named, to appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request, should appoint an arbitrator on behalf of the other party. A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D., of New York, as their arbitrator. On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D. requiring him to join in the naming of an umpire, but he answered that he was about to leave the city, and would return on the 30th; that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not, until its arrival, intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed a nomination made by his partners, during his absence, of an umpire:—Held, affirming the decision in 28 Gr. 648, (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead: (2) that the naming by the arbitrators of an umpire was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated, and S. have the right to name a substitute; (3) (28 Gr. 648) that the naming, by the arbitrators, of an umpire was a judicial act which could not legally be performed by the partners of one of the arbitrators, and his subsequent confirmation thereof was ineffectual. *Direct United States Cable Co. (Limited)* v. *Dominion Telegraph Co. of Canada*, 8 A. R. 416; *S. C., sub nom. Direct Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648.

Time for Making Award.]—An award of umpirage is valid, though made before the time limited for the award of the arbitrators, if they disagree and do not make an award afterwards. *Ray* v. *Durand*, 1 P. R. 27.

Umpire not Chosen.]—Where a submission is to two, and such third person as they shall choose before proceeding, an award by the two only, the third not having acted, is bad. *Sloan* v. *Haldon*, 14 U. C. R. 495.

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5. *Witnesses and Evidence.*

Compelling Attendance.]—An order compelling attendance of witnesses will be

granted on an ex parte application, upon affidavit that the cause has been duly referred: that the arbitrator has appointed a day for proceeding; and that certain parties (giving their respective places of residence) are necessary and material witnesses for the party applying. *Gallena* v. *Cotton*, 3 L. J. 47; *Carrall* v. *Ball*, 3 L. J. 12.

Examination on Oath—*Acquiescence.*]—Held, that under R. S. O. 1877 c. 50, s. 224, the witnesses on an arbitration must be examined upon oath, unless there is a positive agreement or consent to the contrary. Such consent or agreement may be shewn debors the submission, and in this case, upon the affidavits filed, it was held to be sufficiently made out; but, semble, that it cannot be inferred from the absence of objection or mere acquiescence. *In re Rushbrook and Starr*, 46 U. C. R. 73.

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

Foreign Commission.]—A Judge of the court of appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbitration pending before an arbitrator named by a Judge of that court, under s. 487 (1) of the Municipal Act, 55 Vict. c. 42 (O.) Such an arbitration is not a "reference by rule, order, or submission," within the meaning of s. 49 of the Act respecting Arbitrations and References, R. S. O. 1887 c. 53; nor, even if it were a "matter" within the meaning of Rule 466, would a Judge of the court of appeal have any jurisdiction, by reason of his having appointed the arbitrator or otherwise. And semble, distinguishing Re Mysore West Gold Mining Co., 37 W. R. 794, it is not such a "matter." *Re Macpherson and City of Toronto*, 16 P. R. 230.

Personal Knowledge.]—In an arbitration under C. S. U. C. c. 54, the arbitrators did not take or file any oral or documentary evidence under s. 358, s.-s. 13, but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the warden at the last meeting of the arbitrators, and their correctness was not disputed:—Held, sufficient. *In re United Counties of Northumberland and Durham and Town of Cobourg*, 20 U. C. R. 283.

Production of Documents.]—On an application under 7 Will. IV. c. 3, s. 30, for an order on witnesses to produce documents before an arbitrator, it must be shewn that they are such as witnesses would be compelled to produce at a trial. *Carrall* v. *Ball*, 3 L. J. 12.

View of Premises—*Opinion Evidence—Potential Value—Interest.*]—A municipal corporation expropriated land for a road, under a by-law which described the land, and provided "that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive," pursuant to which the corporation took possession. Upon appeal from an award by which the land-owners were allowed $5,505 as compensation for the land taken, and $10,095 for other lands injuriously affected, and interest on both sums from the date of the by-law:—Held, that where an arbitrator has viewed the premises, but has not proceeded upon his view, the court should not give any greater effect to his findings than if he had not taken a view. 2. As to the weight of evidence: there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions. 3. That the arbitrator was justified in taking into account the potential value of the property when improved, after allowing for the cost of improving it, as a means of arriving at its actual value. Ripley v. Great Northern R. W. Co., L. R. 10 Ch. 435; Widder v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 425; and Boom Co. v. Patterson, 98 U. S. 403, followed. 4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken. James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1, specially referred to. 5. That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable on the whole sum from that date. Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and In re Shaw and Birmingham, 27 Ch. D. 614, followed. 6. That the arbitrator had jurisdiction to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

Witness Out of Jurisdiction.]—Upon a submission to arbitration being made an order of court, a suit is pending within the meaning of C. S. C. c. 79, s. 4, so as to enable the superior courts to issue process to compel the attendance of witnesses resident out of their jurisdiction. *Elliott* v. *Queen City Assurance Co.*, 6 P. R. 30.

III. Award.

1. *Construction of.*

Annual Payment.]—Differences having arisen about defendant's going on the plaintiff's land to embank a stream on which defendant had a mill, defendant was directed to pay plaintiff £10 a year, so long as he should hold for his own use the premises on which he had such occasion to go, and which the plaintiff was directed to convey to him:—Held, that the payment was to be every year, as long as defendant's interest continued, although he might not have occasion to go on the plaintiff's land. *Pickle* v. *Perrin*, 1 U. C. R. 387.

Award Alone to be Looked At.]—The meaning of arbitrators, when an award is made, is not to be gathered from affidavits, or from any other source than the award itself. *Keep* v. *Hammond*, 9 L. J. 157; *Smith* v. *Forbes*, 8 L. J. 72.

Certainty.]—When an award between the Great Western R. W. Co. and a person through whose lands the road passes awards a sum for damages, and on payment for the land taken directs a conveyance, the award will not be set aside for not setting out the land to be conveyed by metes and bounds:—Semble, that a conveyance is not necessary. *Great Western R. W. Co.* v. *Rolph*, 1 P. R. 50.

Certainty.]—All matters in difference between the plaintiffs and defendant having been referred, the award was that the defendant should stand fully acquitted and discharged of and from all such matters:—Held, certain, final, and conclusive. *Ryan* v. *Pomroy*, 1 P. R. 59.

An award that the plaintiffs have no cause of action against defendant:—Held, sufficient, as meaning that at the time of submission they had no cause of action. *Ib.*

Certainty.]—All differences in the suit were referred; costs of the suit, reference, and award to abide the event of the award. The arbitrators, reciting in their award that they had heard the proofs concerning the premises, awarded thereupon concerning the same, that all proceedings in the cause should cease, and that defendant should pay to the plaintiff £33 12s. 1d., in full of all demands in the cause:—Held, that there was a sufficient determination in the cause, and a reasonable inference of a finding on each issue. *Mullen* v. *Martin*, 1 P. R. 191.

Certainty.]—An award respecting differences between plaintiff and defendants as to the diversion of a watercourse by defendants, directed that the defendants should turn the stream so that the plaintiff should have the same use of the water as he formerly had for the period of five years from the award, and that the plaintiff should pay defendants 5s. a year during that period:—Held, uncertain, and not final or conclusive. *Bowen* v. *Samis*, 2 P. R. 76.

Certainty.]—Under the special circumstances of this case:—Held, that the award was bad: 1. For want of a finality as to chancery suit referred: for, by dismissing the bill as to W. only, the suit was left still undisposed of as to costs and otherwise as between the plaintiffs and the other defendants. 2. Because, as the sureties were directed to pay a large proportion of a gross sum, including accounts not arising under the lease, it was not clear that they were not declared liable for claims for which they could not be held responsible. *In re Wheeler* v. *Murphy*, 2 P. R. 32.

Certainty.]—The submission recited an action by plaintiff against defendant, and referred all matters and differences for damages between the parties; directing that "they were to go by the leases which will be produced, and also to take into consideration the wheat on the ground." The award gave plaintiff a sum for damages, "to be paid out of the amount awarded on the wheat hereinafter mentioned," and directed that the plaintiff should pay defendants "for a certain amount of wheat now in the grounds of lots 13 and 14, 2nd concession east, in the township of Toronto, to be paid as follows: viz., for the wheat that now is growing in summer fallow, to be paid for at the rate of £4 10s. per acre, and for wheat that is now growing in barley and pea stubble, to be paid for at the rate of £3 per acre." It appeared that the land had been leased by the plaintiff to defendants for six years from the 1st April, 1850:—Held, that the award sufficiently disposed of the matters referred, and that it was unnecessary to specify the number of acres of wheat, the quantity not appearing to have been the matter in dispute, but the price. *In re Montgomery and Moore*, 2 P. R. 98.

Certainty.]—Declaration and award as to payment of money by instalments:—Held, sufficiently certain. *Watson* v. *Sutherland*, 1 U. C. R. 229.

Certainty.]—Where the arbitrators had power to award upon conveyances to be made between the parties, the amount of rent to be paid, and the security to be taken therefor:—Held, that an award directing "all necessary deeds for granting," &c., "and for securing payment of the rent to be executed," without saying what kind of conveyances, was bad. *Beatty* v. *McIntosh*, 4 U. C. R. 259.

Certainty.]—Declaration on the common counts. Pleas, non-assumpsit, payment, and set-off. A verdict was taken for plaintiff, subject to the award of W. H. "upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit:" costs to abide the event. The arbitrator awarded that the plaintiff had good cause of action against the defendant in the said cause, and on the matter so submitted, and was entitled to a verdict therein; and assessed the damages to be paid by defendant to the plaintiff in said cause at £43 8s.:—Held, that the award was good: that it disposed by necessary inference of all the issues in the cause, and was not uncertain. *Charles* v. *Carroll*, 9 U. C. R. 357.

Certainty.]—An award, after directing a certain sum to be paid to defendant for his interest in land, added: "We have taken it for granted in making this award, that the said C. H. shall have the right to cross the railway track from one part of his property to another:"—Held, not sufficiently definite or certain. *Great Western R. W. Co.* v. *Hunt*, 12 U. C. R. 124.

Certainty.]—Where it is essential to determine whether a partnership was an ordinary one or not, an award not clearly deciding it is void for uncertainty. *Jekyll* v. *Wade*, 8 Gr. 363.

Certainty.]—Two partners (plaintiff and defendant) having dissolved partnership, referred all disputes to three persons named. The award directed a certain sum to be paid by defendant to plaintiff, and then added that the same was "to be secured by such good security as may be requisite to save the said plaintiff harmless:"—Held, sufficiently final. Held, also, that the award directing that defendant should pay all debts due by the partnership was sufficiently certain, without determining the amount. *McLean* v. *Kezar*, 3 C. P. 444.

Certainty.]—Held, upon a reference of all matters in dispute between two parties, that an award directing the delivery of a certain promissory note, (which was not in dispute in this action, but was sued upon

in the Queen's Bench,) and upon such delivery ordering releases between the parties, and thereby, as was contended, leaving the note unsettled, was not void. *Lund* v. *Smith*, 10 C. P. 443.

Certainty.]—Held, upon the award set out in this case, that the replevin suit and the right to the possession of the goods in question therein and of the other goods, were clearly and finally disposed of. *Stinson* v. *Martin*, 22 U. C. R. 154.

Certainty.]—A dispute arose between the Northern R. W. Co. and the corporation of Barrie, as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the company be referred to one H. The arbitrator awarded that there was in 1853 a valid agreement by the company with the town to construct this line, provided that suitable land should be procured by the town; that such land was so procured, but that the line had not been constructed; that the claim of the town to have such agreement performed still subsisted, "and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance, and in full satisfaction of said claim, that the company should pay to the corporation at a day and place named £5,000, and should, when requested by the town, convey to them in fee all the lands mentioned in a certain indenture made by one B. to the company; and should further, when so requested, release all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects apparent on the face of it:—Held, that it was not uncertain as to whether the agreement had been carried out, and whether the company had an option to pay the £5,000 or construct the branch line, but sufficiently shewed that it had not been performed, and that no such option was intended; that the direction as to the conveyance and release was authorized, and the latter not objectionable for omitting to state to whom it was to be made; and that as to the amount, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed no more was given. *In re Town of Barrie* v. *Northern R. W. Co.*, 22 U. C. R. 25.

Certainty.]—The award in this case for the purchase money of land taken for a railway was held bad for uncertainty, in not stating the respective persons to whom the money should be paid, and the respective sums. *Mitchell* v. *Great Western R. W. Co.*, 38 U. C. R. 471.

Damages—*Finality.*]—An action against a railway company for penning back water, and thus preventing the use of the plaintiff's mills, was referred, with power to the arbitrators to determine the damages already sustained, and to direct how the channel should be formed by the defendants, or fix a sum to be paid in lieu thereof at defendants' option, and a time within which to choose. They awarded £375 for such damages, and directed that within three months from the 1st July, 1858, defendants should construct a channel of specified size, or in lieu thereof should pay the plaintiff £500 on or before the 1st August, 1858:—Held, 1. That it could not be assumed from the fact that the annual rental of the plaintiff's mills was only £250, that the damages had been given for more than six months before the commencement of the suit; and, semble, that this could form no objection, for that arbitrators, when not restrained by the submission, are not bound as Judges are in a court of law. 2. That the award in other respects was sufficiently certain and final. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.

Delegation of Powers.]—All differences concerning the renting of a farm by defendant to plaintiff and all other matters in dispute were referred to arbitrators, who awarded a division of certain crops and stock specified; and in order that an equal division should be made, they ordered that the defendant and plaintiff should select two disinterested persons from the neighbouring farmers, whose decision should be final:—Held, that the award was bad for the delegation to third parties, and for uncertainty. *Harrington* v. *Edison*, 11 U. C. R. 114.

Direction for Payment.]—An award found that on 1st September, 1860, defendant was indebted to plaintiff in £3,249, and ordered him to pay it accordingly, with interest half-yearly until paid. Quære, as to the intention and effect of this direction. *Stewart* v. *Webster*, 20 U. C. R. 469.

Fence Viewers.]—The plaintiff and defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence viewers, who awarded that defendant should open a ditch from the line fence between himself and defendant, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, and of sufficient length, width, and fall to carry off the water; to be two and a-half feet deep at the line fence; said ditch to be made before the 1st October, 1865:—Held, following Murray v. Dawson, 17 C. P. 588, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch. *Dawson* v. *Murray*, 29 U. C. R. 464.

Finality.] — Where certain matters between A. and B. were referred, and also all costs of suits by either party, civil or criminal, and the award was that B. should pay a large sum to A., and also all costs of suits:—Held, sufficiently final, without stating that the suits should cease; and the award was upheld, though the court were strongly impressed against the justice of it. *Ducat* v. *Green*, 4 O. S. 110.

Finality.]—Where a verdict was taken for 1s. damages, subject to an award, and the award did not in any manner dispose of the verdict or cause:—Held, not final, and bad. *Beatty* v. *McIntosh*, 4 U. C. R. 259.

Finality.]—Arbitrators appointed to determine the value of land required for the railway, and the damages the owner might

sustain thereby, awarded that the company should pay £50 per acre for the land, £31 5s. for damages to the said land, and £13 15s. for other damages. It was admitted that damages to other land were claimed at the arbitration:—Held, that the award was bad, not being final on the matters submitted. *In re Great Western R. W. Co.* v. *Ladcronte*, 1 P. R. 243.

Finality.]—Where the reference was of all matters in difference and actions between the parties, costs of the reference and award and of said actions to be in the discretion of the arbitrators, and power was given to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matters referred; and the referees ordered, among other things, that a certain sum should be paid and accepted "in full satisfaction and discharge of all the said actions and matters in difference;" also directing that no further proceedings should be taken in the suits:—Held, good, for it put an end to the actions, so that it was unnecessary to award upon the several issues, or find specifically upon the subject of costs. *In re Brown and Overholt*, 2 P. R. 9.

Finality.]—On a reference of disputes as to the title to a lot of land:—Semble, that an award of $400, "in full consideration and discharge of all plaintiff's claims to and against the land," shewed that the arbitrators had decided that plaintiff had no further title to the land, and that it belonged to defendant. *Bond* v. *Bond*, 15 C. P. 613.

Finality.]—Assumpsit. Pleas, general issue, and set-off. A verdict was taken for the plaintiff, subject to a reference; and the arbitrators awarded, "that at the time of the commencement of the action, or at any time afterwards, the plaintiff had not any cause of action whatever against the defendant," and directed a verdict for defendant for £20 10s. 1d.:—Held, that both the issues were sufficiently disposed of. *Townsend* v. *Morton*, 2 U. C. R. 100.

Finality.]—Remarks upon the inconvenience and loss occasioned by the neglect of arbitrators to dispose finally of the matters referred to them. *Jones* v. *Hewson*, 2 C. L. J. 107.

Finality.]—Held, upon the award set out in this case, that the replevin suit was clearly and finally disposed of. *Stinson* v. *Martin*, 22 U. C. R. 154.

Finality.]—By a submission, after reciting that differences existed between the parties as to the disposition to be made by P. of certain funds collected by him from the tenants of certain lands, and that they had agreed to refer the same to S., the parties covenanted to abide by his award "of and concerning the premises aforesaid, or anything in any manner relating thereto." It appeared that one D. had conveyed to P., with full covenants, three undivided fifths of a certain lot, of which it afterwards turned out that he owned only one-fifth, and that P. had collected rents from the tenants of D. on the other lands, for the purpose, as he alleged, of repaying himself what he had paid D. for the two-fifths. The arbitrator found that the funds in P.'s hands were collected by him for that purpose, and awarded that he should retain for himself five per cent. on the sums collected, and should out of the balance repay himself two-thirds of the purchase money paid by him:—Held, that the award embraced all matters submitted; that there was no necessity and no power to direct a reconveyance of the two-fifths; and that it was sufficiently certain without specifying the amount to be repaid. *In re Campbell*, 44 U. C. R. 218.

Future Damages.]—Where arbitrators, to whom disputes arising from the overflowing of three acres of the plaintiff's land by water thrown back by defendant's mill were referred, awarded damages to the plaintiff for the injury, and that defendants should have a full fall of nine feet, and no more, for their mill-dam, provided that the water on the plaintiff's land was not raised thereby; and the defendants raised their dam to nine feet, and overflowed five acres more of the plaintiff's land:—Held, that the award did not prevent his recovery of compensation for such further injury. *Casler* v. *Ransom*, 5 O. S. 513.

Inconsistent Amounts.]—An award for a certain sum, and that a verdict shall be entered for the said sum, naming a larger sum, is good for the smaller one. *Charles* v. *Huckson*, T. T. 34 Vict.

Interest.]—Where an award fixes no day for payment, a party suing on it, is not, as of right, entitled to interest. *Bentley* v. *West*, 4 U. C. R. 98.

Issues not Disposed of.]—Where a cause with several issues joined, is referred, with costs to abide the event, and the arbitrators award a certain sum to the plaintiff, without saying anything about the issues, which are not necessarily from their nature determined by the award in favour of the plaintiff, the award is bad. *Bernard* v. *Strachan*, 2 U. C. R. 128.

Issues not Disposed of.]—Where in trespass to personal property, and several pleas pleaded, a verdict was taken, subject to a reference, and the award determined the cause in favour of the plaintiff, and reduced the verdict to £7 10s., the court refused to set aside the judgment on the award, on the ground that the award was void for not disposing of the issues. *Wood* v. *Moodie*, 3 U. C. R. 79.

Issues not Disposed of.]—Where a cause was referred at nisi prius, under a rule of reference providing, "that the costs of the said cause shall be disposed of as follows: the costs on demurrer to be subject to the judgment of the court on the issues in law, upon which the arbitrators are to assess the damages sustained by the plaintiff, and the costs on the issues in fact and the costs on the said reference shall be in the discretion of the said arbitrators," &c.; and the award said nothing respecting the issues in law, and no damages were assessed thereupon:—Held, good. *Mascear* v. *Chambers*, 3 U. C. R. 186.

Lump Sum.]—All matters in difference in this cause, and on the building agreement between plaintiff and defendant, were referred, costs of the cause and of the reference to abide the event. The award, after disposing of the different issues in the

plaintiff's favour, assessed his damages on "account of the non-performance by the defendant of the promises in the said declaration mentioned, and on account of the matters in difference on the building agreement between the parties, over and above the plaintiff's costs and charges, to the sum of £52 10s. 7½d;" —Held, 1. no objection to the award that a gross sum was given, without saying how much for non-performance of the promises declared on, and how much for the difference on the building agreement; 2. that it was unnecessary to determine what damages the defendant was entitled to on the building agreement, or the amount of extra work. *Jones* v. *Reid*, 1 P. R. 247.

Lump Sum.]—Where several parties jointly submit their claims, the award is final, though it does not distinguish the sum each one is to receive. *McGill* v. *Proudfoot*, 4 U. C. R. 40.

Lump Sum.]—The plaintiff sued defendants in case for certain injuries, specifically set forth in the declaration. The cause was referred, and a verdict taken for £1,000, subject to the award. By the reference, the arbitrators had power "to take into consideration the various offers made by defendants, and finally to settle and dispose of all the matters in difference, awarding, if they should think fit, the payment of an entire sum in full satisfaction of all past and future demands," &c. Upon this the arbitrators declared that, having taken into consideration the matters and things which they were empowered by the submission to consider, they increased the verdict to £1,287 10s., with costs to £46 10s., and they concluded the award thus: "And the said sums so to be paid as aforesaid, &c., we do award, &c., be, and the same are for all purposes to be taken in full satisfaction of all past and future demands of the plaintiff against the said defendants, for or in respect of the subject matter or subject matters of the said cause, and all and every part thereof." The defendants moved to set aside the award, objecting—1. That the arbitrators, after hearing evidence (as stated in affidavits filed), of other injuries than those mentioned in the declaration, did not make their award "of all matters in difference," as submitted by the reference, but confined it to the subject matter issuing out of the cause of action in this suit. 2. Because they did not distinguish in their award the sum allowed in the cause, from the sum allowed for the other matters in difference:—Held, award good under the submission. *Watson* v. *Toronto Gas Light and Water Co.*, 5 U. C. R. 523.

Public Rights.]—In dealing with awards made under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, the court will be governed by the ordinary rules of law as applicable to awards between party and party. *Commissioner of Public Works* v. *Daly*, 6 U. C. R. 33.

Question not Dealt With.]—C. had sued B. on a contract by which he agreed to build B. a dam—B. to find certain materials, &c. Afterwards they entered into an agreement, reciting that differences had arisen between them in reference to this contract, and referring the same:—Held, that the submission authorized the arbitrators to consider claims by B. against C. arising out of the agreement; that the omission to dispose of the suit by the award was no objection, as it was not mentioned in the reference nor shewn to have been brought before the arbitrators; and that the award was good, except as to a direction to pay money to E., a stranger to the reference. *In re Campbell* v. *Brown*, 2 P. R. 291.

Question not Dealt With.]—Award held bad for failing to give any directions about the action, or the costs of it. *Roddy* v. *Lester*, 14 U. C. R. 259.

Question not Dealt With.]—Semble, that the award pleaded in this case was void for not disposing of all the points submitted in relation to the note sued on. *Cleal* v. *Elliott*, 1 C. P. 242.

Questions not Dealt With Separately.]—Upon a general reference to arbitrators of all matters in dispute between two parties:—Held, not necessary that the award should distinguish between the matters in dispute in the cause, upon which the reference is made, and general matters between the parties referring. *Lund* v. *Smith*, 10 C. P. 443.

Severable Provisions.]—Although the general principle is, that an award may be good in part and bad in part: still, where arbitrators found a sum due to a creditor, and directed the debtor to pay and the creditor to receive it in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due, and reject that portion of it directing the mode of payment. *Dalton* v. *McNider*, 5 Gr. 501.

Special Award—*Pleading.*]—Held, under the special terms of the award in this case, that defendants were bound to pay monthly for the expense of a new wheel in a mill, in the same manner as for the other repairs; that the plaintiff had the right to judge of the necessity therefor; and that in declaring upon the award it was sufficient to aver that it was deemed necessary, and that the plaintiff proceeded to put it in, as by the award he might do. *Abbott* v. *Skinner*, 20 U. C. R. 414.

See *S. C.*, 7 L. J. 158.

Special Finding.]—Plaintiffs declared on a bond conditioned that W., their treasurer, should pay over all moneys received since the 1st January, 1866, averring that on that day he had in his hands a large sum, and received further sums up to the 6th April, 1868, when he was dismissed; and that he accounted for all moneys received before that day, but not for a large sum received since. Plea, alleging payment of all moneys since that day; and issue thereon. The case being referred, the arbitrator found that W. admitted $3,031 to be due by him on the 1st January, 1866; that he had accounted for all moneys received since; and that of all moneys received up to his dismissal, including the $3,031, the balance was $1,806:—Held, that as the breach was only in respect of moneys received since the 1st January, 1866, the plaintiff upon this finding could recover nothing. *Township of Rawdon* v. *Ward*, 27 U. C. R. 609.

Surrender.]—Plaintiff held from defendant a lease of a farm for a term unexpired. Plaintiff and defendant, with D. and M., be-

come bound to each other by bond, with a condition reciting that the parties had agreed to separate, and cancel all arrangements thereto made, and leave all controversies between them to the arbitration of T. and P., and should they not agree, to choose an umpire whose decision should be final. The umpire awarded that defendant should release and give up to the plaintiff "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay, and that the lease then held by both parties of said farm be immediately cancelled:"—Held, that the bond was not in itself a surrender of the term; that even if so intended the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vict. c. 7, s. 4; that the award would not amount to a deed of surrender by the defendant; and therefore that the plaintiff could not eject the defendant. *O'Dougherty* v. *Fretwell*, 11 U. C. R. 65.

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2. *Drawing up and Executing.*

Attorney Drawing Up.]—It is not desirable that the attorney of either party should draw up the award. *Manley* v. *Anderson*, 2 P. R. 354.

Execution at Different Times.]—Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who two days afterwards executed it in the presence of one of the other arbitrators:—Held, that the award should have been executed by the three arbitrators together, and that it was invalid. *Nott* v. *Nott*, 5 O. R. 283.

Execution by Two—*No Notice to Third.*]—Under a submission to three, the award to be by any two, where the award was drawn up as though to be executed by the three, but was executed by two only, and no final meeting had of all three for settling the same, nor notice given to the one who did not sign it, until some days after:—Held, invalid. *Martin* v. *Kergan*, 2 P. R. 370.

Memorandum.]—Arbitrators having signed a memorandum of their judgment at the same time and place, may execute the more formal award separately and at different times, but within the time allowed. *Williams* v. *Squair*, 10 U. C. R. 24.

Memorandum.]—A memorandum in writing, signed by arbitrators, as instructions to a solicitor to draw an award:—Held, not to be a binding award. *Shaw* v. *Morton*, 13 C. P. 223.

Notice to Third Arbitrator.]—Held, under the circumstances stated in this case, that the notice to the third arbitrator of the meeting to make up the award was sufficient. *Anderson* v. *Cotton*, 2 P. R. 109.

No Notice to Third Arbitrator.]—Semble, that an objection that two of the arbitrators made the award without notice to the third, can be taken advantage of in an action on the award. *Smith* v. *George*, 12 U. C. R. 370.

No Notice to Dissenting Arbitrator.]—The reference was before three arbitrators, and the award was executed by two of the three only. It appeared that at the meeting of the arbitrators a rough sketch of the award was drawn up and read over to them, and was agreed to and signed by two of them, but dissented from by the third, and on the following day the formal award in the terms of the draft was drawn up and signed by the two, without reference to the dissenting arbitrator:—Held, under s. 9, s.-s. 17, of the Railway Act, 1868, that the award was invalid; and semble, that it would be so apart from that Act. *Anglin* v. *Nickle*, 30 C. P. 72.

Separate Execution.]—Held, under the circumstances of this case, not a fatal objection that the award had been signed at different times, and when the arbitrators were not all present together. *Jones* v. *Reid*, 1 P. R. 247.

Separate Execution.]—An award executed by two of three arbitrators, at different times and places, and after the time expired, cannot be supported. *Helps* v. *Roblin*, 6 C. P. 52.

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3. *Publication.*

Notice that Award is Ready.]—An award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published. *Rediek* v. *Skelton*, 18 O. R. 100.

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4. *Time of Making.*

Discretion.]—Though no power has been given by the reference, the court, notwithstanding, under 7 Will. IV. c. 3, s. 29, have power to enlarge in their discretion. *Jones* v. *Russell*, 5 U. C. R. 303.

Effect of Enlargement.]—A rule, issued as of Easter Term generally, to enlarge until the last day of the term:—Held, to relate back to the first day of term, and to operate as an admission that the time had not then expired. *Hawke* v. *Duggan*, 5 U. C. R. 636.

Enlargement.]—An award may be made before the time to which the arbitrators have enlarged. *Tracey* v. *Hodgest*, 7 U. C. R. 5.

Enlargement — *Assent Necessary.*]—Where the rule of reference and an enlargement were made rules of court, the court refused to attach for non-performance of the award, as the enlargement was not shewn to have been assented to by both parties. *Ruthven* v. *Ruthven*, 5 U. C. R. 273.

Enlargement—*Consent.*]—Where a verdict was taken subject to a reference, and before the time limited for the award expired it was enlarged by rule, and afterwards by

consent again enlarged:—Held, that the award was good under the last submission, although it would have been invalid if made under the rule, and the enlargement by consent might have been made a rule of court, as being part of the original reference. *Charles* v. *Hickson*, T. T. 3 & 4 Vict.

Enlargement—*Oral Assent.*]—A rule making an enlargement ordered by the arbitrators a rule of court was set aside, such enlargement not having been consented to by both parties; but the award was upheld, the parties having verbally assented to enlargement. *Ruthven* v. *Ruthven*, 5 U. C. R. 276.

Enlargement—*Oral Assent.*]—Held, that a verbal consent to an enlargement of the time for making an award is sufficient under C. L. P. Act, s. 171. *Jones* v. *Prentice*, 2 C. L. J. 205.

Enlargement—*Rule of Court.*]—An agreement enlarging the time need not contain a consent that it may be made a rule of court, as well as the submission. *Crooks* v. *Chisholm*, 4 O. S. 121.

Enlargement—*Rule of Court.*]—The enlargement must be made a rule of court as well as the original submission. *Mascear* v. *Chambers*, 4 U. C. R. 171.

Expiration of Time.]—After expiration of the time limited, arbitrators cannot, without (even if they can with) the concurrence of both parties to the submission, make a binding award. *Ruthven* v. *Ruthven*, 8 U. C. R. 12.

Expiration of Time—*Parol Submission.*]—Where the time for making an award under a submission made an order of court has expired, and the parties afterwards meet by consent, such meetings operate as a mere parol submission, which is revocable; and if revoked, the time for making an award cannot afterwards be enlarged by the court; and the party making the revocation will not be restrained from merely prosecuting his suit from the point at which it was arrested by the reference. *Ruthven* v. *Rossin*, 8 Gr. 370.

Extending Time.]—Declaration, first count, that defendant, by bond, agreed that one C. should abide by an award respecting differences between C. and the plaintiff if made before the 6th June; that the arbitrators, with the consent of C., of the defendant, and of the plaintiff, enlarged the time to the 1st July, and made their award on the 12th June, alleging non-performance of such award. Second count, that defendant requested plaintiff to extend the time, and plaintiff, on such request, and in consideration that the defendant promised him to continue bound, and that C. or the defendant would perform the award, agreed, for the convenience of said defendant and C., that the time should be extended; setting out the award, &c., as in the first count;—Held, on demurrer, both counts bad, as shewing no valid enlargement. *Sexton* v. *Woods*, 15 U. C. R. 585.

Extending Time—*Award Made.*]—The court has jurisdiction under R. S. O. 1887 c. 53, s. 43, to enlarge the time for making an award upon voluntary submission, after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement. *Re Clement and Dixon*, 17 P. R. 455.

Extending Time by Consent.]—In an action on contract, the matters in difference were, by rule of court by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might indorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing, indorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favour of the plaintiff for the sum of $5,001.42, in full settlement of all matters in difference in the cause:—Held, that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties. That the fact of one of the parties being a municipal corporation makes no difference. *Oakes* v. *City of Halifax*, 4 S. C. R. 640.

Extending Time—*Death of Party—Statute of Limitations.*]—Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties died after the submission, and the survivor now applied to the court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim:—Held, that the facts of the death and the absence of the right of appeal would not warrant the court in refusing to enlarge the time, and that under the circumstances no injustice would be done by enlarging it. *Re Curry*, 12 P. R. 437.

Extending Time—*Loss of Papers.*]—An arbitrator having failed, owing to the loss of the papers in the cause, to make his award within the time limited, a Judge extended the time under C. L. P. Act, s. 172. *Johnston* v. *Anglin*, 5 P. R. 62.

Extending Time—*Production of Submission.*]—On applying for an order to enlarge the time, the original submission should be produced, or if in the custody of the opposite party, it must be shewn that he refused to give it up; it is not sufficient that the party applying swears merely that he cannot procure it. *Johns* v. *Furze*, 1 Ch. Ch. 260.

Mistake as to Date.]—Submission by bond. On the day limited the arbitrators were prepared to award, but, all parties believing the time would not expire until next day, deferred the publication then at defendant's request, and heard further evidence on both sides next day, and then made their award:—Held, that the extension of time was a parol submission, and that assumpsit was maintainable thereon for not performing the award, although no action would lie on the bond. *Hall* v. *Alway*, 4 O. S. 375.

Readiness to Deliver.]—Where the submission is, that the award shall be delivered by a certain day, if it be ready for delivery by that day it is sufficient. *Galbraith* v. *Walker*, E. T. 2 Vict.

IV. Costs and Fees.

Abiding the Event—*Entering Judgment.*]—Where a cause was referred, costs to abide the event, and the arbitrators having made no award the parties agreed to refer the cause to any Judge of the district court who should first come to Perth, and such Judge awarded that the plaintiff had no cause of action, and that judgment should be entered for the defendant:—Held, that the award was good, and that defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment. *Hale* v. *Matthison*, 3 O. S. 78.

Abiding the Event.]—All matters in difference in this cause, and in a building agreement between plaintiff and defendant were referred, costs of the cause and reference to abide the event. The award after disposing of the issues in plaintiff's favour, assessed his damages on account of the non-performance by defendant of the promises alleged in the declaration, and of the matters in difference on the building agreement, and also the plaintiff's costs and charges, at £52 16s. 7d. The costs of the reference and award were then fixed by the award at £29. The costs of the suit were afterwards taxed without notice to defendant:—Held, that as no verdict had been taken the plaintiff was entitled to full costs. *Jones* v. *Reid*, 1 P. R. 247.

Abiding the Event—*Enforcing Payment.*]—Where the costs of the cause were to abide the event, but no authority was given to direct a verdict, and the award was silent as to costs:—Held, that attachment was the proper remedy for their recovery. A power of attorney from one of three defendants to demand the costs is sufficient. *Shipman* v. *Shipman*, 2 P. R. 303.

Abiding the Event—*Scale of Costs.*]—Where a cause is referred, costs to abide the event, the plaintiff is not entitled to full costs if he is awarded anything, but to such costs only as he could have claimed if he had recovered the same amount. *Watson* v. *Garrett*, 3 P. R. 70.

Abiding the Event—*Scale of Costs.*]—A cause was referred, before trial, by Judge's order, costs to abide the event, and the arbitrator awarded £9 3s. 9d., the claim being originally of the jurisdiction of the county court, and reduced by set-off. The plaintiff applied for full costs, on affidavit shewing that he intended to enforce his award by rule of court, and execution under C. S. U. C. c. 24, s. 19. The application was refused for—Held, that he must be considered as obtaining final judgment without trial, and the case came within the rule of court No. 155. *Watson* v. *Garrett*, 3 P. R. 70.

Abiding the Event—*Scale of Costs.*]—Where a cause was referred, costs of the cause to abide the event, and costs of the reference in the discretion of the arbitrator, and £4 was awarded to plaintiff, the taxing officer refused to tax only division court costs subsequent to the award, and his decision was upheld. *Fleurynck* v. *Clifton*, 3 P. R. 216.

Abiding the Event.]—Semble, that the rule of T. T. 24 Vict. applies in the case of a compulsory reference to the whole costs in the action, including the costs of the reference and award and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action:—Held, that under any circumstances such was the proper construction of this order of reference, by which "the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs in the same manner as a Judge at nisi prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event." *Johnson* v. *Morley*, 3 P. R. 217.

Abiding the Event.]—Costs of the award ordered to abide the event cannot be divided between the parties. *Martyn* v. *Dickson*, 2 C. L. J. 209.

Abiding the Event.]—By the reference the costs of the cause and award were to abide the event:—Held, that specific directions given as to the costs in the award were unobjectionable, as in effect they directed only what would have been the result without them. *Johnston* v. *Anglin*, 29 U. C. R. 272.

Abiding the Event.]—By an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a Judge at nisi prius, and costs of the reference, arbitration, and award were to abide the result of the award:—Held, that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference. *Devanney* v. *Dorr*, 4 O. R. 206.

Certifying after Award.]—At nisi prius, in an action for unliquidated damages, a verdict was taken for $500, subject to a reference, with power to the referee to certify for costs as a Judge at nisi prius. The referee reduced the damages to $33.50, and made his award without certifying:—Held, that he had no power to certify afterwards:—Quære, whether he had power to certify for the costs of the county or intermediate court. *Smith* v. *Forbes*, 8 L. J. 72.

Certifying for Costs.]—When a rule is asked for to refer a case back for an arbitrator to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs, the costs of taking the award again before

the arbitrator to be borne by the applicant. *Jordan* v. *Ambler*, 8 C. L. J. 67.

Certifying for Full Costs.]—Held—1. That a certificate for full costs, signed by arbitrators after they had made their award, and had finally separated, and when not all together, could not entitle plaintiff to full costs of suit. 2. That after entry of judgment by plaintiff it is too late to move to refer back to enable an arbitrator to certify for costs. *Keep* v. *Hammond*, 9 L. J. 157.

Certifying for Full Costs.]—A cause was referred at nisi prius, and a verdict taken subject to the award. Costs of the cause were to abide the event, and the arbitrators had power to certify for costs as the Judge at the trial could have done. The award reduced the verdict to $68, and directed that the defendant should pay the plaintiff's costs according to the scale to be certified by the court:—Held, that the arbitrators having express powers to certify, and having omitted to do so, a Judge in chambers could not order full costs. *Calder* v. *Gilbert*, 3 P. R. 127.

Costs Not Mentioned.]—Where the costs of the reference are in the discretion of arbitrators, and the award says nothing about them, each party pays his own costs of reference, and the costs of the award are to be borne equally. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.

Costs of the Cause.]—The phrase "costs of the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award as follows: "We also order and award that plaintiffs and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201.50":—Held, that "costs of the cause" meant the whole costs of both plaintiff and defendants. *Scott* v. *Grand Trunk R. W. Co.*, 10 L. J. 72.

Costs of the Suit.] — Held, that the words "costs of the suit," as used in an award, have no reference to any particular scale of taxation, and so cannot, per se, be relied upon as entitling plaintiff to full costs of suit in a case where the amount awarded is within the jurisdiction of an inferior court. *Keep* v. *Hammond*, 9 L. J. 157.

Counsel Fees.]—In taxing the costs of an arbitration upon the county court scale no larger fee for attendance of counsel before the arbitrators than $25 can be allowed even though the attendance is for several days. *Re Montague and Township of Aldborough*, 12 P. R. 141.

Counsel Fees.]—Item 153 of tariff A., Consolidated Rules of Practice, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. 1887 c. 53, s. 24. *Re McKeen and Township of South Gower*, 12 P. R. 553.

Counsel Fees.]—In taxing the costs of an arbitration, a taxing officer has jurisdiction, in his discretion, to allow a second counsel fee. The provision of R. S. O. 1887 c. 53, s. 25, that not more than one counsel fee shall be taxed, is inconsistent with item 164 of the tariff of costs appended to the Consolidated Rules, 1888, and, by virtue of 51 Vict. c. 2, s. 4 (O.), must be taken to be repealed. Re McKeen and Township of South Gower, 12 P. R. 553, followed. Howard v. Herrington, 20 A. R. 175, and Arscott v. Lilley, 14 A. R. 283, distinguished. *Re Pollock and City of Toronto*, 15 P. R. 355.

County Court Judge.]—A county court Judge, on a reference to him under s. 158 of the C. L. P. Act, is not entitled to any fees as arbitrator. On a reference to him at the trial under s. 160, merely adding to his name the designation of county court Judge, but not referring the matter to him as such Judge, he will be entitled to his fees. *Wood* v. *Foster*, 6 P. R. 175.

Day's Sitting.]—Upon the proper construction of the schedules to R. S. O. 1887 c. 53, arbitrators are not entitled to charge as fees for a day's sitting which extends beyond six hours more than the maximum amount fixed by the schedules for a single day's sitting. Armstrong v. Darling, 6 C. L. T. 214, 22 C. L. J. 149, overruled. *In re Town of Thornbury and County of Grey*, 15 P. R. 192.

Excessive Fees.]—The liability imposed on arbitrators by s. 29 of R. S. O. 1887 c. 53, in case of an overcharge of fees, to pay treble the amount of the fees charged or paid, is penal in its nature, and does not arise where a person entitled to take up the award has voluntarily paid the charges without any previous demand of the award by such person, followed by a refusal or delay to make, execute, or deliver the same by the arbitrator until payment of the excessive charges. Taxation of the fees is not a condition precedent to maintaining an action for the penalty. *Jones* v. *Godson*, 25 O. R. 444. See next case.

Excessive Fees.]—An arbitrator is not brought within the punitive provisions of s. 29 of R. S. O. 1887 c. 53, when the payment of the alleged excessive fees is made by cheque to an agent who has authority to accept money only, and the arbitrator refuses to take the cheque. In order to fix an arbitrator with the penalty there must after the expiration of the time named be either a demand upon him to make, execute, and deliver the award and a refusal to do so unless a larger sum is paid for fees than is permitted by the Act; or actual payment of such larger sum. The person desiring to take up the award may either have the fees taxed and then tender the amount, or he may pay the amount demanded and bring action for the penalty, which is a sum equal to treble the excess demanded and not equal to treble the whole amount of the fees demanded. Judgment below, 25 O. R. 444, affirmed. *Jones* v. *Godson*, 23 A. R. 34.

Extravagant Costs.] — An agreement that all costs shall be in the power of the arbitrators, &c., inserted after the condition of the bond, must be read as part of it. Extravagance in the amount of costs allowed under such a submission must be objected to by motion. *Towsley* v. *Wythes*, 16 U. C. R. 139.

Fixing Amount.]—When the costs of the reference are in the discretion of the arbitrators, it is the usual and most proper practice to fix a specified sum. *Laurie* v. *Russell*, 1 P. R. 45.

Fixing Costs.]—Where the costs of the cause, reference, and award were to abide the event of the cause, and the arbitrators assessed the costs of drawing up the award and their fees at a certain sum:—Held, that merely assessing the amount was no ground for setting aside the award. *Boyle* v. *Humphreys*, 1 P. R. 187.

Fixing Costs.]—Where the costs of the cause and reference were to abide the event, and the award fixed the costs of the reference and award:—Held, award bad as to that part. *Jones* v. *Reid*, 1 P. R. 247.

Fixing Fees.] — Arbitrators have no power to fix the amount of their own fees. *McCulloch* v. *White*, 33 U. C. R. 331.

Insurance.] — Costs of arbitration and award where proceedings stayed in an action on a policy pending arbitration as to amount of loss. See *Hughes* v. *British American Ins. Co. and Hughes* v. *London Assurance Co.*, 7 O. R. 465; *Hughes* v. *Hand in Hand Ins. Co.*, *ib.* 615.

Invalid Award of Costs.]—Held, in an arbitration between school trustees and teacher, that the arbitrators exceeded their powers in awarding costs. *VanBuren* v. *Bull*, 19 U. C. R. 633.

Misconduct of Party.]—Where, owing to the misconduct of a party, arbitrators do not award, but an umpire does, costs will not be granted to the other party under a clause in the reference, "that if either party shall, by affected delay or otherwise wilfully, prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just." *Proudfoot* v. *Trotter*, 1 U. C. R. 398.

Note for Fees—*Waiver of Right to Tax.*]—Where the master refused to tax an arbitrator's fee upon proof only that a note had been given to the arbitrator for the amount, a Judge in chambers refused to interfere. *Tyrrell* v. *Ward*, 8 L. J. 21.

Order Silent as to Costs — *Severable Provision.*]—In an action on a bill of costs the parties consented that judgment should be entered for a certain sum, "subject to the award" of a named person. When the action came on for trial this consent was filed, and the trial Judge indorsed the record: "I order that judgment be entered for the plaintiff for the sum of, &c., subject to the consent filed herein." Nothing was said about costs, and they were not provided for in any way. The arbitrator or referee made his report or award finding that the amount of the judgment should be reduced to a named sum, and adding: "I do award to the plaintiff the costs of this action, including the costs of the reference and award." Judgment was entered in accordance with this award. Con. Rule 550 provides that "The court will not refer to arbitration:"—Held, that this Rule does not prevent any arrangement for the settlement of an action entered into and acted upon by litigants from being sanctioned and enforced by the court; and therefore there was power to make a reference by consent in this way; but it was a reference to arbitration and not a reference under the Judicature Act, and the referee had no power to deal with the costs. The award of costs was stricken out of the judgment, and an application afterwards made to the trial Judge to amend the indorsement on the record so as to provide for the costs was refused, although the omission to provide for costs was not intentional. *Macdonell* v. *Baird*, 13 P. R. 331.

Reference.]—It having been agreed on at the trial that if certain facts left to the jury should be found for plaintiff, the matters of account were to be referred, no mention having been made as to costs, the jury found for plaintiff:—Held, that the costs of reference were costs of the cause. *Ruttan* v. *Boulton*, 10 C. P. 417.

Renewal of Lease.]—Costs of reference to fix amount of rent on renewal of lease. See *Smith* v. *Fleming*, 12 P. R. 520.

Scale of Costs.]—Where a cause is referred by order of nisi prius, and a sum awarded within the district court jurisdiction —the court or a Judge may grant an order for full costs under the 9th rule of E. T. 11 Geo. IV. *Elmore* v. *Coleman*, 4 O. S. 321.

Scale of Costs.]—Where a verdict was taken subject to a reference, and the arbitrators awarded £10, reducing only the price and not the items of the account sued for, a suggestion to deprive the plaintiff of costs, under the Court of Requests Act, was refused. *Stratford* v. *Sherwood*, 5 O. S. 169.

Scale of Costs.]—Where final judgment is obtained without a trial, a Judge in chambers has power to make an order for full costs. Quære—Should the order be ex parte? Where a cause is decided by an award, the cause is one proper for an application of the kind. The order may be made unless it appear that the cause was one in which the plaintiff was bound to sue in an inferior court. A plaintiff, in order to bring his cause within the jurisdiction of an inferior tribunal, is not bound to give credits. It is his privilege to do so, but there is no legal obligation upon him to do so. *Geroux* v. *Yager*, 8 L. J. 19.

Scale of Costs.] — Where an action is commenced in the King's Bench, and arbitrators upon a reference award damages under the jurisdiction of the district court, the plaintiff is not deprived of costs. *Lang* v. *Hall*, Tay. 215.

Scale of Costs.]—A cause having been referred by order at nisi prius, and a sum awarded within the county court jurisdiction, the court, on affidavit, granted an order for full costs, under the 9th rule of E. T. 11 Geo. IV. *Morse* v. *Teetzel*, 1 P. R. 375.

Scale of Costs.]—Where the transactions amounted to about $1,100 on one side, and about $800 on the other, and defendant paid into court $176, and plaintiff recovered $102.30 by the award:—Held, that full costs should be allowed to the plaintiff. *Jones* v. *Hewson*, 2 C. L. J. 107.

Scale of Costs.]—Two actions for false imprisonment were referred at the assizes, no verdict being taken, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award:—Held, that he was entitled to full costs without a certificate. Such a case is not within the 155th Rule of court, for the plaintiff cannot be considered as proceeding upon the final judgment. *Cochrane* v. *Scott*, *Cochrane* v. *Cross*, 3 P. R. 32. Moved against in full court of Common Pleas, but rule discharged.

School Act.]—The School Act, C. S. U. C. c. 64, does not provide for the payment of arbitrators, or of the costs of a reference thereunder. *Weaver* v. *Bull*, 10 C. P. 369.

Several Defendants—*Demand by One.*]—A power of attorney from one of three defendants to demand the costs is sufficient, payment to one being payment to all. *Shipman* v. *Shipman*, 2 P. R. 393.

Shewing Cause—*Costs not Mentioned.*]—The costs of shewing cause against a rule for setting aside an award, are costs in the cause, although no mention of them is made in the rule. *County of Essex* v. *Parke*, 12 C. P. 159.

Special Jury.]—Where a cause has been referred by nisi prius order, an application for costs of special jury struck and called, must be to the Judge by whom the reference was made. *Commercial Bank* v. *Pringle*, 3 L. J. 28.

Submission—*Reference.*]—By a submission the costs of the "reference and award" were to be in the discretion of the arbitrators, and they directed that defendants should pay the costs of the "submission and award:"—Held, that the award was final, for that the costs of the submission included the costs of reference. The submission and award being set out in full in the declaration, quære, whether this objection could be raised by plea, or whether defendant should not have demurred. *Ellwood* v. *County of Middlesex*, 19 U. C. R. 25.

Submission Silent as to Costs.]—When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award. A direction as to the costs in such a case:—Held, severable from the rest of the award. *Re Harding and Wren*, 4 O. R. 695.

Taxation.]—Arbitrators' fees may be referred to the master for taxation. *Scott* v. *Grand Trunk R. W. Co.*, 3 P. R. 276.

Taxation.]—Whether named in award or not. *Laurie* v. *Russell*, 1 P. R. 65.

Taxation.]—An order will not be made under 29 Vict. c. 32, s. 5, for the taxation of the costs of an arbitration until the submission has been made a rule of court. *In re Coy and London Assurance Corporation*, 7 P. R. 131.

Taxation by Deputy Clerk.]—A taxation by a deputy clerk of the Crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, as being beyond his jurisdiction, and probably not even an irregularity. *In re Hotchkiss and Hall*, 5 P. R. 423.

Taxing Officer's Discretion.]—Held, that the amount to be allowed per diem to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with. *Re Hillyard and Royal Ins. Co.*, 12 P. R. 285.

Travelling Expenses—*Loss of Time.*]—Upon an appeal from the taxation of costs of an arbitration, which the plaintiffs were ordered to pay:—Held, that items in respect of the loss of time in travelling and travelling expenses of an arbitrator were properly disallowed. *Re Hillyard and Royal Ins. Co.*, 12 P. R. 285.

V. Enforcing Award.

1. *By Action.*

Attachment—*Action.*]—Proceeding by attachment on an award is no bar to subsequent action on the same award, though the court may stay the action so that the defendant be released from the attachment. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.

Collateral Attack.]—Semble, that an objection that two arbitrators made the award without notice to the third, could be taken advantage of in an action on the award. *Smith* v. *George*, 12 U. C. R. 370.

Collateral Attack.]—First count of declaration on a promissory note of $400. 2nd. For $85.18, under an award founded on a submission, leaving all matters in difference, whether partnership or otherwise, to arbitration. Pleas, 1. Payment. 2. Set-off on common counts. On motion to set aside a verdict for plaintiff, on the grounds: 1. That the arbitrators exceeded their authority in making their award. 2. That since the making of said award money had been received by plaintiff to defendant's use:—Held, that as no defence had been set up to the award at the trial, and no action taken to set aside the award, the defendant could not now set up such a defence; and if moneys had been received by plaintiff to defendant's use, as alleged by the defendant, since the award, defendant could on the pleadings have shewn the same at the trial. *McKenzie* v. *Sommers*, 14 C. P. 97.

Defence—*Exceeding Jurisdiction.*]—By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant, on or before the 20th March then next, for which the defendants covenanted to pay so much per log. It was provided that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks. By a submission under seal, reciting this agreement and that differences existed in respect thereof, and of the advances made thereon by defendant to plaintiffs, all such differences were referred to arbitration. The ar-

bitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, $66. To an action on this award, defendants pleaded no award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that, owing to the snow, the plaintiffs could not proceed with the work, and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the costs of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference:—Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiff for work done under the verbal agreement, which was not within the submission; that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action. *Tully* v. *Chamberlain*, 31 U. C. R. 299.

Defence—*Misconduct of Arbitrator.*]—To an action on an award, the defendant pleaded, on equitable grounds, that the arbitrator proceeded ex parte, and without notice to the defendant, and refused to hear defendant and his witnesses, or allow him a reasonable opportunity of proving his case; and also examined the plaintiff and his witnesses privately and in the absence of the defendant, who had no opportunity of cross-examining them; that he never waived any of these irregularities, and was wholly ignorant until some time afterwards of the award being made, and had always repudiated the same; and that it was therefore not binding on defendant, but should be set aside:—Held, plea bad, as setting up facts not the subject of defence by way of plea, but forming grounds for motion to set the award aside, the award, until set aside, being final between the parties. It was urged by defendant that as the declaration did not contain an averment that the submission contained any provision for making it a rule of court under 9 & 10 Will. III. c. 15, or did not provide that it should not be made such rule, no other means of relief were afforded except by plea; but held otherwise, for defendant might still have relief by bill in equity. *Peachen* v. *Lamb*, 25 C. P. 588.

Defence—*Want of Title.*]—In a declaration on an award that defendant should make, execute, and deliver to the plaintiff a good and sufficient conveyance in fee simple, with the usual covenants, of certain land specified. Breach that defendant never had any title, and so could not perform the award. Plea—that defendant did, in pursuance of the award, execute and tender to the plaintiff such deed as in the declaration mentioned:—Held, on demurrer, plea good. *Anderson* v. *Van Buscek*, 18 U. C. R. 172.

Estoppel.]—Suing on an award will estop a party from denying the authority of the arbitrators. *Black* v. *Allan*, 17 C. P. 240.

Evidence—*Contribution.*]—The declaration on a submission bond alleged an award that defendant should pay the plaintiff $540 and each pay their own costs of the submission, and that $60, other costs, should be paid by them equally. Pleas, denying the submission and award. The plaintiff proved the execution of defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of third arbitrator indorsed on it, having served a notice to produce on defendant's attorney, at 11 a.m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail:—Held, 1. that the execution of plaintiff's bond being put in issue, it might be presumed to be in possession of defendant's attorney; and if it were not, that the notice under the circumstances was sufficient; 2. that the plaintiff having paid the $60, was not entitled to recover half of it from the defendant. *Sullivan* v. *King*, 24 U. C. R. 161.

Instalments—*Damages.*]—Defendant became bound to plaintiff in a penalty to abide by an award. The arbitrators awarded $400 to be paid by defendant to plaintiff in three instalments, the two last to be secured by defendant upon real estate, and payable at a future day. Defendant neither paid the first instalment, nor secured the second and third in the manner directed:—Held, that plaintiff was entitled to assess his damages for the whole three instalments. *Bond* v. *Bond*, 16 C. P. 327.

Non-payment—*Covenant.*]—Where the plaintiff had been awarded a certain sum in accordance with the terms of an instrument under seal; for the non-payment of such an award the plaintiff should sue in covenant: he cannot sue in assumpsit unless some new consideration, apart from the written instrument, can be proved. *Tait* v. *Atkinson*, 3 U. C. R. 152.

Pleading.]—Separation of husband and wife. Reference to settle the allowance in lieu of alimony. Declaration on submission bond. Special demurrer. *Beasley* v. *Stegman*, Tay. 398.

Pleading.]—In debt on award that defendant should pay plaintiff £149 on a day mentioned, and that the plaintiff should deliver up a house to the defendant on the same day:—Held, that these were concurrent acts, and that the plaintiff must aver a readiness to perform his part. *Baker* v. *Booth*, Dra. 65.

Pleading.]—But it is sufficient to aver readiness to deliver up the premises without actual delivery, and vice versâ, and where to a plea that the defendant demanded the award from the arbitrator on the 5th February, the plaintiff replied a publication and notice of the award on the 6th (the day when the award was to be made), the replication was held good. *Baker* v. *Booth*, 2 O. S. 373.

Pleading.]—Declaration in debt on a submission bond, averring that the award was made on the day appointed. Plea—"no award." Replication—an award within the time—to wit, on a day and year different from the year stated in the declaration. Replication held sufficient on general demurrer. *Judge* v. *Judge*, 5 O. S. 692.

Pleading.]—Non-payment of the money awarded is a sufficient breach, without averring notice of an award. *Turner* v. *Alway*, 5 O. S. 45.

Pleading.]—When the submission does not limit any time for the award, plaintiff need not aver that it was made within a reasonable time, nor allege notice of the award. *Adams* v. *Ham*, 5 U. C. R. 292.

Pleading.]—Money awarded was held, under the circumstances, not recoverable on the common counts. *Holden* v. *McCarthy*, 5 O. S. 99.

Pleading.]—In debt on bond to perform an award, a plea setting forth mere legal grounds of objection and concluding to the country is bad; and if there be two separate parts in the award, an answer to one part cannot be pleaded in bar of both; and if two breaches be assigned in the replication, it will be sufficient on general demurrer if one only be supported. *Boyd* v. *Durand*, 5 O. S. 122.

Pleading.]—In debt on an award in favour of the Kingston Bank Commissioners, under 10 Geo. IV. c. 7, the declaration set out an award that defendant should pay £900 in bills or notes of the bank, or bank certificates, or orders for stock, by a certain day; and assigned as a breach non-payment in the terms of the award, but did not negative payment in money:—Held, bad on general demurrer. *Kingston Bank Commissioners* v. *Dalton*, E. T. 3 Vict.

Pleading.]—Plea of no award by arbitrators, or by umpire, duly appointed:—Held, bad on special demurrer. *Croker* v. *Hoggan*, 6 O. S. 508.

Pleading.]—Declaration in debt for £1,000, alleging a reference between plaintiff and defendant, by bonds with a penalty of £1,000, and setting out the award thereon, assigning breaches for non-performance, and concluding "whereby an action had accrued to recover the sum of £1,000 above demanded:"—Held, bad on special demurrer, as an informal declaration on the bond of submission. *Simpson* v. *Mode*, 6 O. S. 511.

Pleading.]—A set-off of a sum certain is a good plea in debt on a submission bond, assigning as a breach the non-payment of a sum certain awarded. *Lindford* v. *Musgrove*, 6 O. S. 642.

Pleading.]—Award to be made in writing. Plea, that the arbitrators did not award in writing under their hands:—Held, bad. *Baby* v. *Davenport*, 6 O. S. 643.

Pleading.]—The effect of a repugnancy in a replication, setting out an award, to the submission set out on oyer, as regards the name of the arbitrator. *Tewsley* v. *Dunlop*, 1 U. C. R. 138.

Pleading.]—Where plaintiff and defendant refer all causes of action, and after an award given plaintiff sues defendant for a cause of action not brought before the arbitrators, on the ground that he then had no knowledge of it, an issue tendered as to such knowledge is material. *Lusty* v. *VanVolkenburgh*, 1 U. C. R. 214.

Pleading.]—Plaintiff declares in debt on bond for the performance of an award. Defendant pleads no award upon the premises. Plaintiff replies setting out the award. Defendant rejoins matter extrinsic of the award, and relies upon it for shewing the award void. The rejoinder is bad, as being a departure from the plea. *Maxwell* v. *Ransom*, 1 U. C. R. 219.

Pleading.]—Plea of performance, replication denying it only by inference:—Held, bad on special demurrer. *Lymburner* v. *Norton*, 1 U. C. R. 485.

Pleading.]—Debt on bond. Defendant set out the condition on oyer, which was for the performance of the award of arbitrators, to whom it was referred by the plaintiff and defendant to arbitrate, &c., "upon and concerning the possession" of a certain lot of land, and also of and concerning all, &c., and all manner of action, controversies, and demands whatsoever, between the said parties, from the beginning of the world to the date of the said bond, and pleaded "no award made." The plaintiff replied, shewing an award made by the arbitrators at the proper time, and with the proper formalities, "that the plaintiffs should pay to the representatives of one S., deceased, within one month, the amount due on certain notes of hand given by plaintiff to said S. in payment of the land, and that the defendant should give to the plaintiff on such payment a sufficient deed in fee simple for said land, and that defendant should not transfer the said notes within the said month; and that the bond for a deed given by the said S. to the plaintiff should be delivered by defendant to plaintiff. The plaintiff then averred notice to defendant of the award, and assigned two breaches, 1. that the plaintiff tendered to defendant, the holder of the said notes, and to the defendant's wife, the executrix of S., the full amount of the notes, and demanded a deed, but that they refused to accept the money, and defendant refused to give the deed, although a reasonable time had elapsed; 2. that after the tender and refusal in the first breach mentioned, and before suit, to wit, &c., the plaintiff requested defendant to deliver to plaintiff the bond for a deed; and although a reasonable time had elapsed, defendant would not deliver the said bond. The defendant rejoined, setting out the award verbatim, and then demurred separately to each breach:—Held, 1. that under the general words of the submission authority was given to arbitrate as to the fee simple of the land, if it were a matter in difference between the parties, which must be presumed; 2. that the award was void for not deciding upon the matter expressly submitted to the arbitrators respecting the possession:—Held, also, that the defendant could not, by thus setting out the award in his rejoinder by suggestion, make it a part of the plaintiff's replication, as in the case of a deed pleaded with profert; and that the defendant's demurrer should have been to the replication, and not to the several breaches assigned in the replication. But upon the whole record, judgment was given the defendant on the demurrer, because the award as set out by the plaintiff himself in his replication was void. *Benedict* v. *Parks*, 1 C. P. 370.

Pleading.]—Where a plaintiff proves such an award as stated in his declaration, its legal effect or validity is not involved under a plea of nul tiel award. *Hartley* v. *Huntley*, 4 C. P. 276.

Pleading.]—Plea in assumpsit on an award, held bad on special demurrer for not

identifying the matters referred with the cause of action. *Calvin* v. *McPherson*, 4 C. P. 159.

Pleading.]—Plaintiff need not shew that the award was executed by the arbitrators at the same time. That is assumed in the first instance, but defendant may shew the contrary under a plea denying the award. *Sullivan* v. *King*, 24 U. C. R. 161.

Pleading.]—In an action founded upon a bond conditioned for the performance of an award:—Held, that under a plea of nul tiel award evidence is admissible to shew that the arbitrators took into their consideration and decided upon matters not referred to them. *Carveth* v. *Fortune*, 12 C. P. 399.

Pleading.]—Action by indorsee against executors on a note for $860, made by testator, averring a promise by defendants as executrix and executor to pay. Pleas, 2. That defendant did not promise; 3 and 4. Want of consideration; 5 and 6. Fraud. Replication to all the pleas, by way of estoppel, an arbitration and award as to the liability of defendants as executors, &c., to pay the note, &c., (setting out the terms of the submission and award):—Held, on demurrer, replication bad, as the matter of it did not estop defendants as to the second plea, and because it did not appear on the face of the submission or of the award, that the plaintiff at the time of the reference, and of the making of the award, was the holder of the note. *Cleat* v. *Elliott*, 1 C. P. 252.

Pleading.]—Covenant against the executors of a lessor for not rebuilding after loss by fire. The third plea set up an award as to the damages sought to be recovered between the plaintiff and one G. M., who, it was averred, was assignee of the premises under the will of the plaintiff's lessor for a term in the said will mentioned; but it was not averred that the plaintiff had obtained satisfaction through the award:—Held, on demurrer, third plea bad, as shewing no defence. *Proudfoot* v. *Trotter*, 12 U. C. R. 226.

Pleading.]—Debt on submission bond. Seven pleas objecting to validity of award, all held bad on demurrer. *Finkle* v. *Arnold*, 6 U. C. R. 168.

Pleading.]—Declaration on a bond of submission to J. and L., of an action brought by plaintiff against defendant, with other matters, with liberty, either before said arbitration or pending said reference, to appoint an umpire. The condition was, to abide by the award of the arbitrators, if made on or before the 16th June, 1855, or if they should not make their award by that time, then by the award of the umpire, if made on or before the same day. Plea, no award by arbitrators or umpire, on or before the 16th June. Replication, that the arbitrators before entering on the arbitration appointed an umpire, who with the said arbitrators, within the time limited for making the award by the umpire, to wit, on the 16th June, 1855, awarded that there was due from defendant to plaintiff £55 16s. 1d., upon balance of accounts, and also £5, costs of the arbitration, which sums they awarded defendant to pay to the plaintiff, &c.:—Held, on demurrer, replication bad, for, if the award could be supported at all, it could only be as the award of the two arbitrators, and should have been so set out, to make it in accordance with the submission. *Roddy* v. *Lester*, 14 U. C. R. 259.

Pleading.]—A municipality by by-law opened a road across plaintiff's property, and arbitrators were appointed under 16 Vict. c. 181 to determine what compensation should be paid to him. Afterwards a resolution was passed by the council that the arbitrators so chosen should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled; and they awarded separate sums for opening the road and for damages, respectively. The plaintiff having brought debt on this award, defendants pleaded no award:—Held, that under this plea they could not dispute the arbitrators' authority to award the latter sum; but should have moved to set aside the award, or might have pleaded nunquam indebitati to that sum, which would have brought the submission in issue. *Hodgson* v. *Town of Whitby*, 17 U. C. R. 230.

Pleading.]—To an action on an award defendant pleaded a set-off for costs of defence in certain suits due to him by the same award. The award recited a submission of an action in the Common Pleas by plaintiff against defendant, and also of "all other matters of difference, action and actions, suits, and controversies whatsoever," and awarded that defendant should pay all costs of said suit, "and all other law costs occasioned by any suit or suits, action or actions, either at law or equity, had about and regarding the premises, and brought before the execution of said bonds of submission to arbitration; and we also order and direct that no further proceedings shall be had in any or either of said actions:"—Held, that the defendant could not under his plea recover for costs of suits in which judgment had been given before the reference, for they were not included in the submission or award:—Held, also, that the evidence of the arbitrators was rightly received to shew that such costs were not intended to be allowed. *Campbell* v. *Howland*, 19 U. C. R. 18.

Pleading.]—Declaration, a joint bond by defendants M. and G. to perform an award concerning all differences between plaintiff and defendants averring an award that M., one of the defendants, was indebted to the plaintiff in a sum named, and directing him to pay it by a certain day. Pleas by the other defendant, G., that before the execution of the bond the plaintiff had sued defendants on a contract, which G. denied being a party to; that to settle said action the bond was entered into, which recited the suit, and the matters referred were the said action and all differences between the plaintiff and defendants jointly, not either defendant singly; that the only matters brought before the arbitrators, or upon which they awarded, were the said action and the matters in question therein, and that the award was as follows (setting it out in substance as stated in the declaration):—Held, on demurrer, plea bad. *Gerrie* v. *McDonell*, 18 U. C. R. 146.

Pleading.]—An action on an award, to which the defendant pleaded performance only. At the trial a verdict was entered for defendant, with leave reserved, if he was not so entitled, to enter a verdict for the plaintiff for £26 9s. and interest:—Held, under

the special circumstances set out in the case —1. That defendant was not entitled to a verdict in his favour, for though the award was unauthorized, yet he had not objected to it, but pleaded performance, which he had clearly failed to prove. 2. That a verdict must go for the plaintiff for the £26 9s., as it had been so agreed at the trial, although under the circumstances the plaintiff was not necessarily entitled to that sum, the defendant having offered to do all that he had a just claim to call upon him for. *Anderson* v. *Van Buseck*, 18 U. C. R. 172.

Pleading.]—Held, that s. 171 of C. L. P. Act did not in any way alter the pleadings in the case of awards; but that, the declaration shewing the submission on a certain day and the award within a few days thereafter, the court would intend it to have been within the stipulated time, and that it was certainly within a reasonable period, and within three months from the appointment of the arbitrator:—Held, also, not necessary to aver a demand to comply with the award, or that a reasonable time had elapsed before action. *Reid* v. *Reid*, 16 C. P. 247.

Pleading.]—The court had decided that one portion of an award was bad, but the other portion good. Plaintiff sued for non-compliance with the latter, but omitted to set out the former part:—Held, that the omission was immaterial; but that even the omission of a material part could not be objected to under a denial of the award in the declaration mentioned. *Bond* v. *Bond*, 16 C. P. 327.

Pleading.]—In an action against the makers of a joint and several note payable to R. or bearer, one defendant suffered judgment by default, and the other pleaded, that after the note fell due, and while it was in R.'s hands, disputes arose between R. and this defendant respecting it, among other matters which were referred; that the arbitrators awarded that defendant should pay R. a sum named, and that he and R. should execute mutual releases; and that the plaintiff took the note after it fell due, with notice of the facts. At the trial the submission and award were proved, and that the plaintiff was present at the arbitration; that the note was disallowed to R., because this defendant, being a surety only for the other maker, had been discharged by giving time; and that the plaintiff then stated that he had no claim upon the note:—Held, that the note being several, the plea was good, though the action was against two, and the award related to one only; that it was unnecessary to aver performance of the award; and that defendant was entitled to a verdict. *Folwell* v. *Hyde and Castor*, 20 U. C. R. 565.

Pleading.]—The submission and award being set out in full in the declaration; quære, whether an objection that the award was not final could be raised by plea, or whether defendant should not have demurred. *Ellwood* v. *County of Middlesex*, 19 U. C. R. 25.

Pleading.]—In assumpsit on an award the plea of nunquam indebitatus puts in issue the submission, the enlargement of the time, and the making of an award according to the submission. *Abbott* v. *Skinner*, 7 L. J. 158; *S.C.*, 11 C. P. 309.

Pleading.]—Under a submission of all differences between plaintiff and defendant (not specifying any subject of dispute), with power to determine what they should see fit to be done by either, the arbitrators by their award—after reciting that one G., by a writing indorsed on the submission, had agreed to submit to them a charge of £200 per annum, made for defendant by the management of certain property in Berlin, in which G. and the plaintiff were jointly interested—found that on the 1st September, 1860, defendant was indebted to the plaintiff in £3,249 17s. 8d., which they ordered him to pay accordingly, with interest half-yearly until paid. 2. As to the Berlin property, that as regarded the rights and liabilities of the plaintiff and defendant thereto, they did not find that any difference had arisen calling for their arbitrament, (further than as might regard the said amount claimed for management,) and they therefore made no adjudication on such rights or liabilities. 3. As to certain property in Guelph comprised in a deed made by defendant to plaintiff, they adjudged that the plaintiff should hold the same in fee by virtue of such deed, but that if he, or his heirs or assigns, should sell the same, or any part thereof, and should realize from such sale a larger sum than £1,105, he or they should account for such surplus to the defendant, his executors, &c. To an action on this award, defendant, after setting it out at length, pleaded:—1. That the arbitrators awarded upon matters not submitted, and which accrued after the submission, and upon accounts between the parties to a period long after the submission. 2. That the award was not final, in this, that the said matters relating to the Berlin property were matters in difference, and were submitted to the arbitrators, but that they did not award thereon, and in this, that they did not dispose of the difference respecting the value of the Guelph property, but left the same unsettled and dependent upon the sale thereof by the plaintiff, when only the amount to be accounted for to defendant could be determined:—Held, on demurrer, both pleas good; and as to the second plea, that the averment as to the Berlin property was a sufficient defence, and the plea therefore sufficient, although the award as to the Guelph land was not wanting in finality:—Held, also, that upon the evidence, set out in the case, the first plea was not proved:—Quære, as to the intention and effect of the direction in the award to pay the £3,249, and interest half-yearly until payment. *Stewart* v. *Webster*, 20 U. C. R. 469.

Pleading.] — Defendant, besides demurring to the declaration, pleaded setting out the whole award, as stated in the declaration and alleging that it was void on the face of it, for not deciding all the matters referred, for want of finality, and for excess of authority: —Held, plea bad, as putting in issue matter of law already brought up by the demurrer. *Stinson* v. *Martin*, 22 U. C. R. 154.

Pleading.]—Action on bond. Plea, that the bond was conditioned to perform an award, and no award made. Plaintiff must reply specially, denying the condition, or setting out an award and alleging a breach; he cannot take issue. *Cowan* v. *White*, 9 L. J. 131.

Pleading.]—The declaration, after reciting that certain differences had arisen be-

tween the plaintiff and the testator of defendant, and that said testator had entered into an arbitration bond with the plaintiff to refer said differences, several of which were set out; and that the arbitrators had published their award in writing in the lifetime of testator, and had awarded that said testator should pay plaintiff by a certain day £100;—then averred nonpayment by testator or defendant:—Held, on demurrer, declaration good; for the action appearing to be on the award, and not on the bond, it was not necessary to set out the whole award, but only so much as would support the plaintiff's case. Proper form of declaration on bond conditioned to perform an award stated. *McCallum* v. *McKinnon*, 15 C. P. 561.

Pleading.]—Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others, the costs of an action in the Common Pleas between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay him all the costs of the reference and of the said action, and that they should execute mutual releases. Breach, non-payment of the costs. Defendant pleaded, 1. non est factum; 2. that the arbitrators did not make any such award. The award mentioned no suit, but awarded the costs of reference," and also all costs that may have been incurred by any legal process through which the matter relating to this arbitration may have passed previous to the award." The plaintiff's attorney in the suit in the Common Pleas produced the bill of costs in that suit:—Held, that the award was sufficiently certain and final, if the existence and substance of the suit and its connection with the matters referred had been properly set out in the declaration and proved; but that, on these pleadings, the suit and the fact of its reference might be taken to be admitted; and a verdict for the plaintiff was therefore upheld. *Hibbert* v. *Scott*, 24 U. C. R. 581.

Pleading.]—The second count averred that the defendants, a railway company, by their notice of arbitration, alleged that the plaintiff was entitled to no compensation; and that the arbitrators awarded him $10,000; whereby, and by force of the statute, defendants became liable to pay him the costs of the arbitration, but did not pay:—Held, on the authority of Welland R. W. Co. v. Blake, 6 H. & N. 140, that never indebted was a good plea to this count. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 25 U. C. R. 222.

The eleventh plea to the third count (a common count for money awarded) was that the award mentioned and the money claimed there and in the first count (a special count on the award) were the same:—Held, no defence. *Ib.*

Arbitrators having awarded compensation to the plaintiff for injuriously affecting his land, to an action on the award defendants pleaded, on equitable grounds, that the sum awarded was excessively and fraudulently exorbitant, and that the award was made by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators making it:—Held, on demurrer, a good defence. *Ib.*

Pleading.]—The declaration for non-performance of an award set out in full a deed of submission to arbitration between plaintiff and defendant, which deed provided that the award should be made on or before the 1st July then next, or such further time as the arbitrators by writing, indorsed on the submission, might from time to time appoint. It was then averred, that after the arbitrators had entered upon the reference, the plaintiff and defendant, by writing under their hands, enlarged the time for making the award to the 1st December, and the award was made on the 30th November. Fourth plea: that the enlargment mentioned was not made till after the 1st July, and when the arbitrators' authority had ceased. Replication, setting out the indorsement enlarging the reference, and averring that the parties, with a full knowledge of the facts, appeared subsequently before the arbitrators, and proceeded without objection to the enlargement, and afterwards the award was made as in the declaration mentioned:—Held, upon demurrer, 1. that the action, if founded upon the deed, must fail, the enlargement not being in accordance with the deed; but, 2. that setting out the deed in the declaration did not necessarily make it the basis of the action, for it might be treated as inducement; and the deed and the circumstances following it, read together, shewed a valid award on a parol submission by the parties, and afforded a good cause of action. The declaration was therefore held good, as regarded the enlargement, and the fourth plea bad:—Held, also, that the replication was not a departure; but that as the declaration shewed a new submission by the parties, the facts in the replication as to the attendance of the parties after the enlargement were immaterial, and the replication therefore bad. *McCulloch* v. *White*, 33 U. C. R. 331.

Proof of Award.]—Semble, that the award was not admitted by the pleadings in this case; but—Held, that it was sufficiently proved by shewing that the defendants paid a portion of the sum awarded, and that their officers had stated in writing the particulars of the award, and the sum remaining due on it. *Hughes* v. *Mutual Fire Ins. Co. of District of Newcastle*, 9 U. C. R. 387.

Proof of Award.]—The plaintiff and defendant having a dispute referred it to M. to determine, and M., having heard their statements, awarded that defendant should pay to the plaintiff £25. Subsequently, at the request of the plaintiff's attorney, he made a written award to the same effect, and delivered it to the parties. The plaintiff having sued as upon a verbal submission:—Held, not necessary to produce the written award, as it appeared from the testimony of the arbitrator that the verbal decision was in fact his award and so intended. *Davis* v. *McGivern*, 11 U. C. R. 112.

Proof of Award.]—In an action upon a submission bond, plea, non est factum, and subsequent suggestion of breaches by the plaintiff, it is sufficient to prove the bond and submission set out upon the record, and an award tallying with it. *Lossing* v. *Horned*, Tay. 219.

Proof of Award—*Variance.*]—In an action on an award, with the common counts, the submission to arbitration as set out in the declaration mentioned three defendants, and the award in reciting the submission only noticed two, but referred to the rule by which the submission was made as annexed

to the award, in which rule the three defendants were named:—Held, that the variance between the submission set out in the declaration and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale* v. *Matthewson*, Dra. 65.

Proof of Submission.]—In debt on an award under bonds of submission, it is necessary to shew a mutual submission, and to prove the bonds executed by all the parties; but where the defendant at the trial accepted a credit without objection for money paid on the award, he was held precluded from objecting that the plaintiff had not proved his own execution of the bond. *Skinner* v. *Holcomb*, 6 O. S. 336.

Proof of Submission.] — In debt on award the declaration recited a submission by bond, averring that under it the arbitrators had made an award upon one of the matters in difference, the other matters having been by consent withdrawn, and that afterwards the other matters having been again submitted, the arbitrators made an award in favour of the plaintiffs. Defendant pleaded no such submission, and never indebted. At the trial the plaintiff proved the parol submission, but not the bond, and a point was reserved for the defendant to move upon that objection. The court on motion for a new trial (the verdict being in accordance with the justice of the case) refused to interfere. *Baby* v. *Dacosport*, 3 U. C. R. 13.

Proof of Submission.] — In an action on an award it is sufficient to produce the submission bond executed by defendant, without that executed by the plaintiff. *Townley* v. *Wythes*, 16 W. C. R. 139.

Severable Excess.]—In an action on a bond of submission, an excess of authority in giving costs of the reference was—Held, no objection to the award, as those costs were not sued for. *Roddy* v. *Lester*, 14 U. C. R. 259.

Special Facts.]—Held, under the special circumstances of this case, on demurrer on various grounds, that the declaration and award were good; that the other defendant was liable for non-payment of the $50, though it was a matter in difference between the plaintiff S. and defendant M. only. *Stinson* v. *Martin*, 22 U. C. R. 154.

Time—*Publication—Interest.*]—"Publication" of an award, signifying its completion so far as the arbitrator is concerned, is made when he executes it in the presence of a witness or does any other act shewing his final mind, upon which he becomes functus officio; and when an award is thus complete, an action may be brought upon it forthwith, though the defendant has the right to move against it within the proper time after "publication" to the parties; and a motion by the defendant to set aside the award may go on concurrently with an action to enforce it. Moore v. Buckner, 28 Gr. 606, not followed. Interest upon the amount of an award does not begin to run until notice of the award has been given to the defendant. *Huyck* v. *Wilson*, 18 P. R. 44.

Variance.]—A variance in the names of arbitrators:—Held, no ground of nonsuit. *Bentley* v. *West*, 4 U. C. R. 98.

Variance.]—In an action on an award, the submission, as declared on, mentioned three defendants, and the award in reciting the submission only noticed two, but referred to the rule by which the submission was made as annexed to the award, in which rule the three were named:—Held, that the variance between the submission declared on and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale* v. *Matthewson*, Dra. 65.

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2. *By Attachment.*

(a) *Generally.*

Where executors submitted to arbitration, with a proviso that it should not be taken as an admission of assets, and the arbitrators awarded that they should pay a certain sum, without stating that they had assets, a rule for an attachment against them for non-payment was refused. *Gilbert* v. *Simpson*, M. T. 7 Vict.

An attachment will be ordered against a party who files a bill in equity, contrary to his undertaking in a rule of reference, and in disregard of a rule of court made thereon. *Manners* v. *Clarke*, 1 U. C. R. 191.

The court will enforce performance of an award by attachment, though it extends to the delivery of possession of land. *McPherson* v. *Walker*, 1 P. R. 30.

An attachment will not be granted where a new arrangement has been made between the parties, subsequent to the award; but the successful party will be left to his action on the award. *Thompson* v. *Macklem*, 1 P. R. 293.

A party intending to attach should proceed with reasonable diligence. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.

Where an award is vague, and defendants swear that it is impossible to comply with it, owing to the uncertainty, an attachment will be refused. *In re Manley* v. *Anderson*, 2 P. R. 106.

The execution by defendant of an assignment in trust for his creditors, by which the plaintiff is to be first paid, and the acceptance of such assignment by plaintiff, is no answer to an application for attachment on an award previously made for the same debt. *McKenzie* v. *McKenzie*, 2 P. R. 157.

Where the costs of the cause were to abide the event, but no authority was given to direct a verdict, and the award was silent as to costs:—Held, that attachment was the proper remedy for their recovery. *Shipman* v. *Shipman*, 2 P. R. 393.

(b) *Practice.*

The rule will not be absolute in the first instance, although the party consents by his counsel. *Stewart* v. *Crawford*, Tay. 409.

To obtain an attachment for non-payment of an award, the affidavit should shew that

the person making the demand has a power of attorney for that purpose, and that the party on whom the demand was made was apprised of it. *Powell* v. *McMartin*, Dra. 169.

To bring a party into contempt for not paying money awarded, the original rule and other papers should be shewn when the copies are served. *Kent* v. *Sumner*, T. T. 11 Geo. IV.

It must appear distinctly by the affidavit that the demand was not made too soon. *Barnes* v. *McMartin*, 5 O. S. 143.

Where the award is made by an umpire, it must be shewn how he was appointed, and his appointment must be in writing. *Carpenter* v. *Vanderlip*, E. T. 3 Vict.

Where there was nothing to shew such appointment except the umpire acting as such, a rule nisi for an attachment was discharged, with costs; and the court refused to reserve leave of the plaintiff to renew the application next term. Quære, however, whether he would be prevented from such application. *Reynolds* v. *Burkhart*, 1 P. R. 213.

The affidavit must deny payment of any part of the sum demanded. *Masccar* v. *Chambers*, 4 U. C. R. 171.

An affidavit denying service of an award must be intituled in the cause, and not "The Queen v. Defendant," as it is an affidavit made before the attachment has been ordered. If the affidavit, however, contain a good answer upon the merits, the party will have leave to swear to an amended affidavit. *Heathers* v. *Wardman*, 4 U. C. R. 173.

The affidavit of execution of the award must shew that it was executed within the time limited by the submission. *Ib.*

The allocatur in this case was held not objectionable as improperly embracing a moiety of the costs of reference. *Ib.*

In an application for an attachment for the non-payment of money awarded, the submission being by bond, the rule nisi was intituled "in the matter of A. v. B." The affidavit of service was intituled in the same way. The rule making the submission by bond a rule of this court, was intituled in this court, "A. v. B." The affidavit of the execution of the award was intituled in this court only:—Held, that the intituling of the rule nisi and the affidavit of service thereof was correct:—Held, also, that there was no material variance between the intituling of the rule nisi and the other previous papers. *In re Beckett* v. *Cotton*, 5 U. C. R. 271.

The original award must be brought into court, and the rule for attachment drawn up upon reading it:—Semble, that such rule may be granted on shewing service of a copy of the award, with the demand of performance; the original having before been shewn to defendant. *McLean* v. *Kezar*, 1 P. R. 125.

The rule for an attachment for non-payment of an award, is properly a four not a six day rule. *Jones* v. *Reid*, 1 P. R. 247.

To enforce performance of an award, the proper mode is to serve an order that the party do within a time therein to be limited perform the award; which order must be indorsed with the notice required by the 46th of the orders of 1853. An attachment issued for non-performance of an award, when no such order had been served, was set aside with costs; although an order making the award an order of court with such notice indorsed, had been duly served. *Wilson* v. *Switzer*, 1 Ch. Ch. 44.

A rule nisi for attachment, drawn up "upon reading the rule of court, award, allocatur, and papers filed in the cause," is insufficient: the affidavits filed, and necessary to bring the party into contempt, should be specifically referred to. *Dickey* v. *Mulholland*, 2 P. R. 169.

When a rule nisi on the face of it refers to papers and affidavits filed, this is sufficient in ordinary cases; but in applications touching awards, and in proceedings to bring a person into contempt, the particular materials moved upon should be specified. *Hesketh* v. *Ward*, 17 C. P. 667.

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3. *Other Cases.*

Chancery.]—This court has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contained no submission to pay, where the reference has been made an order of the court, and will in such a case order a reference to the master, and not oblige the party to sue at law. *Armstrong* v. *Cayley*, 2 Ch. Ch. 163.

Entering Judgment.]—Where a cause was referred on a verdict taken by consent, and the award made in vacation, final judgment entered before the next term was held to be irregular. *Vincent* v. *McLean*, Dra. 168.

Entering Judgment.]—A plaintiff who takes a verdict subject to a reference, but does not proceed to an arbitration, owing partly to the fault of the arbitrators, partly to the delay of the defendant, cannot enter judgment on the verdict without first applying to the court. *Mott* v. *Loucks*, T. T. 1 & 2 Vict.

Entering Judgment.]—And the court will not allow such judgment to be entered. *Gould* v. *Freeman*, 3 U. C. R. 270.

Entering Judgment.]—Where on a reference at nisi prius, a verdict is taken subject to the award, and the cause only is referred, and an award made, judgment may be entered after the first four days of the succeeding term. But when the matters not included in the cause are referred, judgment cannot be entered until after the next succeeding term. *Hawke* v. *Duggan*, 5 U. C. R. 636.

Entering Judgment.]—Where a cause "and all matters in difference" were referred:—Held, that judgment could not be entered until after the first four days of the term following the award; and semble, the defendant would have the whole term to move in. *Williams* v. *McPherson*, 2 P. R. 49.

Entering Judgment.] — A verdict was taken at the autumn assizes, subject to an award, which was made in May following, and the plaintiff, without waiting until after the fourth day of the next term, immediately entered up judgment thereon:—Held, regular. *Laurie* v. *Russell*, 1 P. R. 36.

Entering Judgment.]—Where a verdict is taken and the award not made until after the next term, the plaintiff need not wait to enter his judgment until after the first four days of the term following the award. *Blanchard* v. *Snider*, 28 U. C. R. 210.

Entering Judgment.]—Semble, that under the submission in this case no judgment could be entered up for the sum awarded, without application to the court. *Murphy* v. *Cotton*, 14 U. C. R. 426.

Entering Judgment.]—Where a plaintiff, in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under 17 Car. II. c. 8. No execution, however, can issue in the name of plaintiff's executor without reviving the judgment. *Proctor* v. *Jarvis*, 15 U. C. R. 187.

Where a verdict was taken, and an award made on the first day of the term following, on which judgment was entered soon after that term:—Held, not too soon. *Ib.*

Entering Judgment.]—An application to set aside a judgment, founded on a verdict which was taken for the plaintiff subject to a reference to arbitration, the judgment having been entered up before the expiration of four days succeeding the day of making the award, was refused. *Van Norman* v. *Bridgeford*, 2 C. L. J. 132.

Entering Judgment.] — Judgment may be entered upon an award made on a reference at nisi prius under the compulsory clauses of the C. L. P. Act, although no verdict has been taken, without the formalities formerly required in the case of an attachment for non-payment of the amount awarded. An order for leave to enter such judgment is not necessary. *McNeil* v. *Lawless*, 2 C. L. J. 190.

Entering Judgment.] —A county court and a division court suit, and all disputes, were referred, and a sum of money awarded, to be paid by A. to B. after ten days' notice of the award. The notice was served upon the attorney who had acted for A. on the arbitration, but who disclaimed any right otherwise to represent him on application for leave to enter judgment for non-payment:—Held, that the service was insufficient. *In re Burns* v. *Potter*, 4 P. R. 61.

Forum—*Particular Court named.*]—When a submission to arbitration provides for making the submission a rule of any particular court, no suit or proceeding can be had in any other court to set aside the award, whether such submission has or has not been made a rule of the court named in it. *Direct Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648.

Forum — *Tribunal Outside Province.*] — Where an agreement for a submission contained a clause that it should be made a rule of the Court of Queen's Bench, in England, and all proceedings thereunder should be governed, as in Great Britain, by the provisions of the English C. L. P. Act:—Held, that this formed no objection to the jurisdiction of the court of chancery in this Province. *Direct United States Cable Co. (Limited)* v. *Dominion Telegraph Co. of Canada*, 8 A. R. 416.

Municipal Act — *Railway Act.*] — The distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

Order for Payment.] — The award in this case ordered certain securities to be assigned to a trustee, who was to dispose of them, and out of the proceeds pay a certain sum to the applicant:—Semble, not an award on which an order to pay would be granted. *Re Thomas and Brooke*, 2 P. R. 78.

Order for Payment.]—Semble, that the court, when applied to under C. S. U. C. c. 24, s. 19, for a rule to pay over money awarded, will exercise the same discretion as formerly on motion for attachment, for which this remedy is now substituted. *Watson* v. *Garrett*, 3 P. R. 70.

Order for Payment.]—To obtain execution under that section it is not sufficient to make the submission a rule of court. The defaulter must be called upon to shew cause why he should not pay, specifying the sum, and a rule absolute obtained. *Re Thomas and Brooke*, 3 P. R. 78; *Niagara and Detroit Rivers R. W. Co.* v. *Buckwell*, 3 P. R. 82.

Order for Payment — *Instalments.*] — The award directed payment of a sum by monthly instalments, with a proviso that on default in any of them the whole should fall due. Quære, whether the court would order payment of the whole sum, unless it were shewn that defendant had notice of the award before default. *Niagara and Detroit Rivers R. W. Co.* v. *Buckwell*, 3 P. R. 82.

Reference to Master.]—The court of chancery has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contained no submission to pay, when the reference has been made an order of the court, and will in such a case order a reference to the master, and not oblige the party to sue at law. *Armstrong* v. *Cayley*, 2 Ch. Ch. 163.

Specific Performance.]—The court of chancery, when the relief given by the award is of a nature proper to be specifically performed, will decree that relief; and that too, although the court cannot specifically perform some part of the award, which is for the benefit of the plaintiff, but which portion the plaintiff consents to forego. *Bell* v. *Miller*, 9 Gr. 385.

Specific Performance.] — The plaintiff and defendant owned adjoining lots, through which a stream flowed freely in its course until defendant threw logs and refuse wood into it, which had the effect of damming back the water on the plaintiff's land, whereupon the plaintiff instituted proceedings at law, which action, with all matters in difference between

the parties, was referred to arbitration, when the arbitrators decided that defendant should remove all the timber across the creek, and pay one-half the costs of the action at law. The defendant having refused to obey the award, the plaintiff filed a bill for the purpose of compelling obedience thereto. The court, under the circumstances, made the decree as asked, and ordered the defendant to pay the costs of the suit. *Hodder* v. *Turvey*, 20 Gr. 63.

Specific Performance.]—Held, that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and, quære, whether if shewn it would be a defence in such a proceeding. *Norvall* v. *Canada Southern R. W. Co.*, 5 A. R. 13.

Reversed by the supreme court. See *Cassels' Dig.* 35.

Time—*Forum.*]—In answer to a bill to enforce an award, the defendant by answer submitted to the court a number of matters as objections to the award, and that a reference back to the arbitrator, with certain instructions, or a reference to the master as to the matters in dispute, should be directed. At the hearing on bill and answer, the defendant objected (1) to the jurisdiction of the court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas; (2) that the filing of the bill was premature, the time for moving against the award not having expired:—Held, that a proceeding to enforce an award by summary application, must be taken after the time for moving against it has elapsed. *Moore* v. *Buckner*, 28 Gr. 606.

Quære, whether a proceeding for that purpose by action at law or suit in equity, can be taken before that time. *Ib.*

Held, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant, having submitted to the jurisdiction by his answer, and himself asked the intervention of the court, could not now be heard to object. *Ib.*

It not appearing that there was any good reason for filing a bill instead of proceeding in the usual way, the court refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Ib.*

VI. Reference Back.

Absence of One Party.] — Objections not appearing on the face of the award cannot be raised against an application for attachment. But where, on such application, it appeared that defendant had not attended the arbitration through some misapprehension, the matters were referred back. *Bleecker* v. *Loyall*, 2 P. R. 14.

Award Valid on its Face.]—The effect of the C. L. P. Act, s. 164, enabling the court to refer back, is not in any way to alter the arbitrator's power or authority; and the court therefore refused to refer back upon an objection, not apparent on the face of the award, that, in considering the nature of the work claimed for, the arbitrator had not conformed to the engineer's certificate, which it was contended bound the plaintiff. *Read* v. *Weir*, 20 U. C. R. 544.

Consent.]—Agreement by the parties to withdraw all but one matter from consideration, and try to settle the other matters themselves and if they could not do so then to refer them back to the arbitrators. Reference back accordingly. Validity of second award. *Baby* v. *Duvcaport*, 2 U. C. R. 65.

Doubt as to Questions Decided.]—Where cross rules had been obtained for an attachment for non-performance of an award, and to set the award aside, and the affidavits were conflicting as to whether a particular question had been decided by the arbitrators, and as to alleged mistake in calculation, the court, under s. 88 of the C. L. P. Act, 1856, referred back the matters in dispute, discharging the rule for attachment without costs. *In re Smith* v. *Ranney*, 2 P. R. 82.

Exceeding Authority.] — A. leased a right of way over a railway, from B., at a rental to be determined by arbitrators, and covenanted to run "at least one train per day, with leave to run more, the maximum number of trains to be fixed by said arbitrators." An award fixing a rental for ensuring four trains a day instead of one:—Held, bad, and referred back. *Fowler* v. *Port Hope, Lindsay, and Beaverton R. W. Co.*, 6 L. J. 13.

General Merits.]—Held, that 39 Vict. c. 28, s. 5 (O.), does not apply to nisi prius references by consent under s. 160 of the C. L. P. Act, so as to enable the court to re-open the award on the general merits. Quære, whether the Act applies in any case to references entered into before its passage. The question of costs considered. *Nagle* v. *Latour*, 27 C. P. 137.

Grounds of Decision.] — Where an award is good on its face, the court will not refer the matters back that the arbitrators may state the grounds of their decision, and thus enable a motion to be made against it if illegal. *Wells* v. *Gzowski*, 16 U. C. R. 42.

Investigation not Full.] — Held, that under the circumstances appearing in this case it could not be said that the arbitrator had fully considered or really pronounced judgment on the questions submitted, and the matters were referred back. *In re Ingersoll and Ellwood*, 3 P. R. 162.

Judgment Entered—*Costs.*]—After the entry of judgment by plaintiff, it is too late to ask to be allowed to set aside the judgment and have the cause referred back to the arbitrators to enable them to certify for full costs in proper form, assuming that the omission to so certify is a ground, but as to which quære. *Keep* v. *Hammond*, 9 L. J. 157.

Mistake.]—An application to refer back on account of a mistake in charging the plaintiff with the same sum twice was refused, the mistake being denied on affidavit, though the arbitrator certified that in his opinion the case should be reopened, as he was not sure this was not the case. *Latta* v. *Wallbridge*, 3 P. R. 157.

Mistake.] — An arbitrator, as appeared from his minutes taken on the arbitration and other evidence, having misconceived certain acts and misunderstood some alleged admissions by counsel, the award was referred back for re-consideration as to the particular item affected by this mistake, with special directions as to costs. *Clancy* v. *Clancy*, 5 P. R. 108.

Mistake—*Costs.*]—Where a rule is asked for to refer a case back to an arbitrator to allow him to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs, the costs of taking the award again before the arbitrator to be borne by the applicant. *Jordan* v. *Ambler*, 8 C. L. J. 67.

Mistake—*Omission of Costs.*]—An arbitrator intended to award that the costs of the reference and award, as well as of the cause, should be paid by the defendant; but by the mistake of the clerk of the plaintiff's attorney, by whom the award was drawn, the costs of the reference and award were omitted. The award was remitted back for correction, but on payment of costs by the plaintiff, as the mistake was not that of the arbitrator only. *Stewart* v. *Beattie*, 37 U. C. R. 538.

Mistake—*Time.*]—An award, by mistake, instead of directing that the plaintiff should pay his own and the defendant's costs of the reference, except $12 which the defendant should pay, directed that the defendant should pay such costs except the $12, which the plaintiff was directed to pay. The award was made on 17th May, 1873, the Saturday before Easter term, but nothing was done, which delay was not accounted for, until 2nd September, when defendant obtained a certificate from the arbitrator as to the mistake made, and on the 11th September obtained a summons in chambers to enlarge the time for making the award till the 1st October, and to remit the award back to the arbitrator for reconsideration. The summons having been enlarged till Michaelmas term, and heard before the full court:—Held, that the application was not too late, and the rule was made absolute. *Connor* v. *McCormack*, 23 C. P. 271.

New Evidence.]—Matters will not be referred back upon the same grounds, as to the discovery of new evidence, &c., as would support an application for a new trial. *McClain* v. *Maitland*, 2 P. R. 279.

New Evidence.]—An award will only be referred back on the same grounds that would formerly have justified its being set aside. The court refused to refer back on the ground of the discovery of new evidence. *Latta* v. *Wallbridge*, 7 L. J. 207.

New Evidence.]—Held, in this case that no case was made out for remitting the action to the arbitrator on the ground of the discovery of fresh evidence, it not being shewn that the evidence could not have been obtained by reasonable diligence; nor on the ground of the absence of a material witness, of whose evidence the defendants were aware during the progress of the reference, and neglected to ask for a commission or postponement. *Lemay* v. *McRae*, 16 O. R. 307.

Points Not Submitted to the Court.] —The award in an action on a building contract, was in favour of the plaintiffs, and one of the arbitrators, in compliance with the defendants' request, certified, without submitting any question, that the building contract was binding, and the engineer's certificate conclusive, and that the award had been based on that assumption. The plaintiffs moved to refer back the award with a direction that the contract did not bind, or to refer back the certificate for amendment, by stating the facts; but held, that as the arbitrators had not chosen to submit any point for decision, and were not bound to do so, the court could not interfere. *Kesteven* v. *Gooderham*, 20 U. C. R. 500.

Rescission of Contract—*Quantum Meruit.*]—P. was a contractor with the Government of Canada for building a post office, and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P., being dissatisfied with the work done by K., took the contract out of his hands before it was completed, and finished it himself. K. then brought an action for the value of the work done by him and on reference by the court to arbitration an award was made in K.'s favour. The court of appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the quantum meruit, yet the cost of completing the work was considerably in excess of the contract price:—Held, reversing this judgment, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shewn to have been committed by him, no benefit could result from sending the award back for reconsideration, and the judgment was not justified. *Kennedy* v. *Pigott*, 18 S. C. R. 699.

Second Reference Back.]—Under a submission giving power to the court to refer back upon any application to set aside the award:—Held, that the power might be exercised repeatedly. The arbitrators, on a reference back, having taken the evidence of professional witnesses without notice:—Held, that such notice was indispensable; but as the arbitrators seemed to have acted under mistake, and not from a settled intention to do injustice, the matter should be referred back a second time. *In re Manley* v. *Anderson*, 2 P. R. 354.

Strong Grounds Necessary.]—Where a reference contains a power to the court to refer back, it will be exercised only when it appears that the award is egregiously wrong, or not sanctioned by the evidence; and held, that no sufficient ground appeared in this case. *In re Brown and Overholt*, 2 P. R. 9.

Time.]—On a compulsory reference a motion to refer back the award may be made within the first six days of the term following its publication. *Kesteven* v. *Gooderham*, 20 U. C. R. 500.

Time—*New Evidence.*]—An application to remit a case back to arbitrators for recon-

sideration need not be made within the time limited for moving to set aside an award, but it must be made within a reasonable time, and delay must be satisfactorily accounted for. Leicester v. Grazebrook, 40 L. T. N. S. 883, approved and followed. *Re Citizens Insurance Co. and Henderson*, 13 P. R. 70.

In this case a reference of the claims upon certain insurance policies was made by submission to two arbitrators, who disagreed, and in pursuance of the submission chose an umpire, who made his award on the 25th July, 1887. On the 29th May, 1888, the insurers moved for a reference back on the ground that they had then recently discovered evidence that a quantity of goods saved from the fire were not credited by the assured in their proofs of loss and were fraudulently concealed:—Held, that there should be a reference back to the arbitrators to consider the new evidence and determine its bearing on the questions originally submitted to them. The reference back should be general and not limited to an inquiry as to what goods were not destroyed by fire. *Ib.*

Two Arbitrators Ignoring Third.]—The arbitrators met and two agreed upon an amount, and told the third (who dissented) that they intended to award this amount, and afterwards, in the absence of the third, and without notice to him, they increased the award; the objection being that the same two arbitrators took evidence secretly and without notice to the third, by going to see a mill at the urgent request of defendant, but during his absence:—Held, sufficient ground to refer the case back, but defendant not wishing that:—Held, not sufficient to set aside the award. *Hall* v. *Wilson*, 7 C. P. 272.

Two Previous Awards set Aside.]—The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the court refused to refer the matter back to them, but ordered that it be remitted to the Judge of the county court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *In re Albemarle and Eastnor*, 46 U. C. R. 183.

Weight of Evidence.]—Motions to set aside or refer back awards made on nisi prius references under s. 100 of the C. L. P. Act, as contemplated by s. 5 of 39 Vict. c. 28 (O.), are only such motions as were allowable before the passing of the Act. Where, therefore, a motion was made to set aside or refer back the award of the arbitrator merely on the ground of the decision arrived at by the arbitrator being against the evidence or weight of evidence, the motion was refused. *Tannce* v. *Scwery*, 27 C. P. 53.

VII. Setting Aside Award.

Action Pending to Enforce.]—Where an action on the award is pending, an application to set aside the award will be refused if the grounds could be urged as a defence under the pleas. *Smith* v. *George*, 12 U. C. R. 370.

Additional Affidavits.]—When a rule nisi is obtained before the last day of the term in which an award must be moved against, the court may allow additional affidavits to be filed after that day. *In re Wheeler and Murphy*, 2 P. R. 32.

Affidavit Evidence.]—Where the umpire chosen upon a reference to arbitration had allowed an affidavit to be used in evidence; but remarked, when it was read, that he would not attach any weight to it, and swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside, but, under the circumstances, without costs. *McEdward* v. *Gordon*, 12 Gr. 333.

Amendment—*Discretion of Arbitrator.*]—Where the arbitrator, having power to amend the pleadings, allowed a plea to be added, and the parties affected, instead of applying to have the reference revoked, proceeded with it notwithstanding the amendment, which they contended was improper and unjust, and applied for relief against the award on this ground, it was refused although the court thought on the materials before it, if the same were before the arbitrator, that the amendment ought not to have been allowed. So, where the arbitrator, having power to allow or disallow a claim set up by one of the parties to the reference, in the exercise of his judgment decided to allow it, and his motives were unassailed, the court, though differing from him as to the propriety of allowing the claim referred to, would not set aside the award on the merits. *Severn* v. *Cosgrave*, 2 C. L. J. 11.

Appeal.]—Appeal from practice court. See *Brown* v. *Overholt*, 14 U. C. R. 64.

Arbitrator's Certificate.]—An action upon a policy of insurance on goods, was referred by a compulsory reference. On motion to set aside the award, the evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised:—Semble, that the certificate could not be looked at, as it was written after the award. *Newman* v. *Niagara District Mutual Fire Insurance Co.*, 25 U. C. R. 435.

Argument not Heard.]—Where counsel had agreed to submit their views on a legal point in the case to the arbitrators in writing, and the arbitrators decided without waiting to hear from them, the award was set aside. *Perlet* v. *Perlet*, 15 U. C. R. 165.

Conflicting Facts.]—A Judge in chambers will not interfere to stay proceedings on an award, in order that a motion may be made in term to set it aside, when the facts sworn to are conflicting, and for all that appears the award may be in accordance with the facts proved. *McLeary* v. *Smith*, 5 L. J. 212.

Creditor Acting as Arbitrator.]—The fact of one of the arbitrators being a creditor of one of the parties to the suit is not sufficient to make an award invalid. *Hall* v. *Wilson*, 7 C. P. 272.

Damages—*Inferences.*]—An award made under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, awarded a certain sum to A. "for the damage done to his property in the village of

Milles Roches, by the construction of the Cornwall canal," stating no further particulars of damage. Affidavits however were filed to shew that the sum awarded must have been given, from its amount, for consequential, and not direct, damage. But held, that such allowance not being stated in positive terms, and the award being silent on the subject, as it might be, the court could not assume the fact to be so, and upon that ground (if a valid one) set aside the award. *Commissioner of Public Works* v. *Daly*, 6 U. C. R. 33.

Denial Conclusive.]—Facts relied on to set aside an award must be distinctly sworn to, and if denied the denial is conclusive. *Slack* v. *McEathron*, 3 U. C. R. 184.

Discussion by Correspondence.] — Where an award was agreed upon between arbitrators, and afterwards one of them dissented, and the others, after discussing his new view by letter, published the award as first agreed upon, it was set aside, because they should have met for the discussion; a correspondence in such a case being insufficient, though the dissenting arbitrator did not object to that method. *Jckyll* v. *Wade*, 8 Gr. 363.

Disputed Facts.]—On a motion to set aside or refer back, it was alleged that $122 had been twice charged against the plaintiff, being identical with a judgment also allowed against him, and the arbitrator certified that in his opinion the matter should be reopened, as he was not sure this was not the case. It was objected also that the judgment was improperly allowed, having been recovered against the plaintiff and another, and therefore not admissible as a set-off. In answer the mistake was denied, and it was shewn that the identity of the two sums had been expressly in dispute before the arbitrator, and that the judgment had been recovered on a note made by the plaintiff, and indorsed by another defendant, in a suit upon it for his accommodation. It was sworn also that the plaintiff was insolvent. The application was refused. Quære, whether under the circumstances the judgment was not properly allowed as a set-off. *Latta* v. *Wallbridge*, 3 P. R. 157.

Disputed Facts.]—An action upon a policy of insurance on goods was ordered to be referred, and the award was in favour of the plaintiff. The evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised. The main objection was that the arbitrator had found due notice and account of the loss given, whereas it was disproved by the plaintiff's own evidence:—Held, that the objection, being to the arbitrator's finding on the evidence, was untenable unless misconduct could be inferred. *Newman* v. *Niagara Mutual Fire Insurance Co.*, 25 U. C. R. 435.

Dissenting Opinion.]—An award cannot be impugned for excessive damages, on the affidavit of one of the arbitrators, giving no data or basis for calculation to support his opinion against the majority. *In re Great Western R. W. Co. and Chauvin*, 1 P. R. 288.

Evidence not Heard.]—Where after the arbitrators had commenced their investigation, both plaintiff and his attorney requested delay, and understood that it had been granted, but the arbitrators awarded in favour of defendant without giving further time, and without hearing all the testimony that the plaintiff might have offered—the award was set aside without costs. *Grisdale* v. *Boulton*, 1 U. C. R. 407.

Evidence not Heard.]—Where the arbitrators refused to examine witnesses, the award was set aside, although before the submission was signed the arbitrators informed the parties that they would not allow either of them, or their attorneys or agents, to be present at their investigations. *In re McMullen and Cayley*, 2 U. C. R. 175.

Evidence not Heard.]—Arbitrators refusing to give time to produce testimony cannot support their award by shewing that such testimony could have been of no service. *In re Bull* v. *Bull*, 6 U. C. R. 357.

Evidence—*Fraud.*]—To an action brought upon an award of compensation to the plaintiff under the Railway Act for injuriously affecting his land, defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was obtained by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators. At the trial, to support this plea defendants called several witnesses to prove that the sum was grossly excessive. None of the witnesses, however, had been brought forward at the arbitration, although defendants could have called them then as well as at the trial; the award was clearly sustained by the only evidence before the arbitrators: no attempt was made to impeach the credit of any of the witnesses who gave it; no misconduct was proved on the part either of the plaintiff or of the arbitrators; and the arbitrators, being sworn, denied any improper motive:—Held, that under these circumstances the evidence as to value of witnesses not before the arbitrators was inadmissible in support of the plea. Quære, whether anything short of actual fraud could support such a plea. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

Upon appeal from this decision, a majority of the court held that such evidence could not be wholly rejected. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425.

Exceeding Authority.]—Award on a submission of differences in two suits, set aside for excess of authority in awarding payment by certain lessees to W. of any sum whatever, there being no claim by him against them embraced in either of the actions referred. *In re Wheeler* v. *Murphy*, 2 P. R. 32.

Exceeding Authority.]—Defendant sold land to one L., and took a mortgage for part of the purchase money. L. conveyed to the plaintiff, subject to this mortgage. Defendant still owned the adjoining land, and disputes as to the boundary having arisen, the plaintiff brought trespass, which, with all matters in difference, was referred. The arbitrator awarded for the plaintiff, and directed that the defendant should discharge this mortgage:—Held, beyond his authority, the mortgage not being mentioned in the reference; and the award was set aside. *Stewart* v. *Brown*, 2 P. R. 158.

Exceeding Authority.]—Where a reference was specific, of accounts rendered up to 31st December, 1864, and the award went far beyond this, the court, upon the application of the person against whom the award was made, denying any binding authority to thus extend the reference, and his oath being unanswered, set aside the award. *In re Roberts and Lorimer*, 2 C. L. J. 11.

Exceeding Authority — *Consent of Counsel.*]—The rule for a reference, granted on reading the consent to refer indorsed on the record at nisi prius, stated that any question of law at the request of either party should be referred to the court, costs of cause, reference and award, to abide the event. The order of reference as made a rule of court, differed from this: 1. by directing that costs, &c., should be in the discretion of the arbitrator; 2. that he should not be required to reserve any legal questions. Messrs. W. & B. acted throughout as agents for defendants' attorney, and all the papers were served upon them: and W. was counsel for defendants both at nisi prius and the arbitration. It was proved that on an undertaking of W., as counsel for defendants, not to raise any question of law, the terms of the reference were altered as above by consent of W., and of counsel for plaintiffs. On motion to set aside the award:—Held, that W. had authority either as counsel or as agent for defendants' attorney to bind the defendants; and the award was upheld. *Wilson v. United Counties of Huron and Bruce*, 11 C. P. 548.

Exceeding Jurisdiction — *Lump Sum.*]—When an arbitrator awards one sum in respect of matters, some of which are within, and some without his jurisdiction, the award must be set aside. *Cockburn* v. *Imperial Lumber Co.*, 26 A. R. 39.

Exceeding Authority—*Amending Award.*]—The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, on the ground that the arbitrators considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, because defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brothers were excluded from the submission. The bill prayed that the award might be amended and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties; there was also a prayer for general relief:—Held, that to grant the decree prayed for would be to make a new award which the court had no jurisdiction to do, but:—Held, also, that under the prayer for general relief the plaintiffs were entitled to have the award set aside. *Vernon* v. *Oliver*, 11 S. C. R. 156.

Exceeding Jurisdiction.] — Held, that on the facts set out in this case, nothing appeared to support the award as to a matter alleged to have been verbally submitted, but not included in the written reference. *Martin* v. *Kergan*, 2 P. R. 370.

Exceeding Jurisdiction.] — The court will not inquire into the grounds on which an award is made, even although it be suggested that the arbitrators have opened a final judgment of a competent court under a submission in the common form, if it does not clearly appear that they have reversed the judgment or gone into its merits. *McLeecy* v. *Vandecar*, 6 O. S. 481.

Excessive Amount.] — An award, under 35 Vict. c. 80 (O.), regarding land required by the defendants, was objected to as excessive, but was upheld, there being evidence to justify the amount awarded, and no ground for imputing partiality or legal misconduct to the arbitrators. *Re Collins and Water Commissioners of Ottawa*, 42 U. C. R. 378.

Ex parte Arguments.]—Where, on a reference by A. and B., A.'s agent attended, and after B. had given evidence of a claim to the amount of £200, retired, understanding from the arbitrators that the case was closed; and B., in his absence, induced two of the arbitrators to award him £1,000, the third refusing to consent—the award was set aside on payment of costs. *VanEgmond* v. *Jones*, 4 O. S. 119.

Ex parte Arguments.] — Where, after an arbitration was closed, the agent of one party sent letters to two of the arbitrators, containing statements and arguments in favour of his principal, which the other party did not see, the award was set aside. *Williams* v. *Roblin*, 2 P. R. 234.

Ex parte Communication.]—Any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference of which the other party and the other arbitrators are not aware, and at which they are not present, is illegal, and renders the award invalid—an arbitrator being a Judge, whose duty it is to be indifferent between the parties. Therefore, where it was shewn that one of several arbitrators had held interviews with the defendant pending the reference, and that the arbitrator in one at least of such interviews consulted the defendant as to the modes in which the award might be framed, and asked the defendant which he preferred, these facts being withheld from the other arbitrators, the court set aside the award, and ordered the defendant to pay the costs. *Pardee* v. *Lloyd*, 26 Gr. 374. Reversed by the court of appeal on the ground that the motion to set aside the award was too late: 5 A. R. 1. An appeal to the supreme court was dismissed. *Cassels' Dig.* 35.

Ex parte Conferences.] — Where at the commencement of a reference, L., the arbitrator for one side, conferred privately with the parties who nominated him on the matters in question, and on the evidence to be offered, and continued this course to the end:—Held, that the impropriety was not cured by shewing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side. The reference was to two, with power to them to appoint an umpire, who was to award if they disagreed. An umpire was appointed, and made an award:—Held, that the irregularity of L.'s course in holding private conferences with one of the parties was sufficient to avoid the award of the umpire. After the two arbitrators had finally differed, the umpire had a private conversation on the subject of the reference with the arbitrator L., in the absence of the other arbitrator and of the parties:—Held, that as L. had acted as the agent for one side, private conversation with him was as injurious and objectionable as private conversation with the

principals would have been. *In re Lawson and Hutchinson*, 19 Gr. 84.

The court allowed the party prejudiced to serve a supplementary notice embodying the objections as to the course of the umpire and arbitrator L., the same having come to light on cross-examination, and there being strong reason for apprehending that the award was not a fair award. *Ib.*

Ex parte Evidence.]—Held, no objection to an award by three arbitrators, but which might have been made by any two, that one arbitrator alone examined a witness without notice to the opposite party, it being sworn that the other two arbitrators were totally ignorant of such evidence when they made the award. *Boyle* v. *Humphrey*, 1 P. R. 188.

Ex parte Evidence.]—Where a witness was examined in the absence of defendant the award was set aside. *McNulty* v. *Jobson*, *Jobson* v. *McNulty*, 2 P. R. 119.

Ex parte Evidence.]—Though the arbitrator stated that the evidence thus given had in no way influenced his decision. *Waters* v. *Daly*, 2 P. R. 202.

Ex parte Evidence.]—Where a witness for one party is examined in the absence of and without notice to the other party, the award will be set aside. *Hickman* v. *Lawson*, 8 Gr. 386.

Where two arbitrators took the evidence of B. in the absence of the plaintiff and of the other arbitrator, by which evidence it appeared the two were influenced in their award:—Held, that the award was invalid. *Ib.*

Ex parte Evidence.]—Held, that the award in this case was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed. *Whitely* v. *McMahon*, 32 C. P. 453.

Ex parte Offer.]—After the evidence had been closed the construction committee of the railway company wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding:—Held, that the award was bad. Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. *Herring and Napanee, Tamworth, and Quebec R. W. Co.*, 5 O. R. 249.

Ex parte Statements.]—In this case the arbitrator having received statements and information upon the subject in dispute, in the absence of one of the parties, without communicating to him that he had done so, the award was set aside with costs. *In re Cruickshank and Corby*, 30 C. P. 466.

Ex parte Statements.]—Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other:—Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred; it is only necessary to shew that their minds may possibly have been influenced against the applicant by the communications that have taken place. *Re Ferris and Eyre*, 18 O. R. 395.

Where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it:—Held, that the award was bad, and must be set aside. *Ib.*

Ex parte Statement After Decision but Before Award Signed.]—In the conduct of arbitrations the rule is inflexible that the arbitrators must be scrupulously guarded against any possible charge of unfair dealing towards either party; therefore where one of the parties to a reference, who had been examined as a witness, after the evidence had been closed and the matter argued, sent by mail his affidavit explaining some portion of his evidence, to the arbitrator, but which was not received by him until after he had written out the view in accordance with which he subsequently made his award; the court affirmed the judgment of the court below setting aside the award. *Race* v. *Anderson*, 14 A. R. 213.

Explanatory Documents.]—The court will refer to papers delivered by the arbitrators simultaneously with the award, and intended to be explanatory of it, as a part of the award itself. *Hall* v. *Ferguson*, 4 O. S. 392.

Expropriation.]—In a railway expropriation case the respondent, in naming his arbitrator, declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially, and subsequently an award of $1,974.25 damages and costs for land expropriated was made under Art. 5164, R. S. Q. The demand for expropriation, as formulated in their notice to arbitrate by the appellants, was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless:—Held, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction. *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Mathieu*, 19 S. C. R. 426.

Fence Viewers' Award.]—The Court of Queen's Bench has no authority to set aside an award of fence viewers made under C. S. U. C. c. 37. *In re Cameron and Kerr*, 25 U. C. R. 533.

Form of Rule Nisi.]—The rule must be drawn up on "reading the award;" and the

alleged defects in the award must be sufficiently pointed out. *Grand River Navigation Co.* v. *McDougall*, 1 U. C. R. 255; *Wilkins* v. *Peck*, 4 U. C. R. 263.

Form of Rule Nisi.]—A rule nisi, not drawn up "on reading the award," is sufficient if among "the affidavits and papers filed," on reading which the rule was drawn up, there is a copy of the award verified by affidavit. *Tracey* v. *Hodgest*, 7 U. C. R. 5.

Form of Rule Nisi.]—A rule nisi was discharged with costs, because not drawn up on reading the award or copy, nor the submission, nor the rule making it a rule of court. *Jacobs* v. *Ruttan*, 2 C. L. Ch. 138.

Form of Rule.]—A rule nisi to set aside an award must be drawn up on reading the award or a copy of it. *Re Johns and Montreal and City of Ottawa R. W. Co.*, 40 U. C. R. 359.

Formal Defects.]—An award will not be set aside because the style of the cause in which it is intituled is not set out correctly and at length, provided it can be sufficiently identified by reference to the body of the award as being in the cause referred. *Creighton* v. *Brown*, 1 P. R. 331.

Forum—*Improper Execution.*]—Semble, that an objection that two of the arbitrators made the award without notice to the third can be taken advantage of in an action on the award. The application to set aside an award under such circumstances should be made to the court in which the action is pending. *Smith* v. *George*, 12 U. C. R. 370.

Forum.]—An award having been directed to be made within a year by an order of the chancery division where the parties were litigating concerning it:—Held, that a motion to set it aside should have been made in that division, and should be transferred. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.

Fraud—*Concealment of Facts.*]—The court will relieve against an award made between partners in ignorance, on the part of the arbitrators, and of the remaining partners, that important transactions had not been entered by the other, the managing partner, in the books of the firm, in consequence of which omission the award had been to a corresponding amount too favourable to such managing partner. An injunction to restrain proceedings on a judgment recovered at law upon an award alleged to have been made under these circumstances was continued to the hearing, in a case in which the ultimate success of the plaintiffs at the hearing was not considered as wholly free from question, the amount of the judgment being ordered into court. *Wilson* v. *Richardson*, 2 Gr. 448.

Fraud—*Arguments.*]—Action on an award of compensation to plaintiff under the Railway Act, for injuriously affecting his land. Plea, that the award was procured by fraud and misrepresentation. The land in question was situate upon a navigable river, running down to high water mark, and defendants' railway was built upon cribs in the river, cutting him off from access to the water, which was the injury complained of. The jury were directed that if the plaintiff contended before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to damages, when he had not, this was evidence of fraud under the plea:—Held, a misdirection, for no argument used by the plaintiff to enhance his claim or place his case in the best light, could be a fraud. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520; in appeal, 27 U. C. R. 425.

Fraud—*New Evidence.*]—An award may be remitted to arbitrators for reconsideration and redetermination under the Ontario statute though the result of the reconsideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators. The court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made. *Green* v. *Citizens' Ins. Co.*, 18 S. C. R. 398.

General Finding.]—The submission directed a specific finding on a particular issue, and the arbitrator gave only a general award for defendants. A summons to set aside the award on this ground was discharged, on condition that defendants should allow the costs of this issue to be taxed to the plaintiff. *Creighton* v. *Brown*, 1 P. R. 331.

General Rule—*Award Valid on its Face.*]—An award cannot be impeached on the ground that it is erroneous in either law or fact unless the error appears on the face of the award. The cases in which the court will interfere are confined to those where such an error so appears; or where there has been corruption, fraud, or excess of jurisdiction: or the arbitrators making the award admit the mistake. *Re Grant* v. *Eastwood*, 22 Gr. 563.

Grounds Already Passed Upon.]—The court will not set aside an award upon affidavits setting forth a party's just claim to the allowance of large sums of money upon grounds which the arbitrators had rejected. *McMillan* v. *McLean*, 4 O. S. 5.

Impossibility of Compliance.]—The inability of a company awarded against under their charter to expend their funds in paying the award, would be no ground for setting it aside. *In re Town of Barrie* v. *Northern R. W. Co.*, 22 U. C. R. 25.

Improper Reception or Rejection of Evidence.]—The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside. *Webster* v. *Haggart*, 9 O. R. 27.

The evidence received consisted in statements made by the plaintiff ante litem motam in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive parts of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to, and he made no request to be allowed to reconsider his award:—Held, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, and especially so since R. S. O. 1877 c. 50, s. 289, when

it did not appear to have occasioned any miscarriage on the merits. *Ib.*

Improper Reception of Evidence — *Mistake in Principle.*]—Held, affirming 16 O. R. 397, that where the action and all matters of account and counterclaim therein and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged improper reception of evidence by him, or because of alleged errors in the principle of computation upon which he proceeded; the evidence having been received with reference to matters in difference between the parties and within the jurisdiction of the arbitrator, and the principle of computation being disclosed in a draft award, not delivered with, nor forming any part of the formal award, and in conversations, after the making of the award, between the arbitrator and one of the solicitors for the attacking party, the arbitrator himself not admitting that he had made any mistake, and not assisting the party complaining of the award to apply to the court to set it right. Dinn v. Blake, L. R. 10 C. P. 388; Hodgkinson v. Fernie, 3 C. B. N. S. 189, followed. Re Dare Valley R. W. Co., L. R. 6 Eq. 429, distinguished. East and West India Dock Co. v. Kirk, 12 App. Cas. 738, considered. *Lemay* v. *McRae*, 16 A. R. 348, 18 S. C. R. 280.

Inconsistent Provisions.] — An award that defendant should pay the plaintiff a certain sum, including the costs of the reference, and afterwards directing that each party should pay half the same costs, is bad for repugnancy. *Shaver* v. *Scott*, 5 O. S. 575.

Inconsistent Provisions.] — Held, that an award (in an action of replevin for a promissory note) that declared the defendant to have detained the note illegally, and at the same time awarded that it should be delivered up, upon payment of a certain sum, (which amount was due thereon), was not void for inconsistency, as it effected substantial justice between the parties. *Lund* v. *Smith*, 10 C. P. 443.

Interested Witness.]—When arbitrators without consent examined an interested witness, and afterwards awarded in favour of the party calling him, the award was set aside. *Davis* v. *Birdsall*, 2 U. C. R. 199.

Interim Finding—*Waiver.*]— By clause 2 of the order of reference, the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported "we do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," &c.:—Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of s. 209 of the C. L. P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award. *Conmee* v. *Canadian Pacific R. W. Co.*, 16 O. R. 639.

Held, in this case, that apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding was too late, failed. *Ib.*

Held, upon the evidence, that there was no waiver of the objections to the finding; and that although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one. *Ib.*

Invalidity Not Presumed.]—The court will not intend matter; such matter must be shewn affirmatively. *Tracey* v. *Hodgest*, 7 U. C. R. 5.

Irregularity — *Costs.*] — An award set aside for irregularity of the arbitrators, such as the examination of witnesses in the absence of the parties, will be set aside without costs. *Campbell* v. *Boulton*, 1 U. C. R. 407.

Irregularity — *Waiver.*] — Where either party to an arbitration objects to an irregularity in conducting it—as, for instance, against a certain person administering the oath to the witnesses—and takes his chance of the award, he cannot afterwards, on the same ground, impeach the award. *Slack* v. *McEathron*, 3 U. C. R. 184.

Irregularity — *Waiver.*] — The party on whose motion an order of reference has been made a rule of court cannot, in opposing an application to set aside the award, object that the cause is improperly styled in such rule. *Creighton* v. *Brown*, 1 P. R. 331.

Letters Read and Rejected.]—The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it does not appear that they actually received them as evidence. *Hotchkiss* v. *Hall*, 5 P. R. 423.

Lump Sum—*Dual Capacity.*]—The plaintiff and defendant agreed to refer all matters touching and concerning all claims and demands whatsoever of the plaintiff against or in respect of the estate of the late T. P. (except as to a specific devise), and all accounts, claims, and demands whatsoever then existing between the plaintiff, and defendant as executor of T. P., or otherwise howsoever. The arbitrator awarded that $4,485 was due from defendant as executor of T. P., and otherwise, to the plaintiff in respect of the matters referred, which sum he directed to be paid, and that when paid it should be in full satisfaction of all demands by plaintiff against defendant as such executor, and otherwise, in respect to all the matters referred:—Held, no objection to the award, that it did not find separately the amount awarded against defendant as executor, and in his own right. *Perrin* v. *Perrin*, 32 U. C. R. 606.

Miscalculating Strength of Case.]—Where parties to a protracted reference

thought their case so strong that it would be impossible for the arbitrator to find against them, and did not do all that it was in their power to do to repel the case of their opponent, relief against an adverse award was refused on the ground of surprise and discovery of new evidence. *Severa* v. *Cosgrave*, 2 C. L. J. 11.

Misconduct.] — On application to set aside awards for misconduct of arbitrators, the facts which are relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred. *Hotchkiss* v. *Hall*, 5 P. R. 423.

Misconduct—*Specific Charge.*]—A charge of corruption and partiality against an arbitrator must be sustained by specific, not by general, affidavits. *Burr* v. *Gamble*, 4 Gr. 626.

Misconduct — *Umpire.*] — The reference was to two arbitrators with power to them to appoint an umpire, who was to make an award if the two disagreed; an umpire was accordingly appointed: and the arbitrators differing the umpire made an award:—Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference as a condition precedent to the umpire's authority coming into force, as well as their free judgment in the appointment of the umpire: and that one of the arbitrators holding private conferences with one of the parties was sufficient to avoid the award of the umpire. *In re Lawson and Hutchinson*, 19 Gr. 84.

Misconduct—*Consent—Remitting Back.*] —By s. 12 of R. S. O. 1897 c. 62, the court may set aside an award when an arbitrator has misconducted himself, and by s. 35 the court has the same powers as to references under order as are by the Act conferred on it as to references out of court. By Consolidated Rule 652 the court may remit the case referred or any part back for further consideration. When an arbitrator appointed in court by consent of the parties improperly heard evidence behind the back of one of the parties which affected a portion of the award:—Held, that under the above sections Rule 652 does not apply to the case of an arbitration ordered by consent in court to an arbitrator selected and agreed on between the parties, and that the whole award must be set aside. Semble, s. 42 of the above statute gives a discretion to the court setting aside an award to deal with the costs. *Kennedy* v. *Beal*, 29 O. R. 589.

Mistake.]—An award will not be set aside for a mistake in law on the part of the arbitrators, not apparent on the face of the award. *Town of Kingston* v. *Day*, 1 P. R. 142.

Mistake.]—Where all matters in difference in law and equity have been referred, and the award is legal on its face, it will not be set aside, although it may seem that the arbitrators have mistaken the law, and the amount awarded is large. *Hall* v. *Ferguson*, 4 O. S. 392.

Mistake.]—The alleged mistake in law and fact must appear on the face of the award, or be disclosed by some contemporaneous writing. *McDonald* v. *McDonald*, 7 L. J. 297.

In this respect there is no difference between awards made on compulsory reference under the C. L. P. Act and other awards. *Ib.*

Mistake.]—The rules as to setting aside awards are the same with respect to compulsory references as to others. The court, therefore, refused to interfere on affidavits tending to shew that the arbitrator was mistaken as to the law and fact. *Sadler* v. *Carruthers*, 20 U. C. R. 560.

Mistake—*Delay.*]—An award, by mistake, instead of directing that the plaintiff should pay his own and the defendant's costs of the reference, except $12, which the defendant should pay, directed that the defendant should pay such costs, except the $12, which the plaintiff was directed to pay. The award was made on the 17th May, 1873, the Saturday before Easter term, but nothing was done—which delay was not accounted for—until 2nd September, when defendant obtained a certificate from the arbitrator as to the mistake made, and on the 11th September obtained a summons in chambers to enlarge the time for making the award till the 1st October, and to remit the award back to the arbitrators for reconsideration. The summons having been enlarged till Michaelmas term, and heard before the full court:—Held, that the application was not too late, and the rule was made absolute. *Connor* v. *McCormack*, 23 C. P. 271.

Mistake—*Initials—Amount.*]—Held, that a mistake in the initial letters of the name of one of the parties is not fatal; and that an award for a certain sum, and that a verdict should be entered for the said sum, naming a larger sum, is good for the smaller one. *Charles* v. *Hickson*, T. T. 3 & 4 Vict.

Mistake—*Interest.*]—A mistake in the calculation of interest was held no objection. *Priestman* v. *McDougal*, Tay. 451.

Mistake—*Mutual.*] — Declaration on a joint bond by defendants, M. & G., to perform an award concerning all differences between the plaintiff and defendants, averring an award that M., one of the defendants, was indebted to the plaintiff in a sum named, and directing him to pay it by a certain day. Plea, on equitable grounds, in substance, that the only matter in dispute in the action, besides the amount due by M., was whether G. was liable with him, and it was distinctly agreed that in case the arbitrators should award for G., such award should release him from all liability on the bond: that instructions were given to prepare an instrument to carry out said agreement, but by mutual mistake it was not so worded, and was executed without the error being discovered; and that upon the reference the plaintiff abandoned all claim upon G., and the arbitrators thereupon awarded as they did:—Held, on demurrer, plea good. *Gerrie* v. *McDonell*, 18 U. C. R. 146.

Mistake—*Names of Parties.*]—Where a verdict was taken for the plaintiff, subject to a reference, and the arbitrator awarded for defendant, but everywhere styled the plaintiff "John," instead of "Patrick,"—the court set the award aside, and granted a new trial. *McManmon* v. *McElderry*, H. T. 6 Vict.

Mistake—*Two References — Umpire Not Properly Appointed.*]—Where a plaintiff,

having two actions pending, one in a representative character and the other in his own right, referred both to arbitrators, who were to award by a certain day, or appoint an umpire in writing, and the arbitrators not being able to agree appointed, but not by writing, an umpire, who made an award, which the arbitrators adopted and published as their own before the time limited for making the award had expired, and awarded thereby a sum of money to the plaintiff in his representative character—the court, on affidavits of the umpire and of the arbitrators, that the money was intended for the plaintiff in his own right, refused an attachment for non-payment of the sum awarded; and afterwards, on motion, set the award aside on account of the mistake, and because it was not the arbitrators' own award. *Dennison v. Sandford*, 3 O. S. 379.

New Evidence.]—Discovery of fresh evidence is no ground, unless it be shewn satisfactorily why it was not before obtained. *Dawn v. Peterborough and Cobourg R. W. Co.*, 2 P. R. 79.

New Evidence.]—The court refused either to set aside or refer back for the discovery of new evidence. *Latta v. Wallbridge*, 7 L. J. 207.

Notice of Meeting.]—The court set aside an award made under 16 Vict. c. 181, s. 33, as to the damages to be paid to a party through whose land the municipality had opened a road, where it appeared that no notice had been given to the municipality of the meeting of the arbitrators, and that no one had attended on their behalf. *In re Johnson and Township of Gloucester*, 12 U. C. R. 135.

No Notice of Taxation—*Severable Demands.*]—All matters in difference in a cause and on a building agreement between plaintiff and defendant, were referred, costs of the cause and of the reference to abide the event. The award, after disposing of the different issues in plaintiff's favour, assessed his damages over and above his costs and charges at £52, and fixed the costs of the reference and award at £20. The costs of the suit were afterwards taxed without notice to defendant, and a demand made of the amount awarded, the costs of the award as fixed by the arbitrators, and the taxed costs:—Held, that the want of notice of taxation was not a ground for setting aside the award, but for withholding the attachment until the costs could be revised; that the demand upon which the attachment was moved for, though too large in including the costs of the award, was good as to the rest, each sum having been separately demanded. The rule for attachment was therefore made absolute, but the writ was ordered to lie in the office a month, to enable the defendant to get the costs of the suit and award taxed, and make payment. *Jones v. Reid*, 1 P. R. 247.

No Notice to Third Arbitrator.]—Where the award was made in a hasty manner on the day of submission, the third arbitrator not being informed of the sitting, and there being a misapprehension on the part of the litigants as to what was referred, the award was set aside. *In re McCluny and Motley*, 6 L. J. 92.

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

Omission of One Party to give Evidence.]—When the plaintiff's attorney had attended a meeting of arbitrators, the court refused to set aside the award, because the plaintiff had not attended to give his evidence according to the provision in the rule of reference, from the miscarriage of a notice sent to him by his attorney, and although the award proceeded principally upon the evidence of defendant. *McDougall v. Camp*, Tay. 87.

Omission to take Oath — *Municipal Act.*]—The failure of the arbitrator to take the oath required by s. 458 of the Municipal Act, R. S. O. 1897 c. 223, is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award. *Re Burnett and Town of Durham*, 31 O. R. 262.

One Party Present at Deliberations—*One Arbitrator not Executing—Form of Award.*]—H. insured a stock of teas, &c., and having sustained loss by fire, the matter was referred to L. and C., and a third person to be appointed by them, the appraisement and estimate of the loss by them or any two of them to be binding. L. and C. appointed M. third arbitrator. After the close of the evidence and several meetings by the arbitrators, M., having drawn the document set out in the report, produced it at a meeting of the arbitrators, and read it as his finding. At the next meeting a document formally drawn up by the company's solicitor was produced and signed by M.; but for some reason it was abandoned. At this meeting the arbitrators permitted the manager and inspector of the company to be present and take part in the discussion as to the amount of the award and the fixing of the costs. L. and M. agreed on the amount, but C. said he would not sign such award, and an appointment was then made for the next day, C. being present, to meet and sign it. The award was accordingly made on the following day by L. and M., C. not attending:—Held, that under the circumstances C.'s absence formed no objection. Held, also, that permitting the officers of the company to be present and take part in the deliberations of the arbitrators was such improper conduct as to render the award bad. Held, that the document written and signed by M., and expressed throughout in the first person as his decision alone, without anything contained therein shewing it to be the decision of L., the other arbitrator also, although signed by L., could not be upheld as the award of two arbitrators. *Re Hubbard v. Union Fire Ins. Co.*, 44 U. C. R. 391.

Order of Court.]—It is no objection to a motion to set aside an award, that the award has been made an order of court. *In re Lawson and Hutchinson*, 19 Gr. 84.

Order of Reference not Complied With.]—Award held invalid for want of a proper return of the evidence and facts as required by the rule of reference. *Murphy v. Cotton*, 14 U. C. R. 426; *Ross v. County of Bruce*, 21 C. P. 548.

Original Award not Produced.]—Where it was sworn that the original was in

the possession of plaintiff's attorney, who refused to give it up, a rule nisi was granted, which was afterwards made absolute, on the production and verification of copy of the award served. *Steen* v. *Glass*, M. T. 1 Vict.

Partiality.]—Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality and partiality. *Jekyll* v. *Wade*, 8 Gr. 363.

Party Examined.]—The award will be set aside if arbitrators examine one of the parties upon oath when not authorized to do so by the submission. *Stocking* v. *Crooks*, Tay. 392.

Points of Law not Reserved.]—On a submission to arbitration of cause and all matters in difference therein, subject to such points of law as should properly arise on the pleadings and evidence, a question arose as to the sufficiency to bind one of the parties of certain evidence tendered respecting some extra work done outside of the sealed contract entered into between the parties, and the arbitrators, instead of reserving this for the opinion of the court, themselves decided that the evidence was quite sufficient, merely reporting what the legal objections were. The court, with very strong observations on the flagrant disregard of their plain duty under the submission, refused to refer the matter back to the arbitrators, but simply set aside their award and the verdict found by them in favour of the plaintiff. *Ross* v. *County of Bruce*, 21 C. P. 548.

Production of Award.]—The objections taken to the award were, that having been made ex parte, and without hearing witnesses, it was void, and it was urged that it might therefore be set aside without producing it; but held, otherwise. Re Hinton v. Meade, 24 L. J. Ex. 140, not followed. *Re Johnson and Montreal and City of Ottawa R. W. Co.*, 40 U. C. R. 259.

Question not Dealt With.]—Where all matters in difference were referred to three arbitrators, the award to be made in writing by them, or any two of them, and it afterwards appeared that one of the three dissented from an award made by the other two, and that they had made no decision regarding a promissory note in difference, which had been brought under their notice, the award was set aside. *Kemp* v. *Henderson*, 10 Gr. 34.

Rejecting Evidence.]—Where an order of reference by consent provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation," it was held that he had no discretion to reject the evidence of one of the parties on his own behalf. *Lister* v. *Ham*, 1 C. L. J. 298.

Revoking Submission.]—Upon a reference to determine the damage sustained by plaintiff by reason of the taking and detention by defendant of a certain schooner, the arbitrators awarded $2,200.65, and among other items $40 for travelling and law expenses. Upon a motion to set aside the award, the court, without admitting the legality of the charge, refused to interfere as the defendant should have applied to revoke the submission. *Carveth* v. *Fortune*, 12 C. P. 504.

Rule of Court.]—Where there is no provision in an order of reference at nisi prius to make it a rule of court, the court will not set aside the award. *Cumming* v. *Allen*, Tay. 205.

Severable Provision.]—Where differences between the parties to a building contract as to extra work were referred, and the arbitrators awarded on matters in regard to the original contract not relating to extra work, and the bad part of the award could not be separated, the award was set aside. *In re Knowlson* v. *Inglis*, 7 L. J. 124.

Severable Provision — *Costs.*]—When after action matters in dispute have been referred generally, without anything as to costs, and the arbitrators award a sum to the plaintiff, and direct that the costs of defence and of the award are to be deducted therefrom, the court will not set the award aside because of such deduction. Semble, that when arbitrators award the costs of the arbitration without authority to do so, if they are separable, the award is only bad as to that part. *Faulkner* v. *Saulter*, 1 P. R. 48.

Costs awarded without power are separable, and the award is only bad as to that part. *Ib.*; *Jones* v. *Reid*, 1 P. R. 247; *Roddy* v. *Lester*, 14 U. C. R. 259.

Severable Provision — *Costs.*]—Where costs were awarded without authority, and could not be separated from the sum awarded, the award was set aside. *Webster* v. *Black*, 6 O. S. 105.

Severable Provision — *Delegation of Powers.*]—All differences concerning the renting of a farm by defendant to plaintiff, and all other matters in dispute, were referred to arbitrators, who awarded a division of certain crops and stock specified; and in order that an equal division should be made, they ordered that the defendant and plaintiff should select two disinterested persons from the neighbouring farmers, whose decision should be final. And they further awarded £150, to be paid to the plaintiff by defendant:—Held, that the award was bad for the delegation to third parties, and for uncertainty; and that the plaintiff could not recover the £150, that part of the award not being separable from the rest. *Harrington* v. *Edison*, 10 U. C. R. 114.

Severable Provision — *Time for Payment.*]—On a reference under 16 Vict. c. 219, and 20 Vict. c. 80, the Toronto Esplanade Acts, the sum awarded was directed to be paid forthwith, whereas the statute allows a year from the award or from any rule of court ordering payment, but held, that this part of the award, which was clearly bad, might be separated from the rest. *In re City of Toronto and Leak*, 23 U. C. R. 223.

Statutory Finality.]—Awards under 9 Vict. c. 81, ss. 25 and 27, are final, and not subject to be set aside by the court. *In re Great Western R. W. Co.* v. *Light*, 1 P. R. 378.

Statutory Finality.]—What objections are available against an award declared by statute to be final. *Kennedy* v. *Burness*, 15 U. C. R. 473.

Strong Grounds of Merits.]—The court will not set aside an award upon an

affidavit of merits, except upon manifestly clear and strong grounds. *Scobell* v. *Gilmour*, 5 U. C. R. 48.

Supplementing Grounds.]—On a motion to set aside an award, the court allowed the party prejudiced to serve a supplementary notice embodying objections as to the course of the umpire and arbitrator, which had come to light on cross-examination, there being strong reasons for apprehending that the award was not a fair award. *In re Lawson and Hutchinson*, 19 Gr. 84.

Suppression of Facts.]—Where the defendant made a representation to the arbitrators which was to influence their conduct, but suppressed a material fact, the court set aside the award. *Hickman* v. *Lawson*, 8 Gr. 386.

Time for Moving.]—Too late after four terms from the publication, and an attachment granted for non-performance. *Crooks* v. *Chisholm*, 4 O. S. 121.

Time.]—Where a verdict has been taken, subject to a reference, the award, unless under very peculiar circumstances, must be moved against within the first four days of the term after it was made. *Campbell* v. *Cameron*, 1 U. C. R. 29.

Time.]—Where a cause and all matters in difference were referred:—Held, that judgment could not be entered until after the first four days of the term following the award, and, semble, the defendant would have the whole term to move in. *Williams* v. *McPherson*, 2 P. R. 49.

Time.]—Where a verdict was taken, and an award made on the first day of term, which defendant became aware of on the following Monday:—Held, that a motion on the last day of term was too late. *Perley* v. *Loder*, 2 P. R. 105.

Time.]—Held, that the undertaking set out in this case, given on the last day of term, was a waiver of an objection as to time, so that the motion might be made in the following term. *McNulty* v. *Johson*, *Johson* v. *McNulty*, 2 P. R. 119.

Time.]—It would seem that a motion to set aside an award in the court of chancery, must be made within the common law term following the publication of the award. *Re Taylor and Bostwick*, 1 Ch. Ch. 53.

Time.]—Held, that an application to set aside a judgment on an award after a lapse of two years was too late. *Wood* v. *Moodie*, 3 U. C. R. 79.

Time.]—The time given to move under 9 Vict. c. 37, and 10 & 11 Vict. c. 24 — viz., one year—extends to Upper Canada as well as Lower Canada. *Commissioner of Public Works* v. *Daly*, 6 U. C. R. 33.

Time.]—An application was made during Easter term to set aside an award of the 9th December preceding, a term having elapsed after the making of the award:—Held, too late. *In re Matthews and Webster*, 1 P. R. 75.

Time.]—An award, under submission by bond, was made on the 31st January, and a notice mailed to the plaintiff on that day, which was received on the 2nd February, the first day of Hilary term:—Held, that an application in Easter term was too late. *In re Cumming and Graham*, 1 P. R. 122.

Time.]—An action of covenant was referred at nisi prius, and on certain breaches assigned a verdict taken for specified sums, the damages on other breaches being reserved; and as to two of the breaches particularly, a verdict was entered for £125, subject to the award. The rule of reference required that the arbitrators should report in or with their award the evidence and facts on which they should find the damages awarded (if any) on either or both of these breaches, so as to enable the court to determine whether such evidence and facts would in law warrant the damages. The arbitrators awarded damages on each of these breaches, but omitted to return the evidence and facts. A copy of the evidence only was found in court, not signed, or annexed to the award, or referred to in it; and the facts did not otherwise appear:—Held, that under the circumstances of the case and terms of the submission, the award might be moved against although the first term after it was made had expired. *Murphy* v. *Cotton*, 14 U. C. R. 426.

Time.]—The time for moving runs from the time the defendant is notified of the award having been made, not from the making. And when it is made under a rule of reference, the court, on good ground shewn, will not always hold the party to the strict rule of moving within the next term. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.

Time.]—The delay in moving from the 21st August, when the award was made, until the 4th December, was held sufficiently accounted for by the loss of the nisi prius record and submission. *Stewart* v. *Beattie*, 37 U. C. R. 538.

Time.]—Held, that an application to set aside an award made under s. 456, R. S. O. 1877 c. 174, and published before Trinity term, 1877, was too late on the 26th November following, though the full court did not sit in Trinity term. *Re Moyle and City of Kingston*, 43 U. C. R. 307; *Stewart* v. *Beattie*, 37 U. C. R. 538.

Such an award having been set aside by a single Judge, on motion made after Trinity term, the court gave effect to this objection though first taken on appeal from the rule setting aside the award. *Ib.*

Time.]—An award made under s. 160, C. S. U. C. c. 22, before Trinity term, must be moved against within the first four days of that term, even though the full court may not sit, as the motion can be made to a single Judge within the same period. *Wilson* v. *Richardson*, 43 U. C. R. 365.

Time.]—On the 2nd December, 1878, the submission being within the 9 & 10 Will. III., the plaintiff moved to set aside an award made on the 13th August previously, accounting for his delay on the ground that the defendant had, on the 4th September, before the end of the next term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to this notice:—Held, reversing 26 Gr. 374, that the evidence did not shew that the delay was induced by the de-

fendant, but that even if it had, it would have been no excuse for the delay. *Pardee* v. *Lloyd*, 5 A. R. 1. Affirmed by the Supreme Court: *Cassels' Dig.* 35.

Time—*Abolition of Terms.*]—An award must be moved against within the term following its publication, or within the period which such term formerly occupied. And when the term has been abolished, where an award was published on the 15th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was:—Held, too late. *Kean* v. *Edwards*, 12 P. R. 625.

See Coumee v. *Canada Pacific R. W. Co.*, 16 O. R. 639; *Redick* v. *Skelton*, 18 O. R. 109.

Time.]—In the Province of Ontario the governing statute as to the time for applying to set aside an award which has been made under a rule of court, or to remit it to the arbitrators for reconsideration and redetermination, is R. S. O. 1887 c. 53, s. 37, and it is not required that the application should be made before the last day of the term next after the making of the award as provided by 9 & 10 Wm. III. c. 15, s. 2. *Green* v. *Citizens Ins. Co.*, 18 S. C. R. 338.

Time.]—Section 4 of 52 Vict. c. 13 (O.), which requires motions to set aside awards of a specific kind to be made within fourteen days from the filing thereof, and s. 6 of the same Act, which allows motions to set aside awards of another kind to be made within three months from the making and publication thereof, do not apply to arbitrations under the Municipal Act, and a motion made on the 10th February, 1891, to set aside an award made in an arbitration under the Municipal Act on the 31st December, 1890, and filed on the 19th January, 1891, was held to be in time. The scope and meaning of the several sections of the Act considered. *In re Prittie and Toronto*, 19 A. R. 503.

Time.]—A motion to set aside an award under a reference by consent was made within fourteen days of the filing, but more than four months after the making thereof. Held, too late. *Baldwin* v. *Walsh*, 20 O. R. 511.

Time.]—A notice of motion to set aside an award made on 24th July, 1893, of which the applicants had notice on 7th August, 1893, was served on the 29th March, 1894:—Held, too late. The motion, if made under 9 & 10 Wm. III. c. 15, should have been made before the last day of what was formerly Trinity term; and, if the award was one to which s. 4 of 52 Vict. c. 13 (O.) did not apply, by s. 6 could not have been made after the expiration of three months from the making and publication. The provision of s. 2 of the latter Act, as to filing awards, does not prevent the time limited by either enactment from running. *Re Garson and Town of North Bay*, 16 P. R. 179.

Time—*Official Arbitrators.*]—Under the provisions of 44 Vict. c. 25, s. 43 (D.), an application to the court for an order to set aside an award of the official arbitrators must be made within three months after the party applying has had notice of the making of the award, but the order need not be granted within that period. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Time.]—A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired. In re Prittie and Toronto, 19 A. R. 503, considered. Construction of 52 Vict. c. 13 (O.), discussed. Remarks as to the necessity of revision of the legislation as to arbitrations. *In re Caughell and Brower*, 24 A. R. 142.

Time—*Municipal Act.*]—The six weeks allowed by s. 465 of the Municipal Act, R. S. O. 1897 c. 223, for an application to set aside an award, run from the publication to the parties of the award. *Re Burnett and Town of Durham*, 31 O. R. 21.

Time of Execution not Stated.]—Where the time for making an award expired on the 1st September, and the affidavit of execution of the award was sworn on the 7th August, it was held sufficient, without stating on what day the award was executed. *McPherson* v. *Walker*, 1 P. R. 30.

Held, that a copy of the affidavit need not be served together with the award. *Ib.*

Two Arbitrators Deciding.]—The reference was to two, with power to appoint a third, the award to be made by any two. The arbitrators met, and two of them determined the award in a particular way. They were afterwards told that it was out of their power so to award; and they then, at a subsequent meeting, altered their decision. The third arbitrator was not present at the last meeting, and it appeared that he had been notified of the intention to meet again, but no proper notice had been given to him of the time and place of meeting, nor of the intended alteration in the award:—Held, that the award must be set aside; that by sending notice to the third arbitrator of their intention to meet again, the two making the award had shewn that they did not consider his declaration of dissent as final, and therefore he should have had proper notice to enable him to confer with them on the propriety of the proposed change in the award. *In re McDonald and Presant*, 16 U. C. R. 84.

Two Arbitrators Deciding.] — The three arbitrators, C., D., and M., having met and discussed all the matters referred, separated, unable to agree, M. expressing his dissent as final. On the next day the attorney for one party wrote to D., requesting that the amounts found on the different heads of claim might appear on the face of the award, so that they might be able to obtain the opinion of the court, stating that the latter was intended for D.'s colleagues as well as himself, and desiring that the claimant's attorney should be made aware of it. C. and D. considered this communication, and determined to disregard it, but no notice was given to M., and an award was made two days afterwards by C. and D., without further consulting him in any way:—Held, that it was the duty of the other two arbitrators to notify M. of this letter, and of their intention to settle and execute the award, and the award was therefore set aside on this ground. *In re City of Toronto and Leak*, 23 U. C. R. 223.

Unfair Conduct.]—An award set aside for unfair conduct of the arbitrators in the manner of hearing the evidence. *Hamilton* v. *Wilson*, 4 O. S. 16.

Whole Matter not Examined Into.]—Although the court are bound not to set

aside an award on the merits, yet they will interfere when they see that either party has not had an opportunity of explaining or examining into the whole matter submitted. *Small* v. *Rogers*, H. T. 4 Vict.

Withholding till Costs Paid.]—The court refused to set aside an award on the ground that the arbitrators had desired it not to be delivered until the costs of making it were paid. *Gee* v. *Attwood*, Tay. 119.

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

Witnesses not Heard by Umpire.]—Held, that an award decided by an umpire who does not hear the witnesses himself, but takes their evidence from the notes taken by the arbitrators, and from their statements of the nature of it, will be set aside, unless there was an express consent to such a course by both parties. *Morden* v. *Widdifield*, 6 P. R. 159.

VIII. Submission and Reference.

1. *Abortive Reference.*

Conditional Verdict.]—A cause referred at nisi prius, and verdict taken for the plaintiff, subject to a reference, award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made, and after that day was passed the defendant's attorney was asked by the plaintiff's attorney to consent to a further enlargement, and declined; no application had been made to the arbitrators. The court held they could do nothing more than set aside the conditional verdict. *Moulson* v. *Eyre*, 5 U. C. R. 479.

Judgment.]—Where a verdict has been taken by consent for plaintiff, subject to a reference, the court will not, on account of the failure to make an award, allow judgment to be entered for the verdict, though such failure be imputed to defendant. *Watson* v. *Fothergill*, 5 O. S. 135.

Second Time—*Costs.*]—Where a case is referred at nisi prius and again taken down to trial, the reference proving abortive, the party succeeding will be entitled to the costs of the former occasion. *McLellan* v. *London*, 1 U. C. R. 95.

Second Verdict.]—Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863:—Held, that the second verdict was irregular while the first remained, and must be set aside with costs. *Kelly* v. *Henderson*, 3 P. R. 198.

Second Verdict.]—A cause was referred at nisi prius, the award to be made by the 1st July, with leave to the arbitrator to enlarge, but no verdict was taken. He enlarged the time until the 2nd August, and, after hearing the evidence, adjourned till the 4th to enable defendants to procure their witnesses. Neither party attended again, nor took any steps to procure a further enlargement, and the plaintiff gave notice of trial for the autumn assizes. Defendants notified him that they would move against the proceedings, as the order of reference was yet in force, but the plaintiff went on and took a verdict, defendants not appearing:—Held, that defendants, if they desired the reference to continue, should have applied for an enlargement before the verdict, and that by omitting to do so they had waived their right; but under the circumstances the verdict was set aside without costs, upon an affidavit of merits. *Miller* v. *Hogg*, 2 P. R. 289.

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2. *Agreement to Refer.*

Condition Precedent to Action.]—Upon a covenant in a lease that in case of fire a fair deduction should be made in the rent, to be ascertained by arbitration as provided, where neither had appointed an arbitrator:—Held, that the tenant was not precluded from making a jury the medium by which a deduction was to be made. Quære, if the landlord had offered to arbitrate, and the tenant had refused, could the reduction then be referred to a jury. *McGill* v. *Proudfoot*, 4 U. C. R. 33.

Condition Precedent to Action.]—Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided; and in case of failure to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines or plaintiff's performance of the agreement, the same should be referred to three arbitrators, chosen in the manner stated, their decision to be final. In an action for wrongful dismissal by the plaintiff:—Held, that the agreement to refer, being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action. *Griggs* v. *Billington*, 27 U. C. R. 520.

Insolvency.]—By the terms of a contract between C. & Co. and the defendants, a railway company, it was agreed that all matters in dispute between the parties, arising or to arise out of or connected with the contract, should be settled by arbitration. C. & Co. became insolvent, and this suit was brought by their assignee in insolvency to recover the cost of the construction of the railway. On the application of the defendants under s. 167 of C. L. P. Act (C. S. U. C. c. 22), an order was granted staying all proceedings in this suit, it being held that the insolvency of the contractor did not take the case out of the statute. *Johnson* v. *Montreal and Ottawa R. W. Co.*, 6 P. R. 230.

Insurance—*Valuation.*]—By a condition indorsed on a policy of insurance, the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators. An action having been brought on the policy, and an application made under C. L. P. Act, s. 167, to stay proceedings:—Held, 1. that the arbitration intended by the condition was not merely a valuation. 2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute. 3. That the plaintiff was a "party" within the meaning of that section. Proceedings were accordingly stayed. *McInnes* v. *Western Assurance Co.*, 5 P. R. 242, 30 U. C. R. 580.

Partnership — *Fraud.*] — Where parties had agreed to refer any future difference that might arise under a partnership between them to arbitration, and one filed a bill for an account, injunction, and receiver, proceedings were stayed under the C. L. P. Act, though an answer had been filed in the suit, and the bill contained allegations of fraud. *White* v. *Kirby*, 2 Ch. Ch. 444.

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3. *By and To Whom and What.*

Accounts.]—Actions involving the investigation of long accounts will not be referred as a matter of course. There is nothing to prevent parties agreeing to a consent reference of all matters in dispute in an action, even though involving investigation of long accounts. *Webster* v. *Haggart*, 9 O. R. 27.

Ambiguity.]—Semble, that a reference of "the plaintiff's claim in this case, and all matters in difference between the parties in this cause," refers only the matters in dispute in the cause. *Blanchard* v. *Snider*, 28 U. C. R. 210.

Assignment of Claim and Submission.]—Debt on submission bond. The plaintiff insured his property with defendants; upon a fire a dispute arose, which was referred. Before the award, the plaintiff assigned the bond, the policy, and the money due thereon, to H.:—Held, that the defendants' assent to this was not necessary:—Held, also, that the assignment of the bond did not, by vesting the interest in the assignee, affect the legality of the award made under it. *Hughes* v. *Mutual Insurance Company of Newcastle*, 8 U. C. R. 387.

Cestui que trust.]—Plaintiff leased to M. for 21 years, renewable upon certain terms. The lease was assigned by M. to defendant as a trustee for one F. At the expiration of the first term arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at an advanced rent, or that the lessor should pay a certain sum for improvements. The lessor elected to renew, and notified the lessee, who refused to accept at the new rent, and he then brought ejectment:—Held, that the defendant was not bound by the award, the submission being only by his cestui que trust. *McDonell* v. *Boulton*, 17 U. C. R. 14.

Company.]—Held, on demurrer to a plea setting up the absence of a corporate seal, that a parol agreement entered into by "the duly authorized agents" of an incorporated insurance company to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them, and subsequently lost, was not binding on the company, as not being a contract relating to the purposes for which the company was incorporated. *Calvin* v. *Provincial Insurance Co.*, 20 C. P. 267.

County Judge.]—Held, that where a reference is directed to "the Judge" of a certain county, the senior Judge is the person referred to. *Elora Agricultural Company* v. *Potter*, 7 P. R. 12.

Criminal Prosecution.]—A prosecution for selling whiskey without a license cannot be compromised without leave of the court, and therefore cannot be referred. Where, although the offence was not submitted, it was tried by the arbitrator, in order to determine the liability of the parties as to costs, so much of the award was set aside. *In re Fraser and Escott*, 1 C. L. J. 324.

Executor.]—An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable; but held, on demurrer to the declaration set out in the report of this case, that an executor or administrator may, as such, refer to arbitration causes of action which arise in the lifetime of the testator or intestate, so as to bind the estate, and without making himself personally responsible; and, therefore, the declaration being for a breach of submission to perform the award made in pursuance of such a reference, and also on the common counts, admittedly against the defendant in her representative character:—Held, that there was no misjoinder of causes of action. *Reid* v. *Reid*, 16 C. P. 247.

Executor.]—One of several executors being indebted to the estate, the matter was left by himself and his co-executors to arbitration, and the arbitrators awarded a large sum against him:—Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, as he had chosen to submit the matter; and in a suit by the executors he was decreed to pay the amount. *Koella* v. *McKenzie*, 15 Gr. 331.

Executors.]—A plea stating that defendants, executors as aforesaid, submitted to arbitration, does not imply that they submitted in their character as executors. *Becker* v. *Meyers*, Tay 285.

Governor in Council.]—A submission by the Governor in Council under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, is, in effect, a submission by the Commissioners of Public Works. *Commissioner of Public Works* v. *Daly*, 6 U. C. R. 35.

Husband and Wife.]—A bond of submission signed by the wife as well as the husband, is valid. *McGill* v. *Proudfoot*, 4 U. C. R. 40.

Indictment—*Public Road.*]—Right to refer an indictment and all matters in difference between plaintiffs and defendants in respect of a public road, &c. See *Township of Hungerford* v. *Lattimer*, 13 A. R. 315.

Infant.]—An application was made on behalf of the plaintiff for an order referring it to the master of the court to ascertain whether a submission to arbitration would be for the benefit of an infant defendant. The order was granted, on the ground that the established practice in England was in its favour. The effect of the order would be of course to bind the infant by the award, and this is the only way in which an infant can be bound by a submission without the aid of an Act of Parliament. *Allan* v. *O'Neill*, 2 Ch. Ch. 22.

Infants not Represented.]—An administratrix was sued by her brother for a debt

alleged to have been due by her husband, the intestate, and judgment was recovered; subsequently a reference was made in respect of other moneys come to her hands for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys, and the debts of the estate, were to be considered and dealt with together, but the infants were not represented before the arbitrators:—Held, that the infants were not bound by the award. *Secord* v. *Costello*, 17 Gr. 328.

Married Woman.]—A., having devised certain real estate, in separate parcels, to B. and C., afterwards incumbered these lands. B. was a feme covert, and questions having arisen between B. and C. as to the amount of the incumbrance to be borne by each, they by mutual bonds, in which B. and her husband joined, agreed to refer such questions; and an award was made between these parties:—Held, that B. being a feme covert could not enter into such an agreement to refer; that the statutes as to conveyances by married women of their real estates, did not apply to such agreements; and that therefore the agreement and award were not binding on her. *Bagley* v. *Humphries*, 11 Gr. 118.

Master.]—At the trial the following order of reference was made: "Upon hearing the solicitors on both sides, and by their consent, I order that all matters in difference between the parties in this cause be referred to the certificate of the local master of this court at Orangeville, with all the powers as to certifying and amending of a Judge of the high court of justice, and that the costs of the suit and of the reference be in the discretion of the said local master:"—Held, that the master was to act as an arbitrator under the C. L. P. Act, not as an officer of the court under ss. 47, 48 of the O. J. Act, and that defendant might sign judgment on his report. *Wallace* v. *Whaley*, 9 P. R. 248.

Municipal Corporation.] — Corporations, sole or aggregate, if not disabled may submit disputes relating to corporate property to arbitration, and their successors will be bound thereby. *In re Townships of Eldon and Ferguson*, 6 L. J. 207.

Municipal Council.] — Quære, whether the resolution in this case was binding upon the municipal council as a reference to determine the amount to be paid to the plaintiff for damage to crops, &c., on land taken. *Hodgson* v. *Township of Whitby*, 17 U. C. R. 230.

Partner.]—One of two partners cannot execute an arbitration bond in the partnership name so as to bind the other partner. *Baby* v. *Davenport*, 3 U. C. R. 54.

Partner.]—In an action on a sealed agreement to abide by an award, it is no objection in arrest of judgment that the submission is not stated to be mutual. A declaration that defendant agreed with the plaintiffs to refer:—Held, not supported by an agreement by one plaintiff only on behalf of himself and the others, being his partners. *French* v. *Weir*, 17 U. C. R. 245.

Questions of Law.]—Where a cause and all matters in difference had been referred, and an award made:—Held, that all questions of law as well as fact were submitted: that a demurrer afterwards set down for argument must therefore be struck out of the paper; and that objections to the award as bad upon its face could not be raised as giving a right thus to proceed with the action. *McCollum* v. *McKinnon*, 22 U. C. R. 175.

Reference at Trial.]—By an order made at nisi prius on the 4th November, 1886, upon the application of the defendants and without the consent of the plaintiffs, the action and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the high court of justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under s. 189 of the C. L. P. Act; and by clause 8, that the reference should be considered as made in pursuance of s. 48 of the Judicature Act, 1881; and also, in so far as the same was applicable, as under the provisions of s. 189 of the C. L. P. Act:—Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III. c. 15, but under s. 48 of the Judicature Act and s. 189 of the C. L. P. Act. *Conmee* v. *Canadian Pacific R. W. Co.*, 16 O. R. 639.

Surety.]—A. being interested in a lease, B. becomes security for his performance of the covenants; D. and A. refer disputes connected with the lease:—Held, no objection on the part of D. to the bond of submission, that B. is not a party thereto. *McGill* v. *Proudfoot*, 4 U. C. R. 40.

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4. *Compulsory Reference and Reference under C. L. P. Act.*

Account.]—An action for an account and delivery up of a trust estate was referred at the trial to the master at Picton, by an order drawn up on reading the pleadings and hearing counsel; the master to have all the powers of a Judge as to certifying and amending pleadings, &c., and to inquire and report as to the plaintiff's right to bring an action, the defendant to have the right to claim all such allowances for his care, &c., as in the master's opinion he should shew himself entitled to: costs to be in the master's discretion; and the whole report to be reviewed or appealed from, according to the statute in that behalf:—Held, a reference under s. 189 of the C. L. P. Act (not under ss. 47 or 48 of the Judicature Act), and that an appeal from the finding of the master was therefore regularly set down under the provisions of that Act to be heard before a single Judge in court. *Cumming* v. *Low*, 2 O. R. 499.

Action Entered for Trial.]—After a cause had been entered for trial it could not be referred under s. 84, C. L. P. Act, 1856. *Shae* v. *O'Neil*, 2 L. J. 229.

Common Counts.]—Held, on an application to refer to arbitration an action on the

common counts, that where a material question of fact was in dispute, the case was not a proper one in which to make an order for compulsory reference. *Gannon* v. *Gibb*, 8 P. R. 115.

Consent.]—Held, that an order of reference made upon "it appearing that the matters in dispute consist in part of matters of mere account * * * to ascertain and certify what amount, if anything, the defendants should pay to the plaintiff under the policy in the pleadings mentioned," after the negotiations set forth in the report, was not to be considered as an order for compulsory reference under the C. L. P. Act, but rather as an order by consent for arbitration in pursuance of the conditions of the policy; and that it was open to defendants to prove that the plaintiff's claim was false and fraudulent; and that although the arbitrator could not decide the case upon the ground of arson alone, or receive evidence thereon as an independent defence, yet he should not be fettered in his discretion as to receiving any such evidence incidentally appearing in support of the defence that the claim was utterly unfounded and fraudulent. *Inhalt* v. *Phœnix Assurance Co.*, 7 P. R. 341.

Consent.]—Quære, whether a reference by consent by rule of court or Judge's order is within s. 205 of the C. L. P. Act. *McCarthy* v. *Arbuckle*, 31 C. P. 405.

Contract—*Investigation of Accounts.*]—Assumpsit for work upon a railway. The plaintiff contended that the written contract was determined by certain changes made in the work, and that he could recover upon a quantum meruit, while defendants insisted that the agreement was binding, and all the work in question done under it, it being admitted that if so plaintiff had been fully paid. It appeared to the learned Judge at the trial that the case would involve the investigation of long accounts, and he ordered a reference under s. 156 of the C. L. P. Act 1856, directing that the court should determine, upon the report of the arbitrators, how far the contract was in force:—Held, that the order must be set aside, for by the statute all the issues joined must be disposed of, either by reference or verdict, and the Judge cannot direct a reference making the award subject to the opinion of the court:—Semble, that as the necessity for going into accounts was dependent upon the existence of the contract, the more convenient course would have been, first, to take the necessary evidence for determining whether the plaintiff was bound by it, and the verdict of the jury upon that point, after applying the law to the facts proved, and then, if they found in plaintiff's favour, to refer the amount. *Wells* v. *Gizowski*, 14 U. C. R. 553.

It is for the Judge to determine whether the case will involve the investigation of "long accounts," within the statute, subject to be reviewed by the court only when it can be said that he plainly did not exercise any discretion on this point, but applied the Act where it was altogether inapplicable; and held, that this was not such a case. *Ib.*

Country Cause.]—Under s. 158 of the C. L. P. Act a country cause may be referred to the arbitration of an officer of the proper court at Toronto, as well as to the county Judge. *Bigelow* v. *Cleverdon*, 6 P. R. 3.

Goods Sold.]—Where in an action on the common counts for goods sold, interlocutory judgment having been signed, the plaintiff desires a reference to the master under C. L. P. Act, 1856, s. 143, it must be shewn that no dispute is likely to arise either as to quality or price. *Hutchison* v. *Sideways*, 14 U. C. R. 472.

Insurance.]—Action upon a policy of insurance on goods: Pleas, denying the policy; setting up that the goods were not destroyed; that the plaintiff gave no notice of the loss as required; misrepresentation as to the value of the goods and mode of heating the premises; increase of risk by alteration. After the examination of one witness the Judge at nisi prius ordered a compulsory reference:—Semble, that the compulsory reference was authorized; but held, that the defendants having attended at the arbitration without protest, were precluded from this objection. *Newman* v. *Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 435.

Order Expressed to be by Consent.]—Held, that the reference in this case could not be treated by defendant as compulsory, being expressed to be by consent in the order of reference, which on his motion had been made a rule of court; and that if not by consent, he should first have had the order amended. *Wilson* v. *Richardson*, 43 U. C. R. 365.

Payment into Court.]—Where on a reference to arbitration, under R. S. O. 1877 c. 50, s. 189, before plea, the defendant wishes to plead payment into court as to a portion of the demand, the order should direct that the amount paid in be deducted from the plaintiff's claim. *Duit* v. *Cossett*, 7 P. R. 330.

Right to Jury.]—No reference will be made under C. L. P. Act, 1856, s. 84, if it appear that defences are intended upon which the opinion of a jury is desirable. *Evans* v. *Jackson*, 3 L. J. 88.

Scope of Order.]—At nisi prius a certain question of fact in a cause was left to the jury; a verdict was taken for 1s.; and the other questions involving matters of account, it was ordered that "the plaintiff's claim in this cause, and all matters in difference between the parties in this cause, except the question decided by the jury, be referred to P. L., with power to increase the verdict or order a verdict to be entered for defendant," who had pleaded a set-off. On motion against the award, it was objected that this was a reference of all matters in dispute between the parties, and therefore unauthorized:—Semble, that it referred only the matters in dispute in the cause; but it was clear that nothing more was intended or had been considered by the arbitrator, and no objection had been made to the order; and held, therefore, that if necessary the order would be amended. *Blanchard* v. *Snider*, 28 U. C. R. 210.

Venue.]—An action cannot, under C. L. P. Act, 1856, be referred to the Judge of any other county than that in which the venue is laid, unless by consent. *McEdward* v. *McEdward*, 3 L. J. 75.

Waiver of Right to Object.]—On 7th April an order of reference was made in chambers, and served the same day on defendant's attorney. The arbitrator made an appointment for 16th May following, when the plaintiff attended with four witnesses to prove his

account. An enlargement, applied for by defendant's attorney, until the 22nd, was opposed by plaintiff, but was afterwards consented to and allowed on the terms that, in case of an award made in plaintiff's favour on or before the 24th, defendant was to have up to the 26th inclusive to move against it, but if no award made on the 24th, defendant was not to be bound by the consent.. On the 21st defendant moved to set aside the order of reference. No notice was given to plaintiff of this intended motion, or that the enlargement sought for was to be without prejudice:—Held, that defendant had waived his right to move against the order. *Barton* v. *Hubertus*, 16 C. P. 440.

Woodcock v. Kilby, 4 Dowl. Pr. 730, referred to, as indicating the course defendant should have taken to enable him to move; and semble, that if defendants had applied to the same or some other Judge, for a rescission of the order, and in case of failure had given notice of his intention to move the court as soon as it should sit, and renewed such notice when served with the arbitrator's appointment, protesting, in case he was forced on, against the proceedings, and if both plaintiff and arbitrator had been clearly informed of this,—he would have been in a position to make the motion, if the Judge ought not to have made the reference. *Ib.*

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5. *Revocation.*

[By s. 3 of R. S. O. 1897 c. 62, a submission to arbitration is irrevocable unless contrary intention is expressed therein, except by leave of the court or a Judge.]

Damages Improperly Allowed.] — Held, that under the declaration in this case, which was on the common counts, the plaintiff clearly could not recover for damages of any kind: and the plaintiff's counsel having admitted this on the application for leave to revoke, the court would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators. *Ross* v. *County of Bruce*, 21 C. P. 41.

Improper Allowance.]—Upon a reference to determine the damage sustained by plaintiff by reason of the taking and detention by defendant of a certain schooner, the arbitrators awarded $2,200.65; and among other items, $40 for travelling and law expenses. Upon a motion to set aside the award, the court, without admitting the legality of the charge, refused to interfere, it being the duty of the party objecting to apply to the Judge upon affidavit to revoke the submission, and not to content himself with merely objecting to the allowance of the item by the arbitrator. *Carveth* v. *Fortune*, 12 C. P. 504.

Leave of Court.]—On an application to be allowed to revoke a submission, the discretion of the court ought to be exercised in the most sparing and cautious manner. In this case revocation was allowed. *In re Wright and County of Grey*, 8 L. J. 104.

Leave of Court—*Pleading.*] — Declaration on a bond of submission, alleging a revocation of the submission, and non-performance of the award. Plea, that defendant before the award revoked the submission (not saying by an instrument under seal.) Replication, that the bond was executed after the C. L. P. Act, 1856, and contained nothing to shew an intention that it should not be made a rule of court: that the revocation in the declaration and plea mentioned is the same; wherefore, and by force of the statute, the arbitrators were empowered to and did proceed notwithstanding, although defendant did not attend. Rejoinder, that neither the bond nor condition was at the commencement of this suit, nor at the time of the revocation, a rule of court, or in any way exempted from the effect of the said revocation: — Held, plea and rejoinder both bad. *Wood* v. *Closter*, 16 U. C. R. 490.

Semble, that the restraint upon revocation without leave of the court or a Judge, provided by 7 Will. IV. c. 3, s. 29, is extended by the C. L. P. Act, 1856, s. 97, to all submissions without words purporting that they are not to be made a rule of court. *Ib.*

Nisi Prius Order.]—A reference by order of nisi prius might be revoked by either party before award made. *Burrell* v. *Mills*, 2 O. S. 209.

Railway—*Larger Price.*]—Where a railway company took possession of lands without consent of the owner, and held them for some time, and an arbitration was agreed on, by which it seemed probable that the price would be fixed at a sum very much larger than the company would be willing to pay:—Held, that the company could not, on this ground, revoke the submission. *Great Western R. W. Co.* v. *Miller*, 12 U. C. R. 654.

Rejection of Evidence — *Rentals of Adjacent Properties.*]—It is not sufficient ground for the revocation of a submission to arbitration to fix the renewal ground rental of a block of land bounded by streets that the arbitrators declined to receive evidence of the gross and net rentals derived from properties on the other side of one of the streets. *In re Small and St. Lawrence Foundry Company*, 23 A. R. 543.

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6. *Rule of Court.*

Agreement after Submission.] — An agreement to make the submission a rule of court, introduced afterward:—Held, invalid. *In re Thirkell*, 2 U. C. R. 173.

Amending Order of Reference.]—The court can amend the nisi prius order of reference after it has been made a rule of court. *Laurie* v. *Russell*, 1 P. R. 65.

Chambers.]—An application to make an award a rule of court can properly be made in chambers on notice. *White* v. *Kirby*, 2 Ch. Ch. 452.

Compelling Production of Submission.]—An award having been made, and defendant's bond of submission having been given to him by mistake, the court ordered him to bring it in and that it should be made a rule of court. *Hamilton* v. *Alford*, 1 P. R. 13.

Condition Precedent.]—Where a case has been referred and an award made, such award must in all cases be made an order of the court before any other order in the cause can be made. *Wadsworth* v. *McDougall*, 5 Gr. 290.

Municipal Arbitration.]—In the case of an arbitration under the Municipal Act, R. S. O. 1887 c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of court under s. 13 of R. S. O. 1887 c. 53, R. S. O. 1887 c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the high court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court:—Held, upon the language of this section, that the submission should be made a rule of court before the award is moved upon. *Re City of Toronto Leader Lane Arbitration*, 13 P. R. 166.

Oral Appointment.]—The plaintiff and defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named in the submission, who subsequently appointed the arbitrator verbally:—Held, per Patterson and Morrison, JJ.A., affirming 30 C. P. 466, that the fact that the arbitrator was verbally appointed did not prevent the submission from being made a rule of court. Per Burton, J.A., and Armour, J., that the appointment not being in writing, it was a parol submission and could not be made a rule of court. *Cruickshank* v. *Corbey*, 5 A. R. 415.

Proving Non-existence.]—The absence of a rule making the order of nisi prius a rule of court, when objected to, must be shewn by something more than mere inference from the affidavits filed. *Hawke* v. *Duggan*, 5 U. C. R. 636.

Railway Act.]—A reference under the Railway Act, R. S. O. 1877 c. 165, s. 9, s.-s. 15, as to the crossing of one railway by another:—Held, not a submission which could be made a rule of court. *Re Credit Valley R. W. Co. and Great Western R. W. Co.*, 4 A. R. 532.

Right to Make—*Effect of Making*—*Ex parte Application.*]—Held, that any party to the submission has prima facie a right to have it made a rule of court; and according to the practice existing when the Consolidated Rules came into force, no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by Con. Rule 526 there is no necessity for serving notice of motion, and an order can be made ex parte. Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can inquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an ex parte application for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award. *Re City of Toronto Leader Lane Arbitration*, 13 P. R. 166.

Submission out of the Jurisdiction.]—The fact that a submission or award relative to personalty is made out of the jurisdiction of the court, is no objection to its being made an order of court. *Re Coombe and Cockburn*, 6 P. R. 158.

Time.]—An award made in pursuance of a reference by the court will be treated as a judicial act, and made an order of the court of chancery, as a matter of course. It is not necessary to wait until after a term before moving to make it an order of court. *Allan* v. *O'Neal*, 2 Ch. Ch. 452.

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7. *Scope of Reference.*

Change by Consent.]—Debt on a submission bond of all matters in difference. Plea, no award. The plaintiff replied, setting out an award on one matter, for the payment by defendant of a certain sum to plaintiff, and averred that the parties had agreed to withdraw all but that matter from the arbitrators, and to settle the other matters themselves; but if they could not, then to refer them back to the arbitrators, who, within the time for awarding under the submission, awarded on the other matters in favour of the plaintiff; and then set out as a breach the non-payment of the money under the awards. On demurrer:—Held, that the first award was clearly good; and semble, the second was good also. *Baby* v. *Davenport*, 2 U. C. R. 55.

Consequential Damages.]—Quære:—Have arbitrators the power, under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, to award consequential damages. *Commissioner of Public Works* v. *Daly*, 6 U. C. R. 33.

Construction of Submission.]—Where a submission was made to an arbitrator "to determine which of the said several items of claim the estate of Mrs. R. is bound as matter of law to pay:"—Held, that this confined the authority to deciding the question of legal liability, and did not authorize the arbitrator to find sums payable. *Armstrong* v. *Cayley*, 2 Ch. Ch. 128, 163.

Damages—*Railway.*]—The submission, after reciting that the company had located their line, so as to run across a portion of the land of the other party, and that disputes existed as to the value of the land required and also the damage the said party might sustain thereby, referred "all disputes and differences which exist between the said parties." The arbitrators included damages for slashing done on either side of the line taken by the company:—Held, within their authority. *Great Western R. W. Co.* v. *Chaurin*, 1 P. R. 288.

Exceeding Authority.]—In this case the arbitrators awarded a certain sum for the defendant's interest in the lands as lessee, "and for the lumber taken by the said company now piled upon that part of the wharf taken by the said company:"—Held, that the arbitrators had no power to award compensation for the lumber. *Great Western R. W. Co.* v. *Hunt*, 12 U. C. R. 124.

Exceeding Authority.]—The awards in these cases, making special provision with regard to the repairing and keeping up a milldam, &c., were held bad as beyond the submission and power of the arbitrators. *In re Haley* v. *Ennis*, 1 P. R. 173; *Abbott* v. *Skinner*, 7 L. J. 158.

Exceeding Authority.]—Held, on a reference of dispute respecting the title to cer-

tain land, that the arbitrators were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to direct that a portion of the money which was to be paid to defendant for it, should be appropriated to his wife without his consent. *Bond* v. *Bond*, 15 C. P. 613.

Further Damages.]—As to the power of arbitrators, under a very general submission, to cancel an existing partnership agreement, and award prospective damages to the partner losing by such cancellation, see *Crouse* v. *Parks*, 6 U. C. R. 362.

Incidental Directions.]—Where a submission recited that A. agreed to give up his stock in trade to B., and to assign him all claims and debts due in respect thereof, on payment of such sums as arbitrators should decree; and they awarded that B. should pay a certain sum, and assume the payment and responsibility of debts due by A. on account of said stock:—Held, that the award was warranted by the submission. *Fowke* v. *Lister*, E. T. 3 Vict.

Incidental Relief.]—Where arbitrators were authorized to dissolve a partnership:—Held, that they might, in order to adjust the terms of the dissolution, award upon disputes arising as to the partnership subsequent to the submission. *Thirkell* v. *Strachan*, 4 U. C. R. 136.

Representative Capacity.]—On a submission between A. and defendant, described as executor of B., of all matters in difference between the said parties in reference to the business carried on by said A. and B. in partnership, with liberty to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matters referred:—Held, that the arbitrators could order a sum to be paid by defendant absolutely, not merely as executor. *Mulligan* v. *Wright*, 16 U. C. R. 408.

Special Questions Submitted.]—The parties to this suit referred the matters in difference between them, stating in the submission in the alternative what the arbitrators were to direct—either that defendants should deliver up the premises, or that a lease should be executed, embodying certain stipulations in the submission set forth. They awarded that a lease should be executed, and that should it be deemed necessary for the mutual benefit of the parties that during the term certain work should be done, defendants should pay one-fifth of the expense thereof:—Held, that the arbitrators exceeded their power in ordering defendants to pay, &c.; they should, according to the submission, have directed a lease to be executed, containing such a stipulation. *Abbott* v. *Skinner*, 11 C. P. 360.

Special Reference.]—Under a special reference of disputes between the Northern R. W. Co. and the town of Barrie as to the construction of a branch line into the town; it was held, that the directions as to the conveyance of certain lands by the company, and a release of their claims as to other land, were authorized, and the latter not objectionable for omitting to state to whom it was to be made; and that, as to the amount awarded, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed no more was given. *In re Town of Barrie and Northern R. W. Co.*, 22 U. C. R. 25.

Special Submission.]—Award of arbitrators, under a special submission, to determine the title to land in dispute and concerning certain suits:—Held, authorized. *Everett* v. *Whiteford*, 4 U. C. R. 261.

Special Submission.]—Held, that under the general words of the submission in this case, authority was given to arbitrate as to the fee simple of land in dispute, if a matter in difference, which must be presumed. *Benedict* v. *Parks*, 1 C. P. 370.

Verdict—*Finality.*]—Where a verdict was taken for 1s. damages, subject to an award, and the award did not in any manner dispose of the verdict or cause:—Held, not final, and bad. *Beatty* v. *McIntosh*, 4 U. C. R. 259.

Verdict—*Power to Reduce.*]—Where a verdict was taken, subject to be reduced, the costs to abide the event, an award for defendant was set aside as beyond the submission, the arbitrators having power only to reduce the verdict, and the condition as to costs giving no authority by inference to deprive the plaintiff of them altogether, but applying only to the amount of costs to be taxed. *Shaw* v. *Turton*, 4 O. S. 100.

Verdict—*Set-off.*]—A verdict was taken for plaintiff, subject to be reduced, increased, or set aside, and a verdict or nonsuit to be entered for defendant, under the provisions of the C. L. P. Act. The award directed that the plaintiff's verdict should be set aside and a verdict entered for defendant; and it further awarded a sum of money as due and owing from plaintiff to defendant on a set-off:—Held, that the award did not in terms direct a verdict for defendant for any sum of money, but even that if it did such an award would be proper under the reference. *Martyn* v. *Dickson*, 2 C. L. J. 209.

Verdict—*Set-off.*]—Action on the common counts. Pleas, never indebted, payment, and set-off. A verdict was taken subject to be increased, reduced, or a verdict entered for defendant, by the award of an arbitrator, who directed a verdict in defendant's favour for $750, under the plea of set-off:—Held, that he had power to do so. *Johnston* v. *Anglin*, 29 U. C. R. 372.

IX. Miscellaneous Cases.

Arrest.]—Right of defendant arrested to be discharged on reference to arbitration. *Barry* v. *Eccles*, 2 U. C. R. 383; *Ruthven* v. *Ruthven*, 5 U. C. R. 279.

Bills of Costs.]—Where plaintiff sued an attorney for the amount of an account, and defendant set off several bills of costs, including three in the county court, several in the division court, and some for insolvency and conveyancing, and the cause was referred; and after the reference, plaintiff, an unprofessional man, signed a memorandum

as follows: "I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to taxation of all items, properly taxable as aforesaid, charged for costs in suits;"—Held, that not only were the costs in the county court suits taxable, but the costs in the division courts, insolvency fees, &c., were also taxable. *Kelly* v. *Henderson*, 1 C. L. J. 132.

Boundaries—*Bornage—Arts.* 941-945 *and* 1341 *et seq., C. C. P.*]—See *McGoey* v. *Leamy*, 27 S. C. R. 545.

Collateral Attack.]—A sheriff is liable to an action for the escape of a party attached for contempt in not performing an award, and it is not necessary that the party shall be brought up on the return of the writ of attachment, and formally committed by the court. In such an action the sheriff will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award. He cannot go behind the order authorizing the attachment. *Huntley* v. *Smith*, 4 U. C. R. 181.

Collateral Attack.]—Where a married woman applied as devisee and legatee for an administration order by motion without bill, and it appeared that an award had been made professing to determine all matters between the executors and the legatees interested in the estate, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied:—Held, that the validity of the award could not be tried on the motion, and that a bill must be filed, more especially as other legatees, not parties to the motion, were interested in maintaining the award. *Nadell* v. *Elliott*, 1 Ch. Ch. 326.

Collateral Attack.]—A defendant to an action at law pleaded, by way of equitable defence, an agreement by the plaintiff to give time, and a verdict was taken for the plaintiff, subject to a reference. Before the arbitrator had done more than make an appointment to attend before him, the defendant filed a bill to restrain the proceedings at law, on the same grounds as had been pleaded by him in the action. The court dismissed the bill with costs. *Pomeroy* v. *Boswell*, 7 Gr. 163.

Composition.]—After the assignment and execution of a deed of composition and discharge, defendant, the insolvent, permitted an arbitration on the plaintiff's claim to be proceeded with, personally attending it, and not setting up the deed as a bar:—Held, to preclude defendant from setting up such deed as a ground for setting aside a fi. fa. against him issued on the award. *Pidgeon* v. *Martin*, 25 C. P. 233.

Contribution.]—When an award directs two to pay each a certain sum, and one is obliged to pay the whole because the other refuses to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award. *Allen* v. *Coy*, 7 U. C. R. 419.

Estoppel.]—A plaintiff in ejectment who, before action, has submitted the question of the possession of the premises to arbitration, is estopped by an award in favour of defendant. *Doe d. Galbraith* v. *Walker*, E. T. 2 Vict.

Estoppel.]—An award upon a question respecting real property, expressly referred, is binding upon the parties, so far as respects the rights of either to bring or defend an ejectment against the other. *Doe d. McDonald* v. *Long*, 4 U. C. R. 146.

Estoppel.]—A verdict or award for damages against one of two joint trespassers, is in itself a bar, whether paid or not, and has the same effect as a satisfaction by him in precluding any action against his co-trespasser. But in pleading an award to an action of debt, in which two are jointly bound, there, unless payment be averred, it is no bar. *Adams* v. *Ham*, 5 U. C. R. 292.

Estoppel.]—Debt on award made by arbitrators appointed to value the plaintiff's property, through which defendants had by their by-law directed a road to be made:—Held, that defendants, having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson* v. *Town of Port Hope*, 10 U. C. R. 405.

Estoppel.]—The finding of an arbitrator, when unimpeached, is treated as res judicata between the parties to the submission. *Bell* v. *Miller*, 9 Gr. 385.

Evidence—*Account Stated.*]—Held, that an award made after the time had elapsed could not be taken as evidence of an account stated. *Ruthven* v. *Ruthven*, 8 U. C. R. 12.

Evidence.]—A copy of a fence viewer's award, sworn to by the township clerk, was admitted in evidence under C. S. U. C. c. 32, s. 6. *Warren* v. *Deslippes*, 33 U. C. R. 59.

Interest—*Verdict.*]—Where a verdict is given subject to an award, 29 & 30 Vict. c. 42, s. 2, does not authorize the charging of interest on the sum awarded from the time of taking the verdict. *Hope* v. *Beatty*, 7 P. R. 39.

Interlocutory Judgment.]—When a case has been referred after interlocutory judgment signed, and all matters are submitted to the arbitrator, he is not compelled by such judgment to award for the plaintiff. *Petch* v. *Jarvis*, 1 P. R. 81.

Parol Submission.]—Attendance before arbitrators and going into case by consent—effect of as a parol submission. See *Hall* v. *Alway*, 4 O. S. 375; *Ruthven* v. *Rossin*, 8 Gr. 370; *McCulloch* v. *White*, 33 U. C. R. 331.

Pending Action.]—An award made pending a cause does not stay proceedings. If the plaintiff proceed defendant must plead the award puis darrein continuance. *Fido* v. *Wood*, E. T. 2 Vict.

Pleading Award.]—To an action of trespass defendant pleaded, 1. not guilty; 2. close not plaintiff's; 3. plaintiff not possessed:—Held, that an award as to the boundaries between the parties could not be given in evidence by the defendant under any of these pleas. *Lake* v. *Briley*, 5 U. C. R. 136.

Proceeding for the Same Cause—*Award—Motion to Set aside—Appeal.*]—The word "proceeding" in Rule 1243 means a proceeding in court. An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered. *Caughell* v. *Browcr*, 17 P. R. 438.

Proceeding in Chancery — *Contempt.*]—Semble, that it is a contempt of a court of common law to proceed in the court of chancery after a reference to arbitration under an order of that court, which orders the parties to perform the award. *Pomeroy* v. *Boswell*, 7 Gr. 163.

Saw-logs Driving Act—*River Improvements — Detention of Logs — Damages.*]—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbitration under the Saw-logs Driving Act to determine the amount of his damages for such detention, and is not restricted to the remedy provided by s. 3 of that Act, namely, removing the obstruction. Judgment below, 26 A. R. 19, reversed. *Cockburn & Sons* v. *Imperial Lumber Co.*, 30 S. C. R. 80.

School Trustees.]—School trustees cannot be held liable under 23 Vict. c. 49, s. 9, for wilfully neglecting or refusing to comply with an award, without being first afforded an opportunity of explaining or justifying such non-compliance. *Graham* v. *Hungerford*, 29 U. C. R. 239.

Supreme Court of Prince Edward Island—*Jurisdiction to Set Aside Award—Power to Remit—Land Purchase Act*, 1875.] See *Kelly* v. *Sullivan*, 1 S. C. R. 1.

Surety.]—Where, after proceedings have commenced on a replevin bond, the parties to the replevin go to arbitration, without the consent of the surety, all further proceedings against the surety will be stayed;—aliter where the reference to arbitration takes place with his assent. *Hutt* v. *Gilleland*, *Hutt* v. *Keith*, 1 U. C. R. 540; *Burk* v. *Glover*, 21 U. C. R. 294.

Surety.]—The changing of a contract by an award, even though for the surety's benefit, without his consent, would release him from liability thereon. *Titus* v. *Durkee*, 12 C. P. 567.

Sureties—*Principals Intervening.*]—Under the special circumstances of this case;—Held, that although the suit at law referred was against the sureties only, it was competent for the principals to move against the award in respect of it. *In re Wheeler* v. *Murphy*, 2 P. R. 32.

Treble Damages.]—A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under 2 Will. & M. c. 5, s. 4. The word "recover" used in the statute means "recover by the verdict of a jury." *Clark* v. *Irwin*, 8 L. J. 21.

Valuation.]—By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost:—Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works; that E. was not an arbitrator; and that the agreement could not be made a rule of court as a submission to arbitration. *In re Langman and Martin*, 46 U. C. R. 569.

Verdict.]—Upon a motion against a verdict on an award, the court will not go into the merits of the award. *Thirkell* v. *Strachan*, 4 U. C. R. 136.

Void Award — *Account Stated.*]—An award made after the time has elapsed, cannot be taken as evidence of an account stated. *Ruthven* v. *Ruthven*, 8 U. C. R. 12.

Waiver of Irregularity.]—An offer by defendant to refer a case to arbitration cannot be considered as a waiver of irregularity in service of the notice of trial. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

Witness — *Compelling Proof.*] — The attesting witness to an award may be compelled to attend and prove the award. *Taylor* v. *Bostwick*, 1 Ch. Ch. 23.

See CONSTITUTIONAL LAW, II. 3—INSURANCE, III. 9 (f)—MUNICIPAL CORPORATIONS, IV.—RAILWAY, XV. 5—WATER AND WATERCOURSES, IV.

ARCHITECT.

Erroneous Certificates.] — Action by for services—Defendant may deduct loss caused by erroneous certificates. See *Irving* v. *Morrison*, 27 C. P. 242.

Negligence.]—Although an architect, employed by the owner for reward to superintend the construction of a house, may, as between the latter and the contractor by the terms of their own agreement, be in the position of an arbitrator, and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect. Irving v. Morrison, 27 C. P. 242, approved. *Badgley* v. *Dickson*, 13 A. R. 494.

ARMY, NAVY AND MILITIA.

Aiding Civil Power.]—The Act 31 Vict. c. 40, s. 27 (D.), as amended by 36 Vict. 46 (D.), and 42 Vict. c. 35 (D.), requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot,

etc., shall be signed by three magistrates, of whom the warden or other head officer of the municipality shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof requiring such service:" —Held, that a requisition in the form set out in the case was sufficient. The statutes also provide that the municipality shall pay all expenses of the services of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses:—Held, that where the commanding officer died pending such action the proceedings could be continued by his personal representative. *Crewe-Read* v. *County of Cape Breton*, 14 S. C. R. 8.

Band Instruments—*Notice of Action.*]—In replevin for certain instruments of the band of a militia battalion, brought by the commanding officer, it appeared that the instruments had been purchased partly by money voted by the city corporation, partly by general subscription, and partly by donations of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instruments, alleging his right to hold possession as being president of the band committee, and the other defendant acted with him:—Held, 1. That under s. 48 of 27 Vict. c. 3, the instruments became the property of the commanding officer, who might maintain replevin for them; and that this section as to such property, was in no way controlled by s. 47. *Lewis* v. *Teale and McDonald*, 32 U. C. R. 108.

Held, also that defendants were not entitled to notice of action under 31 Vict. c. 40, s. 89, for that statute had no application, and if it had there could be no right to such notice in replevin; and the finding of the jury that defendants did not honestly believe that they had the power under the statute to do what they did, would also disentitle them to the notice. *Ib.*

Clothing.]—A lieutenant-colonel of militia was held not to be liable for the price of clothing ordered by him for his men, he being merely a servant of the government. *McIlderry* v. *Baldwin*, 6 O. S. 31.

Exemptions.]—Plaintiff, under commission from the Governor-General, dated 28th May, 1850, was appointed quarter-master in a troop of volunteer militia cavalry:—Held, that under the general powers conferred by 22 Vict. c. 18, s. 16, the commander-in-chief might make such appointment, and that so long as he was serving with or attached to such troop, he was an officer thereof, and his horse protected from distress under 18 Vict. c. 77, s. 31. *Darcy* v. *Cartwright*, 20 C. P. 1.

Mess Accounts.]—The officers of a regimental mess are not liable for debts contracted by their messman without their authority. *Sutherland* v. *Sparke*, 6 O. S. 103.

Pay.]—No action will lie by an officer against the paymaster of his regiment for his pay, when the paymaster is directed not to pay it over by the commanding officer. *Elliott* v. *Hall*, H. T. 2 Vict.

Pledging Pay.]—Action by payee against the maker of a note. Plea, on equitable grounds, setting up that the plaintiff was captain of a rifle company, and an agreement to reduce the note by the moneys received from drills, and renew it, and that plaintiff wrongfully disbanded the company, so that no money could be received:—Held, no defence. *Vidal* v. *Ford*, 19 U. C. R. 88.

Sailor—*Assisting to Desert.*]—The Naval Discipline Act, 29 & 30 Vict. c. 109, s. 25, (Imp.), authorizes a summary conviction before magistrates for assisting sailors to desert, but the 101st section expressly preserves the power of any court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the Act, punishable by common or statute law, and:—Held, therefore, that the defendant ought to be indicted under C. S. U. C. c. 100, s. 2. *Regina* v. *Patterson*, 27 U. C. R. 142.

The indictment charged that defendant "did receive, conceal, or assist" one W., a deserter from the navy:—Semble, not sufficiently certain and precise. *Ib.*

Security for Costs.]—A military officer on duty out of Canada, and suing as plaintiff, must, upon the usual affidavit, give security for costs. *Tripp* v. *Fraser*, 1 U. C. R. 253.

Soldier — *Assisting to Desert.*] — Held, that a warrant of commitment, in which it was charged that the prisoner on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's service, to desert, was bad, for it was impossible to say upon reading the warrant how many offences he had committed, or how the punishment was awarded. *In re McGinnes*, 1 C. L. J. 15.

Taxation.]—Exemption of land from taxation. See *Jarvis* v. *City of Kingston*, 26 C. P. 526.

Tolls.]—Liability of officers to pay toll when travelling in a private carriage, though in uniform. *Regina* v. *Dawes*, 22 U. C. R. 333.

See CONSTITUTIONAL LAW, I.

ARREST.

See Rule 1057, by which as to matters not provided for by Rules 1021 to 1056, the practice in force at the time of the passing of the Ontario Judicature Act, 1881, was continued. These Rules affect: (1) Order for Arrest; (2) Arrest; (3) Bail to Sheriff; (4) Security in the Action; (5) Delivery of the Statement of Claim; (6) Orders to bring in body; (7) Application for Discharge from Custody; (8) Surrender by Sureties; (9) Capias ad Satisfacundum; (10) Other Writs of Execution.

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I. Attachment of the Person.

1. *For What Cause and Against Whom.*

Award—*Filing Bill.*]—Where a verdict was taken at nisi prius subject to a reference, and the reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity, and defendant, against whom the award was, did not move in the court in the proper time, but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which attachments writs of habeas corpus were subsequently issued; the court refused to set aside those writs, or suspend proceedings upon them. *Regina* v. *Maddock*, 1 U. C. R. 352.

Commissioners of Court of Requests.]—See *Rex* v. *McIntyre*, Tay. 22.

Compelling Answer.]—Where a plaintiff endorses on the copy of the subpœna served on the defendant the notice prescribed by the 75th order of the court of chancery, he cannot afterwards proceed by attachment to compel an answer. *Meyers* v. *Robertson*, 1 Gr. 55.

Custody of Children.]—An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order, it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so if time were given him. To the demand made for the children, the father replied that they were not in his custody:—Held, that he was not excused from obeying the order, and was in contempt. *Regina* v. *Allen*, 5 P. R. 453.

Deputy Clerk of the Crown.]—An attachment was granted against a deputy clerk of the Crown for having issued serviceable process without authority; and afterwards, on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings. *Rex* v. *Fraser*, 3 O. S. 247.

District Judge.]—An attachment for not obeying a certiorari, will not be granted against a district Judge unless he is acting contumaciously. *In re Judge of Niagara District Court*, 3 O. S. 437.

Examination as Debtor.]—An order to commit to close custody for not attending to be examined pursuant to a Judge's order, is to be looked upon as a commitment for contempt, not as a commitment in execution. *Henderson* v. *Dickson*, 19 U. C. R. 592.

Foreigner.]—Where a defendant, in default for non-compliance with a direction of a master, was resident out of the jurisdiction of the court:—Held, that an order for attachment against him could be properly made. *Bloomfield* v. *Brooke*, 6 P. R. 264.

Fraudulent Use of Mandamus Nisi.]—The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi, directed to H., to deliver up to him the books and papers; that he went to the office with two constables in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority (it being only a mandamus nisi), but refusing to allow her or her solicitor to examine it; and they then took away the books, &c. Upon these affidavits the court granted a rule nisi for an attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. *In re McLay*, 24 U. C. R. 54.

Husband and Wife.]—A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption. *Maughan* v. *Wilkes*, 1 Ch. Ch. 91.

Husband and Wife.]—A married woman, a defendant, living with her husband, was ordered, as administratrix of a former husband, to bring certain accounts into the master's office, in a suit in which her husband was joined as a co-defendant. On an application to commit her for disobedience of the order, it was contended that the rule laid down in Maughan v. Wilkes, 1 Ch. Ch. 91, that the husband must answer for his wife's default unless he shewed some ground of exemption, was in effect abrogated by 35 Vict. c. 16 (O.), which renders married women liable for their separate engagements in certain cases:—Held, that s. 8 of that Act was not applicable in the present case, where the marriage took place before the passing of the Act, and that the other sections did not affect the rule. It was also contended that the reason for the rule in this instance was wanting, as it was shewn that the married woman was a woman of great force of character, and not in fact under the control of her husband:—Held, that the husband must satisfy the court that he has used his best endeavours to get his wife to obey the order

before he will be discharged from his liability to attachment. *Murcheson* v. *Donohoe*, 10 C. L. J. 106, 6 Pr. 138.

Insolvent.]—The fact of a person becoming bankrupt will not prevent his being arrested for contempt in not obeying an order of this court. *Brewer* v. *Rose*, 2 O. S. 6.

Justice of the Peace.]—Owing to a mistake in the Crown office a rule to return the writ of certiorari to remove a conviction, and afterwards a rule for an attachment, issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court was asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Jaice*, 19 U. C. R. 197.

Non-compliance With Order.] — A party is not in contempt for non-compliance with an order of court until the opposite party by some step brings him into contempt: if such party omits this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches. *Gillespie* v. *Gillespie*, 2 Ch. Ch. 267.

Non-payment of Costs.]—Attachment for non-payment of costs has been abolished: see R. S. O. 1897 c. 80, s. 5. The following are cases under the former practice: *Regina* v. *Hyatt*, T. T. 4 & 5 Vict., R. & J. Dig. 287; *Wilson* v. *Dillingham*, 6 O. S. 537; *Regina* v. *Kelly*, 6 O. S. 152; *Regina* v. *Cameron*, 4 U. C. R. 165; *McGill* v. *Sexton*, 1 Gr. 311; *Cramer* v. *Nelles*, Tay. 36; *Rowsell* v. *Hartwell*, Dra. 90; *Plumb* v. *Miller*, 5 O. S. 484; *Culver* v. *McDonell*, T. T. 7 Will. IV., R. & J. Dig. 280; *Sanders* v. *McSherry*, 6 O. S. 191; *Macey* v. *Butler*, E. T. 2 Vict., R. & H. Dig. 62; *Morrison* v. *Lowden*, T. T. 2 & 3 Vict., R. & J. Dig. 281; *Qua* v. *Holmes*, E. T. 3 Vict., R. & J. Dig. 281; *Brewster* v. *McEwen*, E. T. 3 Vict., R. & J. Dig. 281; *Hyatt* v. *Anger*, E. T. 3 Vict., R. & J. Dig. 62; *Kimball* v. *Ripson*, T. T. 3 & 4 Vict., R. & J. Dig. 62; *In re McLachlan*, 3 U. C. R. 331; *McGill* v. *Sexton*, 1 Gr. 311.

Non-payment of Costs of Contempt.]—An attachment to commit for contempt will not be granted merely for non-payment of the costs of the contempt. *Dickson* v. *Cook*, 1 Ch. Ch. 210.

Non-payment of Costs of Contempt.]—The court will not hold a party, who has been in contempt for not obeying an order, in gaol for non-payment of the costs occasioned by his contempt. *Pherill* v. *Pherill*, 2 Ch. Ch. 444.

Non-payment of Money.]—The court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one guilty of a contempt of court, it may imprison him for a stated period, allowing him to be discharged if he pays the costs of his contempt before the expiration of such period. *Harris* v. *Myers*, 1 Ch. Ch. 229.

Non-payment of Money.]—The court will not commit for disobeying a decree, where the disobedience is in effect the non-payment of money. *Male* v. *Bouchier*, 1 Ch. Ch. 359; *S. C.*, 2 Ch. Ch. 254. See however *Roberts* v. *Donovan*, 21 O. R. 535; *Berry* v. *Donovan*, 21 A. R. 14.

Receiver.]—Where an order is made upon a receiver for payment of a sum of money, the court, on default will commit for contempt of such order without requiring any further order to be served. *McIntosh* v. *Elliott*, 2 Gr. 396.

Return to Mandamus.]—No attachment will lie for making a return to a peremptory mandamus. It should be for not obeying the writ. *Regina* v. *Trustees of School Section 27, in the township of Tyendinaga*, 3 P. R. 43.

Treasurer.]—A mandamus nisi having been directed to "M. S., treasurer of Belleville," and an attachment being moved for after he had ceased to be treasurer for not making a return to the same:—Held, that the proper direction would have been "To the treasurer," &c., generally, though the personal direction was not absolutely wrong, but that, as S. had ceased to hold the office, the attachment must be refused. *Burdett* v. *Sawyer*, 2 P. R. 398.

Witness.]—The Judge at nisi prius declined to commit a witness for not answering questions, when it was sought to elicit the admission of facts importing a scandal upon himself. Besides, the Judge thought the witness intoxicated, and by no means able to give evidence at all. *Doe Marr* v. *Marr*, 3 C. P. 36.

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2. *Practice and Procedure.*

Accounts.]—A party in contempt to an attachment for not bringing accounts into the master's office of a reference, afterwards filed the same, but neglected to pay the costs of his contempt, and an ex parte order to remove the accounts so brought in from the files, in order to proceed against him for the contempt was granted. *Corbett* v. *Meyers*, 1 Ch. Ch. 26.

Accounts.]—A party neglecting to produce accounts before the master when so required, will be ordered to pay the costs occasioned by his contempt, although no commitment has taken place. The notice required by s. 6 of general order 46, is not necessary in cases of orders nisi for non-production. *Berrie* v. *Moore*, 1 Ch. Ch. 107.

Accounts.]—Where an order nisi has been duly served to enforce the filing of accounts in the master's office, and accounts are filed, but the master certifies that they are insufficient, it is the practice to grant an order absolute ex parte; but if asked, an opportunity will be given to shew the sufficiency of the accounts. *Spencer* v. *Leeming*, 1 Ch. Ch. 186.

Accounts.]—Where, on an application for not bringing in accounts in a master's office, for an order nisi, on the ground that the accounts brought in were insufficient, it appeared that the insufficiency consisted in the items being undated, the order nisi was refused. In such case, before applying a warrant should be obtained from the master, calling upon the parties to bring in better accounts. *Merkley* v. *Castleman*, 1 Ch. Ch. 292.

Accounts.]—Where a party is in contempt for not bringing in accounts,, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will

not be looked into. *Clancy* v. *Patterson*, 2 Ch. Ch. 217.

Accounts.]—When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient. Nor will the payment of costs be made a condition precedent to his discharge. *Clark* v. *Clark*, 3 Ch. Ch. 67.

Accounts.]—Where notice of motion had been given of an application to commit for not bringing in accounts, and four days intervened between the service and the motion, one of which was Good Friday, during which the master's office had been closed, the secretary refused the application without costs. *Wilson* v. *Gould*, 2 Ch. Ch. 236.

Compliance After Notice to Commit.]—Where an order is complied with after service of notice of motion to commit for disobedience of it, and before the motion comes on, an order to commit will not be granted, but the party will be required to pay to the applicant the costs of the motion within twenty-four hours after the amount has been settled. *Malloch* v. *Plunkett*, 1 Ch. Ch. 381.

Costs.] — Where defendants had been brought into court upon an attachment, although they cleared themselves upon interrogatories of the imputed contempt, the court refused to allow costs against the prosecutor, even although he had omitted a fact in his affidavit which might have affected their granting the attachment, and although one of the affidavits upon which the attachment was moved for was not filed early enough for them to answer by a counter affidavit. *Rex* v. *McKenzie*, Tay. 70.

Custody of Children.]—A writ of attachment for contempt in not obeying the original order to deliver up the custody of children, under C. S. U. C. c. 74, was moved against for irregularity:—Held, that it was unnecessary to make the order for delivery of the children a rule of court before bringing the father into contempt, but that the proceedings should have been moved into and adopted by the court before an attachment could issue from it; and that this attachment therefore was irregular. *In re Allen*, 31 U. C. R. 459.

The Judge could by his own order have attached the party. *Ib.*:—Held, also, that such attachment was properly signed and sealed by the clerk of the process, and issued by the clerk of the Crown. *Ib.*

Delivery of Abstract.]—On moving to make an order nisi for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either party named in the order. *Dick* v. *McNab*. 1 Ch. Ch. 21.

Delivery of Possession.]—In moving to commit for a contempt in not delivering possession of mortgaged premises, in obedience to an order made in pursuance of order 32 of 1853, it must be shewn that the possession was demanded. *Nevieux* v. *Labadie*, 1 Ch. Ch. 13.

Ex Parte Application.]—An application to commit a witness for refusing to sign depositions made by him will not be granted ex parte. *Blain* v. *Terryberry*, 1 Ch. Ch. 255.

Forum.]—Motion for orders to commit for non-production are properly made in Chambers. *Ross* v. *Robertson*, 2 Ch. Ch. 66.

Indorsement of Order.] — A direction to do an act "forthwith" is a sufficient compliance with orders 288 and 293. Where under an order so endorsed a party was attached for disobedience, the attachment was held to be regular. Where the attorney of the parties directed to confess judgment at law, had been arrested for disobedience as well as the parties, he was discharged. *Wallace* v. *Acre*, *Livingston* v. *Acre*, 2 Ch. Ch. 392.

Intituling Papers.]—An affidavit to set aside an attachment must be intituled on the Crown side, and not in the names of the parties to the suit. *Malloch* v. *Morris*, T. T. 1 & 2 Vict.

Intituling Papers.]—Even although the attachment ordered has not issued. *Garland* v. *Burrowes*, T. T. 3 & 4 Vict.

Master's Certificate.]—A party moving to commit for disobedience of any order or direction of a master must shew by means of a certificate of the master, that the person moved against has disobeyed the order, and is in default. *Paxton* v. *Dryden*, 6 P. R. 83.

It will be insufficient in Chambers to prove by any other means the service of the order, and that it has not been complied with, as the master is the proper person to decide both these facts. *Ib.*

Non-execution of Conveyance.] — Where an order to commit is sought for the non-execution of a conveyance directed to be kept at a solicitor's office for execution, it must be shewn that it was accessible for execution in such office. *Bell* v. *Miller*, 1 Ch. Ch. 370.

Non-payment of Money.]—The rule for attachment for non-payment of money awarded is properly a four, not a six day rule. *Jones* v. *Reid*, 1 P. R. 247.

Non-payment of Money.] — A party moving under 7 Vict. c. 3, s. 8, for his discharge from custody, must shew that he is in contempt for non-payment of money; and the notice of intention to move must be served on the opposite party, not on his attorney. *Garrison* v. *Balkwell*, 1 U. C. R. 2.

Non-production.] — A notice of motion for an order absolute for non-production in the registrar's office, under order 31 of the 6th February, 1865, requires personal service, by analogy to the former practice by order nisi. *Dickson* v. *Dickson*, 1 Ch. Ch. 366.

Non-production.]—On a motion to commit for non-production of certain documents after an insufficient affidavit on production has been filed, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced, though the court considered such the better course. On such a notice, the court will grant the more limited relief, and order further production, but without costs. *Fisken* v. *Smith*, 2 Ch. Ch. 491.

Non-production.]—When a party neglects to comply with the terms of an order for the production of books and papers, the proper mode of proceeding is to serve personally a notice of motion to commit. *Patterson* v. *Bowes*, 4 Gr. 44.

Notice of Application.]—Four days' notice must be given of a motion to commit. *Gray* v. *Hatch*, 2 Ch. Ch. 12. *Broughall* v. *Hector*, 2 Ch. Ch. 434.

Notice of Application.]—Motions for attachment must be on notice. *Morphy* v. *Feehan*, 2 Ch. Ch. 53.

Notice of Reading Certificate.]—It is not necessary to state in a notice of motion that a certificate of an officer of the court will be read in support of the application. Such certificate can be read though no such notice be given. *Malloch* v. *Plunkett*, 1 Ch. Ch. 381.

Production—*Time.*]—A motion for production, with the alternative that the party be committed in default, being substantially a motion to commit, requires four clear days' notice. *Abel* v. *Hitts*, 9 C. L. J. 363.

Purging Contempt.]—It is sufficient clearing of contempt if a party has done the act ordered and paid the costs. An order of court clearing his contempt need not be made unless he has been in custody. *Duncan* v. *Trott*, 2 Ch. Ch. 487.

Service of Notice.]—A rule nisi for an attachment must be personally served, and the original shewn. *Crysler* v. *Campbell*, 1 U. C. R. 416.

Service of Notice.]—A notice of motion for an order absolute under order 31 of 6th February, 1865, must be served at least four clear days before its return, by analogy to the former practice by order nisi. *Kelly* v. *Smith*, 1 Ch. Ch. 364.

Service of Notice.]—The notice of motion to take an affidavit on production off the files, and to commit for contempt, should be served on the defendant's solicitor, not on defendant personally. *Ross* v. *Robertson*, 2 Ch. Ch. 66.

Service of Notice.]—Service of notice of motion to commit on the solicitor of the party charged with contempt, is good service. *Gourlay* v. *Riddle*, 2 Ch. Ch. 158.

Service of Notice.]—Notice of motion to commit a person not a party to a cause, under order 257, for contempt in disobeying an order which has been duly served, need not be personally served where the party has a solicitor. *Wilson* v. *Wilson*, 7 P. R. 57.

Service of Order.]—On a motion to commit for disobedience of an order of a master it will be insufficient in Chambers to prove by any other means than the certificate of the master, the service of the order and that it has not been complied with, as the master is the proper person to decide both these facts. *Paxton* v. *Dryden*, 6 P. R. 83.

Service of Order.]—A motion to commit defendant, or to take the bill pro confesso for non-attendance of defendant for examination pursuant to a special order, was refused where the order had not been previously served. *McAvilla* v. *McAvilla*, 6 P. R. 311.

Service of Order.]—An order to commit a party for disobeying an order will not be granted if it appear that there is any error or omission in the copy served. *Lindsay* v. *Lindsay*, 13 C. L. J. 197.

Testing Attachment—*Variance in Description.*]—An attachment for not obeying a writ of mandamus must be tested in term, on the same day as the rule on which it issues. *Regina* v. *Trustees of School Section No. 27 in the Township of Tyendinaga*, 3 P. R. 43.

The rule nisi called upon the trustees of school section number 27, in the township of Tyendinaga, in the county of Hastings, to shew cause why an attachment should not issue against them. On the affidavit of service of this rule on A., B., and C., stating them to be trustees of said section, a rule absolute was granted following it in form, and thereupon an attachment issued against A., B., and C.:—Held, bad, as not warranted by the rules. *ib.*

Time Limited.]—Where an order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience. *Wagner* v. *Mason*, 6 P. R. 187.

Vacation.]—The court will entertain applications affecting the liberty of the subject during long vacation. *Harris* v. *Meyers*, 2 Ch. Ch. 229.

Vacation.]—An attachment for not obeying an order to appear and be examined as to debts, cannot be issued in vacation. *Greene* v. *Wood*, 2 P. R. 165.

Warrant to Commit—*Return Day.*]—A warrant to the sheriff to commit a person is not irregular, though no return day is mentioned in it. *Prentiss* v. *Brennan*, 1 Gr. 497.

Witness to Execution of Cognovit.]—An attachment for refusing to swear to the execution of a cognovit will not be granted until a rule has been served on the witness ordering him to do so, and has been disobeyed. *Ham* v. *Ham*, 3 O. S. 176.

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3. *Miscellaneous Cases.*

Bail to the Limits.]—A bond to the limits may be taken on an attachment for non-payment of money, and may be assigned. *Montgomery* v. *Howland*, E. T. 2 Vict.

Bail to the Limits.]—Where upon application to commit a defendant to gaol under 22 Vict. c. 96, s. 13, the Judge ordered a ca. sa. to issue instead, as allowed by that section, and the defendant thereupon gave bail to the limits:—Held, that he could not again be committed to close custody under the first alternative of the same clause. *Perrin* v. *Bowes*, 2 P. R. 348.

Benefit of the Limits.]—A prisoner in custody for contempt may have the benefit of the limits. *Rex* v. *Kidd*, H. T. 6 Will. IV.

Benefit of the Limits.]—A defendant in attachment for contempt for not paying

over money pursuant to a rule of court, may be admitted to the limits, after being ordered to be committed upon his answers to interrogatories. *Rex* v. *Kidd*, 4 O. S. 415.

Benefit of the Limits.]—A party arrested upon an attachment issued out of this court, is entitled to the benefit of the gaol limits, on production to the sheriff of the certificate from the clerk of the Crown of bail having been filed according to the provisions of 10 & 11 Vict. c. 15, which places prisoners in custody upon such attachment on the same footing as debtors. *Davis* v. *Casper*, 1 Gr. 354.

Breach of Injunction—*Stay.*]—A defendant in equity appealed from an order directing his committal for a breach of an injunction, and moved the court to stay proceedings under the order pending the appeal, which was refused. *Gamble* v. *Howland*, 3 Gr. 281.

Constable.]—Quære, is an attachment of privilege at the suit of an attorney within the 9th clause of 2 Geo. IV. c. 1. And quære, would this doubt, or the want of an affidavit being annexed to a bailable process, prevent the defendant, a constable, from having the benefit of the 21 Jac. I., on the point of venue. *Brown* v. *Shea*, 5 U. C. R. 141.

Contempt — *Right to Move Against Order.*]—A writ of attachment for contempt in not obeying the original order of a Judge to deliver up the custody of children, under C. S. U. C. c. 74, was by order of a Judge issued from the Court of Queen's Bench; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it, he could not be heard; but—Held, that he might nevertheless defend himself by objections to the process if irregular. *In re Allen*, 31 U. C. R. 458.

Defensive Proceedings.]—A party may be in contempt although no attachment may have actually issued; the contempt consisting in the disobedience to an order of the court, and the fact of the disobedience having been made to appear to the satisfaction of the proper officer who has made an order for an attachment to issue. A party, though in contempt, is always allowed to take any defensive proceedings in the cause. *Mitchell* v. *Mitchell*, 22 Gr. 23.

Poverty.]—Poverty is no excuse for delay in making an application to the court, as in such case the party can apply in formâ pauperis. *Harris* v. *Meyers*, 2 Ch. Ch. 229.

Quia Timet.]—Quære as to the right of a defendant in contempt for non-appearance to a subpœna issued on an information of intrusion, but not actually arrested, to move quia timet to set aside the process issued against him. *Attorney-General* v. *McLachlan*, 5 P. R. 63.

Sheriff—*Bail.*]—Semble, that before the return of a writ of attachment for contempt the sheriff cannot properly take bail for the appearance of a party, without the order of a Judge; but after the return, if the party be upon attachment merely to compel the payment of money, the sheriff as of course may take bail to the limits. *Lane* v. *Kingsmill*, 6. U. C. R. 579.

Semble, that if an attachment for contempt in not paying moneys is to be regarded as mesne process, it should be averred in a declaration for an escape that the sheriff had not the party in court to answer the exigency of the writ; and if the attachment is to be regarded as an execution, Semble, it then requires something in the nature of a judgment to support it. *Ib.*

The merely averring that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of contempt, is insufficient; a good legal foundation for the attachment must be shewn on the record. *Ib.*

Sheriff—*Escape.*]—A sheriff is liable to an action for the escape of a party attached for contempt of court in not performing an award, and it is not necessary in order to this action that the party should be brought up on the return of the writ of attachment and formally committed by the court. *Huntley* v. *Smith*, 4 U. C. R. 181.

Sheriff's Liability.]—An action will lie against a sheriff for not arresting an attorney under an attachment issued for not handing over deeds, &c., to plaintiffs. *Burnham* v. *Hall*, 44 U. C. R. 297.

Stoppage in Transitu.]—The right of stoppage in transitu of goods consigned to a debtor who absconds, is not suspended by an attachment and seizure thereof at the instance of an attaching creditor. *McLean* v. *Breithaupt*, 3 C. L. T. 314.

Unnecessary Issue of Attachment.]—It is improper to have recourse to an attachment when the object can be obtained without it. Where, therefore, a party who was directed to execute a conveyance had come into town to execute it, although after the proper period, and the plaintiff's solicitor knowing these facts issued an attachment, it was set aside with costs. *Mason* v. *Seney*, 2 Ch. Ch. 220.

Waiver.]—An amendment of a bill by adding parties, requiring no answer from defendant, is a waiver of process of contempt for want of answer; and on an ex parte motion the defendant will be discharged. *Thrasher* v. *Connolly*, 1 Gr. 422.

Waiver—*Vacation.*]—In proceeding before the master a warrant was issued during long vacation for the defendant to bring in accounts, and the master having ruled it to be regular, an attachment thereupon was issued to compel the necessary production; and to escape the attachment the defendant did produce the required papers:—Held, that it was too late for the defendant afterwards to appeal against the master's ruling. *Mitchell* v. *Mitchell*, 22 Gr. 23.

II. Capias and Absconding Debtors' Act.

1. *For What Cause and Against Whom.*

Before Fi. Fa.]—Under what circumstances a ca. sa. may be sued out after issue and before return of a fi. fa. See *Ross* v. *Bryan*, 2 L. J. 89.

Ca. Re. Not Executed.]—Where the plaintiff, pending the suit, took out a ca. re.

upon which defendant was not arrested:—Held, that under 2 Geo. IV. c. 1, a ca. sa. might issue after judgment upon the same affidavit. Semble, that such writ may include the costs, although the sum taxed will exceed that sworn to. *Beatty* v. *Taylor*, 2 P. R. 44.

Ca. Re. Not Executed.]—But under the C. L. P. Act, 1856:—Held, overruling the last case, that such a proceeding was irregular and should be set aside. The affidavit must relate to the present belief of the party making it, and must therefore be sworn at the time of issuing the writ. *Moss* v. *Reid*, 7 C. P. 429.

Costs of Defence.]—A defendant, in whose favour a verdict is rendered, is entitled, under the equity of the King's Bench Act, 2 Geo. IV. c. 1, to a ca. sa. for the costs of his defence. *Thomson* v. *Leonard*, 3 O. S. 151, 610.

Court in Term—*Property—Mesne Process.*]—Held, on an application by way of appeal from a Judge's order for the issue of a writ of ca. sa., that the court in term has power to review such order; but semble that an application made after the lapse of the succeeding term is too late:—Held, on the merits, that the order in this case ought not to be interfered with, as it sufficiently appeared from the affidavits before the Judge that the defendant had parted with his property or had made some secret or fraudulent disposal thereof to prevent its being taken in execution; and semble, that the affidavits also shewed that unless immediately apprehended defendant was about to quit Canada with intent to defraud his creditors:—Held, also, that "property" in C. S. U. C. c. 24, s. 12, refers to personal as well as real property:—Held, also, that an application to discharge a defendant from custody under s. 31 of the Act, lies only when the arrest is under mesne process, and not where he is in custody under final process. *Kidd* v. *O'Connor*, 43 U. C. R. 193.

Criminal Charge—*Pleading.*] — Semble, a person in custody on a criminal charge may be detained in a civil suit. *Palmer* v. *Rodgers*, 6 L. J. 188.

Debt Not Due.]—Goods were sold to the defendant by the plaintiffs upon a five months' credit, and he refused to accept a bill of exchange at five months for their price. The plaintiffs, before the expiration of the five months, issued a writ of attachment against the defendant under the Absconding Debtors' Act, R. S. O. 1877 c. 68, on an affidavit that defendant was indebted to them for goods sold and delivered:—Held, that to bring a case within the statute, there must be a debt due and payable at the time of the issuing of the writ, and that in this case there was no such debt as sworn to. The attachment was therefore set aside. Semble, that in proceedings of this kind the existence of the debt itself may be inquired into. *Kyle* v. *Barnes*, 10 P. R. 20.

Debt under £10.]—A summons to set aside a ca. sa. on the ground that defendant had been arrested for a sum under £10, exclusive of costs, was discharged on the facts stated in this case. *Baker* v. *McKay*, 1 C. L. Ch. 73.

Delay.]—It is irregular to issue a ca. sa. upon a judgment more than a year old, even though a fi. fa. has been issued within the year, but not returned, without a sci. fa. *Wilson* v. *Jamieson*, 6 O. S. 481.

Devastavit.]—On a return of "devastavit," a ca. sa. does not issue as a matter of course without inquiry. *Willard* v. *Woolcut*, Dra. 211.

District Court.]—Where a Judge's order was necessary to hold to bail, an arrest could not be made in a district court. *Ferris* v. *Dyer*, 5 O. S. 5; *Smith* v. *Jarvis*, H. T. 3 Vict.

Execution in Force.]—Semble, that no ca. sa. can be acted upon while a fi. fa. on which proceedings have been taken remains out; and that where goods have been seized and a ven. ex. issued, they must be sold before defendant can be arrested for the residue. *Billings* v. *Rapelje*, 2 P. R. 200; *Ross* v. *Cameron*, 1 C. L. Ch. 21.

Execution in Force.]—The plaintiffs, having obtained a judgment against the defendant on the 7th June, issued a ca. sa. on the judgment, directed to the sheriff of Oxford, but did not then place it in the sheriff's hands. On the 12th June they issued a fi. fa. goods to the same sheriff, which was on the same day returned nulla bona. On the 14th June they issued writs of fi. fa. lands to the respective sheriffs of Oxford and Haldimand. On the same day they filed a bill in chancery to charge certain equitable interests of defendant in lands which could not be directly reached through the writs at law. On the 16th September they, for the first time, placed their ca. sa. in the hands of the sheriff of Oxford, the writs against lands then being in his hands and the proceedings in chancery still pending. The ca. sa. was not properly styled in the cause, and was not tested in the name of the Chief Justice or the other Judge of the court from which it issued:—Held, that the plaintiffs' proceedings violated the spirit of the law, in charging defendant in execution on a ca. sa, whilst endeavouring to enforce a remedy against his lands through an execution issued since the ca. sa. and since a fi. fa. goods returned nulla bona. Such being the case, the application to amend the writ of ca. sa. was refused, and the writ set aside for irregularity with costs, defendant undertaking not to bring an action for the arrest. Semble, the irregularities were amendable, and would, on terms, have been amended under ordinary circumstances. *Curry* v. *Turner*, 8 L. J. 296.

Foreigner.]—Where both plaintiff and defendant were inhabitants of a foreign country, and had come together into this Province to remain only a few hours, and during their stay here the plaintiff made the usual affidavit and arrested the defendant, the arrest was held to be regular. *Raynor* v. *Hamilton*, M. T. 2 Vict.

Foreigner.]—Semble, that it is contrary to the policy of our laws of arrest to permit one foreigner to follow another to this country, and arrest him for a debt contracted abroad. *Frear* v. *Ferguson*, 2 C. L. Ch. 144.

Foreigner.]—Held, that the affidavits in this case did not sufficiently shew the plain-

tiff and defendant to be foreigners, and therefore that the arrest could not be objected to on that ground. *Romberg v. Steenbock*, 1 P. R. 200.

Foreigner.]—The plaintiff, a merchant living in Toronto, arrested defendant, lately from England, on a bill accepted by him there. The arrest was moved against, on the ground that defendant was here for a temporary purpose only, and on business; but the plaintiff gave reason for believing that he had absconded from England to avoid proceedings there on this same bill, and the Judge under these circumstances refused to interfere. *Brett* v. *Smith*, 1 P. R. 309.

Foreigner.]—Defendant applied to be discharged from arrest for a debt contracted abroad, on affidavit that both plaintiff and he were foreigners, that he had come to this Province very lately, and had never any residence or home here; but it was not shewn under what circumstances or for what purpose he came, whether as a transient visitor or intending to become a resident, and on this ground the application was refused. *Blumenthal* v. *Solomon*, 2 P. R. 51.

Foreigner.]—The mere fact that both plaintiff and defendant are foreigners does not of itself warrant setting aside an arrest. *Palmer* v. *Rodgers*, 6 L. J. 188.

Foreigner.]—The property of a person usually residing in the United States, but who employs persons here and comes frequently to superintend their work, may be attached under 2 Will. IV. c. 5. *Ford* v. *Lasher*, 3 O. S. 428.

Foreigner.]—Where a person usually residing in Scotland, while here to settle some affairs, referred some disputes concerning them, and an award was made against him, not payable until nearly two years after he had returned to Scotland:—Held, that he did not come within the Act. *Taylor* v. *Nicholl*, 1 U. C. R. 416.

Foreigner.]—Semble, that a debtor whose family resided in the United States, but who for several months was in this Province purchasing horses for the United States army, and contracting debts therefor, with the declared intention of moving permanently into Canada, was sufficiently a resident of Upper Canada to be within the Act. *Higgins* v. *Brady*, 10 L. J. 268.

Foreigner.]—The defendant absconded from Canada in 1866, being at the time largely indebted to the plaintiff. In 1877 he returned for a temporary purpose, having in the meantime acquired a domicile at Chicago, when he was arrested under C. S. U. C. c. 24. s. 5, for the debt due to the plaintiff:—Held, that the arrest was illegal, and defendant was discharged. *Clements* v. *Kirby*, 7 P. R. 103.

Foreigner.]—Held, on the evidence set out in the report, that the defendant could properly be treated as a resident of this Province. *Cartwright* v. *Hinds*, 3 O. R. 384.

Foreigner.]—The general rule that it is against the policy of our law to permit one foreigner to follow another into Ontario, and arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, and is about to return to his own country. *Butler* v. *Rosenfeldt*; *Sweetzer* v. *Rosenfeldt*, 8 P. R. 175.

Where the debtor has absconded from his own country to Ontario, and does not intend returning, or intends to go to some other country, the creditor may follow and arrest him here upon a ca. re. *Ib.*

Foreigner.]—A defendant having contracted a debt in the United States of America, his ordinary place of abode, and in the act of returning there after a visit to his parents in this country, cannot be arrested on a charge of leaving Ontario with intent to defraud his creditors. *Smith* v. *Smith*, 9 P. R. 511.

Foreigner.]—It is of no consequence where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he come to this Province, and reside here, and contract debts, and is about to quit the country (that is, in fact, to change his residence to a foreign country, even though that country be his place of domicile) with the intent to defraud his creditors, he is subject to arrest as it prevails in this Province. *Kersterman* v. *McLellan*, 10 P. R. 122.

Held, that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this Province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. *Ib.*

Foreigner.]—The plaintiff claimed $20,000 damages from the defendant, the cause of action being criminal conversation with the plaintiff's wife. The defendant lived in the United States, but was here for a temporary purpose when the plaintiff had him arrested under an order to hold to bail. The plaintiff in his affidavit sworn on the 30th January, on which the order was granted, stated that the defendant had arrived in Toronto that morning, and that he intended to leave for his own country that night, with intent to defraud the plaintiff of the damages he had sustained. Upon a motion for the defendant's discharge:—Held, that in leaving Ontario he was not doing so with intent to defraud the plaintiff, and was therefore entitled to be discharged. Ex p. Gutierrez, 11 Ch. D. 298, specially referred to. *Rice* v. *Fletcher*, 13 P. R. 46.

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

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

were arrested:—Held, upon the evidence, that the defendants intended to leave Ontario with the intent of defrauding their creditors. *Meyer Rubber Co.* v. *Rich*, 14 P. R. 243.

Forfeiture of Recognizance—*Crown.*]—Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for attachment under the Absconding Debtors' Act, and that such writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony. *Regina* v. *Stewart*, 8 P. R. 297.

Goods Sold.]—For goods sold and delivered, must shew defendant's request, and the request being laid to other sums will not supply the defect. *Watkins* v. *Liebschitz*, H. T. 7 Will. IV. But this case is overruled by *Ogilvie* v. *Kelly*, 4 U. C. R. 393.

Goods Sold.]—It must be shewn that the goods were sold and delivered by plaintiff to defendant. *McDonnell* v. *Kelly*, 4 U. C. R. 374.

Intent to Defraud Creditors.]—It is not sufficient for a creditor applying for an order for arrest under R. S. O. 1897 c. 80, s. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud. Shaw v. McKenzie, 6 S. C. R. 181; Toothe v. Frederick, 14 P. R. 287, and the opinions of Burton and Maclennan, JJ.A., in Coffey v. Scane, 22 A. R. 269, followed. The opinions of Hagarty, C.J.O., and Osler, J.A., in Coffey v. Scane, and of the latter in Robertson v. Coulton, 9 P. R. 16, dissented from. McVeain v. Ridler, 17 P. R. 353, discussed. Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact. And where the defendant believed that his wife had no claim against him for alimony:—Held, that he could not be intending to defraud her by leaving Ontario. *Phair* v. *Phair*, 19 P. R. 67.

Intention to Leave.]—On an application to review the decision of a county Judge, it was held that defendant must be discharged; that the denial of the debt alone would not be sufficient, though the facts and circumstances relating to the claim might be important to consider as affecting the probability of his absconding; but that an apprehension of his leaving at some future period could not warrant the arrest, for the Judge must be satisfied that he is about to leave unless forthwith apprehended, that is, to leave forthwith. *Bowers* v. *Flower*, 3 P. R. 62.

Intention to Leave.]—Semble, the Judge to whom an application is made for an order to arrest has only to be satisfied of the existence of a cause of action, &c., and an intention on the part of defendant to abscond, with intent, &c. *Damer* v. *Busby*, 5 P. R. 356.

Judge's Discretion—*Intent to Defraud.*]—An application under Rule 1051 to discharge from custody is an original proceeding, independent of the order to arrest, and the Judge to whom it is made is invested with a very large discretion. If the appellate court has doubt as to the proper result of all the evidence, that doubt should lean in favour of personal liberty. Our statute 22 Vict. c. 96 differs from its original, the Imperial Act 1 & 2 Vict. c. 110, and was expressly enacted so as to restrain the freedom of those only who were believed to be contemplating fraud as against their creditors; under it, it cannot be said that a person indebted, without substance, who contemplates removing from Ontario to better his condition, is leaving with intent to defraud creditors; two things must concur before the statute operates—the quitting of Ontario, and an intent thereby to defraud creditors. Robertson v. Coulton, 9 P. R. 18, observed upon. Upon the evidence in this case, the court was not satisfied that the defendant had any intention to flee the country at the time of his arrest, or that there was such dealing with his property as was within the mischief of the statute, and affirmed an order of a Judge in Chambers discharging him from custody. *Toothe* v. *Frederick*, 14 P. R. 287.

Judgment for Costs.]—A ca. sa. cannot be issued in Upper Canada on a judgment for costs only. Under 22 Vict. c. 96, s. 13, on such judgment an order for committal for contempt only will be granted, and not for a ca. sa. *Meyers* v. *Robertson*, 5 L. J. 254.

Liquidated Amount.]—The court will only grant an attachment for sums certain, and where such an affidavit could be made as would enable a plaintiff without a Judge's order to sue out bailable process. *Clock* v. *Alfield*, 5 O. S. 504.

Malicious Arrest—*Libel.*]—An order to arrest was refused in actions for malicious arrest and libel. *O'Connor* v. *Anon.*, and *Darcus* v. *Hall*, T. T. 2 & 3 Vict.

Money Lent.]—That A. and B. are indebted for money lent to A.:—Held, sufficient to authorize the arrest of A. Quære, whether it would have supported an arrest of both. *Ellerby* v. *Walton*, 2 P. R. 147.

Onus—*Intent to Defraud*—*Former Absconding.*]—Upon an application by the defendant for his discharge from arrest under a ca. re., he did not dispute the existence of the debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the Province with intent to defraud. The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this Province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this Province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the Province hurriedly, but that he intended to stay till he had finished the business which brought him to the Province, and then to return to his own country as of course:—Held, that the court could not, upon this application, try the question whether the

defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained. Kerstetman v. McLellan, 10 P. R. 122, distinguished. *Beam* v. *Beatty*, 19 P. R. 207.

Previous Departure — *Temporary Return.*]—The plaintiff stated in her affidavit, on which the order of arrest was made, that the defendant, taking advantage of their engagement, had seduced her, and, as soon as he discovered that she was with child, went to the United States, but subsequently returned to attend his father's funeral, and was then about to quit Ontario with intent to defraud her, &c. The plaintiff's father also swore to the intent; while the defendant, though filing an affidavit, made no reference to his financial condition:—Held, that the alleged intent was sufficiently disclosed. Toothe v. Frederick, 14 P. R. 287, and Rogers v. Knowles, *ib.* 290 *n.*, distinguished. *Vansickle* v. *Boyd*, 14 P. R. 469.

Possession of Goods.]—An affidavit that the defendant "took possession of this plaintiff's goods, and still keeps possession of them" is sufficient to warrant an order to hold to bail. *Ingraham* v. *Cunningham*, Dra. 116.

Previous Departure—*Temporary Return — Contradicting Plaintiff's Case — Imposing Terms.*]- An order for the arrest of the defendant was made on 16th March, 1892, upon an affidavit of the plaintiff, in which he alleged that the defendant in March, 1891, absconded from this Province for the purpose of defrauding his creditors, and that, having lately returned to the Province, he was about to leave it again with a like purpose. The defendant applied, upon new material, to the Judge who made the order to set it aside and to be discharged from custody:—Held, that the affidavit of the plaintiff was, if true, a sufficient foundation for the order. Kerstetman v. McLellan, 10 P. R. 122, followed. And the order could not be set aside by the Judge upon the new material contradicting the case made by the plaintiff. Damer v. Busby, 5 P. R. 356, and Gilbert v. Stiles, 13 P. R. 121, followed. The departure of the defendant from this Province in March, 1891, was open and public; he announced it at a public meeting to six or seven hundred persons along with the fact that he intended to sell his household effects before his intended departure; the newspapers in the place where he lived announced that he was going to Chicago, U.S., with his family to take a situation there which he had obtained; and his fellow townsmen gave him a public dinner, at which several of his creditors were present, before he left. He departed for Chicago, taking no property with him. The only piece of property which he possessed in Ontario was an unsaleable and heavily mortgaged house and lot, which, a year before he left, he had transferred to a creditor as security for a debt. He had a permanent situation and residence in Chicago with his wife and family, and in March, 1892, returned to this Province for a merely temporary purpose. During the year he spent in Chicago he remitted considerable sums earned by him to his creditors in Ontario:—Held, that, under these circumstances, the defendant could not be said to have left Ontario with intent to defraud his creditors, and that he should be discharged from custody under the order for arrest. It is within the power of the court or a Judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shewn to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the Judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province." For the same reason the defendant was entitled to the costs of his application to be discharged from custody. *Scane* v. *Coffey*, 15 P. R. 112. See the next two cases.

Previous Departure — *Temporary Return.*]—In an action for damages for arrest under the order made in the above action the plaintiff recovered a verdict for $1,000. Upon motion to set it aside, made before a divisional court composed of Armour, C.J., and Falconbridge, J.:—Held, per Armour, C.J., that so long as the order for arrest stood, an action for maliciously and without reasonable and probable cause arresting the plaintiff could not be maintained. Erickson v. Brand, 14 A. R. 614, distinguished. 2. Where a creditor, by affidavit, satisfies the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud; for he is removing his body, which is subject to the jurisdiction of the courts of Ontario, and liable to be taken in execution, beyond the jurisdiction of such courts. Toothe v. Frederick, 14 P. R. 287, commented on and not followed. Robertson v. Coulton, 9 P. R. 16, approved and followed. 3. The facts that the plaintiff, being a resident of Ontario, and having numerous creditors therein, including the defendant, left the Province without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded reasonable and probable cause for and justified his arrest. 4. Considering the action as one for imposing upon the Judge by some false statement in the affidavit to hold to bail, and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the Judge to consider in granting the order, and the burden is upon the plaintiff of shewing that the Judge was imposed upon. 5. The word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he was properly described as an absconding debtor. Falconbridge, J., adhering to the views expressed in Scane v. Coffey, 15 P. R. 112, was of opinion that the plaintiff had a cause of action, but thought there should be a new trial on the grounds of excessive damages and misdirection; and concurred pro formâ in the decision of Armour, C.J. *Coffey* v. *Scane*, 25 O. R. 22.

See the next case.

Previous Departure — *Temporary Return.*]—Where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable. Judgment below, 25 O. R. 22, affirmed. *Coffey* v. *Scane*, 22 A. R. 269.

Promissory Notes.]—Arrest on notes secured by mortgage as collateral—action for malicious arrest. *Blakely* v. *Patterson*, 15 U. C. R. 189.

Recovery Back of Purchase Money.]—A plaintiff cannot arrest for purchase money paid for an estate conveyed to him by deed, upon the ground that the defendant, the vendor, was not lawfully seized; he must resort to his covenant. *M'Lean* v. *Hall*, Tay. 491.

Slander.]—In an action by husband and wife for a slander of the latter, not actionable without special damage, the affidavit stated only that persons not named had in consequence withdrawn their custom from her husband, who was a tailor. The learned Judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only. *Allman* v. *Kensel*, 3 P. R. 110.

Specific Performance.]—A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson* v. *Dafoe*, 8 P. R. 332.

Summons.]—Under 12 Vict. c. 63, a bailable capias could not issue in a suit commenced by summons. *Kelly* v. *Kelly*, 1 C. L. Ch. 281.

Summons.]—After that Act commissioners could not issue bailable process under 2 Geo. IV. c. 1, s. 9. *McIntyre* v. *Hutson*, 8 U. C. R. 560.

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

Trespass.]—A capias cannot issue upon a verdict in trespass without a Judge's order. *McLeod* v. *Bellare*, Tay. 273.

Trial Upon Affidavits.]—Under the old law neither the existence of the debt, nor the circumstances under which it was contracted, nor the conduct of the defendant, could be tried upon affidavits for the purpose of permitting an arrest, if the affidavit of debt and intention to leave the country was a positive one. *Frear* v. *Ferguson*, 2 C. L. Ch. 144.

Two Defendants.]—Where one defendant had been arrested, and the other served on mesne process, the court, after judgment, allowed a ca. sa. to issue against both, but to be executed only against the one arrested. *McIntyre* v. *Sutherland*, 5 O. S. 153.

Two Defendants.]—When a judgment is against two, a ca. sa. upon it must include both, or shew some reason for the omission. *Turner* v. *Williams*, 1 P. R. 360.

Unlawful Custody.]—By indenture defendant covenanted to pay purchase money for land conveyed to him by plaintiffs, and by him re-conveyed, together with other land as security therefor. There was a proviso that in default of any of the payments, the said land was to become the plaintiffs' absolutely. It was covenanted by the plaintiffs that they would put up certain mills on the property conveyed to defendant. The property was situated in the county of Grey, where defendant lived. The plaintiffs erected the mills. Defendant, about a year afterwards, having taken the machinery from the mill, and being in default on account of his purchase money, left the county. The plaintiffs followed and arrested him without laying information against him, or having a warrant therefor. Afterwards they procured a warrant to issue against defendant in the county of Oxford, charging him with embezzlement in regard to the machinery, &c., in the mill. On this defendant was again arrested. While in such custody, the plaintiffs issued a capias against the defendant for the debt:—Held, that the first and second arrests were illegal:—Held, also, that the arrest under the capias was illegal, as defendant was in custody unlawfully, at the suit of the plaintiffs, at the time they procured it to issue. *McGregor* v. *Scarlett*, 7 P. R. 20.

Unliquidated Damages.] — An attachment will not be granted against an absconding debtor for unliquidated damages. *Clark* v. *Ashfield*, E. T. 7 Will. IV.

Use and Occupation.]—"That the defendant was indebted to the plaintiff in the sum of £50 for the use and occupation of a certain tenement:"—Held, sufficient. *Ferguson* v. *Murphy*, Tay. 206.

Work and Labour.] — For work and labour done, without stating a request, is defective. *Hall* v. *Brush*, T. T. 3 & 4 Vict.

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2. *Practice and Procedure.*

(a) *Affidavits and their Contents.*

Account Stated.] — On account stated, need not say that the account was had. *Black* v. *Adams*, E. T. 3 Vict.

Affidavit Before Event.] — Where an affidavit to hold to bail was made while defendant was in the United States, and was left here ready in case he should come over, the court set the arrest aside. *Cozens* v. *Ritchie*, Dra. 107.

Affirmation.] — Order to hold to bail granted on affirmation made by a quaker in New York, properly verified, &c., taken before the city recorder. *Smith* v. *Lawrence*, 3 O. S. 18.

Agent.]—Quære, whether affidavit must shew that the deponent is the attorney or agent of the plaintiff. *Chamberlain* v. *Wood*, 1 P. R. 195.

Alternative Allegation.] — It is sufficient to swear either fact, that the debtor has parted with his property to prevent its being taken in execution, or that he has made some secret or fraudulent conveyance for that purpose, &c.:—Held, that in this case, under the facts stated, defendant was amply justified in swearing to the first alternative. *Maxwell* v. *Ferrie*, 8 C. P. 11.

Amount.]—The affidavit stated the amount in sterling, adding, to wit, the sum of £704 9s. 7d., or thereabouts, of lawful money of Canada:—Held, not sufficiently precise and positive; but it is sufficient to state a debt due to a plaintiff in England in sterling money only, and the insufficient statement of the sum in currency would not vitiate; but the amount for which bail should be taken was ordered to be reduced to the true sum in currency, as it appeared that the amount given in the affidavit was excessive. *Pawson* v. *Hall*, 1 P. R. 294.

Assignee of Plaintiff.] — An affidavit made by the assignee of the plaintiff's estate, that the defendant is indebted to the estate and deponent as assignee thereof, &c., and that he is about to leave, &c., "to defraud the deponent, as such assignee as aforesaid, of the said debt:"—Held, sufficient. *Ramsey* v. *Solomon*, 2 P. R. 54.

Bill of Exchange.]—Must state it to be "payable." *Smith* v. *Sullivan*, Tay. 493; *Andruss* v. *Ritchie*, Dra. 6.

Bill of Exchange.]—Must state the default of the maker or acceptor. *Ross* v. *Balfour*, 5 O. S. 683.

Bill of Exchange.]—The defendant is indebted in £560 of sterling money on a bill of exchange drawn, &c., for the payment of £560, not saying of what money:—Held, sufficient. *Pawson* v. *Hall*, 1 P. R. 294.

The affidavit stated the bill to be "payable at a day now past," and presentment on the day and non-payment and then, after stating the several sums for which it was intended to hold to bail, continued "and that the said several sums of money are now justly due and payable as aforesaid;"—Held, that it sufficiently appeared that the bill was still unpaid. *Ib.*

Defendant was stated to be indebted in the amount of the bill, and in £5 19s. 8d. of sterling money aforesaid, "for interest thereupon, being for principal money and interest the sum of £565 19s. 8d. of sterling money aforesaid:"—Held, that the claim for interest was insufficiently stated. *Ib.*

It is sufficient to describe a note as being "for the payment to," instead of "payable to," the plaintiffs. *Ib.*

Bill of Exchange.]—An affidavit stated that defendant was indebted to deponent in £1,217 16s. 5d. of lawful money of Canada, upon and on account of a bill of exchange for £1,000 sterling (describing the bill); and that the sum of 19s. sterling was paid by defendant for notarial charges in protesting the same:—Held, that the amount due for the bill was sufficiently distinguishable from the notarial charges, which ought not to have been included; and therefore that the arrest should not be set aside, but the amount to take bail for should be reduced by deducting such charges. *Brett* v. *Smith*, 1 P. R. 308.

The plaintiff need not state expressly that he is the holder of the bill at the time of making the affidavit to hold to bail. *Ib.*

Bond.]—That the defendant is indebted to the plaintiff upon a certain bond or obligation, is insufficient. *Prior* v. *Nelson*, Tay. 176.

Bond.]—An affidavit on a money bond must shew to whom the bond was made. *Case* v. *McVeigh*, T. T. 3 & 4 Vict.

Christian Name.]—The affidavit need not state plaintiff's second Christian name, where he is described as the above plaintiff. *Perkins* v. *Connolly*, 4 O. S. 2.

Copy of Affidavit.]—A certified copy of an affidavit filed in the office of the clerk of the Crown:—Held, sufficient to move upon. *McKenzie* v. *Russell*, 3 O. S. 343.

Copy of Affidavit.]—In this case an order for a ca. sa. was granted upon two affidavits: one that of the Toronto agent for the plaintiff's solicitors exhibiting a copy of an affidavit made by one of such solicitors, stating that he believed it to be a true copy, and that the original was stated to have been enclosed in a letter received by him that day, but was not so enclosed, but not stating that such an affidavit ever existed:—Held, that this could not be treated as forming any evidence upon which an order for arrest could be founded. *Gilbert* v. *Stiles*, 13 P. R. 121.

Crown—*Affidavit by Crown Attorney.*]—In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor:—Held, that the affidavit of debt which in this case was made by the Crown attorney was sufficient. *Regina* v. *Stewart*, 8 P. R. 297.

Defective Form.] — Where the objection taken to an affidavit to hold to bail was new in this court, and the plaintiff followed a form given in Tidd's appendix, the arrest was set aside without costs, and on condition that no action should be brought. *Ross* v. *Balfour*, 5 O. S. 683.

Departure or Concealment.] — "Has left the Province, or is concealed within the same:"—Held sufficient. *Totten* v. *Fletcher*, T. T. 2 & 3 Vict.

Deponent's Name.] — Deponent's name must be set forth in words at length. *Richardson* v. *Northrope*, Tay. 331.

Deponent's Name.]—And his Christian names must be given in full. *Westover* v. *Burnham*, T. T. 3 & 4 Vict.

Deponent's Residence.]—On a motion to set aside an order to discharge prisoner from arrest, it appeared that the affidavit to hold to bail described the deponent's residence as at Canandaigua, State of New (York being omitted):—Held, description insufficient. *Byard* v. *Read*, Tay. 413.

Fraudulent Conveyance.]—An affidavit for a ca. sa. that the defendant has made some secret and fraudulent conveyance, &c., and not some secret or fraudulent conveyance, is good under the statute. *Ewing* v. *Lockhart*, 3 U. C. R. 248.

Good Reason.]—An affidavit that the plaintiff "had reason to believe," not "good reason:"—Held bad, and arrest set aside. *Meyers* v. *Campbell*, 1 C. L. Ch. 31.

Grounds of Belief.]—Where deponents reside far from the debtor they should state the grounds of their belief. *Bank of Upper Canada* v. *Spafford*, 2 O. S. 373.

Information and Belief.] — Should state the name of the parties informant, but if it shew facts sufficient to satisfy the mind of the Judge, this is sufficient; it need not copy the words of the statute. *McInnes* v. *Macklin*, 6 L. J. 14.

Information and Belief.]—In order to support an order to hold defendant to bail, the plaintiff need not disclose in his affidavit the names of the persons on whose information he founds his belief that defendant is about to leave the Province, where he files also other affidavits, stating facts which would justify such belief: in that case, it is the same as if the plaintiff had stated that these deponents had informed him of the facts stated in their affidavits. *Watson* v. *Charlton*, 40 U. C. R. 142.

Information and Belief.]—The affidavit used stated that the deponent was credibly informed and believed certain facts, not stating the name of his informant nor the grounds of his belief:—Held, that this statement did not comply with Con. Rule 666, and was insufficient as proof of the facts stated, upon an application for such an order. Gibbons v. Spalding, 11 M. & W. 173, and McInnes v. Macklin, 6 L. J. 14, referred to. *Gilbert* v. *Stiles*, 13 P. R. 121.

Insolvency.]—A ca. sa. cannot be issued since the Insolvent Act, 8 Vict. c. 48, on an affidavit filed before. *Sewell* v. *Dray*, 2 U. C. R. 179.

Intent to Defeat.]—The use in the affidavit upon which an order for the issue of a ca. re. was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. 1877 c. 67, s. 5:—Held, not fatal to the arrest *Laing* v. *Slingerland*, 12 P. R. 366.

Intent to Defraud.]—Held, that an affidavit concluding that "Patrick Brady hath departed from Upper Canada, and hath gone to the United States, with intent to defraud (omitting 'me') of my just debts, or to avoid being arrested or served with process," so far as the conclusion was concerned, was sufficient, the Act as well as the affidavit being in the alternative, and the latter alternative alone being sufficient. *Higgins* v. *Brady*, 10 L. J. 208.

Intent to Defraud.]—It is sufficient to shew that the debtor intends to defraud the plaintiffs, without shewing an intention to defraud creditors generally. *Wakefield* v. *Bruce*, 5 P. R. 97.

Intention to Leave.] — An affidavit shewing sufficient to satisfy the Judge that the defendant, unless apprehended, is forthwith about to leave, will be sufficient, though it is only sworn that defendant is about to leave Upper Canada. *Swift* v. *Jones*, 6 L. J. 63.

Intention to Leave.]—"That the plaintiff had reason to believe," instead of "is apprehensive that the defendant was about to depart this Province without paying," &c.:—Held, insufficient. *Choate* v. *Stevens*, Tay. 449.

Intention to Leave.]—When an application is made for an order to arrest, the affidavit must contain the ordinary conclusion, that the deponent is apprehensive of defendant's departure from this Province. *Willsee* v. *Bloor*, E. T. 2 Vict.

Intention to Leave.]—"That defendant will leave the Province of Canada:"—Held, sufficient. *Brown* v. *Parr*, 2 U. C. R. 98.

Intention to Leave.]—Held, that the affidavit under C. S. U. C. c. 24, s. 5, must shew facts and circumstances to satisfy the Judge that there is good and probable cause for believing that the debtor, unless forthwith apprehended, is about to quit, &c. *Demill* v. *Easterbrook*, 10 L. J. 246.

Held, that an affidavit stating deponent's belief that the debtor, unless held to bail, would quit Canada, not saying when, or assigning any special reason for forthwith apprehending him, was sufficient. *Ib.*

Held, that the facts and circumstances laid before the county Judge in this case, to satisfy him that the debtor had at any time an intention to quit Canada, were insufficient. *Ib.*

Intituling.]—Where the order for bailable process was made upon two affidavits, one intituled in the Queen's Bench, and the other not in any court, and the process afterwards issued from the Common Pleas, the arrest was set aside with costs. *Swift* v. *Jones*, 6 L. J. 63.

Intituling.]—A technical objection to the form of the affidavit must be made before the time for putting in bail expires. An objection that the affidavit is not intituled in any court, is such an objection. *Palmer* v. *Rodgers*, 6 L. J. 188.

Intituling.]—An affidavit intituled in the district court, instead of in the Queen's Bench, is irregular, not void. *Sanderson* v. *Cummings*, M. T. 3 Will. IV.

Intituling.]—Arrest under the statute allowing an arrest under an alias writ, on a testatum writ issued to a different district. Affidavit held rightly intituled in the cause. *Glass* v. *Colcleugh*, T. T. 3 Vict.

Intituling.]—Where there is a cause pending, the affidavit must be intituled in it. *Brown* v. *Palmer*, 3 U. C. R. 110.

Intituling.] — Where the commissioner designates himself "A commissioner in B. R. &c." it is no objection that the affidavit is not intituled in any court. *Ellerby* v. *Walton*, 2 P. R. 147.

Followed in *Molloy* v. *Shaw*, 4 P. R. 250, and *Damer* v. *Busby*, 5 P. R. 356.

Intituling.]—The affidavits for a writ of attachment against an absconding debtor should be intituled in the court *Hart* v. *Ruttan*, 23 C. P. 613, citing Allman v. Kensel, 3 P. R. 110; Swift v. Jones, 6 L. J. 63.

Intituling.]—The name of the court must be inserted in the affidavit at the time of suing out the process. *Allman* v. *Kensel*, 3 P. R. 110.

Intituling.]—Affidavits for an attachment against an absconding debtor are not vitiated by being intituled before the issue of attachment. *Wakefield* v. *Bruce*, 5 P. R. 77.

Intituling.]—Held, following Ellerby v. Walton, 2 P. R. 147, not a valid objection to an order to hold to bail, that it was granted upon affidavits not intituled in any court. *Molloy* v. *Shaw*, 5 P. R. 250.

Intituling.]—The affidavit to hold to bail may be intituled in a court or cause, or one of them, or it may be altogether without a title. *Damer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.

Intituling—*Residence of Debtor.*]—The affidavits for a writ of attachment against an absconding debtor should be intituled in the court; and semble, they must state that defendant is a resident of the Province, and possessed of real or personal property therein. *Hart* v. *Ruttan*, 23 C. P. 613.

Quære, whether the fact of defendant stating in an affidavit used on an application to set aside the writ, that he was a resident and possessed of property, cured the defect. The court refused to interfere with an order setting aside the writ for want of such statements in the affidavits. *Ib.*

Intituling.]—The affidavits upon which the order for a writ of attachment against an absconding debtor was issued, were not styled in any court, although sworn before a commissioner for taking affidavits in the Q. B., who appended to his signature the words, "A Com. in B. R., etc.":—Held, that the affidavits were sufficient. Ellerby v. Walton, 2 P. R. 147, followed. Hart v. Ruttan, 23 C. P. 613, not followed. *Scott* v. *Mitchell*, 8 P. R. 518.

Intituling.]—Where the affidavit for an order to arrest was intituled in the High Court of Justice but not in the proper division:—Held, that the objection was clearly amendable. *Robertson* v. *Coulton*, 9 P. R. 16.

Jurat.]—Where a defendant was arrested under a commissioner's writ, and the commissioner's name was not attached to the jurat at the time of the arrest, but was placed there before the motion to set the writ and arrest aside, the court held the proceedings irregular, and set them aside with costs. *Black* v. *Halliday*, T. T. 5 & 6 Vict.

Jurat.]—Under 7 Vict. c. 31, the jurat must state that the affidavit was duly read over and explained to deponent, and the omission of the word "duly" was held fatal. *Thayer* v. *Hensley*, 1 U. C. R. 335.

Lower Canadian Judge.]—A ca. sa. may issue on an affidavit sworn before a Judge in Lower Canada, whose signature is verified by affidavit here. *Coit* v. *Wing*, 4 O. S. 439.

Misnomer.]—An arrest was set aside, where defendant, whose name was "Patrick," was called "Peter" in the affidavit and writ. *Botsford* v. *Stewart*, E. T. 11 Geo. IV.

Misnomer—*Lien on Land.*]—On a motion by the defendant to set aside an order for his arrest in an action for breach of promise of marriage, the plaintiff's affidavit on which the order was based was headed in the proper style of cause, and proceeded, "I Alberta Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed "Berta J. Vansickle":—Held, that the affidavit was not a nullity, but the mistake therein was merely an irregularity, and the objection thereto should have been expressly taken in the notice of motion. The writ of summons was indorsed with a claim for a lien on certain land in Ontario. The defendant did not state in his affidavit that he owned any land; while the plaintiff's counsel stated that, notwithstanding the indorsement, he had no knowledge of the defendant's owning any land:—Held, that this was no ground for setting aside the arrest. *Vansickle* v. *Boyd*, 14 P. R. 469.

Money Lent.]—An attachment was set aside, the affidavit being for money lent, and not stating by whom. *McKenzie* v. *Bussell*, 3 O. S. 343.

Negativing Motive.]—The conclusion negativing any vexatious or malicious motive required by 2 Geo. IV. c. 1, s. 8, is not necessary where a Judge's order to hold to bail is obtained. *McLachlan* v. *Wiseman*, 5 O. S. 333.

Negativing Motive.]—And such conclusion is dispensed with by 8 Vict. c. 48, s. 44. *Lee* v. *McClure*, 3 U. C. R. 330.

Paragraphs.]—It is not necessary, under the 112th rule of T. T. 20 Vict., that an affidavit to hold to bail should be divided into paragraphs and numbered. *Ellerby* v. *Walton*, 2 P. R. 147.

Plaintiff's Attorney.]—During a cause an affidavit to arrest defendant cannot be taken before the plaintiff's attorney. *Burger* v. *Beamer*, 3 U. C. R. 179.

Plaintiff's Attorney.]—But an affidavit before action commenced may be. *Brett* v. *Smith*, 1 P. R. 309.

Plaintiff's Attorney.]—In moving on this ground it should clearly appear that he was attorney at the time the affidavit was sworn. *Demill* v. *Easterbrook*, 10 L. J. 246.

Promissory Note.]—Must shew the amount for which the note was drawn. *Norton* v. *Latham*, M. T. 3 Vict.

Promissory Note.]—That the defendant was indebted in a named sum due on a promissory note, due before the commencement of this suit, the affidavit having been made several days before the writ issued, was held insufficient, as being equivocal and uncertain. *Clarke* v. *Clarke*, 1 U. C. R. 394.

Promissory Note.]—An affidavit for several different notes need not state the

aggregate sum, but the amount of each note must be mentioned. The dates of the notes should be set out in words, but figures will not make the affidavit defective. *Ross* v. *Hurd*, 1 P. R. 158.

Promissory Note.]—An affidavit by the indorsee of a note must state that it was indorsed to the plaintiff, and by whom. *Glass* v. *Baby*, 1 P. R. 274.

Promissory Note.]—The affidavit must shew that the note is overdue, either by directly stating the fact or by giving the date of the note and the time it has to run. *Racey* v. *Carman*, 3 L. J. 204; *Ross* v. *Hurd*, 1 P. R. 158.

Promissory Note.]—An affidavit stated that defendant was indebted to the plaintiff in $2,615, being the amount of four several promissory notes made by defendant, bearing date the 6th February, 1866, for $653.75 each, payable respectively at forty days, sixty days, three months, and four months after date; and that said notes were given by defendant for goods purchased by defendant from plaintiff. On motion to set aside the arrest, because this affidavit did not shew to whom the notes were payable, nor in what character the plaintiff held them:—Held, that it was sufficient. *Jones* v. *Gross*, 25 U. C. R. 594.

Proof of Indebtedness.]—The promissory notes, or the cause of action, being set out fully, the indebtedness of defendant is alleged with sufficient certainty. *Wakefield* v. *Bruce*, 5 P. R. 77.

Proof of Indebtedness—*Medical Services.*]—An affidavit of debt whereon a Judge's order to hold to bail was founded, stated simply "that the defendant is justly and truly indebted to me (the plaintiff) in the sum of $250.00, for medicine, medical attendance, and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him;" without averring either that the medicine was delivered, the medical attendance and service performed, or the money lent by the plaintiff to the defendant, or at his request:—Held, following Handley v. Franchi, L. R. 2 Ex. 34, affidavit insufficient. Semble, that the affidavit would be sufficient without the words "at his request." *Diamond* v. *Cartwright*, 32 C. P. 494.

Residence of Debtor.]—The affidavit must on the face of it shew that the debtor is or was a resident of Upper Canada. *Higgins* v. *Brady*, 10 L. J. 268.

It is not sufficient to describe the debtor as "lately doing business" in Upper Canada; nor to describe him as having "departed from Canada," &c. *Ib.*

Residence of Debtor.]—The plaintiff need not swear that the debtor was residing within Upper Canada, if that fact is sworn to by others. *Wakefield* v. *Bruce*, 5 P. R. 77.

Sealed Instrument.]—When the debt arises on a written or sealed instrument, the affidavit need not set out the date or other particulars, if it shew distinctly the nature of the debt and the instrument on which it accrued. *Clarke* v. *Clarke*, 3 L. J. 149.

Second Application — *Further Material.*]—An application was made to a county Judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the Judge did not finally determine against the application, but gave leave to renew it upon a further affidavit:—Held, that there was no reason why the application should not afterwards be made to another Judge. *Bank of Hamilton* v. *Baine* (2), 12 P. R. 439.

Semble, that where a Judge refuses to grant an attachment or an order to hold to bail, successive applications may be made to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same or different material the Judge should always be informed of every previous application; this, however, more as a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order if the material warranted the granting of it. *Ib.*

Several Claims.]—An affidavit for money lent, paid, and on an account stated, need not state the sum due on each account. *Tannahill* v. *Mosier*, 2 O. S. 449; *Black* v. *Adams*, E. T. 3 Vict.

Several Claims.]—An affidavit for £80, on a promissory note for that amount, and also for goods sold, not specifying the sum due on each account, nor whether the goods sold formed the consideration of the note:—Held, insufficient. *McKenzie* v. *Reid*, 1 U. C. R. 396.

Several Claims.]—An affidavit for £613, stated to be due as a distinct sum for each of three different causes of action, but concluding "that the said sum of £613 is still due and owing to this deponent by the said T. E.," &c.:—Held, insufficient. *Barry* v. *Eccles*, 2 U. C. R. 383.

Several Claims.]—Where more than one debt is mentioned, and they are not combined and the aggregate stated, the affidavit must clearly express the plaintiff's apprehension that defendant will leave with intent to defraud the plaintiff of the several debts mentioned; any uncertainty as to which he apprehends he will be defrauded of will be fatal. *Brown* v. *Palmer*, 3 U. C. R. 110.

Several Claims.]—An affidavit that defendant was indebted in £100 on a note, and in £28 for goods; that the two sums amounted to £128; and that the deponent believed the defendant was about to leave Upper Canada to defraud him of the said debt (instead of debts):—Held, sufficient. *Romberg* v. *Steenbock*, 1 P. R. 200.

Several Claims.]—Where the affidavit set out the cause of action for goods sold and delivered, and also upon an executed contract for the delivery of certain lumber, but stated only an aggregate amount due:—Held, sufficient. *McIntyre* v. *Brown*, 4 L. J. 85.

Several Claims.]—When some of the demands are well and others badly stated, the affidavit is not bad as to all; but the defendant will be released on putting in bail for the sum properly sworn to. *Ross* v. *Hurd*, 1 P. R. 158.

Stating Cause of Action.]—The same particularity in stating the cause of action is not required when a Judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail, when no order of a Judge was required, nor as when personal liberty is involved. *Bank of Hamilton* v. *Baine* (2), 12 P. R. 459.

Statutory Requisites.] — Construction and effect of 7 Vict. c. 31. *Bruce* v. *Schofield*, 1 U. C. R. 1.

Strict Compliance.]—The affidavit to arrest in a special case requiring the sanction of a Judge to the issuing of the writ, need not follow so strictly the form prescribed by the Act, as where the creditor may sue out the capias as of right. *Bordon* v. *Cavdell*, Tay. 486; *Neven* v. *Butchart*, 6 U. C. R. 196.

Sunday—*Deponent's Residence.*] — It is irregular to make an affidavit of debt, or issue a writ, on Sunday; and in an affidavit of debt the proper place of residence of the deponent must be stated. *Hall* v. *Brush*, T. T. 3 & 4 Vict.

"Their said Debt."]—The defendant is about to leave Upper Canada to defraud the plaintiffs of "their said debt." is good, though the form given by the statute says, "the said debt." *Pawson* v. *Hall*, 1 P. R. 294.

Two Deponents Necessary.] — An attachment was refused where only one person besides the creditor swore to the absconding or concealment. *Anon.*, 2 O. S. 292.

Affidavits should follow as nearly as possible the common affidavits of debt. *Ib.*

Word Misspelt.]—It is no ground for setting aside an arrest that the word "malicious" is spelt with a "t" instead of a "c" in the affidavit of debt. *Gardener* v. *Morrison*, H. T. 4 Vict.

(b) *Amendment.*

After Arrest.]—Amendment of writ of ca. sa. granted on payment of costs without setting aside arrest of defendant under it. *Gamble* v. *White*, 2 L. J. 209.

Amount of Judgment.]—A ca. sa. omitting to state any sum for which judgment has been recovered is void, and cannot be amended after execution. *Billings* v. *Rapelje*, 2 P. R. 194, 200; *Henderson* v. *Perry*, 3 U. C. R. 252.

Form of Action.]—Error in the form of action in the body of a writ of capias may be amended after arrest upon payment of costs. *Legear* v. *Lenox*, 3 L. J. 89.

Form of Action.]—Amendment allowed in the address, cause of action, and teste of ca. re. *Myers* v. *Rathbun*, Tay. 127.

Form of Action.]—Refused in a bailable ca. re. *Campbell* v. *Hepburn*, Dra. 3.

Form of Action—*Omission.*]—Held, 1. That a copy of a capias after action should, like the original writ, shew the nature of the cause of action. 2. That in the note at the foot of the writ, the word "calendar" should precede the word "months," and the words, "including the day of such date," should follow the words, "from the date hereof." 3. That such defects both in the writ and copy served, when produced by defendant, may be amended on payment of costs. *Hubbard* v. *Milne*, 1 C. L. J. 14.

Indorsement.]—Where the indorsement directed the sheriff to take bail for too large a sum, the court allowed it to be amended on payment of costs. *Grantham* v. *Peters*, E. T. 3 Vict.

Indorsement.]—Where a ca. sa. in debt has been issued on a judgment in assumpsit, and not indorsed as required by the rule of court, it may be amended. *Keefer* v *Hawley*, 1 P. R. 1.

Intituling—*Rule Nisi.*]—Where the rule nisi was not correctly intituled, the court allowed an amendment by the affidavits on payment of costs. *Ball* v. *McKenzie*, 1 U. C. R. 412.

Intituling Affidavits.]—Where the affidavit for an order for arrest was intituled in the High Court of Justice, but not in the proper division:—Held, that the objection was clearly amendable. *Robertson* v. *Coulton*, 9 P. R. 16.

Irregularities.]—Held, under the facts of this case, that the plaintiffs had violated the spirit of the law in charging defendant in execution on a ca. sa. whilst endeavouring to enforce a remedy against his lands through an execution issued since the ca. sa., and since a fi. fa. goods returned nulla bona. An application to amend the ca. sa. was therefore refused:—Semble, the irregularities might on terms have been amended under ordinary circumstances. *Curry* v. *Turner*, 8 L. J. 296.

Misnomer.]—Amendment refused where one defendant's Christian name was wrong. *Allison* v. *Wagstaff*, M. T. 7 Vict.

Names of Plaintiffs.]—A variance between a writ and a copy in the names of the plaintiffs was corrected by amending the former so as to conform to the latter. *Damer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.

Teste.]—On application to set aside an arrest, the plaintiff was allowed, on payment of costs, to amend the date of teste in copy served. *Wilson* v. *Storey*, 2 P. R. 304; 3 L. J. 50.

Teste.]—A writ of ca. sa. tested in the name of a retired chief justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office:—Held, irregular, but amendable. *Nelson* v. *Roy*, 3 P. R. 226.

Wrong Form of Writ.]—The capias issued after action was in the form formerly used for the commencement of an action:—Held, amendable. *Robertson* v. *Coulton*, 9 P. R. 16.

Wrong Sheriff.]—Where defendant was arrested on a writ issued and tested on 3rd January, 1852, and directed to the sheriff

of the united counties of Wentworth and Halton, there being no such officer since 1st January:—Held, that though the writ might be amended the copy could not. *Lyman* v. *Brethorn*, 2 C. L. Ch. 108.

(c) *Charging in Execution.*

A ca. sa. lodged in a sheriff's office to charge the bail, is not a charging in execution. *Dorman* v. *Rawson*, Tay. 265.

Where a prisoner surrendered by his bail after judgment, applies for a supersedeas, the plaintiff not having charged him in execution in due time, he must shew when notice of render was given. *Jennings* v. *Ready*, E. T. 3 Vict.

The rule of T. T., 29 Vict., No. 99, applies to a defendant who, though not a prisoner at the time of the trial, is rendered by his bail during the same vacation. A defendant who has surrendered himself in discharge of his bail, during vacation, though not a prisoner at the time of the trial, will become supersedeable, unless the plaintiff charge him in execution during the term next succeeding such trial. *Brash* v. *Latta*, 5 L. J. 226.

The fact that a plaintiff has not charged in execution within two terms after judgment a debtor who has given bail to the action, is no ground for an exoneretur. *Torrance* v. *Holden*, 10 L. J. 298.

Where judgment was obtained on 14th January, defendant being on bail, and he was on 21st May following, in the vacation preceding Trinity term, surrendered by his bail, of which notice was given to plaintiff, and the whole of Trinity term allowed to elapse without his being charged in execution, defendant was superseded. *Torrance* v. *Holden*, 10 L. J. 332.

Defendant, having been at large on bail when the verdict was obtained against him, was rendered by his bail near the end of the ensuing term, and not having been charged in execution during that term, applied for his discharge:—Held, that he was not a prisoner, within the meaning of the rules of court, at the time of the trial, not having been in close custody, and the application was refused. *Curry* v. *Turner*, 3 P. R. 144.

Charging in execution is the process whereby a prisoner in actual confinement is detained in custody, whether at suit of the same or a different plaintiff. *Hesketh* v. *Ward*, 17 C. P. 667.

When a party, arrested under capias, pending action and before judgment, gives bail, and after judgment, and ca. sa. to fix bail returned non est inventus, is rendered to the sheriff's custody by his bail, in their own discharge, such prisoner is still held under mesne process, and is not confined in execution. *Ib.*

Quære, whether after voluntary return of an escaped prisoner a plaintiff cannot accept such return, and lawfully charge his debtor in execution by merely delivering a ca. sa. to the plaintiff. *Ib.*

A deputy Judge of a county court declined, on the ground that he was the partner of the plaintiff's attorney, to entertain defendant's application for a supersedeas because he had not been "charged in execution within the term next after judgment:"—Held, that he was entitled to be discharged from custody under a writ of habeas corpus. *Reid* v. *Drake*, 4 P. R. 141.

The vacation succeeding a term is not to be considered, for the purpose of charging a defendant in execution, as a part of the preceding term. The same rule governs in this respect in county courts as in the superior courts. *Ib.*

A defendant, committed to prison on mesne process, and charged in execution in the cause without a new affidavit, before 7 Vict. c. 31:—Held, not entitled to his discharge. *Hamilton* v. *Mingay*, 1 U. C. R. 22.

The ca. sa. lodged in the sheriff's office to charge the bail is not a charging in execution. *Dorman* v. *Rawson*, Tay. 265.

Quære, whether after the voluntary return of an escaped prisoner a plaintiff cannot accept such return, and lawfully charge his debtor in execution by merely delivering a ca. sa. to the sheriff. *Palmer* v. *Rogers*, 6 L. J. 188.

The plaintiff is not compelled to charge the defendant in execution in the county where the bail have surrendered him; he may be charged where the venue is laid. *Beattie* v. *Robinson*, 1 C. L. Ch. 217.

The defendant was arrested under a ca. sa. and afterwards admitted to bail. The trial was in the vacation before Michaelmas term, and the render in the vacation after that term. The plaintiff having omitted to charge the defendant in execution during Hilary term:—Held, on an application for a supersedeas, that the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which the plaintiff must charge the defendant in execution, under Reg. Gen. H. T. 26 Geo. III. The defendant was therefore discharged. *Golding* v. *Mackie*, 8 P. R. 237.

Judgment was signed against defendant in Michaelmas term, and he was rendered in discharge of his bail in the vacation following:—Held, on application for a supersedeas, that the render related back so as to include Michaelmas as one of the two terms within which the plaintiff must charge the defendant in execution; and that not having been charged in execution until Easter term he was entitled to his discharge. *Wheatley* v. *Sharpe*, 8 P. R. 307.

Where a person is once supersedeable for want of being charged in execution, he always continues so, even though he is afterwards charged in execution, before the application for a supersedeas. *Ib.*

An application for a supersedeas was entertained although a similar application in the same case had already been dismissed. *Ib.*

(d) *Costs.*

Attaching Creditor.]—Held, that the object of s. 20 of R. S. O. 1877 c. 68 is to save harmless the bonâ fide attaching creditor, whose writ has had the effect of saving and protecting the debtor's property for the

execution creditor. In this case there was a fund, not exigible under the execution, to which the attaching creditors alone were entitled, and several attachments, of which the plaintiff's was third in time, and the whole property had been seized and sold or retained under the first writ. The plaintiff, without disclosing these facts, obtained an order, under s. 20 of the Act, that all costs of his attachment should be paid out of the debtor's assets before the execution, and under it taxed his whole costs of suit. The order was set aside, for had the facts been disclosed it should not have been made, and in any event only the costs of suing out and executing the attachment were taxable. The application to set aside such order was held not to be an appeal. *Hughes* v. *Field*, 9 P. R. 127.

Term of Dismissal.] — Where a judgment debtor disobeyed an order for his examination he was directed to pay the costs of an application for a ca. sa., although the motion was dismissed upon his giving sufficient excuse for his disobedience. *Imperial Bank* v. *Dickey*, 8 P. R. 246.

Defendant's Costs when Recovery less than Amount for which Arrest is Made.

Where a cause has been referred by order at nisi prius, but no verdict taken, defendant cannot deprive the plaintiff of costs. *Powell* v. *Gott*, 1 U. C. R. 418.

Semble, the words of the statute, "arrested and held to special bail," are satisfied by defendant being arrested and imprisoned. *McGregor* v. *Scott*, Tay. 56.

Where one of two or more defendants is arrested for an amount greater than the verdict afterwards obtained, an order will be granted under 49 Geo. III. disallowing the plaintiff his costs against him solely. *Arnold* v. *Jenkins*, 3 L. J. 133.

Held, that unless a defendant has been both "arrested" and actually "held to special bail," he cannot take the benefit of s. 322 of C. L. P. Act as to costs. *Lyght* v. *Caunte*, 6 P. R. 181.

Plaintiffs arrested for £106, and got a verdict for £54 7s. 6d:—Held, under the special circumstances set out in this case, that the plaintiffs had shewn "reasonable and probable cause," and had sufficiently explained their failure in recovering the full amount for which they had arrested. *Goldie* v. *Cameron*, 1 P. R. 29.

The plaintiff is allowed no costs where in a bailable action he recovers less than the sum sworn to, and the court will order defendant his costs; and the defendant is entitled to set off his costs against plaintiff's verdict. *Burrows* v. *Lee*, E. T. 3 Vict. But see *Higson* v. *Phelan*, 1 P. R. 24.

Where a defendant arrested under a bailable writ has obtained a rule granting him his costs under 49 Geo. II. c. 4, the plaintiff is not entitled to tax costs on entering the judgment. The effect of the first clause of this statute is to deprive the plaintiff of all his costs of suit. And the word "recovered" in the latter part of this clause, as well as the word "recover" in the former part, refers to the amount for which the verdict was given. *Higson* v. *Phelan*, 2 C. L. Ch. 7.

This point was considered at least doubtful in the same case, 1 P. R. 24.

The plaintiff cannot object to the notes of the Judge who tried the cause being referred to, for the purposes of this application. *Higson* v. *Phelan*, 1 P. R. 24.

Semble, that one of two defendants, arrested for more than the sum recovered, cannot obtain costs of defence. *Glass* v. *Curry*, 1 P. R. 132.

A bailable capias having issued, the deputy sheriff went to defendant, and asked him to find bail. They both then went in search of bail, and a bail bond was executed:—Held, a sufficient arrest to entitle defendant to apply; but, that under the circumstances of this case, want of reasonable and probable cause was not shewn. *Morse* v. *Teetzel*, 1 P. R. 369.

Where evidence had been given in court of a larger sum being due to the plaintiff than he had arrested defendant for, and the case was then referred with other matters, and the arbitrators awarded the possession of a mill to the plaintiff, and £6 or £7 only in money, the court refused costs to defendant. *McGregor* v. *Scott*, Tay. 56.

Quære, under what circumstances the court will allow costs to a defendant under the statute where there has been a reference. *Beard* v. *Orr*, Dra. 40.

Where plaintiff arrested a defendant for upwards of £30 without allowing a set-off, of which he must have been aware, and a verdict being taken subject to a reference, the arbitrators allowed the set-off and awarded plaintiff only £20, defendant was held entitled to costs. *Kendrew* v. *Allen*, T. T. 4 & 5 Vict.

Where the plaintiff arrested for £20, and a verdict was taken by consent for £50, subject to a reference, and the arbitrators awarded 11s. 3d. to the plaintiff, and it appeared by their affidavit that the plaintiff shewed a cause of action to no greater an amount, the court allowed defendant his costs. *McMicking* v. *Spencer*, H. T. 6 Vict.

Where a verdict has been taken subject to a reference, plaintiff may be allowed his costs; but, semble, not if the reference direct the costs to abide the event. *Nicholson* v. *Allan*, 6 O. S. 252.

An application for costs under 49 Geo. III. c. 4, must be supported by affidavit stating that defendant was arrested without reasonable or probable cause. *McIntosh* v. *White*, Tay. 57.

Where the difference between the amount recovered and that sworn was only £7, and in defendant's affidavits in support of an application a wrong Christian name was given to one of the plaintiffs in the style of the cause—the court refused to allow them to be amended, and discharged the rule. *Rose* v. *Cook*, 1 U. C. R. 5.

The rule was refused, because it nowhere appeared in the affidavits for what sum the plaintiff had a verdict. *Powell* v. *Gott*, 1 U. C. R. 415.

If the facts sworn to in the affidavits filed shew want of reasonable and probable cause, that is enough, without swearing to it in express terms. *Laderonte* v. *Cullen*, 1 P. R. 22.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be $704, but the plaintiff recovered only $489. As to $80 which the plaintiff failed to recover, it was held, on the facts stated in the report of the case, that he had no reasonable ground for believing defendant to be liable, and he abandoned this portion at the trial, but as to the other portion, for which he failed, he had reasonable ground:—Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. 1877 c. 5, s. 343. *Porritt* v. *Fraser*, 8 P. R. 430.

(e) Discharge and Setting Aside.

Affidavits.]—Where the original affidavit to hold to bail was transmitted by the deputy clerk of the Crown to the clerk in chambers, at the request of defendant's attorney, without a Judge's order:—Held, that such original might be acted upon in moving to set aside an arrest, instead of filing a verified copy. *Chamberlain* v. *Wood*, 1 P. R. 195.

Agreement Not to Arrest.]—Where a debtor leaves the Province and returns upon an agreement that he is not to be arrested, provided that he immediately proceeded to the settlement of his estate, and the creditors arrest him, alleging that he has broken the condition, the court will not discharge him, but will leave him to his action on the agreement. *Sutherland* v. *Murphy*, 4 U. C. R. 176.

Allegations Not Sustained.] — Where application was made for a discharge from custody under a capias upon the ground that the arrest was procured through a trick, by means of the use of criminal process, afterwards abandoned, and the affidavits in answer positively denied the trick and all collusion, the Judge, without inquiring into the legality of the arrest under the criminal process, discharged the summons. *Glennie* v. *Ross*, 3 P. R. 281.

Application to Set Aside Order.]—On an application to set aside the order for an arrest and the writ, &c., but not to be discharged out of custody, objections that the affidavit discloses no sufficient cause of action, or shews that the defendant is about to leave the Province, are not open. *Robertson* v. *Coulton*, 9 P. R. 16.

Bail.] — Defendant was arrested on a capias, and gave bail. After judgment a ca. sa. was issued, and proceedings being had against the bail, the prisoner was rendered to the sheriff, but gave bail to him under C. S. U. C. c. 24, s. 29:—Held, on an application by the prisoner for his discharge from bail as not being worth $29, &c., under C. S. U. C. c. 26, ss. 7, 8, 13, that he was not confined "in close custody in execution," and had not been "arrested under a writ of ca. sa., though not confined to close custody, but has given bail;" and, therefore, that he was not entitled to be discharged. *Hesketh* v. *Ward*, 4 P. R. 158.

Bail Less Than Claim.]—An arrest will not be set aside because the direction to take bail is for less than the sum sworn to. *Campbell* v. *Wood*, 1 P. R. 199.

Bail to the Limits.]—Quere, whether defendant arrested on a ca. sa. having given bail to the limits is not precluded from a formal objection to the affidavit, such as the want of deponent's addition. *Ewing* v. *Lockhart*, 3 U. C. R. 248.

Breach of Promise — *Corroboration.*]—In an action for breach of promise of marriage the defendant was arrested under a ca. re., the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the Province:—Held, that, under these circumstances, the defendant should be discharged, and the bail bond delivered up to be cancelled. *Donegan* v. *Short*, 12 P. R. 589.

Ca. Sa. after Ca. Re.]—Where a plaintiff sued out a ca. re., and without executing it took a cognovit and entered common bail and judgment against defendant, and arrested him on a ca. sa., without filing a fresh affidavit, the ca. sa. and arrest were set aside with costs. *Brown* v. *Bethune*, 4 O. S. 331.

Cause of Action.]—On an application to set aside an arrest the Judge should not inquire into the particular form of the action, if satisfied that a cause of action exists. *Butler* v. *Rosenfeldt*, *Sweetzer* v. *Rosenfeldt*, 8 P. R. 175.

Copy of Writ.]—The copy of a capias need not shew the debt on which the order authorizing the writ issued; nor need the writ shew the name of the county Judge who made the order. *Swift* v. *Jones*, 6 L. J. 63.

Copy of Writ.]—On an application to set aside an arrest for a variance between the original writ and the copy served, the writ was amended so as to conform to the copy. *Damer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.

County Court Judge.]—The Judge of a county court who orders the issue of a writ of attachment out of the High Court under s. 2 of the Absconding Debtors' Act, R. S. O. 1887 c. 66, has no jurisdiction to entertain an application to set aside such writ. *Disher* v. *Disher*, 12 P. R. 518.

County Court — *Divisional Court.*] — A divisional court has power under Con. Rule 1051 to set aside or vary an order for arrest made by a county court Judge in a county court action. *Elliott* v. *McCuaig*, 13 P. R. 416.

County Court — *Divisional Court — Intent.*]—Upon an appeal by the plaintiff from an order of the Judge of a county court, in an action in that court, discharging the defendant from the custody of his bail, it was

objected by the defendant that the order was not a final one, and that no appeal lay:—Held, that the court had, by Rule 1051, jurisdiction to discharge or vary the order, as explained in Elliott v. McCuaig, 13 P. R. 416:—Held, also, upon the evidence, that the defendant should not have been discharged from custody. Toothe v. Frederick, 14 P. R. 287, not followed, having been in effect overruled by Coffey v. Scane, 22 A. R. 280:—Held, by the court of appeal, that no appeal lay, with or without leave, from the order of the divisional court. *McVean* v. *Ridler*, 17 P. R. 353.

Court of Chancery.]—A defendant confined in close custody under a writ of arrest, may apply to the court of chancery for his discharge under C. S. U. C. c. 26, s. 7. *Lawson* v. *Crookshank*, 2 Ch. Ch. 413.

Creditors.]—Proceedings had in suits against an absconding debtor, contrary to the statutes, may be set aside at the instance of other creditors. *Bank of Montreal* v. *Burnham*, 1 U. C. R. 131.

Custody without Warrant.]—Where defendant was illegally detained in close custody, without warrant, at the instance of the plaintiff, on a charge involving the subject matter afterwards stated in the affidavit to arrest, as creating the demand for which the defendant was ordered to be held to bail in the cause, he was discharged from custody on entering a common appearance. *Palmer* v. *Rodgers*, 6 L. J. 188.

Date of Indorsement.]—The date of an indorsement on a capias, given in 12 Vict. c. 63, sched. 3, means the date of the Judge's order, not of the affidavit. Where the arrest is on affidavit no date need be indorsed. *Romberg* v. *Steenbock*, 1 P. R. 200.

Date of Execution of Writ.]—The omission to indorse upon the writ the day of execution thereof, as directed by the rule of court, is no ground for setting aside an arrest. Quære, whether such indorsement should be by the bailiff who makes the service, as he is not the person who has the execution and return of the writ. *McNider* v. *Martin*, 1 P. R. 205.

Debt not Due.]—Quære, when one Judge on a statement of facts has ordered a ca. sa. to issue, can another Judge, taking a different view of the same facts, interfere without any new matter being shewn? The question whether any debt is due or not will be entertained on an application to discharge an order for a ca. sa., but unless a very clear case is made out, the court or Judge will not interfere. *McInnes* v. *Macklin*, 6 L. J. 14.

Debt not Due.]—Where defendant was arrested on a ca. re., and it was doubtful whether the debt was actually due or not, the court refused to discharge the defendant, although the Judge who granted the order for the writ would not have done so, if all the facts had been before him. *Willett* v. *Brown*, 8 P. R. 468.

Defective Material.]—After removal of the proceedings from an inferior court, the writ and arrest were set aside for a defect in the affidavit of debt, though a similar motion was pending in the court below. *English* v. *Everett*, 1 U. C. R. 336.

Defective Material.]—An arrest was made on the 2nd November, special bail put in on the 9th November, a verdict rendered some time before the 12th December, a render by the bail on the 5th January, an application to the county Judge on the 2nd January, and the discharge of that application on the 5th January, and the final judgment given some time in the same month. An application, upon a habeas corpus issued on the 8th March, to discharge defendant because the affidavits upon which the Judge made his order to arrest were not sufficient in law, was not entertained, as it might have been if the affidavits had been a nullity. *Runciman* v. *Armstrong*, 2 U. L. J. 165.

Defective Statement — *Supplemental Affidavit.*]—The affidavit stated only that defendant was indebted in $116.60 on two promissory notes overdue; but defendant, who had left the country, did not deny that he was indebted, and the particulars were stated in the special indorsement of the writ of summons served on him. An affidavit stating the particulars sufficiently was allowed to be filed in support of the order. *Robertson* v. *Coulton*, 9 P. R. 16.

Defects not Disclosed.]—The irregularity complained of must be pointed out in the rule, or referred to in the rule as appearing in the affidavits. *Cook* v. *Norton*, T. T. — Vict.

Defects not Disclosed.]—A rule nisi to set aside an arrest on grounds disclosed in affidavits filed was discharged because the defect was not apparent from the affidavits, but could only be ascertained by a reference to the writ which was annexed to them. *McGann* v. *Howison*, H. T. 7 Vict.

Defects not Disclosed.]—A rule nisi to set aside the order to hold to bail for alleged insufficiency in the plaintiff's affidavit must point out the objection specifically. *Watson* v. *Charlton*, 40 U. C. R. 142.

Defects in Warrant.]—An informality in the warrant of the bailiff is not ground to set the arrest under it aside, especially where the writ itself is not produced. *Hussey* v. *Link*, E. T. 2 Vict.

Delay.]—The court refused to set aside upon motion a ca. sa. issued upon a judgment more than a year old without a sci. fa. to revive it. The ca. sa. was clearly irregular, yet not void, but voidable, and the proper remedy would seem to be a writ of error. *McNally* v. *Stephens*, Tay. 263.

Delay.]—Where a plaintiff proceeded after more than a year from issuing his attachment, the proceedings were set aside and a supersedeas ordered. *Bank of Upper Canada* v. *Spafford*, 3 O. S. 78.

Delay.]—It was held no objection to an arrest on a ca. sa. that several terms had elapsed after the return of the execution against goods before the ca. sa. issued. *Glynn* v. *Dunlop*, 4 O. S. 111.

Delay.]—Motion to set aside attachment and subsequent proceedings, under 2 Will.

IV. c. 5, because plaintiffs were not inhabitants of the Province, refused for delay in moving and insufficiency of affidavit. *Fisher* v. *Beach*, 4 O. S. 118.

Delay.]—Motion on the 2nd September to set aside a ca. sa. on which a party was arrested on the 6th August:—Held, not too late. *Keefer* v. *Hawley*, 1 P. R. 1.

Delay in Trial.]—When a defendant in custody on mesne process put off the trial at one assizes, and at the approach of the following assizes—after being apprized that the plaintiff had neglected to give notice of trial—pressed that the record might be entered low on the docket to give him time to procure a witness, and it was so entered, but could not be tried for want of time:—Held, that defendant was not supersedeable because the cause had not been tried within three terms. *Gordon* v. *Fuller*, 5 O. S. 34.

Denial of Charge.]—A party was arrested upon the affidavit of the plaintiff, stating that "from information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said J. R. is privately making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said J. R. is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court, * * * and for the express purpose of defrauding me of the damages I may recover against him." This was confirmed by similar affidavits from two others. Upon motion to set aside the capias or to discharge defendant:—Held, that the court could not infer that plaintiff did not shew such facts and circumstances as satisfied the Judge there was reasonable and probable cause for believing that defendant was about to leave the Province. But, inasmuch as defendant's own affidavit denied the charge of seduction, upon which he was arrested, most unequivocally, and shewed circumstances by which it might be inferred he had no intention (then) of leaving the Province, the court ordered him to be discharged, but refused to set aside the capias and arrest. This decision is not to be referred to as upholding arrests upon affidavits such as were made in this case. *Brown* v. *Riddell*, 13 C. P. 457.

Denial of Plaintiff's Case.]—On an application by a debtor arrested under a capias for his discharge, the Judge may receive affidavits denying the indebtedness, or his intention to leave, or any other facts relied upon in plaintiff's affidavit. *Demill* v. *Easterbrook*, 10 L. J. 246.

Divisional Court.]—Held, that a divisional court may review the action of a Judge in setting aside a writ of ca. sa. and the arrest thereunder, and also his action in making the order to arrest. *Cartwright* v. *Hinds*, 3 O. R. 384.

Divisional Court.]—A divisional court has power under Con. Rule 1051 to set aside or vary an order for arrest made by a county court Judge in a county court action. *Elliot* v. *McCuaig*, 13 P. R. 416.

Effect of Discharge.]—In debt on a judgment of a district court it is a good plea in bar that the plaintiff arrested the defendant on a ca. sa. and afterwards consented to his discharge. *Fraser* v. *Bacon*, 2 U. C. R. 132.

Excessive Claim.]—After an arrest for £613, and while defendant was in custody, all matters in difference were referred, and an award made for the plaintiff for £140. The defendant was discharged. *Barry* v. *Eccles*, 2 U. C. R. 383.

Excessive Claim.]—So where, under similar circumstances, the award was for a sum payable by instalments, one of which was due:—Held, that the prisoner, without shewing payment of the instalment due, was entitled to his discharge. *Ruthven* v. *Ruthven*, 5 U. C. R. 279.

Executor.]—Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire, and the money lost, the court held the executor guilty of a breach of trust with respect to the money, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest. *Lawson* v. *Crookshank*, 2 Ch. Ch. 426.

Failure to Deliver Statement of Claim—*Extension of Time.*]—Under the present practice there is power, after the expiration of the time appointed by Rule 1044 for the delivery of the statement of claim, where a defendant is detained in custody under an order for arrest, to extend the time. The case is within Rule 353, and the wording of Rule 100 of the Rules of Trinity Term, 1856, has been altered from "shall have been given" to "is given" in Rule 1044. Where the statement of claim was delivered two days after the month had expired, and the defendant moved for his discharge, an order was made validating it for all purposes, upon terms as to speedy trial and payment of costs. *Winch* v. *Traviss*, 18 P. R. 102.

Foreign Discharge.]—Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries. *Brown* v. *Hudson*, Tay. 390.

Foreign Discharge.]—The court refused to discharge a defendant upon filing common bail, on the ground of his person having been discharged from arrest by an insolvent law of New York. *Dascomb* v. *Heacocks*, Tay. 438.

Foreigner.]—A person seeking to set aside an attachment against him, on the ground that he never lived nor was in this country so as to make him come under the Absconding Debtors' Act, should make those facts appear clearly; and the court discharged the rule where those facts were not distinctly made out, and the party had not described himself in his affidavit as the defendant in the suit. *Smith* v. *Niagara Harbour and Dock Co.*, 6 O. S. 555.

Form of Affidavit.]—A statement in an affidavit of a defendant applying to set aside

an order for his arrest, that B. and C. are copies of the affidavits filed on which the order to arrest was granted, &c., means all the affidavits filed. *Demill* v. *Easterbrook*, 10 L. J. 246.

Forum.]—An attachment issued by the order of a Judge in chambers may be set aside by another Judge. *Howland* v. *Rowe*, 25 U. C. R. 467.

Forum.]—Rule 536 does not apply to cases of ex parte orders for arrest, which are specially provided for by Rule 1051; and a county court Judge has no jurisdiction to set aside his own order for arrest. Where an order for arrest has been acted on by the sheriff, it should not be disturbed. *Jury* v. *Jury*, 16 P. R. 375.

Fraud—*Criminal Liability.*]—Where defendant applied under s. 31 of C. S. U. C., c. 22, to be discharged upon the ground that he had no intention to quit Canada with intent, &c.; and it appeared that the debt had been created through fraud; and that he had no more ties in Canada than elsewhere, where he would not be criminally responsible for his fraud—the application was refused. *Terry* v. *Comstock*, 6 L. J. 235.

General Denial.]—Defendant swore that he had not at the time of his arrest, or of making his affidavit, any intention of quitting Canada with intent, &c., but he did not deny or explain any of the facts sworn to on obtaining the order; and the court, holding that these facts justified the arrest, refused his discharge. *Jones* v. *Gress*, 25 U. C. R. 594.

Imposing Terms.]—The court will in general impose terms on a defendant when an arrest is set aside for mere irregularity, or a trifling error; but where an arrest is made for more money than is due, and there is a substantial defect, or if a manifest injury has been sustained, the court will not interfere. *Billings* v. *Rapelje*, M. T. 4 Vict.

Imposing Terms.] — Where the defendant in his notice of motion to set aside an order for his arrest and for his discharge, asked for costs, and an order was made in his favour with costs:—Held, that the Judge making the order had power to impose the term that the defendant should be restrained from bringing any action. Review of the English authorities. *Adams* v. *Annett*, 16 P. R. 356.

Indigent Debtors' Act.] — Where a debtor is in custody under a writ of ca. sa., the court cannot make an order for his discharge except under the Indigent Debtors' Act. *Gossling* v. *McBride*, 17 P. R. 585.

Infant.]—Infancy is no ground for discharging a person from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.

Insolvent.]—Right of insolvent to his discharge from arrest, though not entitled to a certificate of discharge. *Hood* v. *Dodds*, 19 Gr. 639.

Irregularity.]—The court will not set aside an arrest for irregularity in the affidavit, after the prisoner has escaped. *Keefer* v. *Merrill*, Tay. 490.

Judge in Chambers.] — A Judge in chambers has no jurisdiction at common law to discharge a defendant on the ground that he had no intention to quit Canada when the ca. sa. was issued. *Bank of Montreal* v. *Campbell*, 2 C. L. J. 18.

Judge in Chambers—*Grounds for Discharge.*]—A Judge in chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity. *Damer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.

The order itself can be rescinded only by the court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in chambers, or to the county court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defects in the original material. *Ib.*

Either of these orders may be discharged or varied by the court, which possesses over the original order to hold to bail: 1. A general appellate jurisdiction on the identical material which was before the Judge; 2. An express statutory jurisdiction to rescind the order, upon a motion to discharge the prisoner. In addition to this, the court has also co-ordinate jurisdiction with a Judge in chambers, or the county court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties. *Ib.*

Judge in Chambers.] — A Judge in chambers has no power to rescind his own order for a writ of ca. sa. or to discharge the defendant from custody after the order has been acted upon. *McNabb* v. *Oppenheimer*, 11 P. R. 214.

Judge in Single Court.]—A Judge of the High Court sitting in single court has power to set aside an order for the issue of a ca. sa. issued by a local Judge of the High Court. *Waterhouse* v. *McVeigh*, 12 P. R. 676.

Local Judge.]—A local Judge of the High Court has no power to order the discharge of a defendant held in custody under a ca. sa. issued out of the High Court of Justice. *Cochrane Manufacturing Co.* v. *Lamon*, 11 P. R. 351.

Married Woman.] — Where defendant, a married woman, and known to be so by the plaintiff, was arrested on a ca. re., both writ and arrest were set aside with costs. *Foley* v. *White*, 2 C. L. Ch. 51.

When the writ of ca. re. is only against the wife, and is irregular against her, the husband cannot be compelled to appear. *Ib.*

Married Woman.]—Right of married woman to her discharge on application. *Rennette* v. *Woods*, 11 U. C. R. 29.

Merits.]—On an application to set aside an arrest under 22 Vict. c. 96:—Semble, that the existence of the cause of action may be inquired into, but that the absence of it

must be very clearly shewn to warrant interference. *Delisle* v. *Degrand*, 3 P. R. 105.

Mesne Process.]—Section 31 of C. S. U. C. c. 22 applies only to writs of capias in the nature of mesne process. *Bank of Montreal* v. *Campbell*, 2 C. L. J. 18.

Misleading Statement.]—Held, that a statement in the affidavit on which the order to arrest as founded, that the defendant had made "an assignment of all his property," without adding for the general benefit of all his creditors, was of itself objectionable, as leading to the belief that the assignment was fraudulent, but apart from this there was sufficient stated to justify the issue of the order. *Cartwright* v. *Hinds*, 3 O. R. 384.

Misnomer—*No Statement of Affidavit.*]—One of several defendants, Stephen Nathaniel Campbell, was arrested on a capias in which he was called Samuel N. Campbell; and on the copy served there was no direction to take bail. He was taken to the sheriff's office, and about an hour afterwards was served there with another copy, on which was indorsed, "take bail for £319 11s. 3d.," not saying that this was the sum sworn to, nor was this stated on the original either. The next day he was served in gaol with a third copy, on which was indorsed the same direction, with "by affidavit" added. As to the misnomer, the plaintiff shewed that the defendant had represented his first name to be Samuel, but did not shew that he had said this was his only name, or that any inquiries had been made to learn what his second name was: — Held, arrest bad on both grounds. *Pegg* v. *Campbell*, 1 P. R. 328.

Misnomer.]—Where a party by his own conduct and admissions has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer; and in this case defendant was precluded from raising the objection. *Brown* v. *Smith*, 1 P. R. 347.

Name of Issuing Officer.]—The name of the officer who issues a writ in the margin is not "a memorandum or notice subscribed to, or an indorsement on the writ," within 12 Vict. c. 63, s. 24, and therefore the omission of it in the copy served is not fatal. *Jannet* v. *Bush*, 2 P. R. 42.

Name of Issuing Officer—*Seal.*]—It is no objection to an arrest that the copy of the writ served does not contain the name of the clerk of the Crown, or a mark [L.S.] to shew that the original was issued by the proper authority, and sealed. *Carrol* v. *Light*, 1 P. R. 137.

Negotiation for Settlement.] — Held, that defendant had not, by proposals for settlement, &c., waived his right to a discharge because plaintiff had not declared in time. *Tyson* v. *McLean*, 1 P. R. 339.

New Affidavits.] — Quære, whether, on shewing cause to an application to set aside an arrest, affidavits can be received to support the original affidavits as to the cause of action. *Diamond* v. *Cartwright*, 22 C. P. 494.

New Material.]—Upon an application to set aside an order for a ca. sa. upon the ground that it is based upon insufficient material, as distinguished from a motion to discharge the defendant from custody upon the merits, no new material can be used. Damer v. Busby, 5 P. R. at p. 389, followed. *Gilbert* v. *Stiles*, 13 P. R. 121.

Non-existence of Cause.] — Quære, should a capias, or arrest thereunder, be set aside on the ground that there was not at the time of making the affidavit to hold to bail good and probable cause for believing that the defendant, unless forthwith apprehended, was about to quit Canada with intent, &c.; and, if so, can a Judge in chambers entertain the application? *Palmer* v. *Rodgers*, 6 L. J. 188.

Non-joinder.]—The plaintiff having a judgment against defendant and C., and a fi. fa. upon it in the sheriff's hands, sued defendant alone on the judgment, and arrested him under a capias. Richards, J., refused to set aside the arrest or stay proceedings, but left defendant to plead the non-joinder and proceedings under the fi. fa. *Ferrie* v. *McDiarmid*, 2 P. R. 521.

No Return Day.]—A warrant to sheriff to commit a party is not irregular, though no return day is mentioned in it. *Prentiss* v. *Brenaan*, 1 Gr. 497.

Pending Action for Malicious Arrest.]—An action for malicious arrest is not a waiver of objections to the affidavit upon which the arrest was made. *Pawson* v. *Hall*, 1 P. R. 294.

Previous Application.]—A Judge of a superior court will not interfere where the county court Judge has exercised his discretion. *Molloy* v. *Shaw*, 5 P. R. 250.

Previous Discharge.] — The court refused to set aside the attachment upon the ground that the debtor had been previously held to bail for the same cause of action, and the bail had been discharged by a reference to arbitration. *Mosier* v. *McCan*, 3 O. S. 77.

Prior Action for Damages.]—Defendant was arrested on a ca. sa. It appeared that the officer who made the arrest had no warrant from the sheriff, though he assured the plaintiff that he had authority to act. Defendant brought trespass against the plaintiff, and assessed damages. After such assessment, after giving bail to the limits, and nearly two months after the arrest, he applied to be discharged, and to have the bail bond cancelled. The court refused the application. *Kirby* v. *Finkle*, 10 U. C. R. 365.

Prompt Application.] — The rule requiring prompt application for irregularity, is not strictly applied in the case of prisoners. *Barry* v. *Eccles*, 2 U. C. R. 383.

Reasonable Grounds.] — If a creditor has reasonable grounds for inferring his debtor's intention to defraud his creditors, a writ of attachment will not be set aside. *Scott* v. *Mitchell*, 8 P. R. 518.

Reluctance to Interfere.]—There must always be great reluctance to set aside the order of a county Judge directing bailable process, when there are reasonable grounds

from which he might draw the conclusion that defendant was about to leave. *Swift* v. *Jones*, 6 L. J. 63.

Return of Debtor.]—A debtor having returned, and given the bond required by 2 Will. IV. c. 5, and put in special bail, a supersedeas was ordered. *Clark* v. *Mallery*, 3 O. S. 157.

Sale Before Attachment Set Aside.]—Where property had been sold under the attachment, the court, on setting it aside, ordered the sheriff to pay over to defendant the moneys realized, and that no action should be brought for anything done under the attachment. *Hart* v. *Rattan*, 23 C. P. 613.

Second Application.]—Where a defendant moved on the ground that the debt was paid, and the rule was refused:—Held, that he could not afterwards move for a defect in the affidavit of debt. *Smith* v. *Ross*, T. T. 3 & 4 Vict.

Service of Copy.]—It is sufficient to serve a copy of the writ immediately after an arrest; and if defendant refuse to take such copy, he cannot afterwards object that it was not served upon him. *McNider* v. *Martin*, 1 C. L. Ch. 205.

Setting Aside Order.]—Held, that in this case it was unnecessary to set aside the order for arrest as substantially the same object would be accomplished by merely discharging the debtor from custody, which was done. *Demill* v. *Easterbrook*, 10 L. J. 246.

Setting Aside Process.]—A defendant arrested on a ca. sa. was discharged from custody with costs, he undertaking to bring no action; and in the order leave was reserved to him to move the court to set aside the writ and arrest. The court discharged a rule for this purpose; for defendant being released, and precluded from an action, there could be no object served by setting aside the process. *Brown* v. *Brown*, 10 U. C. R. 393.

Special Bail.]—When a defendant puts in special bail to an alias bailable writ, he is not thereby prevented from objecting to any irregularity in the arrest. *Ross* v. *Balfour*, 5 O. S. 683.

Special Bail Given.]—The affidavit complied with 2 Geo. IV. c. 1, s. 8, except in omitting the averment that the writ was not sued out from any vexatious or malicious motive; and defendant having put in special bail:—Held, that this defect was waived. *Barrow* v. *Capreol*, 2 P. R. 95.

Special Bail Given.]—Where a defendant puts in special bail to an alias bailable writ, he may still object to an irregularity in the arrest. *Ross* v. *Balfour*, M. T. 2 Vict.

Special Bail Given.]—Putting in special bail after an application to set aside the arrest is a waiver. *Racey* v. *Carman*, 3 L. J. 204.

Special Bail Given.]—Putting in special bail after having given a bond to the sheriff:—Held, not to preclude defendant from moving to rescind the order for his arrest. *Boucers* v. *Flower*, 3 P. R. 62.

Special Bail Given.]—Does not waive objections not technical. *McGuffin* v. *Cline*, 4 P. R. 134.

Statutory Requirements.]—There is a broad distinction, on an application to set aside an order for an arrest, between an order based on affidavits deficient in statutable requirements, and those containing statements from which different conclusions might fairly be drawn by different Judges. In a case coming under the latter head, a Judge in chambers declined to set aside an order for arrest, by a county court Judge of competent authority, preferring to leave it to the full court. Nor would he interfere, the evidence being conflicting, on the ground that it was not the intention of defendant to leave the country. *McGuffin* v. *Cline*, 4 P. R. 134.

But as the order was granted for a sum greater than that warranted by the allegation in the affidavit, the amount for which defendant was held to bail was directed to be reduced to the correct sum, without setting aside the order. *Ib.*

Sum Not Specified.]—Where an arrest is made upon a Judge's order, and no sum is specified in the affidavit, the 2 Geo. IV. c. 1, s. 8, as to indorsements on the writ, does not apply. *Sligh* v. *Campbell*, 4 U. C. R. 255.

Supersedeas Bond.]—Bonds to obtain supersedeas under 2 Will. IV. c. 5, and 5 Will. IV. c. 3. Amount of penalty. *Heather* v. *Wallace*, 4 O. S. 131.

Supplying Defects.]—On an application to set aside the writ:—Held, that any defect in the materials on which it was granted, might be supplied by the affidavits used on such application. *Regina* v. *Stewart*, 8 P. R. 297.

Temporary Release.]—A mere release from custody under a ca. sa. for a given time, in order to make arrangements, if possible, to satisfy the debt, is not a discharge in law. *Davis* v. *Cunningham*, 5 L. J. 254.

Too Much Asked.]—Where a motion was made to set aside a writ and the arrest for irregularity, and to discharge the prisoner, or to deliver up the bail bond to be cancelled, as the case might be, the court made the rule absolute with costs, although more was asked than could be granted. *Armstrong* v. *Scobell*, 3 O. S. 303.

Trying Question of Intent.]—The question as to the intent with which a person, whose property has been seized under a writ of attachment, left the Province, can be tried on affidavit, on an application to set aside the attachment. *Jackson* v. *Randall*, 6 P. R. 165.

Two Bailiffs.]—Where the warrant to arrest is addressed to two bailiffs, as if jointly, one may nevertheless arrest. *Hetherington* v. *Whelan*, 1 C. L. Ch. 153.

Two Defendants.]—In a case where two defendants were in custody on a joint execution, and the plaintiff, having come to an arrangement with one defendant, discharged him:—Held, that this operated as a discharge of the other. *Leahy* v. *McFarlane*, 5 O. S. 688.

Two Defendants.]—The discharge of one of two defendants in execution on a joint judgment, discharges both. *Fisher* v. *Daniels*, E. T. 2 Vict.

Two Defendants.]—An informality in arresting one defendant cannot be made a ground of objection by the other. *Hetherington* v. *Whelan*, 1 C. L. Ch. 153.

Two Defendants.]—Plaintiff having arrested A. and B. on a ca. sa. took a mortgage from B. and discharged him; but it was taken only as collateral security, and B. did not desire A. discharged:—Held, that A. was nevertheless entitled to it. *Benjamin* v. *Foot*, 2 P. R. 47.

Two Persons Liable.]—Where the affidavit stated that two persons, trading under the name of "T. & Co.," were indebted, and process issued against one only, the other being within the jurisdiction, the arrest was set aside. *Chisholm* v. *Ward*, Dra. 490.

Undertaking to Give Bail.]—An undertaking to "cause special bail in this action to be put in for the defendant in due course of law," is not a waiver of any objection to the affidavit. *Glass* v. *Baby*, 1 P. R. 274.

Waiver of Irregularities.]—Held, that defendant was precluded from moving to set aside the proceedings by having accepted service of the writ, with knowledge of certain alleged irregularities, and having delayed moving until after the time for pleading had expired. *Regina* v. *Stewart*, 8 P. R. 297.

What Must be Shewn.]—Held, that on the affidavits set out in this case, the cause of action and the circumstances to warrant the arrest were sufficiently made out. Semble, that defendant's own affidavit that he is not about to leave the Province would not alone, under any circumstances, be sufficient to set aside the arrest. *Delisle* v. *Degrand*, 3 P. R. 105.

Wrong Sheriff.]—Where defendant was arrested on a writ issued and tested on the 3rd January, 1852, and directed to the sheriff of the united counties of Wentworth and Halton:—Held, that since the 1st January, 1852, there was no such officer: and the arrest was set aside with costs:—Held, that the writ might be amended, but the copy not. The Judge declined permission to arrest on the amended writ. *Lyman* v. *Brethron*, 2 C. L. Ch. 108.

(f) *Recovery and Distribution of Assets.*

First Attachment.]—2 Will. IV. c. 5 gave priority to the creditor suing out the first attachment under which the sheriff seized, to have his debt satisfied out of the goods in preference to other attachment creditors who might obtain judgment and execution before him, where there were no laches on his part in the proceeding to judgment. *Gamble* v. *Jarvis*, 5 O. S. 272.

Fraudulent Cognovit.] — A cognovit given by an absconding debtor to defeat claims of creditors was set aside on application of bonâ fide creditors, and the money made on execution under it ordered to be divided. *Bergin* v. *Pindar*, 3 O. S. 574.

Fraudulent Judgment.] — On application by an attaching creditor under C. S. U. C. c. 25, s. 222, to set aside the judgment and execution of the plaintiff for fraud and collusion:—Semble, that the plaintiff's claim need not be unfounded or fraudulent; a bona fide debt may be sued for, and the action brought in collusion, &c. *White* v. *Lord*, 15 C. P. 289.

Priority of Division Court Garnishee Summons.]—Where money comes into the hands of a division court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, R. S. O. 1887 c. 66, he must pay the money to the sheriff and not to the primary creditor, under the provisions of s. 16 of that Act. *Re Moore* v. *Wallace*, 13 P. R. 201.

Where after the service upon the garnishees of a division court garnishee summons a county court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor, to the sheriff, but the Judge in the division court ordered the sheriff to pay the money to the division court clerk, and the clerk to pay it out to the primary creditors in the division court:—Held, that the Judge was right in ruling that the money should have been paid by the garnishees to the division court clerk under s. 189 of the Division Courts Act, R. S. O. 1887 c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to s. 16 of the Absconding Debtors' Act, R. S. O. 1887 c. 66; and prohibition to restrain the clerk from so paying out the money was directed. *Ib.*

Priority of Execution.]—Where a party serves process on the debtor personally before attachments issue, and obtains judgment before the attaching creditor, his execution has priority. *Bank of British North America* v. *Jarvis*, 1 U. C. R. 182.

Priority of Execution.] — An attachment was issued against defendant on the 6th July, and on the same day a summons was served upon him abroad, at the suit of one G. Within six months the plaintiffs sued out another attachment. It did not appear whether the plaintiffs in the first attachment had obtained judgment, or whether that writ was issued or G.'s summons served first, but G. first obtained execution:—Held, that, so far as appeared, G. was entitled to the benefit of his fi. fa. as against these plaintiffs. *Caird* v. *Fitzell*, 2 P. R. 262.

Held, also, that the mere fact that defendant withdrew his plea, and allowed G. to get judgment by default, was no ground for imputing collusion in obtaining such judgment. *Ib.*

Priority of Execution.]—Where goods have been attached, a creditor obtaining a confession of judgment from the debtor without service of process, and execution upon it before the attaching creditors, does not obtain priority. *Bird* v. *Folger*, 17 U. C. R. 536.

Held, that on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion. *Ib.*

Priority of Execution.]—To entitle an execution creditor to priority over an attach-

ment, he must not only obtain execution before the attaching creditor, but his action must have been commenced by process served before the attachment issued. Therefore, where the execution issued upon a confession given before the debtor absconded, without process served:—Held, that the attachment must prevail. *Bank of Upper Canada* v. *Glass*, 21 U. C. R. 39.

Priority of Execution.]—On the 2nd March, 1876, N. commenced an action by writ of summons against the defendant, who had absconded from the Province, having previously mortgaged all his real estate, and, after attempting to effect personal service, served his wife. On the 20th April an order was obtained for leave to proceed as if personal service had been effected, and on the 8th May fi. fa. lands and goods were placed in the sheriff's hands. On the 8th April, L. and D. each issued writs of attachment against defendant, and on the 30th November following, placed a fi. fa. lands in the sheriff's hands. On the 7th May, 1877, the mortgagees sold under their power of sale, and realized more than enough to pay the mortgage:—Held, that N.'s writ of summons was "served" within s. 20 of the Absconding Debtors' Act, before suing out the writ of attachment, and that, having writs of fi. fa. in the sheriff's hands first, he was entitled to be paid in full out of the surplus. *Nicol* v. *Ewin*, 7 P. R. 331.

Priority of Execution.]—A. sued out a writ of summons against an absconding debtor as residing out of the jurisdiction, served the writ on him in New York on the same day that an attachment issued against him here, and obtained judgment and execution before the first attaching creditor:—Held, that to entitle him to priority, he must also shew that his writ was served before the attachment issued, and no evidence being given to shew at what time of the day either event took place, that the attaching creditor's claim must prevail. Quære, whether a service out of the jurisdiction would be sufficient, even if made before the attachment issued. *Daniel* v. *Fitzell*, 17 U. C. R. 369.

Priority of Execution.]—D., a sheriff, between the 7th May and the 4th August, received several fi. fas. against the goods of defendant. On the 16th August he received one upon which this action was founded. Between the 4th and 18th August, two attachments were placed in his hands, and after the 16th several more. The sheriff treated the plaintiff's fi. fa. as subsequent to the attachments, and returned it nulla bona, upon which this action was brought for a false return:—Held, that the writ of the 16th August having come into the defendant's hands while the goods of plaintiff were in custodiâ legis, it attached prior to the attachments, and ought to have been paid first. *Potter* v. *Carroll*, 9 C. P. 442.

See, also, *Carroll* v. *Potter*, 19 U. C. R. 346; 1 E. & A. 341; 7 L. J. 42.

Priority of Execution.]—On the 27th September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th a writ of attachment under the Absconding Debtors' Act was issued and placed in the sheriff's hands, under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October two more writs of attachment were placed in his hands. On the 13th October the sheriff sold under the executions and realized enough to satisfy them; the moneys remaining in his hands pending these proceedings. On the 20th October the sheriff received a certificate under the Creditors' Relief Act, 1880, and another certificate on the 24th. On the 26th he sold the balance of the defendant's property seized by him. After this various certificates and executions were received by him. On the 14th October he had made the entry in the book under the Creditors' Relief Act. None of the attaching creditors had placed executions in the sheriff's hands:—Held, that as the proceedings under the Absconding Debtors' Act had been commenced prior to the sale of the goods, and therefore prior to the sheriff being required to act under the Creditors' Relief Act, the latter did not supersede the former, so that the moneys realized were subject to such former Act, and must be distributed thereunder; that the proceedings under the latter Act were not well taken; and that the creditors who had certificates, to come within the former Act, must obtain judgment and execution in the ordinary mode. *Macfie* v. *Pearson*, 8 O. R. 745.

Priority of Execution—*Land not Bound till Seizure.*]—The mere fact that a writ of attachment against an absconding debtor is in the sheriff's hands does not bind the debtor's land, and the land is not bound until seizure. *Robinson* v. *Bergin*, 10 P. R. 127.

The sheriff's bailiff went to and entered upon the land of the debtor, on which his family resided, and finding there no goods, did not leave any one in possession; he said that he had no instructions beyond the warrant to seize the land; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure:—Held, that there was no seizure, and that writs of fi. fa. lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled to priority. *Ib.*

Priority of Execution—*Costs.*]—On the 25th January, 1884, seven warrants of attachment at the instance of different plaintiffs were issued out of a division court against the goods of the defendant, an absconding debtor, and under them the bailiff seized certain goods. Subsequently and on the same day a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to s. 16 of the Absconding Debtors' Act. Five other division court attachments and one county court attachment were afterwards issued. Judgments were recovered by all the attaching creditors; executions were issued in the suits in the superior and county courts; and the clerk of the division court furnished the sheriff with a certified memorandum of the judgments in that court, by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold, and the proceeds of the sale paid into court. Upon a motion for distribution of the moneys in

court the plaintiffs claimed payment of their costs of suit in priority to all other claims. It was ordered that the costs of issuing the plaintiff's writ, and the fees and charges paid to the sheriff for executing, should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering, and preserving the property, and that any fees which had been incurred in the division court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to the sheriff, should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that, after payment of these charges, the fund should be distributed ratably among the creditors. *Darling* v. *Smith*, 10 P. R. 360.

Property in Hands of Third Person —*Delivery to Sheriff.*]—Where an attachment has issued against the property of an absconding debtor, an order may be made upon a third person for delivery to the sheriff of property of the debtor in the hands of such person. And where the debtor's solicitor was shewn by an affidavit of the plaintiff to have in his hands for collection certain promissory notes, the property of the debtor, and the solicitor did not deny the fact, such an order was affirmed. *Buntin* v. *Williams*, 16 P. R. 43.

Recovery of Debts by Sheriff.]—An order authorizing a sheriff to sue for debts due to an absconding debtor, to satisfy an attaching creditor's execution, under s. 53, C. L. P. Act, 1856, will be granted ex parte upon affidavit shewing clearly the plaintiff's right to make the application. *Cleaver* v. *Fraser*, 3 L. J. 107.

Recovery of Debts by Sheriff.]—Proceedings under 2 Will. IV. c. 5, by the creditor of an absconding debtor. Averments necessary in the declaration. Amount recoverable. *Thompson* v. *Farr*, 6 U. C. R. 387.

Recovery of Debts by Sheriff.]—The plaintiff obtained execution against A., whose goods were then under seizure upon an attachment. The sheriff, under C. L. P. Act, 1856, s. 53, having sued and obtained payment of a sum due by one of A.'s debtors:—Held, that such money was not liable to the plaintiff's execution, but went to the attaching creditors. *Cann* v. *Thomas*, 17 U. C. R. 9.

Sheriff's Action to Recover Goods.]—Held, that the first count of the declaration, which was by a sheriff against a partner of the absconding debtor, for converting the joint property, was bad: 1. for not stating that the plaintiff sued under that Act, as required by s. 26, though it did state that he had under s. 25 obtained the order of a Judge to bring the action; and 2. for not shewing that notice of the attachment had been served on defendant, or that the goods had been attached by the former sheriff during whose tenure of office the attachment had issued, or by the plaintiff, his successor, the averment being merely that defendant having property in his possession (which the sheriff might have seized, but did not seize, whilst the property was liable to seizure), converted it to his own use. *Taylor* v. *Brown*, 17 C. P. 287.

Semble, that the limitation under the statute of the defence to matters available against the debtor at the date of the attachment, refers to the prosecution of claims arising before the issue of the writ:—But held, that the count was not bad for not stating that the attaching creditor had proved his debt before judgment, or filed an affidavit of the sum justly due before the issue of execution, for that the maxim omnia rite esse acta, &c., applied. *Ib.*

Held, also, not necessary to allege that the property attached was insufficient to satisfy the execution, or what return the sheriff had made, for the suit having been brought by order of a Judge, it must be presumed that he was satisfied as to this. *Ib.*

Semble, that it was unnecessary to allege more than the fact of conversion, leaving it to be shewn that there was such destruction of the joint property as would make it between co-partners a conversion. *Ib.*

Held, also, that it must be assumed, if there was any sheriff having the execution of the writ in this cause, that it was the plaintiff. *Ib.*

Sheriff Suing for Rent.]—In an action brought by a sheriff under the Absconding Debtors' Act to recover rent due by virtue of a lease to the absconding debtor, the evidence given at the trial shewed an assignment of the reversion of the absconding debtor, and receipt of all and half a year's more rent than was due thereon. The bona fides of the transaction between the absconding debtor and his assignee having been submitted to the jury, they found for defendant in this suit. Upon motion for a new trial:—Held, that as between parties themselves, litigating their own disputes, the court would require a stronger case to disturb the verdict than was made out in this instance; yet here the plaintiff being a public officer, suing in the right of his office and knowing nothing of the transactions between the defendant and the absconding debtor, and the circumstances of the case appearing somewhat suspicious, there should be a new trial on payment of costs. *Reynolds* v. *Pearce*, 14 C. P. 369.

Subsequent Executions.]—Where a debtor assigned to a creditor property, which was seized by the sheriff on several executions received on the same day, and these writs were subsequently satisfied by the sale of other property of the debtor, but before they were satisfied, and a fortnight after the assignment, an attachment against the debtor's property came also into the hands of the sheriff:—Held, that the property assigned was secured to the assignee against the attachment, although it had been liable to the preceding executions. *Hooker* v. *Jarvis*, 6 O. S. 439.

Timber.]—The court will restrain the attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by defendant to plaintiff. *Thompson* v. *Crocker*, 3 Gr. 653.

Time when Writ takes Effect.]—A writ of attachment only takes effect from the time of seizure. *Kingsmill* v. *Warrener*, 13 U. C. R. 18.

Time when Writ takes Effect.]—The placing of a writ of attachment in the sheriff's hands does not of itself bind the goods; the writ must be levied on. *Potter* v. *Carroll*, 9 C. P. 442.

(g) *Second Arrest and Alias Writ.*

Alias Writ.]—Where a defendant was arrested on an alias writ under 2 Geo. IV. c. 1, and gave a bail bond to the sheriff after having entered an appearance to serviceable process, the bail bond was set aside with costs. *Douglass* v. *Powell*, M. T. 2 Will. IV.

Alias Writ.]—After the service of non-bailable process a Judge's order obtained by defendant for the delivery of particulars, with a stay of proceedings, does not operate so as to prevent the plaintiff from arresting the defendant on an alias writ. *Wilson* v. *Wilson*, 3 O. S. 297.

Alias Writ.]—A defendant cannot be arrested on an alias writ issued after appearance entered to serviceable process, where it is necessary to obtain a Judge's order for his arrest, as the statute allowing arrest on an alias writ after serviceable process, applies only to cases where the cause of action is a debt. *Ross* v. *Urquhart*, 6 O. S. 556.

Alias Writ.]—And where a Judge's order is necessary, a defendant cannot be held to bail on an alias writ. *Bowman* v. *Yielding*, M. T. 2 Will. IV.; *Ross* v. *Urquhart*, 6 O. S. 556.

Alias Writ.]—An al. test. ca. sa. is still a ca. sa.; and therefore when a defendant justified under the alias, and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a ca. sa.:—Held, no variance. *Robertson* v. *Meyers*, 7 U. C. R. 423.

Charging in Execution.]—Where a defendant was arrested on mesne process and committed to prison, and afterwards charged in execution in the cause without a new affidavit, before 7 Vict. c. 31, the court held that he was not entitled to his discharge, as the plaintiff could issue a ca. sa. against him without a new affidavit, as well when he had been committed to prison on mesne process, as when he had been held to special bail. *Hamilton* v. *Mingay*, 1 U. C. R. 22.

Deputy Clerk.]—An alias ca. sa. may be issued by a deputy clerk of the Crown in an outer district; and it is no ground for setting aside such writ that the deputy has not transmitted the affidavit and precipe, within one month after they were filed, to the principal office, according to the statute. *Scott* v. *Macdonald*, M. T. 7 Vict.

Second Arrest—*Bail.*]—Where a justice takes bail for appearance at a fixed time, a second arrest for the same charge by the same complainant before the time appointed, is illegal. *King* v. *Orr*, 5 O. S. 724.

Second Arrest — *Discontinuance.*] — A second arrest was set aside, where the plaintiff had been non-prossed in the first suit and had not paid the costs. *McCague* v. *Meighan*, 2 O. S. 516.

Second Arrest—*Mistake.*]—A second arrest allowed where first set aside for a clerical mistake in the affidavit of debt, plaintiff having discontinued that action and paid the costs. *Sheldon* v. *Hamilton*, 3 O. S. 65.

Second Arrest — *Supersedeas.*] — A defendant discharged by supersedeas, the plaintiff not having charged him in execution in due time, cannot be arrested again on the same judgment. *Barn* v. *Straight*, 5 O. S. 523.

Second Arrest—*Settlement not Carried Out.*]—Second arrest upheld, where defendant had been discharged from the first on giving a joint note, and agreeing to pay the costs, the note having been dishonoured and costs not paid, although an action had been brought upon the note. *McDonald* v. *Amm*, E. T. 2 Vict.

Second Arrest.] — Where a defendant was discharged for defects in the affidavit of debt, on entering a common appearance, and afterwards arrested on an alias writ, the arrest was set aside, the plaintiff having no right to make a second arrest in that cause, where the entry of an appearance is made a compulsory condition of discharge from the first. *Benson* v. *Adams*, E. T. 3 Vict.

Second Arrest after Judgment.]—Where an arrest on mesne process was set aside for irregularity, and the plaintiff afterwards proceeded to judgment:—Held, that he might again arrest defendant on a ca. sa. issued on a new affidavit. *Gordon* v. *Sommerville*, M. T. 7 Vict.

Second Arrest — *Mistake.*] — Where defendant had been discharged from custody on a ca. sa. by the partner of the plaintiff's attorney under a mistaken supposition that the debt had been compromised by the acceptance of new securities by the plaintiffs, the court refused to order a new ca. sa. *Bradbury* v. *Loney*, 6 O. S. 291.

Second Arrest—*Waiver.*]—Where after an arrest set aside for irregularity in a district court, the plaintiff arrested the defendant in the same cause on an alias writ under the statute, and defendant then removed the cause into the Queen's Bench by habeas corpus, in order to set the second arrest aside, but subsequently took steps in the cause in the district court, and did not put in special bail in the Queen's Bench, the court refused to set the arrest aside, and ordered a procedendo. *Garfield* v. *Simons*, 2 U. C. R. 411.

Second Arrest.]—A defendant discharged cannot be detained by the same plaintiff, upon a second writ issued upon an affidavit sworn while he was in custody upon the first. *Barry* v. *Eccles*, 3 U. C. R. 112.

Second Arrest—*Different Court.*]—The defendant, having been arrested in the county court, was discharged for insufficiency of the affidavit, but expressly without costs. The plaintiff then took out a rule to discontinue this suit on payment of costs, if any, and arrested defendant in the Queen's Bench for the same cause. Defendant was discharged, 1. because, as the first arrest had been set aside for a substantial defect, there could be no second arrest: 2. because the first suit had not been effectually discontinued, the plaintiff having taken no step to tax or pay costs. *Ellis* v. *James*, 1 P. R. 153.

Second Arrest—*Irregularity.*]—A second arrest for the same cause may be made without leave where it appears not to be vexatious, and the first has been set aside for a

very trivial irregularity. *Gillespie* v. *Deming*, 1 P. R. 387.

Second Arrest—*Nullity.*]—On a ca. re. to arrest T., a warrant was made to one G., a sheriff's officer, to execute. G. being unwell, gave it to another bailiff, not named in the warrant to arrest. T. promised this bailiff to go to the sheriff's office and give bail, which he did. Subsequently, because the name of the second bailiff was not in the warrant, the Judge of the county court set aside the arrest. While the process was still current a second warrant was made out and T. arrested. Thereupon, in the county court, this arrest was set aside, as being a second arrest in the same cause without leave. T. was discharged and left the Province, and plaintiff brought covenant against the sheriff and his sureties. The first breach charged that the sheriff neglected to arrest T., &c., to which defendants pleaded that the sheriff did arrest T. At the trial the issue was submitted to the opinion of the court:—Held, that defendants were entitled to succeed, for when the first arrest was set aside as a nullity the sheriff might still arrest while the process was current. Semble, that the first arrest was unnecessarily set aside. *McIntosh* v. *Jarvis*, 8 U. C. R. 535.

Second Arrest under Same Writ.]—A person arrested under a ca. sa., and suffered to go at large by the sheriff for a limited time, with the consent of the attorney, may be re-arrested under the same writ. *Davis* v. *Cunningham*, 5 L. J. 254.

Second Arrest—*Alias Writ.*]—If defendant is arrested on a ca. sa. and gives bail, plaintiff cannot issue an alias ca. sa. and arrest him a second time. But where defendant had endeavoured after the arrest on the ca. sa. by a contrivance to escape, so as to relieve his bail and charge the sheriff, the court refused to set aside his arrest under an alias ca. sa. Semble, before the issue of an alias under such circumstances, the original should be returned and filed. *Brown* v. *Stevens*, 6 L. J. 89.

Second Arrest—*Escape.*]—After a voluntary escape from the sheriff of a prisoner held under mesne process, plaintiff may proceed with his action, and, semble, may issue a ca. sa. without affidavit, if he has had a capias pending action, or an alias ca. sa., if the ca. sa. to fix bail has been returned non est inventus, and take the defendant thereunder; and at all events the plaintiff may have a ca. sa. issued on a new affidavit and re-arrest defendant. *Hesketh* v. *Ward*, 17 C. P. 667.

Quære, whether, after the voluntary return of an escaped prisoner, a plaintiff cannot accept such a return and lawfully charge his debtor in execution, by merely delivering a ca. sa. to the sheriff. *Ib.*

(h) *Miscellaneous Cases.*

Alimony.]—Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs; and semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham* v. *Needham*, 29 Gr. 117.

Appearance—*Special Bail.*]—In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ:—Held, that this was a useless proceeding, and that the defendant should have put in special bail. *Regina* v. *Stewart*, 8 P. R. 297.

Assignees of Contractors.]—The plaintiff contracted to build a mill dam for defendants. While carrying on the work he assigned the contract to his sureties, and afterwards absconded, and an attachment was issued against him. The assignees carried out the contract, and then sued in his name for the money due. After action brought this attachment was withdrawn, and defendants released by the attaching creditors from any claim by them to the money that might be recovered in this action. Within six months another attachment was placed in the sheriff's hands, of which defendants were duly notified:—Held, that the assignees were entitled to recover as well for the work done by the plaintiff before as since his departure; and that the defendants paying would not be liable to the creditors of the plaintiff. *Clarke* v. *Proudfoot*, 9 U. C. R. 290.

Attorney Holding Money.]—The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Stover*, T. T. 3 & 4 Vict.

Bail too Large.]—If defendant be held to bail in too large a sum, this can be amended. *Wakefield* v. *Bruce*, 5 P. R. 77.

Bond.]—Where, under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ. *Needham* v. *Needham*, 29 Gr. 117.

Certiorari.]—Certiorari granted to remove cause from county court, defendant having been arrested. *Winaker* v. *Pringle*, 1 P. R. 357.

Clerical Error.]—A capias addressed to the sheriff of the united counties of York and Peel, and directing him to take defendant, "if he shall be found in your county," is sufficient, the latter sentence being surplusage. *Brett* v. *Smith*, 1 P. R. 309.

Clerk of the Process.]—A writ of attachment is properly issued by the clerk of the process. *Wakefield* v. *Bruce*, 5 P. R. 77.

Close Custody.]—Semble, that a constable may legally allow a debtor, whom he has arrested, to go at large so long as before the return of the writ he deliver him to the sheriff. *Ross* v. *Webster*, 5 U. C. R. 570.

Close Custody.]—A defendant arrested and imprisoned under a ca. sa. is a debtor in close custody in execution within the meaning of R. S. O. 1877 c. 69. *Hay* v. *Paterson*, 11 P. R. 114.

"Commencing Proceedings."]—Making the affidavit of claim is not commencing proceedings within the meaning of s. 26 of the Absconding Debtors' Act, R. S. O. 1887 c. 66. Something to bring the claim within the control of the court must be done before it can be said the proceedings have commenced. Quære, whether proceedings against an absconding debtor under the Absconding Debtors' Act, R. S. O. 1887 c. 66, must not still be commenced by writ of attachment. *Bank of Hamilton* v. *Aitken*, 20 A. R. 616.

Commissioner.]—As to the issue of a bailable ca. re. by a commissioner, and its service. *Story* v. *Durham*, 9 U. C. R. 316.

Continuation of Proceedings Commenced before the C. L. P. Act, 1856.]—See *Kekendall* v. *Krimmon*, 2 L. J. 184; *Kerr* v. *Wilson*, 3 L. J. 13; *Ross* v. *Cook*, 3 L. J. 18; *Buchanan* v. *Ferris*, *ib.*

Copy.]—The original ca. re. must be presumed to correspond with the copy till the contrary be shewn. *McIntosh* v. *Cummings*, 1 P. R. 68.

County Court Judge.]—The Judge of a county court has no power, either as such Judge or as local Judge of the High Court, to order the issue of a ca. sa. in an action in the High Court. Cochrane Manufacturing Co. v. Lamon, 11 P. R. 351, followed. *Waterhouse* v. *McVeigh*, 12 P. R. 676.

Creditor Intervening.]—A Judge at nisi prius may allow the counsel for another creditor to cross-examine the plaintiff's witnesses and to address the jury against the plaintiff. *Laris* v. *Baker*, 13 C. P. 506.

In an action under the Absconding Debtors' Act, upon a motion by an attaching creditor, upon affidavits which shewed fraud and collusion between the plaintiff and defendant to the prejudice of the other creditors of the defendant, a new trial was granted. *Ib.*

Creditor Intervening.]—One M., an attaching creditor of defendant, applied for a new trial of this cause, which was granted on payment of costs. The rule was taken out but never served, and subsequently M. gave plaintiff notice that he had abandoned same. On application by plaintiff, on notice to M., to shew cause why said rule should not be discharged with costs to be paid by M.:—Held, that the application by M. was in the nature of a collateral proceeding, and though he might, when voluntarily seeking the aid of the court, have been ordered to pay the costs of opposing the rule which he had obtained, he could not now be ordered to pay the same when brought before the court by compulsion, and not being a party to the record. *Laris* v. *Baker*, 14 C. P. 336.

Custody—*Criminal Charge.*] — Semble, a person in custody on a criminal charge may be detained in custody in a civil suit. *Palmer* v. *Rodgers*, 6 L. J. 188.

Date of Direction.]—The direction to take bail by affidavit need not be dated. *Pearson* v. *Hall*, 1 P. R. 294.

Date of Return.]—Where, by the operation of Provincial enactments, a plaintiff was unable to give a proper date to the notice at the foot of a ca. re., a general notice to appear on the first day of the term was held sufficient. *Brown* v. *Smith*, Tay. 187.

Date of Return.]—Semble, fifteen days need not elapse between the texte and return. *Beatty* v. *Taylor*, 2 P. R. 44; *Beattie* v. *McKay*, 2 C. L. Ch. 55.

Delay.]—Delay in issuing a ca. sa. to fix the bail, cannot be pleaded in bar to an action against them on the recognizance. *Carroll* v. *Berryman*, 16 U. C. R. 529.

Delivery to Sheriff.]—After an attachment has issued, a rule will be granted against any one in possession of the debtor's property, to deliver it up to the sheriff to whom the attachment is directed. *Mullens* v. *Armstrong*, M. T. 2 Vict.

Discharge of Surety.]—C., one of the obligors in a bond of indemnity to the sheriff for seizing under an attachment, obtained a final order for protection from process. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that under 18 & 20 Vict. c. 93, C. was not discharged by such final order. Held, also, that the obligees were not entitled to set off against the sheriff's claim money which the sheriff had applied from the sale under the attachment to pay executions prior to such attachment. *Moody* v. *Bull*, 7 C. P. 15.

District Judge.]—Under 2 Geo. IV. c. 2, a Judge of a district court had no authority to order an arrest for a cause of action on a contract where the damages were not liquidated. *Forris* v. *Dyer*, 5 O. S. 5.

Effect of Judicature Act.]—Notwithstanding the Judicature Act, s. 90 and Rule 5, a writ of capias may still be issued under R. S. O. 1877 c. 67, and the C. L. P. Act, before an action has been commenced by a writ of summons. *Vetter* v. *Cowan*, 46 U. C. R. 435.

Escape Warrants.]—The English statutes 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape warrants, are not in force in this Province. *Hesketh* v. *Ward*, 17 C. P. 607.

Exemptions.]—Semble, 23 Vict. c. 25, exempting certain articles from seizure, does not apply where the debtor has absconded leaving the goods with his family. *Regina* v. *Davidson*, 21 U. C. R. 41.

Filing Declaration.]—A plaintiff cannot, after taking out his ca. re. in one district, file his declaration in another. *Throop* v. *Cole*, Tay. 214.

Form.] — Form of attachment under 2 Will. IV. c. 5. *Meighan* v. *Pinder*, 2 O. S. 292.

Form of Order.]—Held, that the amount for which special bail is to be put in need not be mentioned in the order for the writ. *Regina* v. *Stewart*, 8 P. R. 297.

Form.]—"Oath for £—," instead of "bail for £— by affidavit," is sufficient. *Gillespie* v. *Deming*, 1 P. R. 387.

Form of Writ.]—Quære, whether it is sufficient, under the first rule of H. T., 13 Vict., to state in the margin of a writ the county where it was issued. The matters directed to be indorsed on a capias by 12 Vict. c. 63, sched. 63, may be at the foot of the copy served; and quære, whether they may not be written at the foot of the original instead of being indorsed. *Chamberlain* v. *Wood*, 1 P. R. 195.

Form of Writ.]—Where in the original the warning to defendant was at the foot of the writ, and in the copy was indorsed, though in the body of the copy it was referred to as "hereunder:"—Held, no objection. The signature of the clerk of the process was placed at the foot of the warning, not of the writ, and also to a memorandum in the margin that the writ had been issued by him:—Held, a sufficient signature of the writ. *Gilmour* v. *McMillan*, 2 P. R. 168, 3 L. J. 71.

Fraudulent Conveyance.] — The fact that a simple contract creditor has sued out an attachment, does not afford any ground for coming to the court of chancery to have a conveyance alleged to be fraudulent against the creditors of the debtor set aside. The creditor must first establish his right to recover at law. *Whiting* v. *Lawrason*, 7 Gr. 603.

Indigent Debtors' Act.]—In an action for seduction, the defendant was arrested under a ca. re., and judgment having been entered against him, a ca. sa. was issued, and he was surrendered by his bail to the custody of the sheriff:—Held, that the defendant was not in custody as a debtor, or on execution, but on mesne process as a wrong-doer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors' Act, R. S. O. 1877 c. 69. *Wheatly* v. *Sharp*, 8 P. R. 189.

Held, that it is within the power of the clerk of the Crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, where it can legally be made. *Ib.*

Inquiry in Chancery.] — When it is necessary, in order to settle the priority of incumbrancers, to inquire whether a party sued was an absconding debtor within the Act, this court will do so; and that, too, although defendant in the action may not have taken any steps to set aside the attachment at law. And the bona fides of proceedings taken against an absconding debtor to obtain priority, can be questioned in this court at the suit of a creditor or third party. *Bank of Montreal* v. *Baker*, 9 Gr. 97, 298.

Interpleader.]—Form of interpleader issue between claimant and attaching creditor. *Doyle* v. *Lasher*, 16 C. P. 263.

Judgment by Default—*Assessing Damages.*]—The plaintiff had sued out an attachment against defendant, and went down to the county court to prove his claim, upon a record shewing interlocutory judgment signed for want of a plea. Defendant applied to plead never indebted, on the ground that such plea had been filed before signing the judgment:—Held, that the application was rightly refused, for defendant should have moved against the judgment if irregular, and could not plead until he had put in special bail. *Offay* v. *Offay*, 26 U. C. R. 363.

Held, also, that although defendant had not put in special bail, his counsel should have been allowed to cross-examine the plaintiff's witness, and give evidence in mitigation of damages. *Ib.*

Judgment Debtor.]—When serving a defendant with an order to examine him as a judgment debtor it is not necessary to exhibit the original order unless demanded in order to entitle the plaintiff to move for a ca. sa. against him under R. S. O. 1877 c. 50, s. 305. *Imperial Bank* v. *Dickey*, 8 P. R. 246.

Mesne Process.]—An arrest by a constable on mesne process directed to the sheriff is not legal by 2 Geo. IV. c. 139, unless the affidavit of the debt be annexed to the process. *Ross* v. *Winter*, 5 U. C. R. 570.

Mesne Process.] — Where a party arrested under a capias pending action, and before judgment, gives bail, and after judgment and ca. sa. to fix bail returned non est inventus is rendered to the sheriff's custody by his bail in their own discharge, such prisoner is still under mesne process, and is not confined in execution. *Hesketh* v. *Ward*, 17 C. P. 667.

Name of Writ.]—Semble, that the writ of capias mentioned in 12 Vict. c. 63, s. 24, may properly be called a ca. re., as it is in 16 Vict. c. 175, s. 3. *Tyson* v. *McLean*, 1 P. R. 339.

Notice to Appear.]—The service of a copy of ca. re. will be set aside, unless a notice to appear be written thereon pursuant to the statute. Quære, must this notice be indorsed on the copy of the writ; may it not be written on a piece of paper attached to it? *McTierman* v. *McChesney*, 5 U. C. R. 631.

Order to Proceed — *Local Master.*] — Local masters have no greater powers in matters coming before them in chambers under the jurisdiction given them by the Ontario Judicature Act (44 Vict. c. 5) and 48 Vict. c. 13, s. 21 (O.), than those conferred upon the master in chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A local master has, therefore, no power to make an order to proceed against an absconding debtor, upon default after service of the writ of attachment, where such order contains a clause directing a reference under s. 197 of the C. L. P. Act (1877). It is intended by ss. 8 and 9 of the Absconding Debtors' Act, R. S. O. 1877 c. 68, that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, where an order of reference is necessary the order to proceed must be made by a Judge who has jurisdiction to refer causes. *Bank of Hamilton* v. *Baine*, 12 P. R. 418.

Payee of Notes.] — The payee of two promissory notes for £25 each, having absconded, is not thereby disabled from suing the maker upon them on his return, because in his absence an attachment has been taken out against him by A., a creditor, for £21. *Slattery* v. *Turney*, 7 U. C. R. 578.

Pleading.]—Alias ca. re. averred in the declaration and a ca. re. produced at the trial:—Held, an immaterial variance. *Wood* v. *Sherwood*, 4 O. S. 128.

Posting up Copy of Process.]—Omission to put up in the Crown office a copy of the process under 2 Will. IV. c. 5, s. 6, and file the affidavit required by 5 Will. IV. c. 5, s. 7, before taking out execution:—Held, irregularities only, and making void what was done under the execution. *Doe d. Boulton* v. *Ferguson*, 5 U. C. R. 515.

Practice.]—Practice in issuing testatum ca. re. *Patterson* v. *Calvin*, 1 U. C. R. 409.

Promissory Note.]—Proof of debtor's signature to a note, without proof of plaintiffs being the payees, considered sufficient proof of the debt. *Appleton* v. *Dwyer*, 4 U. C. R. 247.

Promissory Note—*Discharge of One Defendant.*]—The arrest upon a ca. sa. and subsequent discharge of one of several defendants by the plaintiffs in an action against the drawer and acceptors of a bill of exchange:—Held, not to be a satisfaction of the judgment, so as to prevent the subsequent issue of a fi. fa. thereon against the other defendants. *Hamilton* v. *Holcomb*, 11 C. P. 93. See *S. C.*, 7 L. J. 40.

Promissory Note — *Discharge of Some Defendants.*]—Held, affirming 12 C. P. 38, that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors, and indorsers in one action, he may discharge the drawers or indorsers (or accommodation acceptors) after an arrest under a ca. sa., without losing his remedies against the other defendants liable in priority to those discharged. *Holcomb* v. *Hamilton*, 2 E. & A. 230.

Purchase at Sale.]—Quære: When an attaching creditor purchases at sheriff's sale, and sues for trespass to the property purchased, should he prove a debt to support his attachment? *Haydon* v. *Crawford*, 3 O. S. 583.

Real Action.]—The ca. re. is not the first and original process in a real action, such as dower. *Phelan* v. *Phelan*, Dra. 386.

Real Estate.]—When real estate is attached, the sheriff must enter and keep possession, to give operation to the attachment against strangers. *Doe d. Crew* v. *Clarke*, M. T. 4 Vict.

Repeal of Act.]—8 Vict. c. 48, except s. 44, was continued in force by 18 Vict. c. 85, till the 1st July, 1856, and no longer. The C. L. P. Act, which came into force on the 21st August, 1856, enacted that from the time when it should take effect, the 44th section of 8 Vict. c. 48 should be repealed:—Held, that this 44th section could not be considered as continued by the C. L. P. Act, though, no doubt, it was so intended, and therefore no arrest could take place under it after the 1st July. *Barrow* v. *Caprcol*, 2 P. R. 95.

Return Day of Writ.]—Proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made returnable immediately after the execution thereof; for such purpose it is necessary that the writ should be returnable on a day certain. *Proctor* v. *Mackenzie*, 11 A. R. 486.

Returned Debtor.]—A debtor returning after trial and before judgment:—Held, entitled to a new trial, under 2 Will. IV. c. 5. *Robertson* v. *Burk*, 5 O. S. 75.

Second Attachment.]—Where the creditor at whose suit the property is first attached fails in his action, or is satisfied his debt, and the goods are restored to the debtor's possession, who disposes of them:—Semble, that a second attachment will not defeat such disposition. *Howell* v. *McFarlane*, 16 U. C. R. 469.

Secured Creditor.]—The law of arrest considered, and amendments suggested to meet the case where the creditor holds security for all or part of his claim. *McGregor* v. *Scarlett*, 7 P. R. 20.

Security for Loan With Which to Leave the Country.]—A security taken for a bonâ fide loan of money to enable the borrower to leave the country in order to escape his creditors, is not fraudulent and void. *Hall* v. *Kissock*, 11 U. C. R. 9.

Seduction.]—10 & 11 Vict. c. 31, s. 3, applying only to persons in execution for debt:—Held, not to include a defendant in custody on a ca. sa. in an action for seduction. *Merrall* v. *Fransom*, 1 P. R. 230.

Service of Original Writ.]—Where a defendant moved to set aside the service of a writ of ca. re. for irregularity, and it appeared that the process served was a testatum, and not an original writ, the rule was discharged with costs. *Tool* v. *Lowe*, 2 U. C. R. 95.

Service of Writ.]—7 Vict. c. 16, s. 54:—Held, binding on the courts in Upper Canada as well as upon the courts in Lower Canada. *McPherson* v. *McMillan*, 3 U. C. R. 34.

Service on Friends.]—Writ of attachment directed to be served on the nearest friends of the absconding debtor, and a copy put up in the office of the deputy clerk of the Crown of the county where he resided. *Baxter* v. *Dennie*, 3 L. J. 69.

Service at Residence.]—Upon affidavits that endeavours have been made in vain to effect personal service of attachment, that after diligent inquiry no information can be obtained as to the place defendant has fled to, and that special bail had not been put in for him, the plaintiffs will be allowed to proceed as if defendant had appeared, and to serve papers by leaving them at defendant's last known residence in this Province. *Clark* v. *McIntosh*, 2 L. J. 231.

Service by Sheriff.]—A ca. re. not bailable must be served by the sheriff or his officer, though the deputy sheriff be a party to the suit. *Ruttan* v. *Ashford*, 3 O. S. 302.

Service by Mailing.]—Leave granted to serve absconding defendant with writ of summons by mailing it to his address. *Lyman* v. *Smith*, 3 L. J. 107.

Service on Wife.]—When an attachment has been served upon the wife of a debtor, who has fled to parts where personal service cannot be effected, the plaintiff's damages may be ascertained by the clerk of the

court under s. 161, C. L. P. Act, 1856. *Chapman* v. *DeLorme*, 5 L. J. 138.

Service on Wife.]—Service of an attachment on the wife of the debtor will be allowed as good, upon affidavit that after diligent inquiry plaintiff is unable to ascertain the debtor's whereabouts. *McDougall* v. *Gilchrist*, 3 L. J. 28.

Setting Aside Judgment.]—After judgment has been entered against an absconding debtor pursuant to the finding of a county court Judge on a reference under R. S. O. 1877 c. 68, s. 9, the master in chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills* v. *Carroll*, 10 P. R. 142.

Several Writs.]—Where there have been several writs of ca. re. sued out and the last served, the plaintiff to have the action considered as being commenced by the first writ, must shew at the trial that it was returned. Semble, that the continuance between the intermediate writs may be entered at any time. *McLean* v. *Knox*, 4 U. C. R. 52.

Sheriff.] — Liability to action — Nova Scotia Absconding Debtors' Act—Order of the Court a protection. *See McLean* v. *Bradley*, 2 S. C. R. 535.

Sheriff.]—An original ca. re. may, under 8 Vict. c. 36, issue out of the office of the deputy clerk of the Crown of one district, directed to the sheriff of another district. *McMan* v. *Patterson*, 9 U. C. R. 631.

Sheriff.] — The sheriff and his sureties held not liable under s. 20 of 27 & 28 Vict. c. 28, for not paying over money deposited by plaintiff in lieu of a bail bond to obtain the release of M. arrested under a capias. *Kero* v. *Powell*, 25 C. P. 448.

Sheriff—*Poundage.*]—A sheriff upon arresting a judgment debtor under a ca. sa. thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution. *McNab* v. *Oppenheimer*, 11 P. R. 348.

Sheriff—*Trespass.*]—In trespass against sheriff for seizing goods of the plaintiff under an attachment issued against the goods of a third party by whom they had been sold to the plaintiff before the attachment, the defence was that the sale was fraudulent and void as against creditors under 13 Eliz. c. 5, but the sheriff did not prove any debt from the absconding debtor to the attachment creditor:—Held, that without this his justification was incomplete. *Grant* v. *McLean*, 3 O. S. 443.

Sheriff's Warrant.]—The sheriff's warrant to a bailiff to arrest must be indorsed with the amount of the debt claimed and costs in like manner as the writ is required to be. *Steele* v. *Lamcux*, 5 O. S. 154.

Signature of Order.] — Consolidated Rule 544 provides that all orders made by a Judge of the High Court in chambers shall be signed by the clerk in chambers:—Held, that an order for the arrest of the defendant signed by the Judge who made it, and not by the clerk, was not properly issued:—Held, also, upon the evidence, that the defendant was not about to quit Ontario with intent to defraud; and, upon both grounds, the defendant should be discharged from custody. *St. Croix* v. *McLachlin*, 13 P. R. 458.

Substitutional Service.]—An affidavit for the allowance of service of attachment should, among other things, state what efforts have been made to effect personal service. *Stephen* v. *Dennie*, 3 L. J. 69.

Sureties.]—The sureties required from the plaintiff before sale under 2 Will. IV. c. 5, rejected because not inhabitants of this Province. *Bradbury* v. *Lowry*, 3 O. S. 439.

Sureties.]—The affidavit of justification by the sureties required before execution, must be made by themselves. *Mowat* v. *Forshee*, E. T. 2 Vict.

Surrendering by Bail.]—Where a party arrested under capias pending action, and before judgment, gives bail, and after judgment and ca. sa. to fix bail returned non est inventus, is rendered to the sheriff's custody by his bail in their own discharge, such prisoner is still under mesne process, and is not confined in execution. *Hesketh* v. *Ward*, 17 C. P. 667.

Time.]—A plaintiff cannot take a step in a cause founded on the attachment until the three months allowed for the defendant to put in bail have expired. *Banker* v. *Griffin*, 3 O. S. 163.

Time for Declaring.]—Where a defendant was committed to prison on a bailable writ, and afterwards, and before the return day of the writ, was released on bail, and on the return day of the writ entered special bail, he was—Held, not entitled to be served with a declaration before the end of the term then next after such arrest. *Glenn* v. *Box*, 3 U. C. R. 182.

Time for Declaring.]—Under 12 Vict. c. 63, s. 24, a plaintiff is bound to file and serve a declaration against a defendant in custody before the end of the term next after the arrest. *Tyson* v. *McLean*, 1 P. R. 339.

Time for Declaring.]—So also under C. L. P. Act, s. 32, coupled with Rule 100 of 20 Vict. *Gilcannie* v. *Ross*, 3 P. R. 280.

Held, that the fact that defendant had, during the term, made application for his discharge from custody, which application was refused before the end of the term, was no sufficient excuse for not declaring during the term. *Ib.*

Held, that a defendant once supersedeable is always supersedeable. *Ib.*

Time for Declaring.]—R. G. 100 is imperative that a prisoner arrested and in close custody must be declared against before the end of the term after his arrest, and it is no excuse that a summons was pending during the last week of the term to set aside the capias and arrest. *Houtaling* v. *Cuttle*, 6 P. R. 251.

Time for Return of Writ.]—Where a ca. sa. has been issued upon the judgment within the year it is not necessary to return and file the same within the year. *Beninger* v. *Thrasher*, 1 O. R. 313.

True Copy.]—A true copy of a non-bailable process must be served on a defendant. *Scott* v. *Heffernan*, 5 O. S. 321.

III. Ne Exeat Regno.

Fraud.]—The defendant having by fraud induced the plaintiff to advance money on mortgage upon the assurance that the title was correct, although well aware that the mortgagor had no title, a writ of ne exeat was issued against him. A motion to discharge the writ on the ground that the claim was not a debt but a demand founded on the fraudulent conduct of defendant, was refused with costs. *Hunter* v. *Mountjoy*, 6 Gr. 433.

Money in Court.]—Where a party is entitled to an assignment of a bond and to realize for his own benefit, his rights are the same in regard to money deposited; and where, in an alimony suit, the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor paid into court and applied in discharging arrears of alimony. *Richardson* v. *Richardson*, 8 P. R. 274.

Surrendering Principal.] — Semble, that the bail of a defendant who has been arrested upon a writ of ne exeat, cannot be discharged from their bonds upon the defendant rendering himself to the custody of the sheriff. *McDonald* v. *McDonald*, 1 Ch. Ch. 22.

Surrendering Principal.] — The sureties on a statutory bail bond under a writ of ne exeat Provinciâ have no power to surrender their principal as at common law. An application by sureties for discharge from a bond for repayment of the money paid to the sheriff as collateral security was refused. *Richardson* v. *Richardson*, 8 P. R. 274.

IV. Privilege From Arrest.

Attorney.]—An attorney coming to court in term on professional business, which has been disposed of, is not privileged from arrest in execution. *Stroubridge* v. *Davis*, M. T. 2 Vict.

Attorney.]—An attorney has no privilege on attachment for contempt. *Re McIntyre*, 2 P. R. 74.

Barrister.]—A barrister cannot be arrested upon mesne process. *Adams* v. *Ackland*, 7 U. C. R. 211.

County Court Clerk—*Deputy Clerk of the Crown.*]—A clerk of the county court, being also ex officio deputy clerk of the Crown and clerk of assize, is privileged only while engaged in his official duties, or while going to or returning from his office; and this court therefore discharged a rule to prohibit the county court Judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodson*, 27 U. C. R. 263.

County Court Judge.]—A Judge of the county court cannot be arrested on mesne or final process. *Adams* v. *Ackland*, 7 U. C. R. 211.

Infant.]—Infancy is no ground for discharge from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.

Juror.]—A person who, having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment. *Mittleberger* v. *Clark*, 5 O. S. 718.

Married Woman.]—Right of married woman arrested to be discharged. *Rennett* v. *Woods*, 11 U. C. R. 29.

Officer Executing Process.]—An officer when employed in executing process is privileged. *Welby* v. *Beard*, Tay. 304.

Suitor.]—So is a suitor attending a court of requests. *Baldwin* v. *Slicer*, 4 O. S. 131.

Surrogate Court Judge.]—A Judge of surrogate court is privileged. *Michie* v. *Allan*, 7 U. C. R. 482.

V. Miscellaneous Cases.

Act Abolishing Imprisonment for Debt.]—7 Vict. c. 31, abolishing imprisonment in execution for debt, applied to cases where judgment was obtained before it passed. *Bank of British North America* v. *Clarke*, 1 U. C. R. 1.

Upheld in *Bell* v. *Ley*, 1 U. C. R. 9.

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

Criminal Charge.]—Though an offender for whose arrest a magistrate's warrant is issued, be in a county different from that from which the warrant issued, and though he be a prisoner for debt in close custody in such county, he may be removed under writs of habeas and recipias. *Regina* v. *Phipps*, 4 L. J. 160.

Escape.]—In an action for an escape on final process, a plea of the insufficiency of the gaol is void. *Rowan* v. *McDonell*, H. T. 3 Vict.

Private Individual.]—A man assaulted by a person disturbing the peace in a public street may arrest the offender and take him to a peace officer, who need not be the nearest justice. *Forrester* v. *Clark*, 3 U. C. R. 151.

Private Individual.] — A private individual cannot arrest on suspicion of felony; he must shew a felony committed. *Ashley* v. *Dundas*, 5 O. S. 749.

Private Individual.]—When a private person takes upon himself to arrest without a warrant for a supposed offence, he must be prepared to prove, and affirm it unequivocally in his plea, that a felony has been committed; strong suspicions of it will not do. *McKenzie* v. *Gibson*, 8 U. C. R. 100.

What Amounts to Arrest.]—In an action for malicious arrest, the arrest is not proved by shewing that the bailiff to whom the warrant was directed went to the plaintiff's house and told him at the door that he had a writ against him, but did not enter the house, nor touch him, and afterwards left him on his promise to put in bail the next day, which he did. *Perrin* v. *Joyce*, 6 O. S. 309.

What Amounts to Arrest.]—The deputy sheriff, having a ca. sa. to arrest a party, went to the house with the writ in his possession for that purpose; he told him of the process, and being assured that a friend of his (the debtor's) who was then from home, would go his bail, he returned home and did not insist on the debtor coming with him. Afterwards the sheriff went again to the debtor's house and told him, without laying his hands on him, that he must come to his, the sheriff's house, which he did, and remained there till discharged, but not under actual constraint:—Held, that under these facts there had been no legal arrest of the debtor on the first visit of the sheriff; that the merely insisting on the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest; but that the debtor, in having gone to the sheriff's house as desired, and having remained there till discharged, though without constraint, had been duly arrested. *McIntosh* v. *Demeray*, 5 U. C. R. 343.

What Amounts to Arrest.]—A bailable capias having issued, the deputy sheriff went to defendant and asked him to find bail. They both then went in search of bail, and a bail bond was executed:—Held, an arrest. *Morse* v. *Teetzel*, 1 P. R. 369.

What Constitutes Imprisonment.]—"Standing in front of the horses and carriage driven by V.," although he was "thereby forcibly detained on the highway against his will," is not an imprisonment. *See Regina* v. *McElligott*, 3 O. R. 535.

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

See Bail—Criminal Law, II.—Malicious Procedure, I. 2—Parliament, III. 2—Sheriff, II.—Trespass, III. 2 (a), (b).

ARREST OF JUDGMENT.

See Judgment, II.

ARSON.

See Criminal Law, IX. 2.

ARTICLED CLERK.

See Solicitor, III.

ASSAULT.

See Bail—Criminal Law, IX. 3—Parliament, I. 10—Trespass, III. 1, 2.

ASSESSMENT AND TAXES.

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I. Appeals from Assessment and Actions to Set Aside Assessments.

Appealable Decision.]—A county council, upon a petition for a revision of assessment under 24 Vict. c. 38, without hearing the petitioner further than reading his petition, dismissed it:—Held, that the dismissal of the petition was a sufficient decision to warrant an appeal to the county court Judge. *In re Judge of County Court of Perth and J. L. Robinson*, 12 C. P. 352.

Board of County Judges—*Appeal to Court of Appeal—Practice.*]—Notice of an appeal to the court of appeal, under s. 84 (6) of the Assessment Act, R. S. O. 1897 c. 224, against the decision of a board of county court Judges with respect to a municipal assessment, was served by the municipality upon the railway company whose assessment was in question, but the motion was not set down to be heard nor proceeded with in any way. Upon motion by the railway company for an order dismissing the appeal:—Held, that the appeal, by force of s. 84 (6), was lodged in the court of appeal in like manner as an appeal from a decision of a county court in an ordinary action becomes lodged—when the proper proceedings have been taken—in a divisional court, in which case Rule 790 or Rules 821 and 822 applied, and a motion to dismiss was unnecessary; or if not, that the appeal was not in the court of appeal at all, and no order could be made. *Re Toronto Railway Company and City of Toronto*, 18 P. R. 489.

Board of County Judges—*Appeal to Supreme Court.*]—By 52 Vict. c. 37, s. 2 (D.), amending the Supreme and Exchequer Courts Act, an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court Judges of the county court district where the property has been assessed. Held, that if the county court Judges constituted a "court of last resort," within the meaning of 52 Vict. c. 37, s. 2 (D.), the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. Held, also, that as no binding effect is given to the decision of the county court Judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2. Quære.—Is the decision of the county court Judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2? *City of Toronto* v. *Toronto Railway Co.*, 27 S. C. R. 640.

Correcting Omissions.]—The omission of the assessor to distinguish in his notice to a railway company between the value of the land occupied by the road and their other real property, as required by the Act, does not avoid the assessment. Such an omission may be corrected on appeal by the court of revision and county court Judge. *Great Western R. W. Co.* v. *Rogers*, 29 U. C. R. 235.

Extension of Time—*Practice.*]—Power of the court of revision to grant time for entering appeals beyond that prescribed by the Assessment Act. Practice in appeal cases. Notice of appeal and necessity for stating grounds as causes and matters of appeal. Right of counsel to be heard before courts of revision and all other courts. *In re First Division Court in the County of Elgin*, 6 C. L. J. 295.

Finality of Assessment.]—The court refused a mandamus to compel a municipal council to alter the assessment of the applicant's property as settled on appeal by a court of revision. They also declined to express any opinion as to the principle to be adopted in the taxation of property, whether the intrinsic value only should be regarded, or whether the amount which it could be or has been leased for or what it does in fact produce to the proprietor, should be considered. *In re Dickson and Village of Galt*, 10 U. C. R. 395.

Finality of Assessment.]—Under 16 Vict. c. 182, ss. 26 and 28, the decision of a county court Judge is final only as to such matters as are to be submitted to him, that is, as to any alleged overcharge, or the wrongful insertion or omission of any person's name, not as to whether only the land occupied by a railway is assessable, or the superstructure as well. *Great Western R. W. Co.* v. *Rouse*, 15 U. C. R. 168.

Finality of Assessment.]—Where the assessors illegally assessed the superstructure of a railway as well as the land occupied by it:—Held, that the company might defend an action as to the superstructure, although no appeal had been made to the court of revision, and although the whole was called land in the assessment. *City of London* v. *Great Western R. W. Co.*, 17 U. C. R. 262.

Finality of Assessment.]—The plaintiffs had for several years appealed from the assessment of their property to the court of revision, who had decided against them, and from thence to the county court Judge, who had reduced it one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the court of revision, who said they would consult the city solicitor. The plaintiff's solicitor was told by the clerk of the court of revision that no judgment had been given, and found none in the book where their decisions were entered. The collector, in October, called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed. The mistake having been discovered in the following year:—Held, that they might recover it back, for the court of revision not having determined the appeal, the roll, as regarded the plaintiffs, was not "finally passed," within s. 61 of C. S. U. C. c. 55, so as to bind them. *Law Society of Upper Canada* v. *City of Toronto*, 25 U. C. R. 199.

Finality of Assessment.]—Where property was assessed in the occupation of a Crown official and not appealed against, and taxes collected thereunder—upon replevin:—Held, that under such circumstances the party assessed need not appeal to the court of revision, the assessment being a nullity. *Shaw* v. *Shaw*, 12 C. P. 456; *S. C.*, 21 U. C. R. 432.

Finality of Assessment.]—Held, following City of Toronto v. Great Western R. W. Co., 25 U. C. R. 570, that a person assessed for property exempt from taxation, who has appealed to the court of revision (but not to the county Judge), is bound by their decision. *Scragg* v. *City of London*, 26 U. C. R. 263.

Finality of Assessment.]—The Judge of the county court, on appeal from the court of revision, by which the assessment of a suspension bridge as land at $150,000 was affirmed, reduced the assessment to $1,000, on the ground that all except the land on which the towers stood was personal property:—Held, that his decision was final, though clearly erroneous, and could not be questioned in an action, for he had jurisdiction to reduce the assessment, and the wrong reason given could not make his judgment less binding. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U. C. R. 194.

Finality of Assessment.]—Where bank stock not assessable, because owned out of the Province, was assessed, and such assessment confirmed by the court of revision and county Judge, it was—Held, on demurrer, in replevin for goods distrained, that the defect of want of jurisdiction was not cured. *Nickle* v. *Douglas*, 35 U. C. R. 126, 37 U. C. R. 63.

Finality of Assessment.]—In an action to restrain the defendants, the corporation of the township of Dysart and the members of the court of revision thereof, from increas-

ing the assessment on the plaintiffs' lands in that township to $243,113.75, an increase of $132,000 over the previous year, and from levying taxes thereon, the plaintiffs alleged that the proceedings of the court of revision were all parts of a fraudulent and improper arrangement and conspiracy that had been entered into before the holding of the said court of revision by the members thereof in conjunction with others, to increase the assessment of the plaintiffs. No evidence was adduced as to the actual or assessable value of the lands, but the plaintiffs stated that the highest bid they had had for them was $80,000. It was further alleged that the members of the court of revision had before their election as councillors complained that the company's assessment was not high enough, and had procured their election partly through announcing that if they were elected the assessment would be increased, and that they had held a secret meeting with other persons and arranged for bringing on appeals to that court:—Held, affirming the decision reported, 9 O. R. 495, that the matters complained of were not sufficient to affect the judgment of the court of revision so as to render it void for fraud; and that the plaintiffs had no remedy otner than by an appeal to the stipendiary magistrate of Haliburton, under R. S. O. 1877 c. 6, s. 23. *Canadian Land and Emigration Co.* v. *Township of Dysart*, 12 A. R. 80.

Finality of Assessment.]—The plaintiffs, a mutual insurance company, carrying on business in London (Ont.), were assessed for the gross amount of their receipts after payment of the year's losses and expenses, from which assessment they appealed successively to the court of revision and the county Judge, both of whom sustained the action of the assessor, which was affirmed (11 O. R. 592), on the ground that the decision of the county Judge was final; and an appeal to the court of appeal was on a like ground dismissed with costs. Where the assessor has jurisdiction to assess the property, his assessment can only be reviewed in the mode provided by the Act, viz., by appeal to the court of revision and the county Judge. *London Mutual Insurance Co.* v. *City of London*, 15 A. R. 629.

Finality of Assessment.]—The court of revision confirmed the assessment of a lot of land occupied by a railway company of $1,200 annual value, and assessed the station built upon it at $1,500, and the county Judge being appealed to confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether, after the valuation of the land has been fixed in accordance with s. 30 of the Assessment Act, the building could be added:—Held, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision. *City of Toronto* v. *Great Western R. W. Co.*, 25 U. C. R. 570.

Finality of Assessment.]—Section 65 of the Ontario Assessment Act, R. S. O. 1887 c. 193, does not enable the court of revision to make valid an assessment which the statute does not authorize; and the plaintiffs having been illegally assessed, and having paid the taxes under protest, were held entitled to maintain an action to recover them back. *Watt* v. *City of London*, 19 A. R. 675, 22 S. C. R. 300.

Finality of Assessment.]—The decision of the Judge of a county court on a question of assessment is final, when he is dealing with property that is assessable at all. *Confederation Life Association* v. *City of Toronto*, 24 O. R. 643, 22 A. R. 196.

Finality of Assessment.]—A company carrying on business in London were assessed in Brantford in respect of certain assets held there for them by an agent. Held, that as there was no jurisdiction to assess them in Brantford the company were not bound to appeal to the court of revision, but could dispute the validity of the assessment in an action brought against them to recover the taxes. *City of Brantford* v. *Ontario Investment Co.*, 15 A. R. 605.

Finality of Assessment.]—See *Janes* v. *O'Keefe*, 26 O. R. 489, 23 A. R. 129.

Forum.]—Where there is jurisdiction to assess, any appeal from a court of revision must be to the county Judge or stipendiary magistrate, as the case may be. *Virian* v. *Township of McKim*, 23 O. R. 561.

North-West Territories.] — Appeal from court of revision in the North-West Territories. See *Angus* v. *Calgary School Trustees*, 16 S. C. R. 716.

Quashing Assessment.]—Action to have assessment quashed after payment of taxes under protest. See *Ex parte James D. Lewin*, 11 S. C. R. 484.

Restraining Collection.]—Where a bill to restrain proceedings for collecting the township assessments of the year, on the ground of objections of form, and because of an overcharged assessment of small amount, was filed after it was too late to apply at law to quash the by-law complained of, the court dismissed the bill with costs. *Grier* v. *St. Vincent*, 13 Gr. 512.

Security for Costs.]—The clerk of the division court is not bound under s. 63, s.-s. 3, of the Assessment Act, 32 Vict. c. 36 (O.), to receive an appeal unless the sum of $2 be deposited with him as security for costs; but if so disposed he may give credit for the amount; and if he does so, the appeal is properly entered, and ought to be heard by the county Judge. A complainant to the court of revision is bound to appear and support his appeal; but if he fail to do so, the court may hear the complaint ex parte, and if they affirm the assessment the complainant may appeal to the Judge. *In re Pain* v. *Town of Brantford*, 9 C. L. J. 261.

Time for Appeal to County Judge.]—A county Judge in appointing a day subsequent to the first of August, for hearing an appeal from a court of revision, is not, under R. S. O. 1877 c. 180, s. 59, s.-s. 7, exceeding his jurisdiction, notwithstanding the terms of that sub-section. *In re Ronald and Village of Brussels*, 9 P. R. 232.

Time for Appeal to County Judge.]—R. S. O. 1877 c. 180, s. 59, regulating appeals to the county Judge from the court of

revision as to the assessment of property, provides (s.-s. 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the court of revision a written notice of his intention to appeal; (s.-s. 3) that the Judge shall notify the clerk of the day he appoints for hearing appeals and (s.-s. 4) that the clerk shall thereupon give notice to all the parties appealed against. Section 56, s.-s. 19, provides that all the duties of the court of revision shall be completed, and the rolls finally revised, before the 1st day of July in each year. The court of revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the court of revision sat until the 5th July; on the 15th July the clerk notified the Judge that notice had been given of these appeals, and on the 26th July the Judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties. Held, that the limitation in s. 59, s.-s. 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the court of revision; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further, that service prior to the expiry of the five days was good service. *Scott* v. *Town of Listowel*, *Livingstone* v. *Town of Listowel*, 12 P. R. 77.

Time for Appeal to Court of Revision.]—Where an assessment roll was returned to the county clerk's office on the 1st May, but the certificate was neither signed nor sworn to till 4th May, and additions were made to the roll between the 1st and 4th May, and the notice to the parties assessed (signed) informed them that they must give notice of appeal within fourteen days from the latter date:—Held, that a notice of appeal given on 18th May was in time, because the roll was not "delivered to the clerk completed and added up with the certificates and affidavits attached" before 4th May; and that the county Judge should not therefore have dismissed an appeal to him on the ground that the notice was not served within fourteen days from 1st May, as well as because that was not the ground taken before the court of revision:—Held, also, had the court of revision proceeded on that ground their decision would have been binding on the county Judge. A mandamus was therefore directed to the county Judge to try the appeal. *In re Allan*, 10 O. R. 110.

Semble, the county council having extended the time for the return of the roll to the 15th June, although that date was disregarded by all parties to this application, the applicant had of right the power to appeal within fourteen days from such date. *Ib.*

Time for Notice of Appeal.]—The three days allowed for service of notice of appeal from assessment, are reckoned from the time of the decision of each case by the court of revision, and not from the day the court closes. *In re Downey*, 8 C. L. J. 198.

Who may Appeal.]—The appeal from the court of revision to the county Judge in a case where such court allows an appeal by the party assessed, against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but must be by the corporation itself. *Re British Mortgage Loan Co. of Ontario*, 29 O. R. 641.

II. Assessment.

Appointment of Assessors.] — The council by resolution appointed an assessor, who was sworn into office and made an assessment. The appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances the court granted a quo warranto to determine the validity of the last appointment. *In re McPherson and Beeman*, 17 U. C. R. 99.

Assessor's Neglect to Return Roll.]—The omission of assessors in a city to make and complete the roll until after the 1st May, does not avoid the assessment; and the person assessed, having appealed to the court of revision and county Judge, paid part of his taxes, and refused to pay the rest on a ground inconsistent with this objection, was held precluded from taking it. *Nickle* v. *Douglas*, 35 U. C. R. 126.

Average Value.]—Upon replevin to recover goods seized for taxes, the plaintiffs contended that their land was not assessed at the average value of land in the vicinity; that no proper notice was given of the assessment; and that the roll was not completed within the proper time. The defendant produced a letter written by the plaintiffs' solicitor, as follows: "In reply to yours of the 15th instant, addressed to the managing director of this company I am directed to inform you that the only real property owned by the company in the township of Maidstone, consists of the roadway of 106 acres, and 17 acres of extra or waste land. I have not the rate at which this land has been hitherto assessed, but I presume that the average value of land in the locality cannot exceed £10 per acre." They also proved a notice of assessment delivered 9th July, 1886:—Held, that this letter did not fix £10 as the average value of the land, and that the notice of assessment, under which the plaintiffs' land had been assessed at £10 per acre, while the average value of the land through which the railway went was £1 10s., being served after the time for the revision of taxes had expired, was too late. The plaintiffs, therefore, were held entitled to succeed. *Great Western R. W. Co.* v. *Ferman*, 8 C. P. 221.

Bank—*Capital—Realty and Personalty.*] By s. 25 of the St. John City Assessment Act of 1882, it is provided that "all rates and taxes levied and imposed upon the city of St. John shall be raised by an equal rate upon the value of the real estate situate in the city and parts of the city to be taxed, and upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants or residents of the said city. * * * and upon the capital stock, income, or other thing of joint stock companies, corporations, or persons associated in business." And, after providing for the levying

of a poll tax, such section goes on to say that "the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same, as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." Section 28 of the same Act provides that "all joint stock companies and corporations shall be assessed under this Act in like manner as individuals, and for the purposes of such assessment the president or any agent or manager of such joint stock company or corporation, shall be deemed and taken to be the owner of the real and personal estate, capital stock, and assets of such company or corporation, and shall be dealt with and may be proceeded against accordingly." The president of the Bank of New Brunswick was assessed under the provisions of the above Act, on real and personal property of the bank, valued in the aggregate at $1,100,000. The capital stock of the bank at the time of such assessment was only $1,000,000, and he offered to pay the taxes on that amount, which was refused. It was not disputed that the bank was possessed of real and personal property of the assessed value:—Held, that the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, $1,000,000. *Ex p. James D. Lewin*, 11 S. C. R. 484.

Bank Stock.]—Under 32 Vict. c. 36 (O.), bank stock is personal property liable to assessment. *In re Appeal from Court of Revision of City of Kingston*, 9 C. L. J. 259.

Bank Stock.]—But in another case it was held not to be liable to assessment. *In re Appeal from Court of Revision of Town of Cobourg*, 9 C. L. J. 294.

Bank Stock.]—Bank stock held by a person as trustee is not assessable as against the trustee. *In re Appeal from Court of Revision of Kingston*, 9 C. L. J. 259.

Bank Stock—*Void Assessment.*]—Bank stock owned by a resident of Kingston in the Merchants' Bank, which had its chief place of business in Montreal, is personal property owned out of the Province, and therefore exempt from taxation; and the assessment of such stock being wholly unauthorized and void, the owner is not bound to appeal against it to the court of revision, and is not estopped by having so appealed. *Nickle* v. *Douglas*, 35 U. C. R. 126, 37 U. C. R. 51.

Business Carried on in Two Municipalities.]—Section 15 of the Ontario Assessment Act R. S. O. 1887 c. 193, provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandize in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandize, but when sales were made a delivery order was given, upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London:—Held, affirming the decision in 19 A. R. 675, that W. did not carry on business in London within the meaning of the section, and that his merchandize in the warehouse was not liable to be assessed at London. *City of London* v. *Watt*, 22 S. C. R. 300.

Change of Domicile.]—By the St. John City Assessment Act (59 Vict. c. 61), s. 2, "for the purposes of assessment, any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the city of St. John, shall be deemed * * an inhabitant and resident of the said city." J. carried on business in St. John as a brewer up to 1883, when he sold the brewery to three of his sons, and conveyed his house and furniture to his adult children in trust for them all. He then went to New York, where he carried on the business of buying and selling stocks and securities, having offices for such business and living at a hotel, paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John, visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York, and took no part in municipal matters there. Being assessed in 1887 on personal property in St. John, he appealed against the assessment unsuccessfully, and then applied for a writ of certiorari with a view to having it quashed:—Held, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his bona fide intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile, and that in St. John had been abandoned within the meaning of the Act. *Jones* v. *City of St. John*, 30 S. C. R. 122.

Character of Person Assessed.]—Section 16 of c. 100, C. S. New Brunswick, relating to rates and taxes, provides that "real estate where the assessors cannot obtain the names of any of the owners shall be rated in the name of the occupier or person having ostensible control, but under such description as to persons and property * * as shall be sufficient to indicate the property assessed and the character in which the person is assessed." T. G., owner of real estate in Westmoreland county, N. B., died, leaving a widow who administered his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G.":—Held, that the last named assessment was illegal as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed. *Flanagan* v. *Elliott*, 12 S. C. R. 435.

City and County.]—Held, that the effect of 29 & 30 Vict. c. 53 was to abolish the distinction between the mode of assessment in cities and counties both for the purposes of the Jurors' Act and otherwise. *County of*

Frontenac v. *City of Kingston* 30 U. C. R. 584, 32 U. C. R. 348.

Company—*Head Office*—*Assets in Other Municipalities.*]—The defendant company carried on their business at London and were assessed there. They purchased the mortgages and other assets of the Brant Loan and Savings Company, a similar institution, which carried on business in Brantford. After this the latter company ceased to do business and the defendants left the mortgages and assets which had been transferred to them with an agent in Brantford for collection, but they had no branch office and did not carry on business there. The plaintiffs assessed them for personal property in Brantford, from which the defendants did not appeal to the court of revision, and the plaintiffs brought an action to recover the amount of the assessment:—Held, that the defendants were assessable in London for the property which the plaintiffs had assumed to tax, and that, as they had no branch office in Brantford and were not carrying on business there, the plaintiffs' assessment of them was illegal and void. *City of Brantford* v. *Ontario Investment Co.*, 15 A. R. 605.

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

Description by Plan—*Change.*]—Under the circumstances stated in the report, the municipal authorities at first assessed some of the lots as lying on Thomas street, sold them for non-payment, and conveyed upon non-redemption by that description. Upon their again becoming liable to sale for arrears of taxes, the authorities made a change, designating the lots as being on side road, without any by-law authorizing such change, or anything to shew that it was made otherwise than upon the assessment rolls and other documents in relation to the collection of taxes:—Held, that the owner of such lots was bound to pay the taxes upon them, by whatever designation they were entered on the roll, and it was at his peril if he omitted to pay. *Aston* v. *Innis*, 26 Gr. 42.

Executors and Trustees.]—Where executors and devisees in trust of land were assessed as owners:—Held, that they were properly so assessed, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 U. C. R. 276.

Finality of Roll.]—A municipal council has no authority to place names on the assessment roll after it is finally passed by the revising tribunal. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.

Foreign Company.]—Held, that under s. 36 of 32 Vict. c. 36 (O.), the personal property of an incorporated company is not assessable against the corporation; and, therefore, personal property situate in this Province, and owned by a company incorporated in England under the Imperial Joint Stock Companies Acts of 1862 and 1867, and in the possession of and under the control of an agent of the company residing in this Province, is not liable to assessment under 32 Vict. c. 36 (O.) or 37 Vict. c. 19 (O.) *Western of Canada Oil Lands and Works Co.* v. *Township of Enniskillen*, 28 C. P. 1.

Foreign Company—*Interest on Ontario Investments.*]—The plaintiffs were a company incorporated under the Imperial Companies' Acts of 1862 and 1867, for the purpose of lending money on real estate or on public securities, &c., the registered office of which was in the city of Aberdeen, Scotland, but having an agency, and the only agency, of the company at Toronto, Ontario. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the general managers at Toronto to Aberdeen, where all dividends were declared, and paid to the shareholders, who were assessed for income tax under the laws of Great Britain. By 43 Vict. c. 27, s. 1 (O.), the personal property of an incorporated company (other than those mentioned in s.-s. 2, namely, banks or companies investing all or the greater part of their means in works requiring the investment of the whole or principal part of their means in real estate, and which are exempt), shall be assessed against the company in the same manner as an unincorporated company, or partnership, which, under s. 30 of R. S. O. 1877 c. 180, is assessable against the firm at the usual place of business, and not against the individual partners; and by s. 3 of 43 Vict. c. 27, all personal property in the Province, the owner of which is not resident therein, shall be assessable like that of residents, whether in the possession or control or in the hands of an agent or trustee or not, and shall be assessable in the municipality in which such property shall happen to be, but by s.-s. 3 this section was not to apply to dividends or other choses in action owned by and standing in the name of a person not residing in the Province. The corporation of the city of Toronto, under s. 3, assessed the plaintiffs for $100,000 of personal property, being the interest of moneys invested in Ontario, and paid or payable to the agents at Toronto, or at the credit of the company at a bank, or being moneys lying at the credit of the company in a bank for investment:—Held, that s. 3 of 43 Vict. c. 27 (O.) was not ultra vires the Legislature, and that the assessment came within its provisions; that this was not one of the companies mentioned in s.-s. 2 of s. 1 of the Act, nor were the personal property "dividends or other choses in action" under s.-s. 3 of that section. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.

Foreign Company—*Insurance — Premiums.*]—The plaintiff company was a foreign corporation, with its head office in England, but carrying on insurance business in Canada, with an agency office at Kingston, Ontario, and the head office for Canada at Montreal:—Held, that insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were, under 43 Vict. c. 27 (O.), assessable at Kingston as taxable income or personal property against the company and its said agent, although the agent paid taxes on his own income, which was partly derived from commissions on the premiums received, and the fact that the premiums, having been previously sent by the agent, after collection, to the head office

in Montreal, were not in the municipality of Kingston when the assessment was made, did not make any difference. *Phœnix Ins. Co. of London* v. *City of Kingston*, 7 O. R. 343.

Forgery of Assessment Roll.]—An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk. *Regina* v. *Preston*, 21 U. C. R. 86.

Gas Company.]—Held, that the pipes of a gas company laid throughout and under the streets of a city could not be deemed "land," but rather personal property, within the Assessment Act, C. S. U. C. c. 55. *In re Gas Company and City of Ottawa*, 7 L. J. 104.

Gas Company—*Mains and Pipes.*]—The mains and pipes of the Toronto Gas Company laid under the public streets are assessable under the Consolidated Assessment Act, 1892, 55 Vict. c. 48 (O.), as appurtenant to the land owned by the company for the purposes of its business: — Semble, that the proper mode of assessment in a city divided into wards would be to value the concern as a whole and then apportion ratably to the wards so much of the value as falls to that part of the concern territorially situate in each locality. *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 26 O. R. 722. See next two cases.

Gas Company—*Mains and Pipes.*]—The mains and pipes of the Consumers' Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 Vict. c. 48 (O.). Toronto Street R. W. Co. v. Fleming, 37 U. C. R. 116, considered. Judgment below, 26 O. R. 722, affirmed. *Consumers' Gas Company of Toronto* v. *City of Toronto*, 23 A. R. 551.

Gas Company—*Mains and Pipes.*]—Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the Ontario Assessment Act of 1892, and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act. The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. c. 14), operated as a legislative grant to the company of as much of the land of the streets, squares, and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation. The pipes so laid and fixed in the soil of the streets, squares, and public places in a city should be assessed separately in the respective wards of the city in which they may be actually laid, as in the case of real estate. *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 27 S. C. R. 453.

Income.]—Where the appellant, who was manager of a bank in the incorporated village of St. Thomas, ceased to be such in February, 1860, was then paid $170.83, the balance of his salary, had not during 1860 derived income from any other source, and had not after the commencement of May, 1860, been a resident of the village:—Held, under C. S. U. C. c. 55, that he could not be assessed by the village for an amount greater than $170.83, and as that sum was under $200, the proper amount to enter on the assessment roll under s. 33, would be $100 only. *In re Yarwood*, 7 L. J. 47.

Income.]—Where the appellant, though in the village of St. Thomas at the time of assessment, was there only temporarily to wind up the business of an agency of the Bank of Montreal at that place, but his real place of residence was London:—Held, that he could not be taxed on his income in St. Thomas. *In re Ashworth*, 7 L. J. 47.

Income.]—Where a former resident of Vienna had taken a house at Ingersoll, in another municipality, whither the major part of his household effects had been removed, and his servant and most of his family resided when the assessment was taken, and he remained and slept in his former domicile during the night previous to the taking of the assessment, and was found on the following morning in the act of removing the last of his household effects, and taking his final departure, when the assessor came to assess:—Held, that his "residence," for the purpose of assessing his income under C. S. U. C. c. 55, s. 40, was at Ingersoll, his permanent residence, and not at Vienna. *Marr* v. *Village of Vienna*, 10 L. J. 275.

Income—*Balance of Gain Over Loss.*]—The tax imposed by 31 Vict. c. 36, s. 4 (N. B.), upon "income," is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly accepted sense as the balance of gain over loss. *Lawless* v. *Sullivan*, 6 App. Cas. 373, reversing 3 S. C. R. 117.

Increase of Assessment Without Notice.]—The plaintiffs were served by the assessors of a municipality with a notice prescribed by 32 Vict. c. 36, s. 48 (O.), in which the amount of the value of their personal property, other than income, was put down at $2,500; but in the column of the assessment roll, as finally revised by the court of revision, the amount was put down at $25,000, thereby changing, without giving any further notice to plaintiffs, the total value of real and personal property and taxable income from $20,000 to $43,400:—Held, reversing the decision in 26 C. P. 323, which had reversed that in 25 C. P. 169, that the plaintiffs were not liable for the rate calculated on this last named sum, and that a notice to be given by the assessor in accordance with the Act is essential to the validity of the tax. *Nicholls* v. *Cumming*, 1 S. C. R. 395.

Insurance Company — *Branch.*] — The defendants were a life insurance company with their head office at H., in this Province, and transacted business by agents in K., who received applications for insurances which

they forwarded to the head office, from which all policies issued ready for delivery, the premiums on the same also being collected by the agents in K. In an action by the corporation of the city of K. to recover taxes assessed against the defendants on income, it was contended that the defendants' only place of business was in H., and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O. 1887 c. 193, s. 35, s.-s. 2, to be assessed at H. on their whole income:—Held, reversing the decision in 18 O. R. 18, that the agency at K. was not a branch business within the meaning of s. 35 above referred to, and that the premiums received year by year at K. were not assessable there. The ultimate profit represents the year's taxable income under the statute, but this could only be ascertained by placing the sum total of gains and losses against each other, together with the result of the volume of business done at the head office, and no distinct integral part of this income was referable to the K. agency. *City of Kingston* v. *Canada Life Assurance Co.*, 19 O. R. 453.

Semble, that notwithstanding s.-s. 10 of s. 2, "personal property" in ss. 35 and 36 of R. S. O. 1887 c. 193 is intended to cover only something readily and specifically ascertainable, and "income," an intangible and invisible entity, is not to be read into these provisions of the Act. Lawless v. Sullivan, 6 App. Cas. 373, specially referred to. *Ib.*

Insurance Company—*Net Profits—Reserve Fund.*]—The amount deposited by an insurance company with the Dominion Government for protection of policy-holders may properly be deducted from the gross income of the company in ascertaining the net profits liable to taxation under the assessment law of the city of St. John, 52 Vict. c. 27, s. 125 (N.B.)—The Act requires the agent or manager of such company to furnish the assessors each year with a statement under oath, in a prescribed form, shewing the gross income for the year preceding and the amount of certain specified deductions, the difference to be the net income, and if such statement is not furnished, the assessors may assess according to their best judgment. W. furnished a statement in which, in place of the deductions of one class specified, he inserted "an amount equal to seventy-five per cent. of the premiums received, as deposited with the Dominion Government for security to policyholders." The assessors disregarded this statement, and assessed the company in an amount fixed by themselves, and on application for certiorari to quash such an assessment, it was shewn by affidavit that the deposit of the company was equal to about seventy-five per cent. of the premiums:—Held, that the agent was justified in departing from the form prescribed to shew the true state of the company's business; that the deposit was properly deducted; and that the assessors had no right to disregard the statement and arbitrarily assess the company as they saw fit. *Peters* v. *City of St. John*, 21 S. C. R. 674.

Insurance Company—*Reserve Fund.*]—Where the county court Judge had decided, on appeal from the court of revision, that the plaintiffs were liable under s. 34, and s. 2, s.-s. 10, of the Consolidated Assessment Act, 55 Vict. c. 48 (O.), to be assessed upon the interest arising upon investments of their reserve fund, although such interest was always added to the reserve fund and reinvested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal:—Held, that, although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but might make the necessary increase with any money whatever, and the Judge of the county court had full jurisdiction, and the matter was, therefore, res judicata. *Confederation Life Association* v. *City of Toronto*, 24 O. R. 643, 22 A. R. 166.

Insurance Company—*Reserve Fund—Income — Divisible Profits.*] — The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the company's special Act, as profits among participating policy holders and not subject to the control or disposition of the company. *In re Canada Life Assurance Co. and City of Hamilton*, 25 A. R. 312.

Lessee Not in Occupation.] — Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term continues. *McCarrall* v. *Watkins*, 19 U. C. R. 248.

Lessees of Gravel Road.]—The gravel road in the county of Elgin, forming part of the London and Port Stanley Road, was granted by the Crown to the corporation of the county, and by them leased for a term of years to the appellants, who were not residents of the village of St. Thomas:—Held, under C. S. U. C. c. 55, that the interest of the appellants in the road, being a chattel interest, could only be assessed as personal property. 2. That, as the appellants did not reside in the village, they could not be assessed by the municipal council of that village in respect to their interest in the road. *In re Appeal from Court of Revision of St. Thomas*, 7 L. J. 46.

Lot Partly Occupied.]—In a suit to impeach a sale of land for taxes, it appeared that about twenty or thirty acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres was stored in winter, by a person occupying the adjoining lot, under the authority of the proprietor; no one resided on the twenty acres; the owner was resident out of the country, and had not given notice to the assessor of the township to have his name inserted on the roll of the township:—Semble, that the lot should have been assessed as occupied. *Bank of Toronto* v. *Fanning*, 17 Gr. 514, 18 Gr. 391.

Lots on Irregularly Registered Plan.]—The plan of a survey of a portion of a town plot was registered in the proper registry office, but without being properly authenticated in the manner required by R. S. O. 1877 c. 111, not being duly certified by a surveyor:—Held, notwithstanding this irregularity, that the municipality had the right to assess these lots, and levy the taxes as-

sessed by sale in the usual way. *Aston* v. *Innis*, 26 Gr. 42.

Names of Owner and Occupant.]—Section 24 of C. S. U. C. c. 55, requiring the names of owner and occupant to be entered, applies to the assessor's roll only, not to the collector's. *Coleman* v. *Kerr*, 27 U. C. R. 5.

Non-resident.]—Held, under 16 Vict. c. 182, that a non-resident owner of lands can only be rated on the assessment roll by name at his own request. *Municipality of Berlin* v. *Grange*, 5 C. P. 211, 1 E. & A. 279.

Non-resident.]—And that the entry of a party on the assessment roll as resident, when in fact he was a non-resident, did not render his assessment nugatory. *De Blaquiere* v. *Becker*, 8 C. P. 167.

Non-resident.] — The term "lands of non-resident" means unoccupied land not assessed against the owner or occupant. *Mace* v. *Ruttan*, 7 L. J. 209.

Partnership.]—Held, under C. S. U. C. c. 55, that the personal property of a partnership must be assessed against it at its usual place of business. *In re Hatt*, 7 L. J. 103.

Place of Business.]—Held, that C. S. U. C. c. 55 requires every person to be assessed for personal property at his place of business or place of residence. *Re Cartwright and City of Kingston*, 6 L. J. 189.

Presumption of Correctness.] — The east half had been assessed separately, and it was admitted that the whole of the lot had been granted together:—Held, under 13 & 14 Vict. c. 67, that it should be presumed the tax on the west half had been paid, and that it had therefore been properly assessed separately. *McDonell* v. *McDonald*, 24 U. C. R. 74.

Quebec License Laws.] — By virtue of the first clause of a by-law passed under 55 & 56 Vict. c. 51 (Q.), an Act consolidating the charter of the city of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and in addition thereto, under cl. 3 of the same by-law, was taxed a special tax of $200 also for the same occupation. Section 55 of the Act 55 & 56 Vict. c. 51 (Q.) enumerates in s.-ss. from (*a*) to (*j*) the kinds of taxes authorized to be imposed, s.-s. (*b*) authorizing the imposition of a business tax on all trades, occupations, &c., based on the annual value of the premises, and s.-s. (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of s.-s. (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act (Art. 927, R. S. P. Q.) limits the powers of taxation for any municipal council of a city to $200 upon holders of licenses:—Held, that the power granted by 55 & 56 Vict. c. 51 (Q.) to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of $200, the by-law was intra vires, the proviso at the end of s.-s. (*g*) not applying to the whole section. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 268.

Railway — *Average Value of Land in Locality—Fences.*]—Held, that the average value per acre of the lots or farms through which the railway passes must be taken as the value per acre of the roadway occupied by the company. Also, that the value of the buildings on the farms should not be excluded from such average value. Also, that the railway fences are part of the superstructure, and as such exempt from assessment. *Re Midland Railway and Townships of Uxbridge and Thorah*, 19 C. L. J. 330.

Railway—*Right of Way.*]—The plaintiffs had a license to use and were using a right of way through the Queen Victoria Niagara Falls Park for their electric railway, under an agreement confirmed by 55 Vict. c. 96 (O.):—Held, that there was an actual, visible, continuous, and exclusive possession of the roadway for the profitable use and operation of the railway for a term, and that the company was liable to taxation for the roadbed as an occupant is assessed in respect of property: but the property itself, being in the Crown or held by the public, was exempt. *Niagara Falls Park and River R. W. Co.* v. *Town of Niagara*, 31 O. R. 29.

Railway — *Taxation — By-laws — Construction of Statute—Voluntary Payment—Action en Répétition.*]—The statute 29 Vict. c. 57 (Can.), consolidating and amending the Acts and Ordinances incorporating the city of Quebec, by s.-s. 4 of s. 21, authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation:"—Held, that the general words of the statute quoted are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and, further, that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax, in the same general terms as those expressed in the statute:—Held, that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. Judgment below (Q. R. 8 Q. B. 246) affirmed. *Canadian Pacific R. W. Co.* v. *City of Quebec*, *Grand Trunk R. W. Co.* v. *City of Quebec*, 30 S. C. R. 73.

Railway.]—Under 16 Vict. c. 182, s. 21, only the land occupied by a railway is subject to assessment, not the superstructure. *Great Western R. W. Co.* v. *Rouse*, 15 U. C. R. 168.

Railway.]—The omission of the assessor to distinguish, in his notice to a railway company, between the value of the land occupied by the road and their other real prop-

erty, as required by the Act, does not avoid the assessment. Such an omission may be corrected on appeal by the court of revision and county court Judge. Scragg v. City of London, 26 U. C. R. 263, dissenting from Great Western R. W. Co. v. Rogers, 16 U. C. R. 360, approved of and followed on this point. *Great Western R. W. Co.* v. *Rogers*, 29 U. C. R. 245.

Railway.]—By 52 Vict. c. 27, s. 125 (N. B.), the agent or manager of any joint stock company or corporation established out of the limits of the Province, who has an office in the city of St. John for such company or corporation, may be assessed upon the gross income received for his principals, with certain specified deductions therefrom, and to enable the assessors to rate such company or corporation the agent or manager is required, on 1st May of each year, to furnish them with a statement under oath, in a form prescribed by the Act, shewing such gross income for the year preceding, and the details of the deductions; in the event of neglect to furnish said statement the assessors may rate the agent or manager according to their best judgment, and there shall be no appeal from such rate. The general superintendent of the Atlantic division of the Canadian Pacific Railway had an office for the company in St. John, and was furnished by the assessors with a printed form to be filled in of the statement required by the Act: the form required him to state the gross and total income received for his company during the preceding year, as to which he stated that no such income had been received, and he erased the clause "this amount has not been reduced or offset by any losses," &c.; the other items were not filled in. This was handed to the assessors as the statement required, and they treated it as neglect to furnish any statement, and rated the superintendent on a large amount as income received. The Supreme Court of New Brunswick refused to quash the assessment on certiorari:—Held, that it was sufficiently shewn that the company had no income from its business in St. John liable to assessment; that the superintendent was justified in departing from the prescribed form in order to shew the true state of the company's business; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the superintendent in any sum they chose without making inquiry into the business of the company as the statute authorizes;—Held, further, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against overvaluation under C. S. N. B. c. 100, s. 60, and not to an appeal against the right to assess at all:—Held, also, that s. 125 of 52 Vict. c. 27 (N.B.) does not apply to railway companies. *Timmerman* v. *City of St. John*, 21 S. C. R. 691.

Residence Within Municipality.]—If the owners of personal property, within a particular municipality, be not themselves resident within that municipality, and have not a place of business within it, they cannot be properly assessed in respect thereof. *Re Cartwright and City of Kingston*, 6 L. J. 189.

Roll Not Completed in Time.]—The omission of assessors to return their roll by the 1st May is not an indictable offence under s. 175 of the Assessment Act, 32 Vict. c. 36 (O.), and if it were, the two assessors would not be jointly liable. *Regina* v. *Snider*, 23 C. P. 339.

School Rates.]—An assessment for school purposes cannot be levied by an unequal rate in different wards in a city. *In re Scott* v. *City of Ottawa*, 13 U. C. R. 346.

School Rates—*Inhabitants of School Section.*]—Where several devisees and executors were rated to a school rate in respect of the property of their testator, as "John A. and brothers," which entry appeared to have been made at the instance of some of the plaintiffs, but two of them only had slept on the premises occasionally, although such was not their usual place of residence, and they had received the usual notice of assessment in that form without appealing, and the same two had paid taxes on an assessment on the township roll in their individual names:—Held, 1. That the facts afforded sufficient evidence to shew that the plaintiffs were "inhabitants of the school section," for the purposes of the rate. 2. That the parties were sufficiently named on the roll to render the rate lawful. *Appelgarth* v. *Graham*, 7 C. P. 171.

Separate Lots.]—It is the duty of the assessors to assess village lots, the property of non-residents, separately, placing opposite to each the value and amount of assessment. *Black* v. *Harrington*, 12 Gr. 175.

Steamboat.]—Held, under C. S. U. C. c. 55, that a steamboat was personal property, and properly assessable at one of the two places between which in summer it plied, and at which in winter it was laid up. *In re Hatt*, 7 L. J. 103.

Street Railway.]—Held (reversing the decision in 35 U. C. R. 264), that the Toronto Street Railway Company were not assessable for those portions of the streets occupied by them for the purposes of their railway, as being land, within the meaning of the Assessment Act, 32 Vict. c. 36 (O.) *Toronto Street R. W. Co.* v. *Fleming*, 37 U. C. R. 116.

Street Railway.]—A street railway company in Toronto was to be assessed in respect of repairs to the roadway traversed by the railway as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be such:—Held, that after the termination of its franchise the company was not liable for these rates. *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

Street Railway.]—By a by-law of the city of Montreal a tax of $2.50 was imposed upon each working horse in the city. By s. 16 of the appellants' charter it was stipulated that each car employed by the company should be licensed and numbered, &c., for which the company should pay "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car:"—Held, that the company were liable for the tax of $2.50 on each and every one of their horses. *Montreal Street R. W. Co.* v. *City of Montreal*, 23 S. C. R. 259.

Street Railway.]—The rails, poles, and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways of the city of Toronto, are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict. c. 48 (O.). Toronto Street R. W. Co. v. Fleming, 37 U. C. R. 116, has been overruled by Consumers' Gas Co. v. Toronto, 27 S. C. R. 453. *In re Toronto R. W. Co. Assessment*, 25 A. R. 135.

Street Railway—*Rails, Poles, and Wires—Bridges—Road-bed—Adding Items on Appeal.*]—Although a street railway is operated as a continuous system through all the wards of a city, the portions of the rails, poles, and wires, in each ward, must be assessed in that ward, and in making the assessment the rails, poles, and wires must be treated as material situate in the ward, and not as necessary portions of a going concern operated in several wards. Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles, and wires. Consumers' Gas Co. v. Toronto, 27 S. C. R. 453, In re Bell Telephone Company Assessment, 25 A. R. 351, and In re Toronto Railway Company Assessment, 25 A. R. 135, applied. Upon an appeal to a board of county Judges from a court of revision coming on for hearing, the board, at the request of the city, and without any previous notice or assessment or application to the court of revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company:—Held, that the board of county Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 Vict. c. 27 (O.) not then being in force. *In re London Street Railway Co. Assessment*, 27 A. R. 83.

Sub-dividing Lot.]—The patent granted the lot by north and south halves. The patentee in 1853 conveyed the lot as a whole, and it continued in one owner until the sale of 35 acres in 1858. In 1858 and 1859 each half was assessed separately:—Held, not objectionable. For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years the north half, 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of $330 on the whole:—Held, right. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

Sub-dividing Lot.]—For several years a parcel of land, containing 100 acres, was returned to the treasurer of the county as non-resident land. In 1860 fifty acres only of the 100 were returned to the treasurer as non-resident:—Held, sufficient to authorize the treasurer in sub-dividing the 100 acres for assessment purposes. *Brooks* v. *Campbell* 12 Gr. 526.

Sub-division of Taxes.]—A lot, previously assessed as to the whole, was, on claim made to half of it, assessed as to this half, and the taxes of previous years apportioned between both halves:—Held, that there was no objection to this. *Stewart* v. *Taggart*, 22 C. P. 284.

Suspension Bridge.] — The suspension bridge across the Niagara Falls at Clifton, with the stone towers, &c., supporting it:—Held, land and real property, within the Assessment Act of 1866, s. 3. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U. C. R. 194.

Telephone Company — *Poles, Wires, Conduits, and Cables.*]—In assessing for purposes of taxation the poles, wires, conduits, and cables of a telephone company, the cost of construction, or the value as part of a going concern, is not the test; they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed and taken away by the purchaser or creditor. *In re Bell Telephone Co. and City of Hamilton*, 25 A. R. 351.

Time for Making Assessment—"*May adopt.*"]—By s. 52 of the Assessment Act, R. S. O. 1887 c. 193, where the assessment in cities, towns, &c., is made by virtue of a by-law passed under that section, in the latter part of the year, such assessment may be adopted by the council of the following year:—Held, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment. Overwhelmingly strong reasons of convenience in favour of having one assessment instead of two might justify the court in giving to "may" the force of "must." *Re Dwyer and Town of Port Arthur*, 21 O. R. 175.

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

Trustees—*Non-resident Beneficiaries.*] — Trustees are liable to be assessed on all the income derived from the property of a trust fund coming into their hands within the Province, as though they were the actual owners thereof. The fact of the beneficiaries residing without the Province makes no difference. *Re Appeal of Trustees of Grayson Smith*, 35 C. L. J. 723.

Trusts—*Minister's House.*] — Held, that the assessors are not bound to inquire into trusts upon which lands are held, but to view each man's premises and find out whether or not he is assessable or comes under any of the exemptions allowed; and that the assessor upon seeing a dwelling house occupied as such by a minister of religion for his private residence, is bound to assess the occupant for it, no matter upon what trust the freehold in the land upon which the house stands is held. *Franchon* v. *Town of St Thomas*, 7 L. J. 245.

Want of Notice.]—Invalidity of assessment for want of notice. See *Bain* v. *City of Montreal*, 8 S. C. R. 252.

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

Wild Lands.]—Under 59 Geo. III. c. 7, it was the duty of the quarter sessions to assess the amount of taxes to be paid upon lands, not exceeding the sum of one penny in the pound of the statutable value; and where the treasurer of his own motion charged every wild lot one penny in the pound of such value, the sale of land for such taxes was held invalid. Quære, as to the manner in which wild lands of non-residents, not included in the assessment rolls, were to be rated under 59 Geo. III. c. 7; and semble, such lands were not assessable at all. *Cotter* v. *Sutherland*, 18 C. P. 557.

Windsor Water-works.] — The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a water-works system of their own, and did not use that of the plaintiffs, though they could have done so had they wished. The commissioners imposed a water rate "for water supplied, or ready to be supplied," upon all lands in the city based upon their assessed value irrespective of the user or non-user of water:—Held, that this rate was, under 37 Vict. c. 79, ss. 11, 12 (O.), validly imposed. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

III. Collection of Taxes.

1. *In General.*

Application of Payments to Arrears.] —Defendant G. was collector of rates in the town of B. for 1856-1858. One M. was charged on the collector's roll for 1857 with 427 taxes for 1855 remaining unpaid, together with 424 15s. taxes for 1857. The roll for 1855 was not shewn to have been returned. On the 7th December, 1857, the council, by resolution, authorized G. to continue the collection of taxes on the roll for 1857, after the usual time:—Held, that G. had the right to appropriate the moneys collected by the sale of M.'s goods in January, 1858, to the taxes charged against him for 1855. *McBride* v. *Gardham*, 8 C. P. 296.

Delivery of Roll.]—Section 120 of the Assessment Act, R. S. O. 1887 c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st October, or such other day as may be prescribed by by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st January, 1887:—Held, that the provisions of s. 129 are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid. *Lewis* v. *Brady*, 17 O. R. 377.

Demand on One of Several Persons Liable.]—Where several devisees and executors were rated to a school rate in respect of the property of their testator as "John A., and brothers," which entry appeared to have been made at the instance of some of them, and they had received the usual notice of assessment in that form without appealing:—Held, that a demand made by the collector on "John A." was sufficient to bind the others. *Applegarth* v. *Graham*, 7 C. P. 171.

Extending Time for Payment.]—Section 364 of the Municipal Act, R. S. O. 1887 c. 184, relates to the period of the fiscal year for which the taxes are imposed and levied, and not to the extension of the time for payment of the yearly taxes which is done by by-law passed under the authority of s. 53 of the Assessment Act, R. S. O. 1887 c. 193. Chamberlain v. Turner, 31 C. P. 460, and Carson v. Veitch, 9 O. R. 706, considered. *Goldie* v. *Johns*, 16 A. R. 129.

Future Owners and Occupants.]—The "future owners and occupants," mentioned in s. 24 of the Assessment Act, C. S. U. C. c. 55, are persons who become owners or occupants by purchase or otherwise between the making of the assessment and the return of the collector's roll. *Smith* v. *Shaw*, 8 L. J. 297.

Liquidation of Company—*Taxes and Water Rates—Right to Prove.*]—The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of the land. Where, therefore, a claim was made for arrears of taxes against a company in liquidation, and it was shewn that before the date of the winding-up order the taxes might have been, but were not, recovered by distress, the claim was disallowed. A board of water commissioners, by s. 11 of 35 Vict. c. 80 (O.), were empowered to fix the water rates payable by the owner or occupant of any house or land which were to be a charge thereon; and by s. 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for payment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass the necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict. c. 78, and by s. 7, uncollected water rates were made a lien on the premises and collectable by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor:—Held, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors. *In re Ottawa Porcelain and Carbon Company, Limited*, 31 O. R. 679.

Occupant.] — When land is assessed against an occupant, the collector of taxes

cannot collect the taxes, as in the case of lands of non-residents, by distress and sale of goods, under s. 97 of the C. S. U. C. c. 55, Assessment Act. *Mace* v. *Ruttan*, 7 L. J. 299.

Persons Liable.]—Held, that "the persons who ought to pay the taxes," mentioned in C. S. U. C. c. 55, s. 96, are persons whose names appear on the collector's roll as owners or occupants, or persons who have become owners and occupants by purchase or otherwise between the time of the making of the assessment and the return of the collector's roll. *Smith* v. *Shaw*, 8 L. J. 297.

Purchaser's Title—*Regularity of Procedure.*]—In case of a sale of chattels for taxes, it is not necessary for the purchaser, to maintain his title, to be able to shew a strict and literal compliance by the bailiff with the directions of the Assessment Act, 29 & 30 Vict. c. 53, s. 99. *Gibson* v. *Lovell*, 19 Gr. 197.

A sale for city taxes was objected to on the allegation that the public places where the advertisement of the sale was posted were not within the ward where the sale took place. It appeared, however, that the chattels were seized and sold on the premises of the owners with the knowledge of the parties in charge, and without fraud, and without objection by any one:—Held, that the sale was valid. *Ib.*

Chattels in the possession of a receiver were seized and sold by a bailiff for municipal taxes. Neither the bailiff nor the purchaser was aware until after the completion of the sale that the property was in the receiver's possession, or was intended to be affected by the order appointing the receiver; and both had been informed to the contrary in good faith by the party in charge. The court refused to hold the sale void. *Ib.*

The establishment in which these chattels were, being afterwards sold by order of the court in one lot as a going concern, it was held, that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realized at the chancery sale. *Ib.*

Return of Roll.]—After the return of the collector's roll municipalities must sue under s. 102 of C. S. U. C. 55, or proceed against the land. *Smith* v. *Shaw*, 8 L. J. 297.

Special Rate—*Bonus By-law—Failure of Scheme.*]—Where a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company and for the levying of an annual rate for the purpose of paying the debentures:—Held, that it was the duty of the township clerk under s. 129 of the Assessment Act, without any further direction or authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount levied each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and s. 402 of the Municipal Act had not the effect of making it necessary. Clarke v. Town of Palmerston, 6 O. R. 616, distinguished. 2. That the rate could be levied notwithstanding that none of the debentures had been sold. 3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme. Semble, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation. *Bogart* v. *Township of King*, 32 O. R. 135.

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2. *By Action.*

Defence—*Lands Not Separately Valued.*]—The declaration stated that a tax amounting to £128 was duly assessed against defendants for the year 1856, of which they had due notice, yet defendants, although said sum had been duly demanded, refused to pay the same. Defendants, as to £6 15s. 5d., pleaded payment into court, and except as to that sum, that the assessors for the year did not deliver or transmit by post to any station or office of defendants a notice of the total amount at which they had assessed defendants' real property in the municipality, distinguishing the value of the land occupied by the road, and the value of all defendants' other real property:—Held, a good defence. *Town of London* v. *Great Western R. W. Co.*, 16 U. C. R. 500.

Defence—*Too High Assessment.*]—It is no defence to an action for taxes that defendants' property was rated higher than the average value of land in the locality as assessed for the same year: the only remedy in such a case is by appeal to the court of revision. *Town of London* v. *Great Western R. W. Co.*, 17 U. C. R. 267.

Failure to Distrain.]—Where there is sufficient distress on the property, and the municipality by its own laches put it out of its power to distrain, s. 100 of R. S. O. 1877 c. 180, does not avail to give the right to collect by action. *Carson* v. *Veitch*, 9 O. R. 706.

Non-resident.]—A non-resident owner of lands cannot be sued for the recovery of rates imposed in respect of such lands, unless it be averred and proved that the owner had personally or in writing informed the assessor that he owned the property, and desired to be assessed therefor; and the omission to aver such request is not cured by defendant suffering judgment to go by default. *Town of Berlin* v. *Grange*, 1 E. & A. 279, 5 C. P. 211.

Non-resident.]—The taxes due on lands of non-residents cannot be sued for as a debt until they have been five years in arrear, and until they cannot be realized by a sale of the lands in manner provided for in the Act. *Town of Berlin* v. *Grange*, 5 C. P. 211.

School Rates.]—A township collector may sue for the amount of an assessment for common schools under 4 & 5 Vict. c. 18, in a division court. *McGregor* v. *White*, 1 U. C. R. 15.

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3. *By Distress.*

Absence of By-law — *Demand of Payment.*]—The mere delivery to a ratepayer, in places other than cities and towns, of the statement of taxes due, is not sufficient evidence of the demand required to be made for the payment thereof, unless a by-law has been passed under the Consolidated Assessment Act, 1892, s. 123, s.-s. 2, empowering the

collector to take that course. *McDermott* v. *Tracheel*, 26 O. R. 218.

Action—*Proof of By-law.*]—An avowry by collector of taxes for distress in levying a municipal rate, must shew that a by-law was passed authorizing the levying and collecting of such rate. *McCarthy* v. *Shaw*, 8 L. J. 49.

Action—*Proof of Demand.*]—A justification for taking goods under a distress for taxes assessed under 22 Vict. c. 7:—Held, bad, for averring only a demand of part of the sum due, not saying what part. *Campbell* v. *Corporation of Elma*, 13 C. P. 296.

Action—*Railway*—*Pleading.*] — In avowing for distress for taxes due upon land belonging to a railway company, it is unnecessary to allege that in the assessment the value of the land occupied by the railway was distinguished from that of their other real property, or that they had no other real property, or that the assessment was communicated to the company. Such objections should form the subject of a plea. *Great Western R. W. Co.* v. *Rogers*, 27 U. C. R. 214.

Bulk Sum—*Part Not Payable.*] — Where a warrant for the collection of a single sum for rates for several years included the amount of an assessment which did not appear to be either against the owner or the occupier of the property: — Held, that the inclusion of such assessment would vitiate the warrant. *Flanagan* v. *Elliott*, 12 S. C. R. 435.

Change of Ownership — *Chattel Mortgage* — *Purchase from Mortgagee.*] — Goods purchased from the chattel mortgagee thereof are not "claimed * * * by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R. S. O. 1887 c. 224, s. 35, s.-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor. Judgment below, 31 O. R. 301, affirmed. *Horsman* v. *City of Toronto*, 27 A. R. 475.

Costs.]—A collector of taxes or his bailiff distraining for arrears of taxes, is entitled only to two dollars for distress and sale. He is not entitled to collect from the debtor poundage on the amount of taxes levied. *Murray* v. *McNair*, 2 L. C. G. 14.

Demand—*Instalments* — *Leaving Bill.*]—On the 2nd April, 1880, a by-law was passed by the corporation of the city of Toronto imposing a rate for that year, and on the same day another by-law was passed providing for the time and mode of payment, declaring that all taxes over $5 should be due on 4th June, and might be paid by three instalments, and that on prompt payment of the first instalment on the said 4th June, the time would be extended for the payment of the other instalments to days named, and so with the second instalment, &c., and on non-payment an additional charge of five per cent. was imposed. It was also expressly provided that nothing therein contained should affect or diminish the collector's right, when he should deem it expedient, after a proper demand made, to proceed at any time before the said several days to collect the said taxes by distress, &c. By the statute R. S. O. 1877 c. 180 the right to distrain is given on neglect to pay in fourteen days after demand; and such demand shall be made by calling at least once at the party's residence and demanding the taxes. The statute also provides that all taxes levied for any year, should be considered to be imposed and to be due from the 1st January, and end with the 31st December thereof, unless otherwise expressly provided by by-law. The tax collector, about 20th May, left with the plaintiff, whose taxes were over $5, a tax bill stating, in accordance with the above by-law, that the taxes were due on 4th June, but that payment could be made by instalments, &c.; and that by want of punctuality, the party would not only forfeit such right, but render his goods liable to distress on neglect to pay fourteen days after demand. After the 4th June, the plaintiff, not having paid any of the taxes, the tax collector, without any further demand, issued his warrant to his bailiff, who distrained the plaintiff's goods on the 12th June, and sold them on the 18th June:—Held, that the taxes were not due until the 4th June, and that no demand could be made until that date, and therefore the leaving a tax bill before that date, even if otherwise a demand, could not be deemed to be such; and quære, whether the mere leaving of such tax bill, even after the 4th June, could be deemed to be a demand. *Chamberlain* v. *Turner*, 31 C. P. 460.

Semble, that the rate and the time and mode of payment should more properly have been contained in the same by-law instead of separate ones as here, but as they were passed on the same day, even if an application to quash the latter by-law on this ground had been made, it would not be deemed invalid. The plaintiff was therefore held entitled to recover the value of the goods sold. *Ib.*

Demand.]—It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for:—Held, that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required. *Lewis* v. *Brady*, 17 O. R. 377.

Demand.]—In December, 1886, the plaintiffs sold to one H., who was a tenant of the defendant G., of certain premises in the city of Stratford, a safe under the ordinary lien agreement. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H. (including the safe), at a valuation, and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premises to the defendant P., and sold to him the chattels (including the safe). The defendant J. was the collector of taxes for the city of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887. It was provided by by-laws of the city that all taxes and assessments should be paid by the 31st December in each year, and that five per centum should be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment. On the 2nd November, 1887, J. served on P. a tax notice shewing the amount of taxes and requiring payment of these taxes on or before the 31st December "according to city by-law; after that date 5 cents on the dollar will be added to the above amount." On the 9th March, 1888, the plaintiffs demanded from the defendants P. and G. possession of the safe, but possession was refused, and on the same day the defendant J., acting under the instruc-

tions of the defendant G., issued his warrant to the defendant T. to distrain, and the safe was seized on that day and sold on the 15th March to the defendant G., whose object in buying was to protect P. No demand for payment of the taxes other than the demand served on the 2nd November, 1887, had been made:—Held, that the sale (upon the evidence) was not made in good faith, and was void:—Held, also, that as to the collector and bailiff, though not as to the other defendants, the sale was made in good faith and would have protected them if otherwise valid, but that it was bad as to all the defendants on the ground that no demand had been made by the collector after the time fixed by the by-law for payment of the taxes. *Goldie* v. *Johns*, 16 A. R. 129.

Discretionary Power to Distrain.]—Held, that the insertion in the by-law of the discretionary power to the collector to distrain was improper and unauthorized. *Chamberlain* v. *Turner*, 31 C. P. 460.

Distress for More Than Due.]—A collector having legal authority for the collection of three sums, being the rates for three specific years due for taxes, distrained by his bailiff for the amount of them with other sums not properly collectable. Upon replevin:—Held, that the three legal distresses were separable from the illegal ones, and until the sums due on them were paid replevin would not lie. *Corbett* v. *Johnston*, 11 C. P. 317.

Distress for More Than Due.]—One N. S., the plaintiff's son, was assessed in 1868 as a freeholder for $450, on real estate, and $200 on personal property, and was on the collector's roll for county rate $2.75; schools, $7.02; township rate, $2.60; and dog tax $2.00; in all, $21.37. The rate did not appear on the collector's roll, and the collector was not aware how much was for real and how much for personal property. He demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August, 1868, and the plaintiff offered to pay him the tax on the real estate only, but he tendered no money and required a receipt in full for the real property. The defendant thereupon seized on the premises goods which had belonged to N. E., and the plaintiff brought trespass:—Held, that he could not recover, for it was not shewn, and the court would not assume, that any part of the amount seized for was for personal property, except the $2 dog tax; and this sum being severable, and the other sums not tendered, his seizing for it with the rest would not vitiate the whole distress. *Squire* v. *Mooney*, 30 U. C. R. 531.

Executors and Trustees.]—Held, that executors and devisees in trust of land were properly assessed as owners, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 U. C. R. 276.

Failure to Distrain—*Enforcing Payment in a Subsequent Year.*]—Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor. The provisions of s. 135 of R. S. O. 1887 c. 193, [R. S. O. 1897 c. 224, s. 147], requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk are imperative, and if they are not observed the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor. Judgment below, 30 O. R. 16, affirmed. *Caston* v. *City of Toronto*, 26 A. R. 459, 30 S. C. R. 390.

Fixtures.]—Held, that a planing machine standing on the floor without fastening, with belts, and an engine to work it, was a chattel liable to seizure for taxes. *Hope* v. *Cumming*, 10 C. P. 118.

Goods of Stranger.]—No action on the case will lie against a collector of taxes for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made. *McElhorn* v. *Menzies*, 7 L. J. 244.

Goods of Stranger — *Unreasonable Conduct.*]—A bailiff having a warrant from the collector to distrain for taxes due by A. on his lands went to the premises, where A. pointed out to him property of his own amply sufficient to cover the amount due. The bailiff, however, insisted on seizing a pair of horses then in the stable, and which A. was at the time putting to a waggon in order to use them, but A. refused to let him take these, saying that they belonged to his son-in-law, who lived in the house, but was then away from home. The bailiff declared that he seized them for the taxes, though he did not touch them, but A. drove them away, and three days after the bailiff returned and took them from the stable, no one being present. The owner replevied, and it appeared on the trial that the horses belonged to the son-in-law, who kept them in a part of the stable reserved for his exclusive use. There was no evidence that the collector interfered in any way in the execution of the warrant. The jury having found for the plaintiff against both defendants:—Held, that the horses were in the possession of A., and liable to seizure under 16 Vict. c. 182, s. 42; that the facts proved amounted to a distress; and that defendants therefore were entitled to succeed, though the bailiff might perhaps be liable in another form of action for his unreasonable conduct. Quære, whether the collector in this case could be held liable for the acts of his bailiff. *Fraser* v. *Page*, 18 U. C. R. 327.

Goods of Stranger.]—By agreement between the plaintiffs and the Erie and Niagara R. W. Co., the plaintiffs were working the latter railway with their own engines and cars, and defendant as collector seized the plaintiffs' car on such railway for taxes due by the Erie and Niagara R. W. Co., in respect of other land belonging to that company:—Held, that such seizure was unauthorized, for the car when taken was in the plaintiffs' possession and their own property. *Great Western R. W. Co.* v. *Rogers*, 29 U. C. R. 245.

Goods of Stranger.]—Premises in a city municipality were occupied, as tenants, by a firm of auctioneers, who, however, were not assessed in respect to them. Goods of the plaintiff left with the auctioneers to be sold by auction were distrained by the defendants for the taxes payable upon the premises for the current year:—Held, that the distress was valid under s. 124 of the Consolidated

Assessment Act, 1892, 55 Vict. c. 48 (O.) *Norris* v. *City of Toronto*, 24 O. R. 297.

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

Goods on Another Lot.]—A lot of land being in arrear for taxes for six years up to 1859, inclusive, during which it had been assessed as "non-resident" land, was duly returned in 1865, under 27 Vict. c. 19, as occupied by the plaintiff, who had become tenant of it on the 1st April of that year. These taxes were placed on the collector's roll, and in order to satisfy them he seized the plaintiff's goods upon another lot in the same township:—Held, that such seizure was unauthorized. *Warne* v. *Coulter*, 25 U. C. R. 177.

Incomplete Rolls.]—Defendant held two rolls, each headed "Collector's Roll for the town of Belleville," one being also headed "Town Purposes," the other, "School Purposes." In the first, the column headed "Town or Village Rate," contained nothing, but in that headed "Total Taxes, Amount," $40 was inserted. In the other that column had nothing, but $16 was in the column headed "General School Rate:"—Held, in replevin for goods seized, insufficient, for there was nothing to shew for what purpose the sum not specified to be for school rate was charged. Spry v. McKenzie, 18 U. C. R. 161, distinguished. *Coleman* v. *Kerr*, 27 U. C. R. 5.

The omission to set down the name in full of the person assessed was treated as immaterial. *Ib.*

Landlord and Tenant—*Custodia Legis.*]—There is nothing in the Assessment Act, R. S. O. 1897 c. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods, which being under distraint by a landlord, are in custodiâ legis; and in this case subsequent rent having accrued due during the joint possession of the landlord and the collector, the landlord was also held to have priority in respect to another distress made by him for such subsequent rent. *City of Kingston* v. *Rogers*, 31 O. R. 119.

Lessee.]—Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term continues; but held, that the plaintiff having omitted to appeal was liable to pay the sum assessed against him, and therefore could not replevy his goods seized. *McCarrall* v. *Watkins*, 19 U. C. R. 248.

Municipality's Liability.]—Section 126 of the Assessment Act, 32 Vict. c. 36 (O.), directs, that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *County of Frontenac*, 30 U. C. R. 275.

Non-residents.]—A statement and demand of taxes are not a condition precedent to a distress in the case of non-residents. *DeBlaquiere* v. *Becker*, 8 C. P. 167.

Non-residents.] — Where lands, which had been assessed as non-resident, became occupied and assessed as such:—Held, not competent for the treasurer, under s. 126 of 32 Vict. c. 36 (O.), to issue his warrant to levy arrears accrued when the lands were non-resident, ss. 111 to 117 of the Act providing for that event. *Snyder* v. *Shibley*, 21 C. P. 518.

Note Given For Taxes.]—Replevin for horses. Plea, justifying the taking under a warrant for school taxes, and alleging that they were delivered by the collector to defendant, an inn-keeper, to take care of until the sale. Replication setting out facts to shew the rate illegal, and averring that the plaintiff after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes; that the collector released the property seized, and said note is still outstanding, and the plaintiff liable upon it, and that the seizure in the plea mentioned was made afterwards:—Held, on demurrer, replication bad, for, 1, the collector acting under a warrant legal on the face of it, would not be liable in trespass or trover, and therefore not in this action, nor the defendant for taking the horses from him to keep; and 2, even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 U. C. R. 161.

Person Authorized to Act as Collector—*Extending Time for Collection.*]—Section 132 of the Act provides that every collector shall return his roll to the treasurer on or before the 14th December in each year, or such day in the next year, not later than the 1st February, as the council of the municipality may appoint. Section 133 provides that in case the collector fails or omits to collect the taxes or any portion thereof by the day appointed the council may by resolution authorize the collector, or some other person in his stead, to continue the levy and collection of the unpaid taxes in the manner and with the powers provided for by the general levy and collection of taxes. On the 11th December, 1886, (before the roll was delivered to the collector), the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on the 7th March, 1887, another resolution instructing P. B. (the defendant) to enforce the payment of the uncollected taxes at once; on the 14th November, 1887, a resolution that P. B., collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on the 17th January, 1888, (after the distress and before the replevy), a resolution that the time for the collection of the unpaid taxes for 1886 be extended until the 15th February, 1888, and that P. B. be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time

of the delivery of it to him until after the distress and replevy:—Held, that the defendant was either the collector within the meaning of s. 132 when he made the distress, and having the roll still in his hands unreturned was authorized to make it, following Newberry v. Stephens, 16 U. C. R. 65; or he was a person authorized as collector, or in the stead of the collector, by the resolution of the council to continue the levy and collection under s. 133, which provides no limit of time in such case; and in either case the distress by him was valid. *Lewis* v. *Brady*, 17 O. R. 377.

Held, also, that the appointment in December, 1887, of another person to collect the rates for 1887 had not the effect of removing the defendant from office; for it was an appointment to collect the rates for that year only, and by s. 12 of the Assessment Act the council might appoint such number of collectors as they might think necessary; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the 17th January, 1888, authorized him to continue the collection under s. 133, and legalized the distress then made. *Ib.*

Replevin—*Onus of Proof.*]—The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized:—Held, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made. *Lewis* v. *Brady*, 17 O. R. 377.

Return of Roll.]—In replevin defendant avowed, setting out the assessment of certain taxes in the city of Kingston for the years 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid; that the defendant was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls; that certain persons named were set down and assessed on the said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector for those years; and that at the same time when, &c., (being in 1861) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiff's possession on the premises so assessed:—Held, on demurrer, that the avowry shewed no defence, the council having under the circumstances no authority to make such appointment. The plaintiffs in answer to the avowry pleaded several pleas, denying the assessment of the several parties as alleged, to which the defendants replied, so far as it might be intended to rely on any error in said assessments, that the collector's rolls for said years were made out by the clerk from the assessment roll as finally passed, and the assessments in question correctly transcribed:—Held, on demurrer, replication bad. *Holcomb* v. *Shaw*, 22 U. C. R. 92.

Under C. S. U. C. c. 55, after the collector's roll for the year has been formally returned, the municipality cannot appoint any one to collect the unpaid taxes by distress; their collection belongs to the treasurer. *Ib.*

Return of Roll.]—In an action against a collector and his bailiff for an illegal distress, it was shewn that the distress had been made after the return of the roll; and no resolution authorizing the collector to continue to collect the taxes under R. S. O. 1877 c. 180, s. 102, was proved:—Held, that the distress was illegal; and that there was no presumption that the collector had received such authority merely because it was conceded that he acted as collector in directing the levy. Quære, referring to Holcomb v. Shaw, 22 U. C. R. 92, whether even if such a resolution had been proved it would be ineffectual. *Langford* v. *Kirkpatrick*, 2 A. R. 513.

Seizure in Part Valid.]—Part of a levy for school taxes, being correct, was held not to make valid the whole seizure. *Free* v. *McHugh*, 24 C. P. 13.

Subsequent Occupant.]—Held, that the goods of a subsequent occupant, who took possession of premises after assessment, and was in possession before the return of the collector's roll, were liable to distress for taxes assessed in respect of the premises against the previous occupier, and this although the goods were not at the time on the property actually assessed. *Anglin* v. *Minis*, 18 C. P. 170.

Time.]—City and county councils cannot legally pass a resolution under s. 104 of C. S. U. C. c. 55, to continue the levy and collection of unpaid taxes by distress after the return of the collector's roll, and such roll must be returned at furthest by 1st March in each year. *Smith* v. *Shaw*, 8 L. J. 297.

Time.]—Defendant was duly appointed collector of the municipality for the years 1865 and 1866;—Held, following Newberry v. Stephens, 16 U. C. R. 65, Chief Superintendent of Education v. Farrell, 21 U. C. R. 441, and McBride v. Gardham, 8 C. P. 296, that he had authority in 1866 to distrain for the taxes of 1865 upon the owner of premises duly assessed. *Coleman* v. *Kerr*, 27 U. C. R. 5.

Time.]—Held, that a collector of school taxes might in 1861 collect by distress the taxes for 1859 and 1860, not having made his final return of such taxes as in arrear, and being still collector; and, semble, that in this case, the plaintiff, who complained of the seizure, having led to it by his own conduct, the proceedings should in the division court have been upheld at all events. *Chief Superintendent of Education* v. *Farrell*, 21 U. C. R. 441.

Time.]—The time for levying a school tax in the city of Kingston, imposed by by-law in December, 1855, was extended by the resolutions of the city council, under 18 Vict. c. 21, s. 3, until the 1st August, 1856, and again on the 22nd December, 1856, to the 1st March, 1857:—Held, that the collector, who was the same person for both years, might distrain between the 1st August and the 22nd December, 1856, although no resolution extending the time was then in force. *Newberry* v. *Stephens*, 16 U. C. R. 65; *McBride* v. *Gardham*, 8 C. P. 296.

IV. Collectors.

Appointment — *Declaration of Office.*]—By by-law providing for the assessment and

levying of rates for 1885, passed by the council on 11th December, 1885, the defendant was appointed collector to collect the rates for 1885. On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village, which recited that he had been appointed collector; and on the same day a resolution was passed by the council that the bonds of P. B. as collector be accepted, as presented to the council; but no other appointment of the defendant as collector was proved, and the defendant swore that he did not think he made any declaration of office for any year: —Held, that the effect of the defendant not having made and subscribed the declaration required by s. 271 of the Municipal Act, R. S. O. 1887 c. 184, was not to make his acts void; and having been duly appointed by-law collector, he held office until removed by the council, even if what was done by the council on the 23rd December, 1886, did not constitute a good appointment. *Lewis* v. *Brady*, 17 O. R. 377.

Bond.]—Bond by collector of township rates after 6 Will. IV. c. 2, and before the repeal of 5 Will. IV. c. 8—Right of action on. *McLean* v. *Shaver*, 1 U. C. R. 189.

Bond—*By-law Directing Payment in Instalments.*]—To debt on bond against the collector of a township and his sureties for not paying over moneys collected in 1846, on or before the first Monday of December of that year, defendant pleaded a by-law of the council passed in May, 1843, that the collector should pay his moneys quarterly, which he did:—Held, bad, as no answer to the condition. *Baby* v. *Drew*, 5 U. C. R. 556.

Bond—*Division of Municipality.*]—The bond was taken to "The municipality of the township of Whitby," and afterwards the township was divided by 20 Vict. c. 113, into Whitby and East Whitby:—Held, that the bond was properly sued upon in the name of the corporation of Whitby. *Township of Whitby* v. *Harrison*, 18 U. C. R. 603.

Bond—*Extension of Time to Collect—Roll not Certified — Oath not Taken.*]—To an action against a surety for a collector of taxes for moneys received and not paid over, defendant pleaded that no roll properly certified was received by the collector, but that he collected the moneys wrongfully and without authority. It appeared that a roll was delivered to him signed by the clerk, but not otherwise certified:—Held, sufficient authority. *Township of Whitby* v. *Harrison*, 18 U. C. R. 603.

An extension of time for making the collection without the surety's consent does not discharge him, that being expressly allowed, and his liability retained by 18 Vict. c. 21. *S. C.*, 18 U. C. R. 606.

The fact that a collector of taxes received the money without any roll having been delivered to him, and without having taken the oath of office, forms no defence for his surety to an action for not paying over such money. *Ib.*

Bond—*Non-disclosure.*]—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:—Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an inquiry before the county court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before 10th September next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888; were not such non-disclosures as amounted to constructive fraud, on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds. Township of Adjala v. McElroy, 9 O. R. 580, specially considered. *Town of Meaford* v. *Lang*, 20 O. R. 42, 541.

Bond—*Treasurer.*]—Section 60 of 13 & 14 Vict. c. 67, requiring the collector to give a bond, as required by by-law, is directory, and not so imperative as to make the collection of the taxes illegal where a bond from the collector's surety had been given to the treasurer instead of the town by its corporate name, and no by-law had been passed by the corporation under that section. *Judd* v. *Read*, 6 C. P. 362.

Commission.]—The jury, without any evidence to justify such finding, allowed the collector a commission of three and a half per cent. on the taxes collected by him:—Held, that this amount could not be allowed, and that the amount against the sureties must be increased by this amount, less a sum of $75, which appeared by a by-law, put in by leave on the motion, to be the proper amount of remuneration to the collector, on defendants' pleading a plea which would justify plaintiffs in making such deduction. *Town of Welland v. Brown*, 4 O. R. 217.

Delivery of Roll to Collector.]—By s. 119 of the Ontario Assessment Act, 55 Vict. c. 48, provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the Province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." * * *:—Held, affirming 21 A. R. 379, that the provision as to delivery of the roll to the collector was imperative, and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes. Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes. *Town of Trenton* v. *Dyer*, 24 S. C. R. 474.

Illegal Arrest—*Respondeat Superior.*]—Issue of execution by the receiver of taxes for city of St. John and arrest in default of

payment—Respondeat superior. See *McSorley* v. *City of St. John*, 6 S. C. R. 531.

Ineligibility for Office.]—Under s. 18 of 1 Vict. c. 21, a collector of rates who had not paid over the amount collected by him and settled his accounts with the treasurer on or before the third Monday in December of the year for which he had been serving, was ineligible for any township office. *Regina* v. *Ryan*, 6 U. C. R. 296.

Liability for Bailiff's Act.]—A collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and an action will lie against them jointly. *Corbett* v. *Johnston*, 11 C. P. 317.

Mandamus to Account.]—The treasurer of a town by authority of the corporation applied for a mandamus to the collector, commanding him to give an account in writing, for each of the seven years during which he had held office, of the taxes remaining due on his rolls, and the reason why he could not collect the same, by inserting in each case the words "non-resident," or "no property to distrain," and to make oath that the sums were unpaid. The court refused the writ, holding that as there were other remedies provided, under ss. 167, 170, 173, and 177 of the Assessment Act, C. S. U. C. c. 55, it must at least be shewn that they could not be used or would be of no avail. *In re Quin*, 23 U. C. R. 308.

Negligence—*Roll not Certified.*]—Held, that the roll not being "certified under the hand of the clerk," the collector was not liable to the corporation for negligence in not distraining on the goods of a party assessed. *Township of Vienna* v. *Marr*, 9 L. J. 301.

Summary Remedy against Defaulting Collector.]—One M. was collector of a township for 1864 and 1865. In January, 1865, he was authorized to continue the collection of the taxes for 1864, until the 1st May then next; and in January, 1866, to continue the collection of taxes for the township "so long as he should be recognized by the municipality of said township." He did not return the rolls until April, 1867, when a large sum of the taxes for each year appeared not to be accounted for. On the 2nd of that month the treasurer, under s. 182 of the Assessment Act of 1866, under a resolution of the council, demanded payment, and on the 6th he issued his warrant to levy of the goods and lands of the collector, under which the sheriff in May sold the land in question:—Held, under C. S. U. C. c. 55, as amended by 27 Vict. c. 19, s. 12, and under the Assessment Act of 1866, that the sale was unauthorized, and that the sheriff's deed conveyed no title. *Charlesworth* v. *Ward*, 31 U. C. R. 94.

On the 1st January, 1867, the Acts above mentioned were repealed, "saving any rights, proceedings, or things legally had, acquired, or done under them." Quære, whether the right to issue the warrant still existed. *Ib.*

Sureties—*Entries on Roll.*]—In an action against sureties for a town collector for his default in paying over the sum collected by him:—Held, (1) not necessary that the roll should be certified, but sufficient that it was signed by the town clerk; (2) that entries made by the collector on his roll in the discharge of the duties of his office of taxes paid to him were evidence against the sureties. *Town of Welland* v. *Brown*, 4 O. R. 217.

Venue.]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. 1887 c. 73, and under s. 15 of that Act, and s. 4 of R. S. O. 1887 c. 55, a county court action against him for replevin of goods seized by him and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place. The Consolidated Rules as to venue do not override these statutory provisions. Legacy v. Pitcher, 10 O. R. 620, distinguished. Arscott v. Lilley, 14 A. R. 283, applied. *Howard* v. *Herrington*, 20 A. R. 175.

V. COURT OF REVISION.

Counsel.]—Courts of revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act. *Re Rosbach and Carlyle*, 23 O. R. 37.

Notice—*Waiver.*]—An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requested the clerk to notify them and the assessor when the matters would be tried by the court of revision. On the 22nd May the court met, when it was objected for the parties named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters:—Held, that they were right, the six days' notice being imperatively required by the Act: and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it. Semble, that, if this were otherwise, the proper course would have been a mandamus to the mayor to summon the court of revision, under s. 55 of C. S. U. C. c. 55. *Regina* v. *Court of Revision of Town of Cornwall*, 25 U. C. R. 286.

Notice of Sitting—*Finality of Assessment.*]—A person appealing against his own assessment to a court of revision is not entitled to a personal notice of the time and place of the sitting of the court under s.-s. 9 of s. 64 of the Consolidated Assessment Act. He is sufficiently notified by the publication of the advertisement required by s.-s. 7, and by the posting of the list under s.-s. 4. *Vivian* v. *Township of McKim*, 23 O. R. 561.

Persons Who May Complain.]—It is competent for the court of revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll, should be inserted therein, upon the complaint of the person himself, or of any elector, or ratepayer. *In re Roman Catholic Separate Schools*, 18 O. R. 606.

Raising Assessment Without Notice.]—The plaintiffs were entered upon the assessment roll for the year 1877, which was duly completed and delivered to the clerk of the municipality, for the total aggregate value of all their property and income at $8,000, and on the 28th April were served with the notice in accordance with 32 Vict. c. 36, s. 48 (O.), against which they did not appeal. At the first meeting of the court of revision on the 19th May, a resolution was passed instructing the clerk to notify the plaintiffs, amongst others, that they were assessed too low, but it did not appear that the plaintiffs were ever so notified. On 26th May the court of revision again met, when a resolution was passed that the plaintiffs' assessment be laid over until the next meeting. After this second meeting the assessor, of his own motion, and without any authority therefor, altered the assessment to $10,000, and delivered to the plaintiffs a second notice notifying them thereof. The plaintiffs' clerk happened to be present at the second meeting and heard plaintiffs' names mentioned, and on afterwards receiving the notice supposed the matter was settled, and thought no more about it. The court of revision, however, held a third meeting on 2nd June, and without any notice to plaintiffs, acting apparently under the belief that without such notice or an appeal by any one, they had authority so to do, raised the assessment to $12,000:—Held, that under the circumstances neither the assessor nor the court had any authority to alter the assessment roll, and therefore the increase was illegal and void. *Tobey* v. *Wilson*, 43 U. C. R. 230.

Remission of Taxes.]—The court of revision of a municipality is obliged to receive and decide upon a petition for remission of taxes, presented under s. 67 of 55 Vict. c. 48 (O.), notwithstanding that the municipality has not passed any by-law on the subject. *Re Norris*, 28 O. R. 636.

School Tax.]—Held, that the court of revision has jurisdiction, under R. S. O. 1887 c. 225, s. 120, s.-s. 3, on the application of the person assessed, or of any municipal elector (or ratepayer, as under R. S. O. 1887 c. 227, s. 48, s.-s. 3), to hear and determine the complaints, (a) in regard to the religion of the person placed on the roll as Protestant or Roman Catholic; and (b) as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf; and (c), which appears to be involved in (b), where such person has been placed in the wrong column of the assessment roll for the purposes of the school tax. *In re Roman Catholic Separate Schools*, 18 O. R. 606.

Time for Holding Sittings.]—By 37 Vict. c. 19, s. 11 (O.), the first sittings of the court of revision is directed to be held ten days after the time within which notice of appeal may be given; and s. 12 provides that the notice must be given within fourteen days after 1st May, &c.:—Held, therefore, that the sittings on the 19th May was illegal. Held, also, that it was not essential that there should be a plea of tender of the proper sum and evidence in support thereof; but even if necessary, there was such plea and evidence. *Tobey* v. *Wilson*, 43 U. C. R. 230.

Voters' Lists.]—Compelling court of revision to hear voters' lists appeals. See *In re Marter and Court of Revision of Town of Gravenhurst*, 18 O. R. 243.

VI. Equalization of Rates.

Capitalization — *Quashing By-law.*]—Where the county council, in equalizing the assessments under that section, had intentionally capitalized the personal property in towns and villages at ten per cent., instead of six, contrary to the express direction in s. 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection. It was also objected that by this course the amount of ratable property in towns and villages was made much greater than it should have been, and so (in effect) that the amount shewn in the last revised assessment rolls, followed in the by-law, was wrong; but, held, that on this application the court clearly could not go behind the rolls. *Record and County of Lincoln*, 24 U. C. R. 142.

Capitalization—*Quashing By-law.*]—Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by defendants of the proportion to be raised by them. Plea, that in capitalizing the real property not actually rented but held and occupied by the owners in the towns of N. (the defendants), and C., and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby $1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up:—Held, on demurrer, a good defence, for such capitalization was contrary to the statute, and though it lessened the defendants' assessment they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the Act. Held, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants' right to contest their liability on any legal ground. *County of Lincoln* v. *Town of Niagara*, 25 U. C. R. 578.

Evasion of Law—*Grants by County Council.*]—A county council by by-law granted moneys to different municipalities in the county to assist them in improving and repairing roads and bridges, &c. The assessment of two municipalities had been decreased, and that of two others increased, by the county Judge, after the equalization made by the county council, and it appeared that one object of the by-law was to make this up to the municipalities so increased, the two which were reduced receiving no grant by the by-law, and the grant to the other two being increased by the amount which the Judge had put on against them. Remarks upon such attempted evasion of the law. *In re Strachan and County of Frontenac*, 41 U. C. R. 175.

Finality.]—Upon an application to quash a by-law imposing a county rate, for disregard of the directions of s. 70, C. S. U. C.

c. 55, as to equalizing the rates:—Held, that except perhaps when a dishonest intention on the part of the council is clearly shewn (which was not the case here), the court have no authority to overrule the valuation on the ground of its alleged unfair or unequal effect. Remarks as to the proper mode of proceeding under the above section. The court refused a mandamus commanding the council to proceed as directed by the Act, as it was not clear that they had not complied with it by their law. *Gibson and United Counties of Huron and Bruce*, 20 U. C. R. 111.

Valuations.]—Held, that the aggregate value of municipalities, to form the basis for the calculation for equalization for county purposes, under s.-s. 2 of s. 71 of the Assessment Act, 32 Vict. c. 36, is the value of the municipality as returned in the last revised assessment roll, and that it is not in the power of county councils to vary such valuation. *Town of Simcoe* v. *County of Norfolk*, 5 C. L. J. 181.

Valuations.]—Held, in equalizing the rolls, although a difference is recognized by 32 Vict. c. 15, s. 71, between town and village property and county property, that as the valuation of the former is arbitrarily reduced by two-fifths, the duty of the county council is to increase or decrease the aggregate valuations of townships, towns, and villages, as the rolls stand, as well as to make the statutory reduction with respect to the latter—town and village rolls being subject to equalization in the same way as townships. Statement of the mode of procedure adopted in bringing the question for consideration in this case before the Judge of the county court under s.-s. 3 of s. 71. Remarks upon the difficulty, under the present system of assessment, of arriving at a fair equalization of the assessment rolls in different townships. *In re Appeal from County Council of County of Simcoe*, 5 C. L. J. 294.

VII. Exemptions.

Application of Amending Act.]—By s. 3 of the Assessment Amendment Act, 51 Vict. c. 29 (O.), which came into force on 1st August, 1888, s. 7 of the Assessment Act, R. S. O. 1887 c. 193, was amended by adding to the exemptions: "All horses, &c., owned and held by any owner or tenant of any farm, and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, &c., R. S. O. 1887 c. 185: s. 20 of which provided for the making of an assessment roll, which said roll, by s. 28, when finally revised, was to be the roll of the municipality until a new roll was made, the council by s. 29 to fix the time for making the subsequent roll at periods of not less than one nor more than three years, and the year for the purposes of the Act was to commence on 1st January thereof; and by s. 364 of the Municipal Act (R. S. O. 1887 c. 184), the rates or taxes were to be considered as imposed on and from 1st January, and end with 31st December, unless otherwise provided. By s. 30, the council might in each year after the final revision of the roll pass a by-law levying a rate on all the real and personal property, &c. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st May, and was finally revised by the council sitting as a court of revision on 16th June. On 4th August a by-law was passed directing a rate to be levied to meet the current expenses for the year:—Held, under the circumstances, the personal property mentioned was not exempt for the year 1888. *Henderson* v. *Township of Stisted*, 17 O. R. 673.

Canadian Pacific R. W. Co.]—By the charter of the Canadian Pacific R. W. Co. the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial, or municipal taxation for twenty years after the grant thereof from the Crown:—Held, that lands which the company have agreed to sell, and as to which the conditions of sale have not been fulfilled, are not lands "sold" under this charter:—Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the Crown. Lands which were in the North-West Territories when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba. *Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702.

Church and School.]—Section 8 of the Assessment Act of 1866 clearly exempts church and school property from local as well as other taxes. *Haynes* v. *Copeland*, 18 C. P. 150.

Crown.] — Plaintiff in 1853 purchased Crown lands through the agent at Chatham, taking a receipt for the first instalment. In January, 1854, the commissioner of Crown lands, in supposed compliance with 16 Vict. c. 182, s. 48, transmitted a list to the registrar of the county, (in the statement of the case set out). Plaintiff paid all the instalments on the land as they became due, but obtained no evidence of his right, except by this receipt. The lands had never been in the possession of any person, and the plaintiff had always resided out of the county in which they were situate. Plaintiff having paid the taxes from 1854 to 1859 under protest:—Held, that these lands were not subject to assessment, as they were vested in the Crown, no license of occupation, lease, or patent thereof, having been granted by the Crown:—Held, that 16 Vict. c. 159, s. 24 (C. S. U. C. c. 22, s. 27, since repealed), was not intended for Upper Canada: that s. 13, C. S. U. C. c. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease, or settle on any Crown land. *Street* v. *County of Kent*, 11 C. P. 255.

Crown.]—Property, whether leasehold or freehold, in the use or occupation of the Crown, or of any person or persons in his or their official capacity as servants of the Crown, is not assessable, either at present or as a charge upon the reversion. *Shaw* v. *Shaw*, 12 C. P. 456. See also *Shaw* v. *Shaw*, 21 U. C. R. 432.

Crown.]—Held, approving Shaw v. Shaw, 12 C. P. 456, that land leased to a commissariat officer on behalf of the secretary of state for war, and occupied by Her Majesty's

troops, was exempt from taxation; and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference. But where such land before the execution of the lease had been assessed to the lessor for that year:—Held, that it was not discharged, but that as payment could not be enforced from the Crown, and the officer had paid to the collector under protest, the money might be recovered back. *Principal Secretary of State for War* v. *City of Toronto*, 22 U. C. R. 551.

Crown.]—Where the premises were so leased in April, having been previously assessed to the lessors, but the roll had not been returned:—Held, that the property was exempt as against the Crown for the taxes of that year. *Principal Secretary of State for War* v. *City of London*, 23 U. C. R. 476.

Crown.]—In 1808 an order in council was passed for a grant of land to W., the daughter of a U. E. Loyalist. In 1818 certain land was located thereunder, and a patent issued therefor. In 1819 W. petitioned the Governor-in-Council, stating that this was by mistake and without any authority from her; and in 1820 an order in council was passed allowing her to surrender the land and to locate other land in lieu thereof. In 1820, before the surrender, the surveyor-general furnished the treasurer with a list of lands in this district, specifying this lot as deeded to W. The land was thereupon assessed, and in 1831, having been returned by the treasurer to the sheriff as in arrear for the taxes for the years 1820-9, and liable for sale, it was in that year sold to S., and a tax deed given in 1832. In 1839 S. conveyed to N., who in 1840 conveyed to G., through whom the plaintiff claimed. In 1839 N. petitioned the Governor-in-Council, stating that he was the assignee of the tax purchaser; that he had discovered that the surveyor-general's return was in error, the land having been surrendered, but that under the circumstances the tax sale was regular, and that it should be confirmed, and a patent issued to him. In 1840 an order in council was passed, stating that if N.'s tax title was valid he did not require a patent, but if not, the government had no power to make a free grant of the land. In 1868 the Crown granted the land to H., who conveyed to the defendant:—Held, (reversing 6 O. R. 564) that as, under 59 Geo. III. c. 7 and 6 Geo. IV. c. 7, only lands granted by the Crown were to be liable to assessment and sale, and as, under the circumstances, the lands never passed out of the Crown and vested in W.—the formal surrender being taken rather as a precautionary than as a necessary act, and the mistake of the surveyor-general in not giving notice of the surrender could not make the land liable to be sold for taxes as against the Crown—the tax sale was invalid, and nothing passed under it; and that the defendant, claiming under the subsequent patent, was entitled to the land:—Quære, also, whether the plaintiff had any claim against the Crown for the moneys paid at the tax sale; at all events after the tax sale the parties dealt with the land with notice of the difficulties that existed. *Moffatt* v. *Scratch*, 8 O. R. 147, 12 A. R. 157.

Crown—*Trust.*]—Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vict. c. 40 (D.). The Crown then sold them, and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the tax sale:—Held, that the Act 33 Vict. c. 40 (D.) was intra vires, as dealing with "Bankruptcy and Insolvency," or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. 1887 c. 193, s. 7, s.-s. 1. *Regina* v. *County of Wellington*, 17 O. R. 615, 17 A. R. 421. See the next case.

Crown—*Beneficial Interest in Land.*]—Property of a bank became vested in the Dominion Government, and a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale:—Held, affirming 17 A. R. 421, sub nom. Regina v. County of Wellington, that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. *Quirt* v. *The Queen*, 19 S. C. R. 510.

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

Dominion Official.]—Held, reversing 40 U. C. R. 478, that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. Semble, that the Legislature of Ontario did not intend to include such an income in the exemptions mentioned in 32 Vict. c. 36, s. 9, s.-s. 12 (O.), as one derived "elsewhere out of this Province." *Leprohon* v. *City of Ottawa*, 2 A. R. 522.

Educational Establishment.]—In an action brought by appellants against respondents to recover the sum of $808.50 for three years' school taxes imposed on property occupied by them as a farm situate in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the mother house, situate in another municipality:—Held, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by 32 Vict. c. 16, s. 13 (Q.):—Held, also, that said s. 13 does not extend, as regards exemptions, s. 77 of c. 15 of C. S. L. C., which has not been repealed, but which has been amended by the addition of 41 Vict. c. 6, s. 26 (Q.) *Commissaires D'Ecoles de St. Gabriel* v. *Sœurs de la Congregation de Notre Dame de Montreal*, 12 S. C. R. 45.

Educational Establishment.]—Action by the city of Montreal to recover the sum of

$408 taxes for the years 1878, 1879, 1880, on property in the said city occupied by defendant. The property set out in the plaintiff's declaration was during the time mentioned therein occupied and used as a private boarding and day school for girls, kept and maintained by defendant, who employed divers teachers, and who, during that time, had therein on an average for their education as pupils eighty-five girls per annum. The institution never received any grant from the plaintiffs:—Held, that the institution was an educational establishment within the meaning of 41 Vict. c. 6, s. 26 (Q.), and exempt from municipal taxation. *Wylie* v. *City of Montreal*, 12 S. C. R. 384.

Extension of Limits.]—The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from the 1st January, 1883. In 1888 the limits of the (then) town of Windsor were, under the provisions of R. S. O. 1887 c. 184, s. 22, extended so as to embrace the lands in question:—Held, that assuming that the water rate in question was a species of taxation, the effect of R. S. O. 1887 c. 184, s. 54, was to put an end to the exemption. Municipality of Cornwallis v. Canadian Pacific R. W. Co., 19 S. C. R. 702, distinguished. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

Gravel Roads.]—The Proof Line Gravel Road Company was incorporated under the Joint Stock Companies Act (C. S. U. C. c. 49), and constructed their road as a public highway or road allowance in the township of Biddulph. The township assessor assessed the property in the road against James Hamilton as secretary of the company:—Held, that the assessment was illegal, because, although the road was vested in the company by s. 60 of the Act, it was nevertheless a public highway and therefore exempt from taxation by 32 Vict. c. 36, s. 9, s.-s. 6; and that in any event the assessment should have been in the name of the company, and not in that of one of its officers. *In re Hamilton and Township of Biddulph*, 13 C. L. J. 18.

Harbour.]—Held, under C. S. U. C. c. 55, s. 3, that land covered with the waters of a harbour is not taxable, and therefore, that the Buffalo and Lake Huron R. W. Co. could not be taxed for the Goderich harbour. *Buffalo and Lake Huron R. W. Co.* v. *Town of Godcrich*, 21 U. C. R. 97.

Hospital.]—A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under the Charity Aid Act, R. S. O. 1897 c. 320, is a public hospital within the meaning of s.-s. 5 of s. 7 of the Assessment Act, R. S. O. 1897 c. 224, and exempt from taxation. Judgment below, 30 O. R. 116, affirmed. *Struthers* v. *Town of Sudbury*, 27 A. R. 217.

Indian Lands.]—Land vested in Her Majesty in trust for the Indians was exempt from taxation under 13 & 14 Vict. c. 67; and the defendant here claiming such land under a sale for taxes imposed in 1852 and 1853, was held not entitled. *Regina* v. *Guthrie*, 41 U. C. R. 148; *Regina* v. *McDonnell*, *ib* 157.

Indian Lands—*Surrender to the Crown—Patent to Locatee Before Sale.*]—In 1854 a tract of land was surrendered to the Crown by the Indians, to whom the interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands, and after the passing of the B. N. A. Act, still continued under the management of this department, which was under the control of the Dominion Government, "Indians and land reserved for Indians," being by s. 91, clause 24, of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question, being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the 15th February, 1858, and the last on the 29th July, 1867, when the lot was paid for in full, and on the 14th June, 1869, the patent from the Dominion Government issued therefor. In 1870 the lot in question was sold for the taxes assessed and accrued due for the years 1864-9:—Held, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts, and liable to taxation under 29 Vict. c. 19, re-enacted in 1866; and the sale was therefore valid. *Church* v. *Fenton*, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239.

Indian Lands.] — Held, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation. Church v. Fenton, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239, referred to and followed. *Totten* v. *Truax*, 16 O. R. 490.

Manufacturing Establishment—*Cessation of Business.*]—R. S. O. 1887 c. 184, s. 366, which gives municipal councils power to exempt manufacturing establishments from taxation, does not authorize such exemption when such establishments cease under liquidation to carry on business, and any exempting by-law will, in such event, cease to be operative. *Polson* v. *Town of Owen Sound*, 31 O. R. 6.

Municipal Elections—*Exemption without Contract.*]—In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years:—Held, that the exemption, not being founded upon any contract, but being an exemption without a contract, as provided for by 56 Vict. c. 35, s. 4 (O.), there was no disqualification. Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished:—Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, four partners being rated for this property as freeholders to the amount of $10,000: 55 Vict. c. 42, ss. 73, 86 (O.) The words "exempt from taxation" in 56 Vict. c. 35, s. 4 (O.) mean exempt from payment of all taxes, including school rates. *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314.

Municipal Property.]—Land owned by a city, but leased by them to a tenant for his own private purposes, is liable to taxation,

and the corporation may distrain for such taxes. *Scragg* v. *City of London*, 28 U. C. R. 457, 26 U. C. R. 263.

Nova Scotia Railway Act.]—By R. S. N. S., 5 ser., c. 53, s. 99, s.-s. 30, the road-bed, &c., of all railway companies in the Province is exempt from local taxation. By s. 1 the first part of the Act, from ss. 5 to 33 inclusive, applies to every railway constructed and in operation, or thereafter to be constructed, under the authority of any Act of the Legislature, and, by s. 4, part two applies to all railways constructed under authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, s.-s. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway:—Held, that part one of this Act applies to all railways constructed under provincial statutes, and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the Legislature as a mining company with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coal from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act [49 Vict. c. 45 (N. S.)], to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with, and subject to the provisions of part two of c. 53, R. S. N. S., 5 ser. intituled 'Of railways,'" is a railway company within the meaning of the Act; and that the reference in 49 Vict. c. 145, s. 1 (N. S.), to part two does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co.* v. *County of Cape Breton*, 22 S. C. R. 305.

Officer on Half Pay.]—The plaintiff, a major in the regular army, went on half pay, and with the consent of the Horse Guards, accepted the appointment of Deputy Adjutant-General of Militia under the Dominion Government, with a salary and allowances, including rent, payable by them, and by whom his duties were prescribed. He was however, directed by the Imperial authorities to consider himself subject to the orders of the general officer of the regular army at Halifax, and was always subject to re-call, and after five years' service was re-called. His promotion in the regular army continued, first to the brevet, and afterwards to the full rank of lieutenant-colonel, the appointment here being recognized by the royal warrant of 1870 as one the service in which qualified him for such promotion:—Held, that during such appointment he was not an officer of Her Majesty's regular army in actual service, within s. 9, s.-s. 12, of 36 Vict. c. 36 (O.), so as to exempt from taxation the house occupied by him. *Jarvis* v. *City of Kingston*, 26 C. P. 526.

Preferential Exemptions—*Some of a Class.*]—Section 44 of 31 Vict. c. 30 (O.) empowers municipal corporations to exempt from taxation for not more than five years manufacturers of woollen, cottons, glass, paper, and such like commodities. Under this a by-law was passed, enacting that every person or firm thereafter commencing any new manufacture of the nature contemplated by the section, who should employ therein more than $1,000, and pay to operatives more than $30 weekly, should be exempt for five years as to such property. It was provided that the property should nevertheless be assessed, but entered in a separate page of the assessment roll, and that the clerk was to post up a list of such property, and the court of revision should hear and determine complaint against such exemptions, and if they were sustained should place the property on the roll in the ordinary column. The persons claiming exemptions were also required to file yearly a statement, verified under oath, shewing the capital employed and the sum paid for wages:—Held, that the by-law was bad, for exempting new manufactures only in preference to those of the same kind already established, and for exempting only those persons doing a specified amount of business. Semble, however, that all manufacturers of the same trade might be exempted, so as to give them an advantage over other trades:—Held, also, that the by-law would not have been bad for exempting manufactures instead of manufacturers, nor for requiring the oath, nor on account of the provisions as to the assessment of the property and the reference to the court of revision. Quære, whether it would have been objectionable to empower the mayor or the clerk to decide upon applications for exemption. *Pirie and Town of Dundas*, 29 U. C. R. 401.

Quebec Law.]—Property belonging to a corporation for the ends for which they are established and not possessed solely by them to derive a revenue therefrom is not taxable. *Séminaire de Québec* v. *Corporation de Limoilou* [1899] A. C. 288.

Railway.]—Under 16 Vict. c. 182, s. 21, only the land occupied by a railway is subject to assessment, not the superstructure. *Great Western R. W. Co.* v. *Rouse*, 15 U. C. R. 168.

Railway.]—The portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant company within the limits of the town of St. Johns, are exempt from taxation under ss. 326 and 327 of 40 Vict. c. 29 (Q.), although no return had been made to the council by the company of the actual value of their real estate in the municipality. 2. A warrant to levy the rates upon such property for the years 1880-83, is illegal and void, and a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same. *Central Vermont R. W. Co.* v. *Town of St. Johns*, 14 S. C. R. 288, 14 App. Cas. 590.

Railway.]—Under the Assessment Act of 1869, 32 Vict. c. 36 (O.) the lands of railways might be sold for the non-payment of taxes. *Smith* v. *Midland R. W. Co.*, 4 O. R. 494.

Right to Repeal By-law.]—A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under s. 366 of the Municipal Act, R. S. O. 1887 c. 184, by which the property was exempted from all taxation, &c., for a period of ten years from the date at which the

by-law came into effect. The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The court, being of opinion, on the facts as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council. On this application a ground relied on by the council was that the applicant had erected more than two dwelling-houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them: —Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law. Semble, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business. Semble, also, the period of exemption was within the statute. *Alexander* v. *Village of Huntsville*, 24 O. R. 665.

Sisters of Charity.]—The institution of the Sisters of Charity in the city of Ottawa was held exempt as "a public hospital" within the Assessment Act of 1853. Quære, if it is a "poor house" or "alms house," within the Act. Semble, even if so the parcels of land assessed in this case could not be deemed "real or personal property" "belonging to or connected with the same," so as to be exempt from taxation. *In re Sisters of Charity of Ottawa*, 7 L. J. 157.

Special By-law—*Canadian Pacific Railway.*]—By-law No. 148 of the city of Winnipeg, passed in 1881, exempted forever the Canadian Pacific R. W. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind." Held, reversing 12 Man. L. R. 581, that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. c. 64 (M.), it was provided that by-law 148 authorising the issue of debentures granting by way of bonus to the Canadian Pacific R. W. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law 148 and extending the time for the completion of the undertaking * * * be and the same are hereby declared legal, binding, and valid * * * Held, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law, including the exemptions from taxation, was valid. *Canadian Pacific R. W. Co.* v. *City of Winnipeg*, 30 S. C. R. 558.

Special Rates.]—By 41 Vict. c. 6, s. 26 (Q.), all educational houses or establishments, which do not receive any subvention from the corporation or municipality in which they are situated, are exempt from municipal and school assessments, "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary:"—Held, that the exemption from municipal taxes enjoyed by educational establishments under said Act extends to taxes imposed for special purposes, e.g., the construction of a drain in front of their property. *Ecclésiastiques de St. Sulpice de Montreal* v. *City of Montreal*, 16 S. C. R. 399.

Unpatented Land.]—Land not described by the surveyor-general is not liable to be taxed. *Doe d. Bell* v. *Orr*, 5 O. S. 433.

Unpatented Land.] — But lands "described as granted" by the surveyor-general are taxable, under 59 Geo. III. c. 7, although no letters patent for them have ever issued. *Doe d. McGillis* v. *McDonald*, 1 U. C. R. 432.

Unpatented Land.]—Held, affirming 12 C. P. 284, that unpatented lands, though held by purchasers from the Crown who had paid a part of the price therefor, were not liable to assessment, although purchased from the Crown after June, 1853. *County of Simcoe* v. *Street*, 2 E. & A. 211.

Unpatented Land.]—When the surveyor-general returns a lot of land as described for grant, proof that the land was not so in fact described must be of a very positive and affirmative kind; the mere evidence of a clerk in the surveyor-general's office that he finds no trace of it, will not do. *Perry* v. *Powell*, 8 U. C. R. 251.

Quære. The effect of a lot having been erroneously returned as described for grant, and in consequence of this error having been assessed and sold. *Ib.*

Unpatented Land — *Presumption of Regularity.*]—When taxes are in fact imposed on patented lands, and no return of the surveyor-general of the land having been granted can be found or proved, such return may be presumed. *Cotter* v. *Sutherland*, 18 C. P. 351.

VIII. Local Improvements.

Block Pavements—*Liability to Repair —Reconstruction.*] — A city corporation having, by by-law passed in 1888, adopted the local improvement system, a cedar block pavement was constructed as a local improvement in 1891, its "lifetime," as stated by the by-law for levying the assessments therefor, being ten years. Sections 664 and 665 of the Municipal Act, R. S. O. 1897 c. 223, authorize the passing of by-laws providing for the construction of local improvements and the making of assessments therefor. Section 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repairs or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the * * city * * generally." Held, that what the legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to

reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of reconstruction. Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public. Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 Vict. sess. 2, c. 26. Semble, that if the dilapidated condition of the pavement were due to the municipality having in the past neglected the duty to repair, the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed. *Re Medland and City of Toronto*, 31 O. R. 243.

By-law — *General and Special.*] — The council of a city by a resolution confirming the report of the committee on works authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their tracks on a certain street—whereby the corporation were to build as a local improvement two new bridges over said tracks at an approximate cost of $75,000, $20,000 thereof to be paid by the railway companies in full of all liability, $30,000 by the corporation as their respective share, and $25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current year for the payment by the corporation of the amount to be paid by them:—Held, that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality; and that the fact of there being a general by-law passed under s. 612, s.-s. 1 (a), for determining property to be benefited by a proposed local improvement was not sufficient; but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what proportion of the cost was to be imposed on the property to be locally assessed. An interim injunction was granted restraining the corporation from acting under the agreement. *Fleming v. City of Toronto*, 20 O. R. 547, 19 A. R. 318.

By-law—*Variance between Notice and By-law.*]—In carrying out a local improvement the council may either ascertain and provide for the cost of the work before it is actually commenced by imposing and confirming the assessment necessary for that purpose, or they may do the work first and make the special assessment after its completion. A by-law imposing assessments for local improvements initiated by the city was quashed where the work done and the times of payment therefor were different from those set out in the notice of intention to do the work. Per Osler, J.A.—The by-law was bad on the further grounds (1) that the notice given to the ratepayers was of an improvement costing the sums named therein, to be provided for by an assessment to be made and confirmed before the commencement of the work, while the by-law imposed an assessment for the cost of construction as ascertained after its execution; and (2) that a petition duly signed objecting to the performance of the work had been, within the proper time, delivered to the council. The motion to quash the by-law was dismissed by Galt, C.J., on the ground that it had been expressly validated by 54 Vict. c. 82, s. 14 (O.) While an appeal from the judgment was pending, 55 Vict. c. 90 (O.) was passed, s. 6 of which enacted that "nothing contained herein or in the Act passed in the 54th year of Her Majesty's reign, and chaptered 82, shall affect any action or proceeding now pending:"—Per Osler, J.A.—The latter Act was declaratory or retrospective; its effect was to prevent the defendants from asserting that the by-law had been validated by the earlier Act, and therefore the by-law being defective the judgment must be reversed, though it was right when it was delivered. Quilter v. Mapleson, 47 L. T. N. S. 561, referred to. *In re Gillespie and City of Toronto*, 19 A. R. 713.

By-law—*Registration — Mode of Assessment.*]—In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing, and then, if necessary, make a further assessment to be confirmed by the court of revision in the same manner as the first, or they must defer the actual assessment until after the completion of the work, the ratepayers then having the right to appeal. They cannot proceed partly in one way and partly in another without giving any opportunity of appealing from a definite assessment. A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to construct a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the court of revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the court of revision:—Held, that the assessment was invalid, and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment. The provisions of s. 351 of the Municipal Act, R. S. O. 1887 c. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax. Re Farlinger and Morrisburg, 16 O. R. 722, distinguished. *Sweeny v. Town of Smith's Fall*, 22 A. R. 429.

By-law—*Directory Provision.*]—The provision in R. S. O. 1897 c. 223, s. 685 (2), that it shall be sufficient to state in any by-law for borrowing money on the credit of a municipality, that the amount of the general debt of the municipality as therein set forth is exclusive of the local improvement debts secured by special Acts, rates, or assessments, is merely directory, and the omission to observe it is not fatal to a by-law otherwise

valid on its face. *Ward* v. *Town of Welland*, 31 O. R. 303.

By-law—*Division of Lots.*]—Where under a local improvement by-law an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement which is entered on the assessment and collectors' rolls, and such lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided. The duty of the clerk of the municipality is to bracket on the roll the different subdivisions with the name of the persons assessed for each parcel and the annual sum charged against the original parcel as that for which the sub-lots and persons assessed for them are liable under the special rate. *Capon* v. *City of Toronto*, 26 O. R. 178.

Increase of Cost.]—The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the council, and a by-law passed for the purpose, the cost being estimated at $14,500, an assessment for that sum being adopted by the court of revision after notice to the persons interested. After some delay the council purchased the land required at a price much greater than the estimate, and passed a by-law levying over $36,000 for the work. No work was done on the ground and no notice of the second assessment was given:—Held, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid. *Petman* v. *City of Toronto*, 24 A. R. 53.

Mode of Assessment—*County Court Judge—Prohibition.*]—When a sewer is being constructed by a municipal corporation under the local improvement system, and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class inter se. Semble: Such an improvement and the assessment therefor must be carried out under the provisions of a special by-law, not under a general by-law passed pursuant to s. 667. Judgment below, 30 O. R. 158, affirmed. But held also, reversing that judgment, that after the county court Judge had, on appeal by an owner, given his decision, on a day subsequent to the argument, it was too late to obtain an order for prohibition against him. *In re Robertson and City of Chatham*, 26 A. R. 554.

Repair of Streets—*Double Taxation.*]—By s. 14 of the Nova Scotia statute, 53 Vict. c. 60, the city council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vict. c. 39, furnished the material to construct a brick sidewalk in front of the same property and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well. Held, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless, and dangerous. *City of Halifax* v. *Lithgow*, 26 S. C. R. 336.

Sidewalks—*Notice.*]—Publication of an advertisement in a newspaper having a large circulation in the municipality stating that the corporation intend to construct sidewalks in certain named districts, is not sufficient notice to a property owner affected by the proposed work. The procedure to be observed in passing by-laws for the construction of sidewalks considered. Judgment below, 26 O. R. 480, affirmed. *In re Hodgins and City of Toronto*, 23 A. R. 80.

Special Act.]—Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively and the rate levied in proportion to the special benefit each parcel has derived from the local improvement. Where an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the courts upon an application to have the assessment roll set aside. Judgment below, Q. R. 9 Q. B. 142, reversed; judgment of the superior court, Q. R. 15 S. C. 43, restored. *City of Montreal* v. *Belanger*, 30 S. C. R. 574.

Special Agreement.]—A city municipality and a railway company and others entered into an agreement for the execution of certain work by the former, authorized by order in council under the Railway Act, the cost being apportioned between them, of which the railway company paid their share. The agreement provided that no party to it should be entitled to compensation for injury or damages to their lands by reason of the construction or maintenance of the works, a necessary part of which was the construction of a road towards and under the railway tracks. A portion of the roadway fronted on the lands of the railway company, and the city sought to charge the railway company with the cost of the construction of the roadway as a local improvement under the Consolidated Municipal Act, 1892, and passed a by-law for that purpose:—Held, that the work having been done under the agreement between the parties and the order in council, the local improvement clauses were not applicable and the by-law was void. *In re Canadian Pacific R. W. Co. and City of Toronto*, 23 A. R. 250.

Special Agreement.]—An agreement was entered into by the corporation of

Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east on King street to the limit of the subway, the street being lowered in front of the company's lands, which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway. Held, that to the extent to which the lands of the company were cut off from abutting on the street as before, the work was an injury and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement. Held, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable.—Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. In the result the judgment below, 23 A. R. 250, was affirmed. *City of Toronto* v. *Canadian Pacific R. W. Co.*, 26 S. C. R. 682.

Vendor and Purchaser—*Liability to Pay Local Improvement Rates.*]—See *Re Graydon and Hammill*, 20 O. R. 199; *Armstrong* v. *Auger*, 21 O. R. 98; *Cumberland* v. *Kearns*, 18 O. R. 151, 17 A. R. 281.

IX. Recovery Back of Taxes.

(See also Sub-Title I.)

Crown.]—Held, that the Crown could not be prejudiced in its right to recover back taxes paid on land held on behalf of Her Majesty, by the mistake of the officer in charge in paying them. *Principal Secretary of State for War* v. *City of London*, 23 U. C. R. 476.

Excessive Rate—*Voluntary Payment.*]—If a person overrated pay the overrate without remonstrance or compulsion, he cannot afterwards recover it back. *Grantham* v. *City of Toronto*, 3 U. C. R. 212.

Invalid Assessment.]—Action to recover taxes paid under belief that assessment is valid. *Bain* v. *City of Montreal*, 8 S. C. R. 252.

Mistake as to Appeal.]—The plaintiffs had for several years appealed to the court of revision, who had decided against them, and from thence to the county Judge, who had reduced the assessment one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the court of revision, who said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the court of revision that no judgment had been given, and found none in the book where their decisions were entered. The collector in October called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed. The mistake having been discovered in the following year:—Held, that they might recover it back, for the court of revision not having determined the appeal, the roll, as regarded the plaintiffs, was not "finally passed," within s. 61 of C. S. U. C. c. 55, so as to bind them. *Law Society of Upper Canada* v. *City of Toronto*, 25 U. C. R. 199.

Payment after Seizure.]—When goods are seized, and money paid under protest to release them from seizure, an action will lie. *Smith* v. *Shaw*, 8 L. J. 257.

Payment Misapplied—*Second Payment under Protest.*]—Where taxes were paid to the treasurer of the Home district on lands situated in the Ottawa district, for the purpose of their being transmitted to the treasurer of the latter district, and the treasurer of the Home district not having so transmitted the amount, the lands were duly advertised for sale, and the plaintiff, in order to save the lands, paid the taxes to the treasurer of the Ottawa district under protest:—Held, that he could not maintain an action for money had and received against him to recover them back. *Baldwin* v. *Johnson*, 2 U. C. R. 475.

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

Payment under Protest.]—Where lands were sold for taxes, and within a year the owner paid under protest to the county treasurer the sum required to redeem them, he having objected to the sale:—Held, that he could not recover this sum from the county as money had and received, for under s. 148 of C. S. U. C. c. 55, it was received, not for his use, but for that of the purchaser; and the payment of redemption money, to deprive the purchaser of his rights, must be unqualified. *Boulton* v. *United Counties of York and Peel*, 25 U. C. R. 21.

Payment under Protest.]—Defendants having assessed certain lands as non-resident, the treasurer returned the same as in arrear and issued his warrant for their sale. The plaintiff, to avoid further expense, paid the taxes under protest. The lands were not

patented, and not liable to be assessed:—Held, that the money having been paid under pressure and protest, the plaintiff was entitled to recover it back as money had and received. *Street* v. *County of Simcoe*, 12 C. P. 284, 2 E. & A. 211.

Payment without Prejudice.]—Certain lands were sold by the Crown to B. in 1853, which sale was cancelled in 1866, and the same lands sold to the plaintiff, to whom the patent issued. The land, it was admitted, had been legally assessed for certain taxes for 1863, 1864, and 1865. The plaintiff, on application to the county treasurer, ascertained the amount due and paid it, stating that he did so under protest and without prejudice to his rights; but no demand had been made, nor any pressure exercised or threatened to compel such payment:—Held, that the money so paid could not be recovered back. *Benjamin* v. *County of Elgin*, 26 U. C. R. 660.

Validating Act.]—The plaintiff paid certain taxes imposed by a by-law of a district council. This by-law was afterwards decided to be illegal in ejectment brought by this plaintiff to contest the validity of the sale of his land for these taxes, but it was not quashed by the court, because before the application was made for that purpose it had been repealed by the council who passed it. The plaintiff then brought this action for money had and received, &c., to recover back what he had paid. During this suit 16 Vict. c. 183 was passed, enacting that taxes imposed under certain by-laws, of which this was one, should be valid, &c. The action was held to be defeated by this statute, and it was unnecessary, therefore, to determine the point argued—whether money had and received would lie under the circumstances in which the payment was made. *McGill* v. *United Counties of Peterborough and Victoria*, 12 U. C. R. 44.

Voluntary Payment.] — The plaintiff having remitted money through the county treasurer to pay taxes supposed to be due by him on unpatented lands in that county, on the terms stated in his letter (as shewn in the statement of case):—Held, that the circumstances created the treasurer the plaintiff's agent, and that the payment as made was a voluntary one with a full knowledge of the facts, and could not be recovered back. *Street* v. *County of Lambton*, 12 C. P. 294.

X. Sale of Land.

1. *Action to Set Aside or Enforce Sale.*

Action to Obtain Conveyance—*Pleading.*]—In a declaration against a sheriff for not conveying lands sold under the assessment law, an averment that the sale took place on the 22nd July, 1830, and that "afterwards, and at the expiration of twelve calendar months from the time of such sale, to wit, on 22nd July, 1831, the plaintiff demanded a deed," was held sufficient on general demurrer:—Held, also, unnecessary to aver that there was no sufficient distress on the lands, or that a deed was tendered to the sheriff for execution. *Spafford* v. *Sherwood*, 3 O. S. 441.

Administrator Ad Litem.]—The plaintiff was appointed under Rule 311 administrator ad litem of a deceased person's estate in a summary administration matter more than twelve months after the death:—Held, that he had no locus standi to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased. *Rodger* v. *Moran*, 28 O. R. 275.

Costs.]—In a suit by the owner of land impeaching a tax sale deed as a cloud on title, the defendant disputed the right of plaintiff, which was decided in his favour. The court ordered the defendant to pay the costs of the suit, notwithstanding the amount to which the defendant was found entitled as compensation for improvements was estimated at double the value of the land, and which the court ordered plaintiff to pay in the event of his preferring to take back the land rather than allow the defendant to retain it, paying its value. *Aston* v. *Innes*, 26 Gr. 42.

Ejectment by Tax Purchaser—*Procedure by Owner.*]—Where ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed, to apply to the court for relief. *Bamberger* v. *McKay*, 15 Gr. 328.

Evidence—*Treasurer's Books.*]—In ejectment upon a sale for taxes, made under 16 Vict. c. 182:—Held, that the treasurer producing his official books, and shewing that the lands were charged with the taxes when the warrant issued, was sufficient proof of their being in arrear. Quære, whether the warrant alone would not suffice. *Hall* v. *Hill*, 22 U. C. R. 578.

Evidence—*Treasurer's Books.*]—It is not incumbent, under 33 Vict. c. 23 (O.), upon the tax purchaser, in order to bring himself within the protection of s. 1, in cases where he has paid eight years' taxes charged on the lands, to prove that the taxes so paid had been legally charged, but the production of the treasurer's books, shewing that such taxes had been charged and paid, is sufficient. Under that Act any person claiming under the tax purchaser may avail himself of the provisions of the Act. *Fraser* v. *West*, 21 C. P. 161.

Evidence — *Treasurer's Books—Extract.*]—The extract from the treasurer's books, set out in this case, shewing credits against the taxes charged, required explanation, and was not sufficient proof of the taxes being unpaid. *Kempt* v. *Parkyn*, 28 C. P. 123.

Evidence—*Treasurer's Books — Recitals.*]—In ejectment under a tax deed the plaintiff, to prove the taxes being in arrear, produced the treasurer's books containing such entry:—Held, sufficient primâ facie evidence:—Held, also, that the recital in the tax deed, and the advertisement in the Gazette, were sufficient evidence of the amount of taxes due, but not of the warrant to sell. *Hutchinson* v. *Collier*, 27 C. P. 249.

Evidence.]—It was objected to a sale under 13 & 14 Vict. c. 67, that there was no proof of want of distress on the land, nor of the advertisement of sale; that the affidavit

of the collector was insufficient: that the assessment was not proved: and that ss. 45 and 46 of the Act had not been complied with; but these objections, upon the evidence set out in this case, were overruled. *Street* v. *Fogul*, 32 U. C. R. 119.

Evidence.]—Where a party relies on a tax sale, it is not sufficient in equity, any more than at law, to produce the sheriff's deed. There must, among other things, be the proper legal evidence of the taxes having been in arrear for the necessary period; and such evidence is not dispensed with by 27 Vict. c. 19. *Jones* v. *Bank of Upper Canada*, 13 Gr. 74.

Evidence.]—A sale in 1880 of non-resident lands for taxes being impeached on the ground of no taxes being due, the original non-resident collector's rolls for 1877, 1878, and 1879, were produced, shewing amounts in arrear for each year respectively, which with interest amounted to the sum for which the land was sold. The due preparation of the warrant to sell, and advertising in the Official Gazette, were also proved:—Held, sufficient proof of the taxes being due. *Fitzgerald* v. *Wilson*, 8 O. R. 559.

Evidence—*Warrant for Sale.*]—Where it is necessary to prove title under a deed given upon a sale of land for taxes, the production of the warrant directing the sale, issued by the treasurer to the sheriff, is sufficient evidence of the taxes having been in arrear for the periods therein mentioned. *Clark* v. *Buchanan*, 25 Gr. 559.

Imposing Terms.]—Where the court is called upon to set aside a tax sale which is equally void at law and in equity, the court does so, if at all, only on such terms as are equitable. *Paul* v. *Ferguson*, 14 Gr. 230.

Jury's Findings of Sufficient Distress.]—Where the jury found that there was sufficient distress to satisfy the taxes, the court refused a new trial, although it might be doubtful whether much too high a value had not been put upon the distress. *Doe d. Powell* v. *Craig*, 2 U. C. R. 464.

Jury's Finding.]—Held, that the jury, on the evidence set out in this case, were warranted in finding that there were no taxes in arrear for five years. *Harbourn* v. *Boushey*, 7 C. P. 464.

Parties to Action.]—To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money, with interest, the corporation of the county municipality is not a necessary party. *Smith* v. *Bedford*, 12 Gr. 316.

Parties to Action.]—The corporation of a local municipality is not a proper party to a bill impeaching a tax sale. *Mills* v. *McKay*, 14 Gr. 602.

Parties to Action.]—A municipal officer charged with irregularities in the performance of his duties, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax sale on the ground of such irregularities. *Mills* v. *McKay*, 15 Gr. 192.

Pending Action—*Effect of New Act.*]—An action of ejectment to try the validity of a tax title having been begun before 33 Vict. c. 23 (O.) was passed, the court, under s. 4, determined the objections taken to the sale, in order to settle the right to costs, as if the Act had not been passed. *McAdie* v. *Corby*, 30 U. C. R. 349.

Proof of Arrears.]—Defendant claimed under a sale for taxes, made in 1839, but the only proof that any taxes were imposed or in arrear was an extract from the treasurer's book, shewing that the taxes on the lot had been paid up to 1828:—Held, insufficient. *Munro* v. *Grey*, 12 U. C. R. 647.

Proof of Insufficient Distress.] — A sheriff's vendee bringing ejectment for land sold under 6 Geo. IV. c. 7, must prove that there was no sufficient distress on the premises to satisfy the arrears. *Doe Bell* v. *Reaumore*, 3 O. S. 243; *Doe d. McGillis* v. *McDonald*, 1 U. C. R. 432.

Proof of Sufficient Distress.]—Proof that there were some few pieces of wood and timber that had been cut down by trespassers and left by them on the lot to be prepared for market:—Held, not sufficient evidence of distress. *Doe d. Powell* v. *Rorison*, 2 U. C. R. 201.

Proof of Warrant.]—Held, that s. 130 of 32 Vict. c. 36 (O.) does not dispense with proof of the warrant or cast the burden of negativing its existence on the objector to it. *Hutchinson* v. *Collier*, 27 C. P. 249.

Right of Purchaser from Owner to Attack Sale—*Description.*]—A parcel of land was described in the patent and in the books of the county treasurer as "the north part of lot number thirteen * * * containing sixty acres of land, be the same more or less." The parcel contained in fact eighty-two acres. In 1868 there were sold for taxes fifty acres described thus:—"Commencing at the north-east angle of said north part at the limit between said north part of lot number thirteen and lot number fourteen, thence along said limit taking a proportion of the width corresponding in quantity with the proportion of the said north part of lot number thirteen in regard to its length and breadth sufficient to make fifty acres of land." Then in 1871 there was sold for taxes a parcel described thus: "The whole of said southerly part of the north half of said lot number thirteen * * * containing ten acres, and being part not sold for taxes in 1868:"—Held, that the sale of 1871 could not be limited to ten acres to be located by the court "in such manner as is best for the owner," but was, the taxes being properly chargeable against the whole of the unsold portion, a sale of the whole of that unsold portion and could not, in consequence of the provisions of R. S. O. 1887 c. 193, s. 191, be attacked by the plaintiff, a purchaser from the owner after the time of the tax sale, who then had a mere right of entry. Application and effect of this section considered. Judgment below, 20 O. R. 351, reversed. *Hyatt* v. *Mills*, 19 A. R. 329.

Staying Action.]—The Act 32 Vict. c. 35 (O.), staying actions impeaching sales for taxes, applies only to cases in which the validity of a tax sale is called in question. If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to

the other branch of his case. *Cameron* v. *Barnhardt*, 2 Ch. Ch. 346.

Time for Action—*New Statute.*]—The sheriff's deed was given on the 19th May, 1866, and the action was not brought until the 13th January, 1871:—Held, that the plaintiff was not barred by 29 & 30 Vict. c. 53, s. 156, passed on the 15th August, 1866, which made valid all tax deeds before it, unless questioned within four years from their date; for that the effect of 32 Vict. c. 36, s. 155 (O.), passed on the 23rd January, 1869, was to give two years from the passing of that Act to all whose rights were not then barred. *Booth* v. *Girdwood*, 32 U. C. R. 23.

Time for Action—*New Statute.*]—By the Assessment Act of 1866, owners had four years to impeach a tax deed. By an Act passed in 1869, all actions for that purpose were stayed until after the following session; and by another Act of the same session all previous Assessment Acts were repealed, amended, and consolidated, with a reservation of rights had or acquired under the repealed Acts. By one of the clauses of the amended Act the limit appointed for bringing actions was two years:—Held, that an owner who had less than two years of his four remaining when the Acts of 1869 were passed, had like others two years thereafter to bring his suit. *Connor* v. *McPherson*, 18 Gr. 607.

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2. *Certificate and Deed.*

Assignee of Purchaser.]—The deed of land sold for taxes may be made by the sheriff to the assignee of the highest bidder. *Doe d. Bell* v. *Orr*, 5 O. S. 433.

Deed by Sheriff After Change in Law.]—On the 18th December, 1852, the sheriff, acting under 13 & 14 Vict. c. 67, sold a lot of land for taxes, but did not execute a conveyance therefor until the 9th January, 1856, after the passing of 16 Vict. c. 182, which repealed the first named Act:—Held, that the deed was invalid, as at the time it was executed the sheriff had not power to make a conveyance. *McDougall* v. *McMillan*, 25 C. P. 75.

Deed by Successor in Office.]—In ejectment defendant claimed through a sale under 6 Geo. IV. c. 7. The warrant relied on issued in 1837 to the then sheriff, M., who ceased to hold office in 1838; the return stated the sale to have been made in 1840; and M. executed the deed in 1841:—Held, clearly insufficient, for the sale and deed being made by a person out of office were primâ facie unauthorized, and defendant proved no proceedings taken by M. which could be regarded as an inception of execution. If there had been such proof, quære, whether the law as to inception of execution or process applies equally to tax sales and to sales of land on judgments. *McMillan* v. *McDonald*, 26 U. C. R. 454.

Deed by Successor in Office.]—Semble, that a deed by the successor of the sheriff who made the sale, is good under 27 & 28 Vict. c. 28, s. 43. *Bell* v. *McLean*, 18 C. P. 416.

Description.]—Defendants claimed under two deeds from the sheriff, made upon different sales, one in 1841, the other in 1851, under a sale in 1846. One described the land as thirty acres of the lot, "to be measured according to the statute in that case made and provided," the other as "twenty-five acres" of the lot, giving no further description:—Held, that the first deed was sufficient, the second not. *Fraser* v. *Mattice*, 19 U. C. R. 150.

Description.]—"Eighty-nine acres of the south part of the east half of lot number twenty-five in the second concession of the township of Charlottenburg:"—Held, insufficient, under 13 & 14 Vict. c. 67, as containing no statement of boundaries. *McDonell* v. *McDonald*, 24 U. C. R. 74.

Description.]—A description in the sheriff's deed of land sold under 6 Geo. IV. c. 7, "twenty-five acres of lot 31 in the 12th concession of the township of King:"—Held, insufficient. *Cayley* v. *Foster*, 25 U. C. R. 405.

Description.]—"75 acres of the front part of the west half of lot number five in the 1st concession of the township of Winchester:"—Held, sufficient, under 7 Will. IV. c. 19. *Fraser* v. *West*, 21 C. P. 161.

Description.]—Where a sheriff sold 185 acres out of 200 for taxes, and gave a certificate merely describing the land sold as the west part of the lot, comprising 185 acres, and no further intimation was given by the sheriff of the portion of the lot he was to convey until the deed was executed, the sale was held invalid. *Knaggs* v. *Ledyard*, 12 Gr. 320, 32 U. C. R. 30 (*n*).

Description.]—Land sold for taxes under C. S. U. C. c. 55, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17 in the 9th concession of Rawdon, 75 acres, and in the sheriff's deed by metes and bounds:—Held, that according to Knaggs v. Ledyard, 12 Gr. 320, and McDonell v. McDonald, 24 U. C. R. 74, such description was insufficient:—Semble, such a defect would not be cured by 27 Vict. c. 19, s. 4, or by 29 & 30 Vict. c. 53, s. 166, or 32 Vict. c. 36, s. 155 (O.) *Booth* v. *Girdwood*, 32 U. C. R. 23.

Description.]—A certificate given for a portion of a lot sold for taxes on the 12th November, 1867, under 29 & 30 Vict. c. 53, stated it to be the "one-twenty-seventh part," without further describing it. The deed given on the 19th April, 1871, described the land by metes and bounds:—Held, that the deed was void. *Williams* v. *McColl*, 23 C. P. 189.

Description.]—In a tax deed by the sheriff in 1859 the land was described as follows: "The easterly fourteen acres of the westerly ninety acres of the north half of lot No. 2 in the 10th concession of the said township of Innisfil, butted and bounded as follows, that is to say: commencing at the north-east angle of the said ninety acres, then southerly along the eastern limit of the said ninety acres and always parallel to the western limit of the said lot, to the centre of the said concession; thence westerly, along the said centre of the said concession, to the western limit of the said fourteen acres; then

northerly on a line parallel to the said western limit of said lot, to the northern limit thereof; then easterly along the said northern limit to the place of beginning, containing the said fourteen acres:"—Held, a sufficient description. Knaggs v. Ledyard, 12 Gr. 320, and Fraser v. West, 21 C. P. 161, distinguished. *Austin* v. *Armstrong*, 28 C. P. 47.

Description.]—Where there were two lots on a street with the same number, one on the south side and one on the north side, and neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other, the sale was held void for uncertainty. *Lount* v. *Walkington*, 15 Gr. 332.

Description.]—A sheriff's deed for "about fifteen acres, more or less, being the whole of a block or piece of land adjacent to the Grand Trunk Railway, being a part of lot number twenty-seven in the first concession of South Easthope, now in the town of Stratford:"—Held, insufficient, under C. S. U. C. c. 55, and the deed void. *Davidson* v. *Kiely*, 18 Gr. 496.

Description.]—Held, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in the sheriff's deed, might be rejected as surplusage. *Nelles* v. *White*, 29 Gr. 338.

Description.]—A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of lot 17 in the 4th concession" of King; and a deed given to one S. contained an exception, "save and excepting out of the same forty-five acres sold for taxes:"—Held, that the exception was void for uncertainty; and that a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release. *Pearson* v. *Mulholland*, 17 O. R. 502.

Effect of Certificate Before Deed.]—Under the sheriff's certificate the purchaser is entitled to possession of the land sold for taxes; and being in part possession he can avail himself of such certificate as a defence to ejectment by the owner, even though he has not received a deed, or a valid deed, from the sheriff; and semble, he could maintain ejectment on such certificate against any one in possession under the former owner. *Cotter* v. *Sutherland*, *Stevens* v. *Jacques*, 18 C. P. 357.

It is competent for the purchaser to set up a defence under the sheriff's certificate given at the time of sale, notwithstanding he has given it up on receiving the invalid conveyance. *Ib.*

Effect of Deed.]—Quære, as to the effect of a conveyance under 16 Vict. c. 182. *Harbourn* v. *Boushey*, 7 C. P. 464.

Error in Sheriff's Certificate of Sale.]—A sheriff's certificate of sale for taxes is made for the purpose of giving the purchaser certain rights, in order to the protection of the property, until it is redeemed or becomes his absolutely, and forms no part of his title. The description in it being defective does not invalidate the sheriff's deed, nor, semble, would its absence. *Nelles* v. *White*, 29 Gr. 338.

See *S. C., sub nom. White* v. *Nelles*, 11 S. C. R. 587.

Officers to Execute.]—The proper officers to execute the deed of land sold for taxes are the warden and treasurer at the time the deed is demanded, not the persons holding those offices at the time of the sale. *Ferguson* v. *Freeman*, 27 Gr. 211.

Repeal of Act.]—Certain land was sold for taxes in 1830, under 6 Geo. IV. c. 7, but owing to the loss of the certificate no deed was made by the sheriff until 1863. 13 & 14 Vict. c. 66, which was passed on the 10th August, 1850, and came into force on the 1st January, 1851, repealed 6 Geo. IV. c. 7, except so far as it might affect any taxes which had accrued and were due, or any remedy for the enforcement or recovery of the same:—Held, that this exception did not continue the power of the sheriff to convey, and therefore that nothing passed by his deed. *Bryant* v. *Hill*, 23 U. C. R. 96. Followed in *Cotter* v. *Sutherland*, *Stevens* v. *Jacques*, 18 C. P. 357.

Repeal of Act.]—13 & 14 Vict. c. 67 allows three years for redemption before the sheriff can convey. It was repealed by 16 Vict. c. 182, which came into force on the 1st January, 1854, except in so far as it might affect "any rates or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this Act." The plaintiff purchased under 13 & 14 Vict. c. 67, in 1852; so that he was not entitled to a conveyance until the Act had been repealed:—Held, that as the exception in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended. *McDonald* v. *McDonell*, 24 U. C. R. 424.

Time for Giving Deed.] — Held, that 3 Vict. c. 36 does not limit the period, within which a sheriff's deed for a sale for taxes may be given, to two years from the date of sale. Hamilton v. McDonald, 22 U. C. R. 136, followed on other points. *Weegan* v. *McDiarmid*, 12 C. P. 499.

Two Descriptions — *Lot Bounded by River.*]—The lot in question, fronting to the north, was bounded on the south by the River Thames. The sheriff, while 6 Geo. IV. c. 7, was in force, sold 120 acres of the lot for taxes, and in his deed first gave a description by metes and bounds, which was not in accordance with the statute, and then added a general description of the land, as being 120 acres measured in the manner prescribed by the Act:—Held, that the latter description must govern:—Held, also, that according to the statute the rear line of the tract should correspond with the rear line of the whole lot, following the windings of the river. *McIntyre* v. *Great Western R. W. Co.*, 17 U. C. R. 118.

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3. *Conduct of Sale and Persons Entitled to Buy.*

Agreements Between Purchasers.]—Agreements between intending purchasers at sheriff's sale. See *Keefer v. Roaf*, 8 O. R. 69.

Bidders Acting Unfairly.] — Quere, whether a sheriff is justified in proceeding with a sale, when the audience evinces a determination to purchase nothing but entire lots, or act in any other way inconsistent with a proper sale. *Scholfield* v. *Dickenson*, 10 Gr. 226.

Lessee Purchasing.]—Purchase at tax sale by lessee during tenancy. See *Heyden* v. *Castle*, 15 O. R. 257.

Mayor.]—Semble, the mayor of a town or city cannot purchase at a tax sale of lands in his municipality. *Greenstreet* v. *Paris*, 21 Gr. 229.

Mortgagee Purchasing.]—It appearing on the evidence, though not mentioned in the pleadings, that the purchaser for taxes was a mortgagee of the property:—Held, in dismissing a bill to set aside the purchase for undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that he was disqualified as mortgagee to purchase for his own benefit. *Scholfield* v. *Dickenson*, 10 Gr. 226.

Mortgagee Purchasing.]—Property subject to a mortgage, having been allowed to run into arrear for taxes, was offered for sale under the wild land assessment law, when the mortgagee purchased and obtained the deed from the sheriff. The mortgagee afterwards sued the mortgagor for the mortgage money and interest, whereupon the mortgagor filed a bill to restrain the action, asserting that the sale discharged him from the mortgage debt. The court refused the application, the effect of such purchase by the mortgagee being not greater than a decree for foreclosure; where, if after a final decree the mortgagee proceeds to enforce payment of mortgage money, it will open up the foreclosure; and semble, that after such a sale the mortgagor might have treated the mortgagee as liable to be redeemed, and have filed his bill for that purpose. *Smart* v. *Cottle*, 10 Gr. 59.

Mortgagee Purchasing.]—Although a mortgagee may as well as a stranger purchase lands of which he is mortgagee, still, if he purchase as mortgagee, and make his interest in the land a ground for being allowed to purchase, he cannot set up his title thus obtained against the mortgagor's right to redeem. *Kelly* v. *Macklem*, 14 Gr. 29.

Land having been sold for taxes, a party interested therein as mortgagee applied to the vendee of the sheriff to be allowed to purchase, on the ground of his having an interest in the land, and was permitted to do so, his only interest in the land being as mortgagee:—Held, that the purchaser could not afterwards set up his title in opposition to the mortgagor's claim to redeem. *Ib.*

Owner Purchasing.] — The party assessed may become the purchaser of the land sold for taxes. *Stewart* v. *Taggart*, 22 C. P. 284.

Part of Lot Offered.]—Where less than the whole lot is sold, the sheriff should designate in some way the portion sold or offered for sale, so that bidders may know what portion they are bidding for. *Knaggs* v. *Ledyard*, 12 Gr. 320, 32 U. C. R. 30 (*n.*)

Part of Lot—*Treasurer's Duty of Selection.*] — At a sale of land for taxes, the treasurer is bound under R. S. O. 1877 c. 180, s. 137, if he sells any particular part of a lot, to sell in preference such part as he may consider best for the owner to sell first, and s. 129 does not relieve him from this duty; and for such purpose he must obtain the necessary information to enable him to arrive at a sound judgment thereon. Section 129 applies to the duty of the treasurer before the sale; s. 138 to his duty at and after the sale, and before he grants his certificate. History of the provisions of these sections traced. *Haisley* v. *Somers*, 15 O. R. 275.

Semble, it is sufficient to sell so much of a lot as may be necessary to secure the payment of the taxes due, and the particular part need not be determined until the certificate is given to the purchaser. *Ib.*

Where the treasurer, before he granted his certificate, knew that there was a house upon the lot, and although within a few minutes walk of his office, did not take the trouble to ascertain on what part of the lot the house was situated, but gave his certificate describing the part sold so as to include the greater part of the house:—Held, affirming on this point, 13 O. R. 600, that the sale not having been fairly conducted was invalid. *Ib.*

Purchaser Inducing Others not to Bid — *Forum.*] — Defendants claimed title through one W. McC., who claimed under a sale for taxes. On the trial it was proved that W. McC. claimed the lot in question at the sale for taxes; and alleging that his title was imperfect, he asked the audience not to bid against him, which request they complied with, and he became the purchaser thereof for £4 or £5. The jury found that McC.'s statement was false, and in consequence he purchased without competition:—Held, that the sheriff having duly conveyed the land to McC., the legal estate thereby passed, and if it was sought to impeach the sheriff's deed for fraud, the case must be taken into equity, where complete justice could be done to all parties concerned. *Raynes* v. *Crowder*, 14 C. P. 111.

Purchaser Inducing Others not to Bid—*Selling Officer Interested.*]—The lot was first put up on the 10th April, 1839, when one M. offered to take 29 acres for the sum to be levied, but afterwards he refused to carry out the purchase; and the sheriff in July following put up the whole lot, 200 acres, which M. then purchased for the same sum, stating at the sale that he had already acquired a title to the land, which he wished to have confirmed, and requesting the bystanders not to bid against him. This title came by deed from the treasurer, who had purchased from a person assuming to be heir of the patentee, but who was not in fact his heir; and M. had given back a mortgage to the treasurer to secure part of the purchase money:—Held, that the second sale of the whole lot was illegal, being unauthorized by the statutes, and improperly conducted. Semble, that the treasurer's connection with the land could not avoid the sale, he not having been in fact the purchaser. *Todd* v. *Werry*, 15 U. C. R. 614.

Purchaser Inducing Others not to Bid—*Illegal Adjournment.*]—The sheriff at a tax sale, on the 26th December, 1855, notified the purchasers that if they did not pay in two or three weeks he would sell the land again. Defendant having purchased portions of certain lots did not pay, and the lots were put up again as whole lots, not by the acre. Defendant then asked those present not to bid, as he had a title to the lots bid off by him at the first sale, which he wished to perfect. Accordingly no one bid against him, and he obtained the lots. What his title was did not appear. Semble, that the sale under such circumstances could not be supported: but no opinion was given on this point, as the plaintiff might, under Raynes v. Crowder, 14 C. P. 111, be compelled to go into chancery for relief on such a ground. *McAdie* v. *Corby*, 30 U. C. R. 349.

It was objected also that the land was sold for taxes which had accrued for more than twenty years, and that the sale was adjourned illegally, though a large number of bidders were present. Semble, that these objections could not be supported. *Ib.*

Reeve Purchasing.]—A reeve of the township in which the land sold for taxes is situate, is not disqualified, ex officio, from purchasing. *Totten* v. *Truax*, 16 O. R. 490.

Selling Officer's Ignorance of Value.]—A sheriff can and should ascertain, to a certain extent, the value of land sold for taxes. He cannot be heard to say that he cannot tell whether it is worth £2 12s., or £500. *Henry* v. *Burness*, 8 Gr. 345.

Selling Officer's Ignorance of Value.]—The sheriff not having made himself acquainted with the land, was unable to correct an erroneous impression among the audience as to the value of a lot, in consequence of which property worth £400 was sold as if doubtfully worth $20:—Held, that such omission of duty by the sheriff was not a sufficient ground to disturb the sale to an innocent purchaser. *Logie* v. *Stayner*, 10 Gr. 222.

Selling Officer not Protecting Owner's Interests—*Costs.*]—The sheriff's duty is to sell such portions of the lands offered as he may consider most for the advantage of the owners. Where, therefore, a sheriff so neglected his duty that very valuable lots of land were knocked down for trifling amounts of taxes, in pursuance of an agreement to that effect amongst the bidders, some of which lands were purchased by bailiffs in his employ, and with his knowledge, the court in dismissing the bill filed to set aside one of the sales to the bailiff, as against the sheriff, refused him his costs. It is not sufficient that the sheriff does not participate in such arrangements for his own benefit. *Massingberd* v. *Montague*, 9 Gr. 92.

Stifling Competition.]—By an arrangement between several of the parties bidding at the sale, it was agreed that each should be allowed to bid off a whole lot for the taxes due upon it; and others, not parties to this agreement, were prevented from bidding, by reducing the quantity to such a trifle as to be quite useless to the purchaser. The land in question, said to be worth £500, was thus bid off for £2 12s. The court set aside the sale, but without costs, it being shewn that the purchaser was not a party to the combination complained of. *Henry* v. *Burness*, 8 Gr. 345.

Stifling Competition—*Costs.*]—Where at the sale a lot of land was sold at a trifling amount, as compared with its value, by reason of a combination among some of the persons attending the sale to prevent competition; and although it was not shewn that the purchaser was any party to such combination, still he so acted as to prevent competition, the court in setting aside such sale ordered the purchaser to pay the costs of the suit; and the sheriff having been joined as a defendant, was, under the circumstances, refused his costs. *Davis* v. *Clark*, 8 Gr. 358.

Stifling Competition.]—A., one of the sheriff's officers, conducted the sale, at which he knocked down without any competition to another officer of the sheriff a lot worth about £350, for less than £7 10s., which lot was subsequently, with the assent of the sheriff, entered in the sales book in the name of A. to enable the person to whom it had been knocked down to cheat his creditors. Upon a bill filed to set aside the sheriff's deed, it was shewn that by arrangement amongst the persons attending the sale it was understood a lot should be knocked down to each in turn, in pursuance of which the sale in question was effected. The court set aside the sale with costs as against the person to whom the conveyance was made. *Massingberd* v. *Montague*, 9 Gr. 92.

Stifling Competition—*Undervalue.*]—Twenty-four acres, worth £7 10s. an acre, were sold in 1859 for £5 1s. 9d., and purchased by one of the bailiffs in the employ of a former sheriff. Although there was no direct evidence of combination amongst the audience to prevent competition, still their conduct was such as to lead to that opinion. The court, following Massingberd v. Montague, 9 Gr. 92, and Henry v. Burness, 8 Gr. 345, set the sale aside upon payment of the amount which would have been required to redeem the land within the year, and interest since that time; or the amount might be applied in part payment of the amount due upon a mortgage created on the land by the purchaser at the sale for taxes. *Templeton* v. *Lovell*, 10 Gr. 214.

Stifling Competition.]—Where at the sale practices were indulged in by the audience which checked fair and free competition, and the lands were sacrificed, the court, in the absence of any direct proof of combination, granted relief to the owner by setting aside the sale. *Logie* v. *Young*, 10 Gr. 217.

Stifling Competition.]—The several cases where sales have been set aside for intimidation, or other undue practices preventing fair competition, approved of and concurred in. *Scholfield* v. *Dickenson*, 10 Gr. 226.

Stifling Competition.]—Semble, it is the duty of the sheriff, when he sees the intention of the legislature thwarted by improper practices indulged in by the audience, to declare to those guilty of them that he will not continue the sale, but will postpone it until a fair sale can be effected. *Henry* v. *Burness*, 8 Gr. 345; *Logie* v. *Young*, 10 Gr. 217.

Stifling Competition.]—Held, that it would not be inferred that a sale which took place in November, was necessarily affected by practices of the audience to prevent competition, which had been carried on at the sale in October preceding, and from which this sale in November was adjourned. *Logie* v. *Stayner*, 10 Gr. 222.

Township Clerk Purchasing.] — The purchase under a tax sale by the township clerk, is a voidable transaction. *Beckett* v. *Johnson*, 32 C. P. 301.

Treasurer's Duty.]—The duty of the county treasurer in reference to tax sales observed upon. Hall v. Hall, 2 E. & A. 569, and Haisley v. Somers, 13 O. R. 600, considered. *Hall* v. *Farquharson*, 15 A. R. 457.

Treasurer Purchasing.] — The county treasurer is not at liberty to become a purchaser. *In re Cameron*, 14 Gr. 612.

Treasurer Purchasing.]—A purchase of land at a tax sale was made, nominally, by one G for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale:—Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R. S. O. 1887 c. 193, s. 189, although it took place in 1883, and the action was not brought till 1889. *Mooney* v. *Smith*, 17 O. R. 644.

Undervalue.]—Quære, whether a sheriff ought to permit a whole lot or piece of land to be sold in the first instance, where the value is greatly unproportioned to the taxes due, without adjourning the sale, or taking some steps to protect the interests of the owner. *Scholfield* v. *Dickenson*, 10 Gr. 226.

Undervalue.]—It is competent to sell the whole of a lot for taxes, and the court will not presume against a sale on the supposition that too much land was sold for a small amount. *Cotter* v. *Sutherland*, 18 C. P. 357.

Undervalue.]—The purchase money was $1, although the value of the land with the improvements was about $1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll. Semble, that the sale would be void as not having been under the circumstances openly and fairly conducted within the meaning of s. 155 of R. S. O. 1877 c. 180. *Hall* v. *Farquharson*, 15 A. R. 457.

Untrue Representations.] — Where a person, in order to purchase lands at the sheriff's sale, consented to representations which he knew to be untrue, and which prevented competition, and so was enabled to purchase at less than the value, the sale was declared void. *Foy* v. *Merrick*, 8 Gr. 323.

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4. *Objections to Validity of Sale.*

(a) *Assessment Invalid.*

Description Void in Part.]—On a tax sale certain land assessed for taxes was described in the assessment as the north part of a certain lot containing 30 acres; and the certificate and deed were of the same piece:—Held, that this description included the most northerly thirty acres only, and that it and no other part was affected by the assessment. Of the thirty acres so assessed it appeared that portions thereof were vested in the Crown, in other owners, and occupied as gravel roads:—Held, that the assessment was void as to such portions; and being void as to part was void as to the whole; and that the deed made in pursuance thereof was void also. *Ley* v. *Wright*, 27 C. P. 522.

Effect of Issue of Patent.]—When, owing to land being patented in July, taxes are charged thereon only for half a year, yet that is in effect a taxation for the whole of the fiscal year, and so long as the patent issues before the assessment is completed, taxes for the whole of the year wherein such patent issues may be properly imposed, and the lands sold therefor if unpaid. *Cotter* v. *Sutherland*, 18 C. P. 357.

Improper Assessment.]—Held, that the district council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of so much in the pound on the assessed value. The land having been sold for arrears of such taxes, in addition to arrears accrued under the statute:—Held, that the sale was void. Quære, whether the district council could direct land to be sold for payment of taxes imposed not by the provincial statute, but by their by-law. *Doe d. McGill* v. *Langton*, 9 U. C. R. 92. Followed in *Williams* v. *Taylor*, 13 C. P. 219.

Improper Assessment.]—In a suit commenced by a bill in the court of chancery, asking for an account of damages sustained by certain trespasses alleged to have been committed by the defendant, for an injunction, and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the plaintiff claimed title, was valid:—Held, that there was no evidence to shew that the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. *McKay* v. *Crysler*, 3 S. C. R. 436.

Insufficient Description — *Assessment En Bloc Instead of According to Registered Plan.*]—An assessment of lots as "Water Lots 436 x 660" is invalid as not identifying them. An assessment of lots en bloc after they have been subdivided by registered plan, and without shewing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R. S. O. 1887 c. 224, s. 13. The requirements of R. S. O. 1897 c. 224, ss. 147, 152-5, inclusive, as to the duties of the collector, treasurer, clerk, and assessor, with reference to the list of lands liable to be sold, were held not to have been complied with in this case; and the defects were held not to have been cured by s. 208, which makes the tax deed binding if the land is not redeemed in one year, nor by s. 209, by which the deed is valid if not questioned within two years. *Wildman* v. *Tait*, 32 O. R. 274.

Non-Resident Land.]—Held, that under 13 & 14 Vict. c. 67, non-resident lands

could be sold for taxes due prior to 1st January, 1853. *Jarvis* v. *Brooke*, 11 U. C. R. 269.

Occupied Land.]—Under C. S. U. C. c. 55, the chamberlain and high bailiff in cities had power to sell the lands only of non-residents for arrears of taxes. A sale in 1865 of land belonging and assessed to a resident, was therefore held invalid. *McKay* v. *Bamberger*, 30 U. C. R. 95.

Occupied Land.]—Held, that under the facts stated in this case, the land was improperly assessed for the year 1858, as non-resident, being occupied, and that the sale being therefore for more than was due was entirely void. *Allan* v. *Fisher*, 13 C. P. 63.

Occupied Land.]—Under 13 & 14 Vict. c. 67, land was sold in 1852 for taxes of several years, including 1851, for which year the collector's roll had been returned to the treasurer, with his affidavit that the reason for not collecting the amount was that the land was non-resident. It was proved clearly, however, that from the 6th February, 1851, until long after the sale, the land had been occupied by defendant's father, who lived upon it with his family:—Held, that the sale was illegal. *Street* v. *Fogul*, 32 U. C. R. 119.

Occupied Land.]—An erroneous assessment of land as non-resident or unoccupied, is not a ground for impeaching a sale for taxes. The plaintiff purchased a lot in 1870, in which year and the preceding the lot had been returned as non-resident and unoccupied, though occupied by a tenant of the then owner. The plaintiff, however, made no inquiry or search as to taxes, but in succeeding years regularly paid them. In fact the taxes for 1869 and 1870 had not been paid, and the land was in due course sold for such arrears:—Held, following Bank of Toronto v. Fanning, 18 G. R. 391, that the sale was binding on the owner; and a bill filed after the expiration of a year from the time of sale to set it aside was dismissed with costs, although the court considered the case one of great hardship upon the plaintiff. *Silverthorne* v. *Campbell*, 24 Gr. 17.

Unpatented Land.]—Where the Crown land commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only part of the purchase money, and the lands were afterwards sold for taxes:—Held, the tax sales were of no validity as against M., to whom a patent was subsequently issued. *O'Grady* v. *McCaffray*, 2 O. R. 309.

Since 16 Vict. c. 182, s. 56, a tax sale of unpatented land conveys to a purchaser only such rights in respect of the land as the original locatee enjoyed. *Ib.*

(b) *Procedure Invalid or Irregular.*

Advertising.]—A defendant claiming under a sale for taxes under 6 Geo. IV. c. 7, need not shew that all the necessary formalities were attended to, such as advertising, &c. *Doe d. Bell* v. *Orr*, 5 O. S. 433.

Advertising.] — Held, under 13 & 14 Vict. c. 67, that a sale would not be invalid for want of due advertisement thereof in a newspaper published in the county where the lands are situated, as required by s. 50. *Jarvis* v. *Brooke*, 11 U. C. R. 299. But see *Hall* v. *Hill*, 22 U. C. R. 578, 2 E. & A. 569.

Advertising.]—Where a tax sale was advertised in the Canada Gazette for thirteen successive weeks before sale, but such thirteen weeks did not amount to three calendar months from the date of the first publication, it was held that the irregularity did not invalidate the sale. *Connor* v. *Douglas*, 15 Gr. 456. Followed in *McLauchlin* v. *Pyper*, 29 U. C. R. 526.

Advertising.]—Semble, that the advertisement of a sale made in 1855 was bad for not specifying whether the lands were patented or held under a lease or license of occupation. *McAdie* v. *Corby*, 30 U. C. R. 349.

Alternative Description.] — A designation in the treasurer's list furnished under 32 Vict. c. 36, as "the N. or W. ½ 14:"—Held, sufficient. *Stewart* v. *Taggart*, 22 C. P. 284.

Amount of Arrears.]—The county council, by by-law passed in June, 1866, directed the treasurer to collect all taxes on lands where the same were in arrear and unpaid on the 1st May, 1861:—Held, that under this he should have sold for the arrears due up to 1865. *Thompson* v. *Colcock*, 23 C. P. 505.

Arrears at Time of Previous Sale.]—By 3 Vict. c. 46, certain sales for taxes made in June, 1839, were confirmed, and under the provisions of that Act the sheriff in 1842 conveyed to the plaintiff:—Held, that under the circumstances set out in the case there were in fact eight years taxes in arrear at the time of sale in June, 1839, for the warrant issued in 1829 for a previous sale was for taxes only up to the 1st July, 1828, though it might properly have been for another year in addition. *Hamilton* v. *McDonald*, 22 U. C. R. 136.

Assessment Including Too Much Land.]—The assessment of four lots, containing about 400 acres, in the name of the plaintiff, embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter:—Held, that the assessment was illegal, and vitiated the sale. *Fleming* v. *McNabb*, 8 A. R. 656.

Clerical Mistake in Acreage — *Occupied Land assessed as Non-resident.*]—In the year 1875, a lot of land containing 200 acres and patented as one lot was assessed on the resident roll as lot 114, 200 acres, value $1,000. From 1876 to 1878 it was similarly assessed. In 1879 it was also so assessed, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879, the east half of the lot appeared assessed as 100 acres, value $800. By reason thereof it was returned to the county treasurer as in arrear for the taxes of 1879, and a sale thereof made:—Held, that the sale for taxes was invalid; that the assessment on

the resident roll for 1879 was of the whole lot upon which the taxes were paid, the mistake in stating the quantity of land to be 100 acres, not making such assessment less an assessment of the whole lot, while the error of putting the east half on the non-resident roll could not affect the owner's right to the land. *Jeffery* v. *Hewis*, 9 O. R. 364.

Collector's Neglect to Obtain Address.]—Held, that the neglect of the collector to inquire with sufficient care for the address of the party assessed on his roll, in order to transmit a statement by post under s. 41 of 16 Vict. c. 182, did not invalidate a sale of land made for non-payment of those taxes. *Allan* v. *Fisher*, 13 C. P. 63.

Collector's Return Delayed.]—Held, no objection to a sale that the collector was bound by the Act to make his return on the 14th December, but delayed till the 8th April following, for that it was a matter between him and the municipal council, which could not prejudice the title; and as they received the return without objection, it might be assumed that they had appointed the 8th April to make it on. *McDonell* v. *McDonald*, 24 U. C. R. 74.

Confusion of Lots.]—Where there were two lots on a particular street with the same number, one on the south side and one on the north side, and neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other, the sale was held void for the uncertainty. *Lount* v. *Walkington*, 15 Gr. 332.

Confusion of Lots.]—Ejectment for village lot 4, south side of Catharine street, village of Ingersoll, part of lot 10 in broken front concession of N. Oxford. Defendant claimed through a sheriff's sale for taxes. It appeared that the village comprised parts of two townships, called N. and W. Oxford; of W. Oxford it contained a park lot 4, which was sub-divided into village lots after the year 1854. The treasurer's warrant dated in June, 1860, contained two village lots 4 south of Catharine street, one being stated as in arrear for 1854 only, the other 1854-5 and 1858. The sheriff sold both to different purchasers, and conveyed the one in dispute to the purchaser as being the one charged with three years' taxes. Under the facts set out in the case, it was held that the warrant and evidence did not sufficiently define this lot as the one on which the three years' taxes were in arrear, or prove such arrears, and that the sale was bad. *Townsend* v. *Elliott*, 11 C. P. 217.

Confusion of Parcels — *Different Owners.*]—A. and H. were the respective owners of the north and centre parts of a certain lot, which were both occupied by H. until the year 1871, when the buildings were burned, and H. went out of possession. He subsequently paid the taxes up to 1873, when he left the neighbourhood, and did not return until 1883, and then found his part and that of A. had been sold for taxes, but he had received no notice of any taxes being in arrear. In an action by H. and his wife, who had subsequently acquired his title, it appeared that both pieces had been assessed separately in 1872, together in 1873, were not assessed at all in 1874, were assessed together as the "north-half of lot 13, one-tenth of an acre," in 1875, together as the "north part of lot 13" in 1876, in one parcel as "north part 13" in 1877, and that they had been sold for the taxes due on both parcels down to 1877, and for those on the north piece for 1878:—Held, that the tax sale was invalid and could not be sustained, and that the plaintiffs were entitled to recover possession. *Hill* v. *Macaulay*, 6 O. R. 251.

Copy of Collector's Roll not Furnished.]—The omission of a township treasurer to comply with s. 49 of 16 Vict. c. 182, by furnishing the county treasurer with a correct copy of the collector's roll, was not sufficient to invalidate a sale for taxes, which was properly conducted by him. *Allan* v. *Fisher*, 13 C. P. 63.

Delay in Paying Purchase Money.]—Held, that the fact that the purchase money was not paid for a week or two after the sale did not invalidate the sale. *Haisley* v. *Somers*, 13 O. R. 690.

Delay in Sale.]—A sale in 1839, under a warrant issued in 1837:—Held, valid, the sale having been delayed by 1 Vict. c. 20, passed in consequence of the rebellion. *Todd* v. *Werry*, 15 U. C. R. 614.

Delay in Sale.]—By 3 Vict. c. 46, certain sales for taxes made in June, 1838, were confirmed, and under the provisions of that Act the sheriff in 1842 conveyed to the plaintiff:—Held, that, under the circumstances set out in the case, the warrant issued in 1836 had clearly not lapsed or become void before the sale. *Hamilton* v. *McDonald*, 22 U. C. R. 136.

Description Ambiguous.] — By the treasurer's warrant, dated in June, 1860, there appeared to be two village lots 4, south of Catharine street, in arrear for taxes, one being in arrear for the year 1854 only, the other for 1854, 5, and 8. The sheriff sold both, but only conveyed the one in dispute in this action to the purchaser:—Held, that the warrant did not sufficiently define the lot to be sold (although the sheriff had assumed it to be the one in question in this action), and that the sale was invalid. *Townsend* v. *Elliott*, 12 C. P. 217.

Description Indefinite.] — Held, in ejectment, that a sale of land for taxes to defendant in 1865, the only description of which, in the Canada Gazette and in the treasurer's warrant, was "Pt. of S. pt. 111, 1st con. Tay, 40 acres, $12.95," could not be supported. *Grant* v. *Gilmour*, 21 C. P. 18.

Description.]—In advertising lands for sale for taxes they were described as "Race lands, Paris Hydraulic Company," no further specification of the locality or quantity to be sold being given:—Held, that the description was insufficient and the sale void. *Greenstreet* v. *Paris*, 21 Gr. 229.

Description—*More or Less.*]—The land was described in the sheriff's deed as containing "100 acres more or less:"—Held, a sufficient compliance with s. 65 of 16 Vict. c. 183. *Crysler* v. *McKay*, 2 A. R. 569. Reversed by the supreme court, 3 S. C. R. 436.

Description.]—A warrant describing the lands as "all patented" is sufficient. *Brooke* v. *Campbell*, 12 Gr. 526.

See, also, "all deeded." *Cook* v. *Jones*, 17 Gr. 488.

Description by Plan.]—In a survey of a portion of a town plot the land was divided into blocks, with streets running through them, and the blocks were sub-divided into lots, which were numbered in all from 1 to 174, inclusive:—Held, that a sale of any such lots by their numbers only would be a sufficient description, and that if named incorrectly as being on one of the streets, it would not vitiate a private sale, as anything beyond the numbers in such sub-division would be surplusage; and the same would apply to a tax sale. *Aston* v. *Innes*, 26 Gr. 42.

Description — *Fractional Portions of Lot.*]—On a sale of two adjoining town lots for taxes, the treasurer sold the easterly seven-eighths of the westerly lot and the westerly seven-eighths of the easterly lot:—Held, a sufficient description to enable the parties to ascertain and define the land sold. *Aston* v. *Innes*, 26 Gr. 42.

Distrainable Effects on Part of Lot.]—Where taxes have accrued upon the whole of a lot while it is undivided, and a distress could be made upon part, no portion could be sold for such taxes. *Stafford* v. *Williams*, 4 U. C. R. 448.

Distress—*Want of Knowledge of Distrainable Effects.*]—Under 16 Vict. c. 182, the sheriff might sell, unless he had good reason to believe that there was sufficient distress. A declaration, therefore, which charged him with neglect of duty in selling when there were goods on the land to distrain, but did not aver notice of the goods being there, was held insufficient. *Foley* v. *Moodie*, 16 U. C. R. 254.

Distress—*Want of Knowledge of Distrainable Effects.*]—In ejectment upon a sheriff's deed for taxes the plaintiff shewed that the lot was all wild, with no one living on it, and that an inspection had been made but no distress found. Defendant proved that certain persons were then in the habit of making sugar upon the rear of the lot, and used to leave there two kettles and their saptroughs, which might have been worth the sum due:—Held, that such evidence could not be allowed to invalidate the sale. *Frazer* v. *Mattice*, 19 U. C. R. 150.

Distress—*Goods Available after Inception of Sale.*]—Where there was proved to have been ample distress on the premises between the receipt of the warrant and the day of sale:—Held, under 6 Geo. IV. c. 7, that the sale was invalid. *Dobbie* v. *Tully*, 10 C. P. 432.

Distress—*Goods Available after Inception of Sale.*]—Per McLean, C.J., the evidence of distress (set out in the case) having been left to the jury, their verdict for the plaintiffs must be taken as shewing that there was none at any time before the sale. Per Burns, and Hagarty, JJ., the existence of distress between the 17th April, 1839, when the land was first offered, and the sale on the 19th June, would form no objection, as the sheriff was not bound to search then. Quære, whether in any case a search could be required between the inception and completion of the sale. *Hamilton* v. *McDonald*, 22 U. C. R. 136.

Distress—*Collector's Return Sufficient—Collector's Neglect.*]—The defendant in ejectment claimed under a sale for taxes made on the 4th November, 1859:—Held, under C. S. U. C. c. 55 and 16 Vict. c. 182, that it was not the duty of an officer, after the return by the collector to the township treasurer, to search for distress upon the premises. *Allan* v. *Fisher*, 13 C. P. 63.

Held, also, that the neglect of the collector to search for goods which with diligence he might have found, and which would have satisfied the taxes, did not invalidate the sale. *Ib.*

Distress—*Collector's Omission to Levy.*]—Where land is assessed and taxes imposed, an omission by the collector to demand and levy the amount from property on the premises, cannot, since 32 Vict. c. 36 (O.), avoid the sale. *Stewart* v. *Taggart*, 22 C. P. 284.

Estoppel.]—Owner's presence at sale held not to estop him from complaining of irregularities in sale. See *Claxton* v. *Shibley*, 9 O. R. 451.

Excessive Amount.] — Where land has been sold for a larger amount of taxes than has been or can be lawfully imposed, such sale is void. *Allan* v. *Fisher*, 13 C. P. 63; *Cotter* v. *Sutherland*, *Stevens* v. *Jacques*, 18 C. P. 357; *Doe McGill* v. *Langton*, 9 U. C. R. 91.

Failure to Distrain—*List of Lands—Non-delivery by Clerk to Assessor—Omission to Notify Occupants—Non-delivery by Assessor to Treasurer of Certified List.*] — Where after a sale of land for taxes it appeared that there had been a failure to distrain, although sufficient goods were on the premises to have paid the taxes during each of the years they became due, and also that the account furnished by the collector did not, as required by s. 135 of R. S. O. 1887 c. 193 (R. S. O. 1897 c. 224, s. 147), shew the reason why the taxes had not been collected; that there was no delivery to the collector by the clerk of the list furnished him by the treasurer, as required by s. 141, R. S. O. 1887 c. 193 (R. S. O. 1897 c. 224, s. 153), and no notification, as also required by that section, by the collector to the occupant or owner of the land, who lived in the vicinity, and whose name could easily have been ascertained, of its liability to be sold for taxes; and no certificate verified by oath, as required by s. 142, R. S. O. 1887 c. 193 (R. S. O. 1897 c. 224, s. 154); nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly described, as required by s. 143, R. S. O. 1887 c. 193 (R. S. O. 1897 c. 224, s. 155):—Held, that the sale was invalid; and the invalidity was not cured by ss. 189, 190, R. S. O. 1887 c. 193 (R. S. O. 1897 c. 224, ss. 208, 209), which validate a sale on the expiration of two years from the making of the tax deed. *Boland* v. *City of Toronto*, 32 O. R. 358.

Half Lots.]—The patent granted the lot by north and south halves. The patentee, in 1852, conveyed the lot as a whole, and it continued in one owner until the sale of 35 acres in 1858. In 1858 and 1859, each half was assessed separately:—Held, not objectionable. For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years, the north half, 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of $330 on the whole:—Held, right. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

In 1865 the 165 acres were sold for the taxes due for six years, including 1858, which was not covered by the warrant under which the 35 acres were sold in that year:—Held, that the sale as to 1858, could not be supported, for all or a part of each half should have been sold for the taxes due on it for that year, notwithstanding the sale of the 35 acres; and that as there were not five years due of any portion of the residue for which the warrant issued, the whole sale must fail. *Ib.*

Imperative and Directory Requirements.]—Considerations as to what requirements of the tax Acts are imperative, and what are merely directory. *Cotter* v. *Sutherland*, 18 C. P. 357.

Inconsistency of Description in Warrant and Deed.]—The land was called in the collector's return the east half 25, 2nd concession Charlottenburg, the word "front" before "2nd" being struck through with a pen, while in the warrant that word was written, and in the sheriff's deed it was omitted:—Held, immaterial, for that the identity of the land sold with that on which the tax was to be collected was sufficiently proved. *McDonell* v. *McDonald*, 24 U. C. R. 74.

Keeping Accounts in Statutory Form.]—It is not necessary that the treasurer should keep his accounts of taxes due according to the statute in order to validate the sale. *Cotter* v. *Sutherland*, *Stevens* v. *Jacques*, 18 C. P. 357.

Lands not Described in Warrant but in Attached List.] — The warrant authorized the sale of "the lands hereinafter mentioned." The lands were not mentioned in the warrant, but were contained in a list attached thereto which made no reference to the warrant; nor were the lists authenticated with the seal of the corporation and the signature of the warden, as required by s. 128 of 32 Vict. c. 36:—Held, that the description of the lands was a sufficient compliance with the above section, and that the want of the seal and signature on the lists was cured by s. 155. *Church* v. *Fenton*, 4 A. R. 159.
See S. C., 5 S. C. R. 239.

List of Arrears.]—The treasurer's list, under ss. 110 and 131 of 32 Vict. c. 36 (O.), is sufficiently furnished at any time during the month of February. The list need not contain the amount in arrear. *Stewart* v. *Taggart*, 22 C. P. 284.

List not Furnished to Clerk or Assessor.]—Where a township treasurer had neglected to furnish the clerk of the municipality with a list of lands liable to sale for taxes, and no such list or copy thereof was delivered to the assessor as provided by s. 108 of c. 180, R. S. O. 1877, and by reason thereof a lot worth $1,500 or $1,600 had been sold for $5.53, taxes due thereon, the court, on a bill filed impeaching the sale, set it aside, with costs, less the amount of taxes paid with interest thereon, and the expenses attending the purchase. *McKay* v. *Ferguson*, 26 Gr. 236.

List Embodied in Warrant.]—By s. 128 of the Assessment Act, 32 Vict. c. 36, the warden is required to return one of the lists of the land to be sold for taxes transmitted to him, &c., to the treasurer, with a warrant thereto annexed, under the hand of the warden and seal of the county, &c.:—Held, that the section was merely directory, and was sufficiently complied with by the list being embodied in the warrant, instead of being annexed thereto. *Church* v. *Fenton*, 28 C. P. 384.
See S. C., 4 A. R. 159, 5 S. C. R. 239.

Lot not Separately Assessed—*Costs.*]—The assessor should assess village lots the property of non-residents separately, placing opposite to each the value and amount of assessment. Where, therefore, the assessor had included three village lots in one assessment, two of which only belonged to one person, the sale was set aside; but without costs, as the purchasers—defendants in the suit—had nothing to do with the irregular proceedings for which the sale was set aside. *Black* v. *Harrington*, 12 Gr. 175.

Lot not Separately Assessed—*Costs.*]—Where three distinct lots were assessed in bulk, and sold for taxes, the sale was set aside, and the purchaser having stated at the sale that his object in buying was to secure the property for the person entitled, and afterwards having claimed to hold the land for his own benefit, he was ordered to pay the costs of the suit. *Christie* v. *Johnston*, 12 Gr. 534.

Lot not Separately Assessed.] — The land in question in this case was not sold for its own arrears only, but was assessed with another lot, and the arrears charged against both:—Semble, that this would be fatal. *Thompson* v. *Colcock*, 23 C. P. 505.

Lots Separately Assessed Sold Together.]—Where two half lots were assessed separately, a sale of the whole lot for the total amount was held invalid, notwithstanding 27 Vict. c. 19, s. 4. *Yokham* v. *Hall*, 15 Gr. 335.

Misdescription of Land.]—The north part of a lot called lot 1 in one survey, and lot 4 in another, of 100 acres more or less, was assessed variously as "number 1, N. half," &c. "Number 1, N. part," &c. "N. half lot number 1," &c., and "broken lots 1 and 4." The collector's roll shewed similar discrepancies:—Held, that though these irregularities indicated want of care and accuracy in the officers of the municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. McKay v. Crysler, 3 S. C. R. 436, distinguished. *Nellis* v. *White*, 29 Gr. 338.

Misdescription—*Taxes Paid but Credited to Wrong Lot.*]—Plaintiff was the owner of a group of small islands in Lake Rosseau, in the township of Medora, containing in all less than fifty acres. The island in question was patented to one Pope by the description of island D. Plaintiff purchased it from Pope and called it by the fancy name of Oak Island, and built a house and made other improvements thereon, residing there for some months in each year. The assessor, having been erroneously informed that Pope was the owner of an island in Lake Rosseau called D, put down island D in the non-resident division of the assessment roll with the name "Robert T. Pope." This was done to distinguish it from another island D in the same lake and township. He did not know that this island D was one of the group belonging to the plaintiff, though he knew that the plaintiff

was putting improvements on one of the islands, which was in fact island D or Oak Island. He supposed that the name of the improved island was Flora; and this was the name of one of the plaintiff's islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed, and actually assessed, though under a wrong name. The taxes so assessed were actually paid. In 1883 the island D was sold for arrears of taxes for the years 1879, 1880, 1881 and 1882:—Held, affirming 12 O. R. 598, that island D being identified as that intended to be assessed, and being that on which the improvements had been made, the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid the sale was void:—Semble, that island D or Oak Island should have been assessed on the resident instead of the non-resident division of the assessment roll. *Hall* v. *Farquharson*, 15 A. R. 457.

Observations as to assessment of several parcels of non-resident land less than 200 acres for statute labour. *Ib.*

Mistake in Warrant.]—Under 59 Geo. III. c. 7, lands returned in the surveyor-general's schedule in June, 1820, were liable to have taxes charged against them on the 1st July following, which taxes for the first year were to be then assessed for 1820, so that, if not paid, there would be eight years' taxes in arrear on the 1st January, 1828. Such lands having been sold under a warrant which described the taxes on them as being in arrear from the 1st July, 1820, to the 1st July, 1828, the sale was upheld: for, eight years' taxes being really due, the mistake in the time of commencement was unimportant, and could not vitiate the warrant. *Doe d. Stata* v. *Smith*, 9 U. C. R. 658.

No Arrears — *Treasurer's Return Incorrect.*]—The surveyor-general made a return to the treasurer of the London district, headed thus: "Township of Dorchester, southern division, broken front concessions A and B, south part to John Reilly, Jr., 100 acres, north part to Dudley McPhee, 200." The treasurer did not open his account in accordance with this return, but opened a separate account against "N. ½ of lot 22 in broken front B, 100 acres," and returned it as in arrear, upon which return it was sold. It was proved that the parties who had paid taxes on the lot, having title to the whole 200 acres, had paid taxes on the whole, and not separately on any part of it:—Held, that the sale of the north half of lot 22, made in 1830, was void, because, notwithstanding the return by the treasurer, there was no arrear in fact subjecting the land to sale. *Doe d. Upper* v. *Edwards*, 5 U. C. R. 594.

No Specific Description.]—It is not necessary at a sale of lands for taxes to describe particularly the portion of the land to be sold, and therefore a sale of "80 acres" of a particular lot was held sufficient. *Stewart* v. *Taggart*, 22 C. P. 284.

Not Advertised for Three Months—*Patented and Unpatented Lands not Distinguished.*]—The evidence shewed that there were thirteen advertisements in the Gazette, though not covering three months, the first being on the 18th July, and the last on the 10th October: that the warrant and advertisement did not distinguish between patented and unpatented lands; and that the description in the deed was of "Broken lot, number 17, in the D concession of the township of Mariposa," describing it as containing seven acres, and professing to convey the whole lot, which was not shewn to contain more than seven acres. The Judge at the trial held, that the irregularity in the advertisement would not invalidate the sale, and that the description was sufficient; but that the patented and unpatented lands should have been distinguished. *Kempt* v. *Parkyn*, 28 C. P. 123.

Omission of Duty by Assessor and Township Clerk.]—The duties of the assessor and township clerk, under ss. 109, 110, and 111 of R. S. O. 1877 c. 180, are imperative and not directory merely, and their performance is conditional to the validity of a tax sale. *Donovan* v. *Hogan*, 15 A. R. 432.

Paid Taxes Wrongly Included.]—Where land was sold for taxes including one year's assessment which had been paid, the sale was set aside, though the number of years in arrear was greater than was required to warrant a sale. *Irwin* v. *Harrington*, 12 Gr. 179.

Part of Lot Sold — *Variance Between Sale Book and Deed.*]—At a sale of part of a certain lot for taxes the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on 5th December, 1884; the bid was for one-tenth of an acre only:—Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth. *Haisley v. Somers*, 13 O. R. 600.

Part of Taxes not Chargeable.]—Held, that, under the facts set out in this case, the sale was void, for that as a portion of the east half of the lot had been sold for taxes, part whereof had accrued upon the west half, and was not chargeable on the east half, and as there were no means of apportionment, it was void as to all. *Ridout* v. *Ketchum*, 5 C. P. 50.

Patented Lands Described as Unpatented.] — Certain patented lands, which were sold for taxes, were described in the advertisement as unpatented, and in the treasurer's deed as "all that," &c., "being composed of all the right, title, and interest of the lessee, locatee, licensee, purchaser from the Crown, in and to lot," &c.:—Held, that the treasurer by his deed having purported to sell the interest only of a locatee or purchaser from the Crown, the power he exercised was directed to that particular estate only, which being non-existent, there was nothing that the power could operate upon, and that the deed was invalid. *Scott* v. *Stuart*, 18 O. R. 211.

Payment Before Sale.]—If a writ has been issued for the sale of land for taxes, but before sale under it, the taxes are paid, the sale is illegal and void. *Howe* v. *Thompson*, M. T. 6 Vict.

Payment Before Sale.]—The lot was duly advertised by the sheriff on the 4th June, 1840, pursuant to 3 Vict. c. 46, but the taxes had been paid to him before sale:—Held, that, as the payment was made to the sheriff

and not to the treasurer, 3 Vict. c. 46 was not applicable, and the sale was void. *Doe d. Sherwood* v. *Matheson*, 9 U. C. R. 321.

Payment Before Sale.]—The land having been duly advertised in accordance with 3 Vict. c. 46, the sale was held valid notwithstanding a receipt produced for taxes for a portion of the time, the owner having failed to comply with the provisions of s. 3. *Macdonald* v. *Rowe*, 9 C. P. 76.

Payment to Acting Collector.] — To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such. *Smith* v. *Redford*, 12 Gr. 316.

Payments Wrongly Applied.] — A patent having issued for lot 8 and three-quarters of lot 7, including the east quarter, although the east quarter was not returned by the surveyor-general as described for grant, and the taxes on the whole of the grant having been paid, the treasurer credited such payment to the west three-quarters, and returned the east quarter as in arrear for taxes: —Held, that the east quarter could not be sold, the payments having been made on the part which included it. *Peck* v. *Munro*, 4 C. P. 363.

Proof Required.] — Strict proof should be given as to the legality of the tax and its actual imposition, but in matters concerning its collection unnecessary or unreasonable rigour in carrying out the clauses of the statute should not be exacted from the officials intrusted therewith. *Cotter* v. *Sutherland*, 18 C. P. 357.

Rates not Kept Separate.]—The provision requiring certain rates to be kept separate on the collector's roll is directory only; and where it had not been observed, a sale was held valid. *Cook* v. *Jones*, 17 Gr. 488.

Reasonable Accuracy.]—The court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell. *Fitzgerald* v. *Wilson*, 8 O. R. 559.

Sale Before Three Years—*Onus of Proof.*]—On the 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on the 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown lands commissioner had made any return to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown under s. 106 of R. S. O. 1877 c. 180, so as to render it liable to be assessed prior to the year 1878:—Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid. At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed:—Held, that the plaintiff by production of his patent made out a primâ facie case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson* v. *Traynor*, 12 O. R. 804.

Sale After Return Day.] — Sales for taxes made after the return day of the writ to sell are valid. *Stevenson* v. *Traynor*, 12 O. R. 804; *Cotter* v. *Sutherland*, 18 C. P. 357.

Second Sale for Omitted Arrears.]—After a sale of land for taxes for 1859 and following years, a subsequent sale for the taxes of 1858 was held invalid, and the purchaser under the first sale was held entitled to retain the land free from past taxes. *Mills* v. *McKay*, 15 Gr. 192.

Second Sale for Omitted Arrears.]—On the 5th February, 1867, the lot in question was sold for taxes due for 1859 and 1860, and on the 28th December, 1867, it was again sold for the taxes due for 1862, 3, 4, 5, and 6, these latter taxes being due at the time of the first sale:—Held, that the second sale was valid, for the fact of the subsequent taxes being due at the time of the first sale and not included in the warrant under which it took place, did not free the land from the payment thereof. *Thompson* v. *Colcock*, 23 C. P. 505.

Separate Columns in Roll.]—The provisions of s. 121 of the Consolidated Assessment Act as to entering on the roll by the clerk of the municipality, opposite to each lot or parcel, all the rates or charges with which the same is chargeable, in separate columns for each rate, are imperative, and non-compliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid. The provisions of s. 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer certified to by the clerk under the seal of the corporation, and that of s. 142, which requires an assessor's certificate to each list, are also imperative. The principle of the decision in Town of Trenton v. Dyer, 21 A. R. 379, 24 S. C. R. 474, followed. *Love* v. *Webster*, 26 O. R. 453.

Separate Lots.]—Semble, that where several lots are included in one grant, but described by separate numbers, a portion of each lot must be sold for the taxes due on it, and not a portion of the whole block, beginning at the boundary from which the lots are numbered, for the taxes due on the whole. *Munro* v. *Grey*, 12 U. C. R. 647.

Separate Lots.]—Lot 18, and the west part of 19, containing together 200 acres, were granted to B. in one patent, and in the same year the east part of 19, 156 acres, was granted to one S. B.'s land, being in arrear for eight years, was returned to the treasurer as 18 and the west part of 19, 200 acres, and the sheriff in 1848 sold and conveyed to the plaintiff 135 acres of lot 19, which would include part of the lot granted to S.: — Held, that the sale could not be upheld even as to that portion of 19 granted to B., for lot 18 and the west part of 19 should each have been separately charged, and sold for its own arrears. *McDonald* v. *Robillard*, 23 U. C. R. 105.

Separate Lots.] — The north and south half of a lot having been assessed separately, and different amounts charged against each half, which were afterwards added together and charged against the whole lot, and a por-

tion of the whole lot having been sold for the combined amounts:—Held, that such sale was illegal. *Laughtenborough* v. *McLean*, 14 C. P. 175.

Separate Lots.] — Where three distinct lots were assessed in bulk, and sold for taxes, the sale was set aside. *Christie* v. *Johnston*, 12 Gr. 534.

Time.]—The five years for which lands are to be in arrear for taxes, before they are liable to be sold, under 16 Vict. c. 182, must be before the delivery of the treasurer's warrant to the sheriff. *Kelly* v. *Macklem*, 14 Gr. 29.

Time.]—When the first year's taxes had been imposed by a by-law passed in July, 1852, and the collector's roll was not delivered until after August, 1852; and the treasurer's warrant was dated 10th July, 1857:—Held, that the sale was invalid, for no taxes had been in arrear for five years. *Connor* v. *McPherson*, 18 Gr. 607.

Time.]—The collector's roll was delivered to him on 26th August, 1852, and the treasurer's warrant to sell was issued on 11th August, 1857:—Held, that, under s. 42 of the Assessment Act of 1853, no portion of the tax being due for five years on 11th August, 1857, the sale was void:—Semble, that the taxes of the preceding year, for the purposes of sale for arrears, are not in arrear till after the year in which they are imposed. *Bell* v. *McLean*, 18 C. P. 416.

Time.]—The taxes were unpaid for 1853, 4, 5, 6, and 7. On the 25th February, 1858, the treasurer issued his warrant to sell:—Held, that no portion of the taxes was due for five years, within C. S. U. C. c. 55. *Ford* v. *Proudfoot*, 8 Gr. 478.

Time.]—On the 18th July, 1873, a warrant issued, and on the 18th December following the land in question was sold for the taxes imposed in 1870:—Held, that under s. 18 of 32 Vict. c. 36 (O.), which makes the taxes due on and from the 1st January of the year in which they are imposed, the taxes for 1870 were due in that year for the first year, and consequently in 1872 for the third year, so that when the sale took place the taxes were due and in arrear for the third year, in accordance with s. 128 of the Act. *Wapels* v. *Ball*, 29 C. P. 403.

Time.]—Held, that the sale in 1855, of the land in question was valid, as the evidence, which is fully set out in the case, shewed that there were five years' arrears of taxes due at the time of the sale. *Crysler* v. *McKay*, 2 A. R. 569. Reversed by the supreme court, 3 S. C. R. 436.

Treasurer's Neglect.]—Where the taxes had been paid to the treasurer of the district, and a receipt obtained, a subsequent sale by the sheriff, as for taxes, in consequence of the treasurer having omitted to credit the payment on the lot, was held void, although the treasurer had returned the land as in arrear. *Myers* v. *Brown*, 17 C. P. 307.

Held, also, that such sale was equally void, where the taxes had, in accordance with 9 Geo. IV. c. 3, been paid to the treasurer of the district in which the owner resided. *Ib.*

Treasurer's List.]—Held, that 13 & 14 Vict. c. 67, ss. 46 and 47, did not make the list of taxes directed to be prepared by the treasurer binding, and that if the tax was not legally imposed, but merely debited against the lot by the treasurer, it was not made valid by being entered in such list. *McAdie* v. *Corby*, 30 U. C. R. 349.

Warrant not Directed to Any One.]—It was objected that the warrant was not addressed to any one. It recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded: "Now, I, the warden, command you," &c. This was given to the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to 32 Vict. c. 36, s. 128:—Held, that the warrant was sufficient. *Fitzgerald* v. *Wilson*, 8 O. R. 559.

Warrant not Distinguishing Patented Lands.]—16 Vict c. 182, ss. 55 and 56, C. S. U. C. c. 55, requiring the county treasurer in his warrant for the sale of lands in arrear to distinguish those that have been patented, from those under lease or license of occupation, is compulsory; and sales effected under a warrant omitting such particulars are void. *Hall* v. *Hill*, 2 E. & A. 568, 22 U. C. R. 578.

Warrant not Sealed.]—A sale for taxes under a warrant issued without a seal:—Held, invalid. *Morgan* v. *Quesnel*, 26 U. C. R. 539.

Warrant with Schedule.] — Semble, that it is sufficient to state the lands to be sold in a schedule annexed to the warrant, if such schedule is expressly incorporated with it; but, quære, if the warrant mention no lands and the schedule is not so incorporated. *Hall* v. *Hill*, 22 U. C. R. 578.

Warrant with Two Entries of Same Lot.]—The warrant contained two different entries of the same lot for taxes due for two successive years. The sheriff sold the lot for the first year's taxes, then adjourned the sale in consequence of other lots remaining unsold, and at a subsequent date sold the same lot for the second year's taxes to another party:—Held, that the warrant was wrong in entering the same lot twice, as if two separate properties, and that the sale was void; the first, because the sheriff did not sell for all the taxes appearing to be due; the second, because, having previously, at the same sale and under the same warrant, sold the land to one, he could not sell it again to another. *Schaefer* v. *Lundy*, 20 C. P. 487.

See the next sub-head.

(c) Statutory Finality.

Advertising.]—The advertisement of sale not having been inserted in a local newspaper in accordance with 16 Vict. c. 183:—Held, that the sale was not confirmed by said statute. Semble, that the statute being passed to give effect to a forfeiture, a strict compliance with its terms was necessary to bar the rights of owners of land sold. *Williams* v. *Taylor*, 13 C. P. 219.

Advertising.]—The omission of the treasurer to advertise the list returned by him to the court of quarter sessions, within one month thereafter, and to advertise such list in the official Gazette, and imperfections in

the advertising:—Held, to be irregularities cured by 6 Geo. IV. c. 7, s. 22, and by analogy to the holding of the courts in the cases of sales under execution. *Cotter* v. *Sutherland, Stevens* v. *Jacques*, 18 C. P. 357.

The sheriff's advertisements of the sale and its postponement in the Gazette in these cases were held sufficient. *Ib.*

Application of Limitation Clause.]—The 32 Vict. c. 36, s. 155, limiting the time for bringing suits for setting aside a sale for taxes, applies only where an actual, though irregular, sale of lands has been effected. *Greenstreet* v. *Paris*, 21 Gr. 229.

Arrears not Due for Statutory Period.]—In 1865 the land was sold for six years' taxes, including 1858; for that year the sale could not be supported, and as there were not five years due of any portion of the residue for which the warrant issued, the whole sale was held bad—and held, following Yokham v. Hall, 15 Gr. 335, that this defect was not cured by 27 Vict. c. 19, s. 4; 29 & 30 Vict. c. 53, s. 131; or 32 Vict. c. 36, s. 150 (O.) *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

Description in Roll and Advertisement.]—Land sold under C. S. U. C. c. 55, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17 in the 9th concession of Rawdon, 75 acres, and in the sheriff's deed by metes and bounds:—Held, insufficient; and,—semble, such a defect would not be cured by 27 Vict. c. 19, s. 4, or 29 & 30 Vict. c. 53, s. 146, or 32 Vict. c. 36, s. 155. *Booth* v. *Girdwood*, 32 U. C. R. 23.

It was objected that the description of the land on the roll and in the warrant as the N. ½ and W. pt. S. ½, 165 acres, and the N. ½, 100, and W. pt., S. ½, 65, was insufficient: and that the treasurer had improperly altered the roll so as to reduce the taxes by one-half, and make the descrintion still more defective—but held, that these objections would be cured by 27 Vict. c. 19, s. 4, and 29 & 30 Vict. c. 53, s. 131. *Ib.*

Erroneous Description of Land Assessed.]—Ejectment under a tax deed by the assignee of the purchaser, who was the township clerk. The sale was for the taxes alleged to be due for the years 1871 and 1872. In the assessment roll for 1871 the land was described as the "S. pt. 12, 53 acres;" and for 1872 as "S.E. pt. 12, 53 acres;" and it appeared that the land, whether taken as the south or south-east part, included portions of the lot owned respectively by F. and C., and on which they had paid their taxes; and also certain lots of a village laid out on part of 12:—Held, that the plaintiff's title failed; for that the assessment was illegal. Held, also, that the defect was not cured by s. 155 of the Assessment Act of 1868, 32 Vict. c. 36 (O.) *Beckett* v. *Johnston*, 32 C. P. 301.

Errors of County Clerk and Assessor.]—Where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale were regular, and authorized by 32 Vict. c. 36, and that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years:—Held, that the sale and deed were not afterwards impeachable, although it was not clear on the evidence, whether the county clerk and assessor had or had not properly complied with the requirements of ss. 111 and 112 of the said Act. *Smith* v. *Midland R. W. Co.*, 4 O. R. 494.

Error in Amount.]—Certain lands, worth from $600 to $800, having been sold in November, 1881, for $6.06 taxes, being one-eleventh in excess of taxes really due, the sale was on this ground set aside by Proudfoot, J., 9 O. R. 451, who held that R. S. O. 1877 c. 180, s. 155, did not cure the error, and that the maxim de minimis non curat lex did not apply; but, on appeal to a divisional court this judgment was reversed. Per Boyd, C.—In Yokham v. Hall, 15 Gr. 335, the excess of statute labour tax was clearly illegal, and its imposition being unjustifiable vitiated the sale. There was no illegal excess of tax originally imposed upon the land in this case, and the owner must be regarded as being notified by the advertisement of sale of the error in carrying forward the amount, and having taken no steps to have it remedied, pending the period allowed for payment or redemption, he cannot afterwards invoke its aid to annul the tax sale. Per Ferguson, J.—The difference of twenty cents and the calculation of interest and commission upon it must fall within the meaning of the words "error or miscalculation" mentioned in s. 150 of R. S. O. 1877 c. 180, and not be invalid. Yokham v. Hall, 15 Gr. 335, considered and distinguished. *Clarton* v. *Shibley*, 10 O. R. 295.

Excessive Sum.]—A tax sale of land for more than was due, is not rendered valid by 27 Vict. c. 19, s. 4. *Yokham* v. *Hall*, 15 Gr. 335.

General Effect.]—Semble, that several objections taken to the tax title, and set out in the report of this case, were cured by 33 Vict. c. 23 (O.) *Davies* v. *Van Norman*, 30 U. C. R. 437.

Half-lots—*Sale En Bloc.*]—Where two half lots were assessed separately, a sale of the whole lot for the total amount was held invalid, notwithstanding the Act. *Yokham* v. *Hall*, 15 Gr. 335.

Halifax Assessment Act.]—The Act provided that in case of non-payment of taxes assessed upon any lands thereunder, the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk, and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, &c. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act, the legality of the assessment and sale was attacked:—Held, that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section, it was necessary for the defendants to shew, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the Act, and the production and proof of one of such statements was not sufficient. *O'Brien v. Cogswell*, 17 S. C. R. 420.

Inaccurate Advertisement.]—Semble, the sale was not "fairly conducted," as the advertisement describing the lands as unpatented, was of such a character as to damp the sale. *Scott* v. *Stuart*, 18 O. R. 211.

Indefinite Description in Sheriff's Deed—*Second Deed.*]—The sheriff, on a sale of land for taxes in 1869, gave the purchaser a certificate of the land sold as "five acres of land to be taken from the south-west corner of the south-west quarter of lot 3 in the 11th concession of the township of East Zorra;" but made no further description thereof. Six years afterwards a new sheriff gave a deed, describing the land particularly by metes and bounds:—Held, affirming 41 U. C. R. 212, that the sale was invalid, and that therefore, no land having been sold, s. 155 of 32 Vict. c. 36 (O.) did not apply to validate the deed. *Burgess* v. *Bank of Montreal*, 3 A. R. 66.

Irregularities in Assessments.]—Quære, as to the effect of the curative provisions of s. 156 of the Assessment Act, R. S. O. 1877 c. 180, since the decision of the supreme court in McKay v. Crysler, 3 S. C. R. 436, and whether a tax deed may be questioned for irregularities in the assessment or in the proceedings prior to sale after the lapse of the two years. *Jeffery* v. *Hewis*, 9 O. R. 364.

Laches of Tax Purchaser.]—Quære, whether s. 155 of 32 Vict. c. 36 (O.) applies to make good a sale otherwise bad in favour of a purchaser for taxes who makes no claim for nearly twenty years, leaving the original owner in possession, and in ignorance of the sale. A new trial was granted to enable the defendant to raise this and other points not sufficiently taken at the trial. *Austin* v. *Armstrong*, 28 C. P. 47.

Land on Non-Resident Instead of Resident Roll—*List not Sealed—List not Returned.*]—Land was sold in January, 1871, for an arrear of taxes assessed in 1867, under a warrant for sale, dated 20th August, 1870. The land was put on the non-resident in place of the resident roll, and a list of lands liable to be sold, required by 32 Vict. c. 36, s. 128 (O.), to be sealed with the corporate seal and signed by the warden, and to be returned to the treasurer with the warrant for sale annexed, was not so sealed or signed or returned:—Held, that the land could be sold under 32 Vict. c. 36, s. 128, at any time after the taxes had been due for more than three years at the time of the warrant, as they were here; and that the placing the land on the wrong list and the omission to authenticate and return the list were defects cured by s. 155—more than two years having elapsed before this suit since the execution of the tax deed. No list was returned by the treasurer to the clerk of the lands on which three years' taxes were in arrear, as required by s. 110; and s. 131 enacts that the treasurer shall not sell any lands which have not been included in such lists. Held, therefore, that the sale in this case was unauthorized, and that it was not made valid by ss. 130 or 155. *Fenton* v. *McWain*, 41 U. C. R. 239.

Land not Returned as Occupied.]—It was objected to the regularity of the sale, that in 1881 neither the assessor nor the clerk returned the lands as occupied, as in fact they were, and further that the clerk did not examine the assessment roll when returned by the assessor as required by R. S. O. 1877 c. 180, s. 111:—Semble, that these are matters of procedure only, and would be cured by s. 155. *Claxton* v. *Shibley*, 9 O. R. 451.

Non-Resident Land—*Subsequent Occupation—No Notice of Intention to Sell.*]—Unoccupied land divided into lots was assessed in the year 1879, and entered in the non-resident division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued, and without the name of the owner, it was entered with the name of the owner prefixed, and valued en bloc. The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax roll, and transmitted to the county treasurer. The owner became also the occupant of the lands before the delivery to the collector of the collector's roll for 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned them to the county treasurer in a "list of non-resident taxes returned from the collector's roll," and they were so entered in the treasurer's books. In the treasurer's list of lands liable to be sold for arrears of taxes in 1882, sent to the township clerk, the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed, as occupied land, for the years 1880, 1881, and 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to s. 111, in the list of non-resident lands which appeared, by the assessment roll of 1882, to have become occupied. The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation, and being ignorant of the sale or that the taxes were alleged to be in arrear:—Held, that the taxes having been entered in the collector's roll, with the name of the person assessed, the payment to the collector was valid, and consequently that there were no taxes in arrear for which the land could lawfully be sold. Semble, under the circumstances in evidence, the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to s. 155. *Donovan* v. *Hogan*, 15 A. R. 432.

No Notice to Owner.]—Though the owner of the land was known, he was not notified as required by R. S. O. 1877 c. 180, s. 109, of the assessment and liability to sale—Held, that this was an omission which was not cured by R. S. O. 1877 c. 180, s. 155. *Haisley* v. *Somers*, 13 O. R. 600.

No Taxes in Arrear.]—Held, that s. 155 of 32 Vict. c. 36 (O.) does not make valid a deed given in pursuance of a sale for taxes where there were in fact no taxes in arrear at the time of sale, but they had been regularly paid. *Hamilton* v. *Eggleton*, 22 C. P. 536.

Nothing Overdue for Statutory Period.]—Where it appears that no portion of the taxes has been overdue for the period

prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by s. 155 of 32 Vict. c. 36 (O.) *McKay* v. *Crysler*, 3 S. C. R. 436; reversing 2 A. R. 569.

No Statement that Land Patented.]—It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented:—Held, that R. S. O. 1877 c. 180, ss. 150, 155, did not cure this defect. *Haisley* v. *Somers*, 13 O. R. 609.

No Notice of Intention to Sell.]—By R. S. O. 1877 c. 180, ss. 108, 109, the county treasurer is to furnish the clerk of each municipality with lists of lands three years in arrear for taxes, and such clerks are to keep the lists in their offices for inspection, and are to give copies to the assessors, who are to notify the occupant and owner, if known, by means of the assessment notice, that the land is liable to be sold for arrears of taxes. By ss. 155 and 156 a tax deed is to be final and binding on the former owners and all claiming under them if the lands are not redeemed in one year, and the deed is to be valid against all persons if not questioned by some interested person within two years from the time of sale. The land in question was, in 1879, assessed as non-resident. Defendant became the owner in 1878, and, having come to reside thereon in the former year, improperly paid these taxes to the collector instead of to the treasurer. No notice of arrears was given to the then owner and occupant, and they were not entered on the roll for 1882, as required by the Act. The defendant paid all taxes subsequently demanded, including those for 1882, but the land was, notwithstanding, put up and sold for the taxes of 1879, a trifling sum, on the 30th December, 1882. The treasurer's deed was dated the 15th February, 1884:—Held, that the sale could not be supported, as the notice required by s. 109, that the land was liable to be sold for taxes, had not been given, and that such irregularity was not cured by ss. 155 and 156 of the Act. Hutchinson v. Collier, 27 C. P. 249; Church v. Fenton, 28 C. P. at p. 404, doubted by Wilson, C.J.:—Per Armour, J. —The substantial compliance with the provisions of R. S. O. 1877 c. 180, ss. 108-111 inclusive, is a condition precedent to the right to sell non-resident lands for taxes:—Quære, per Wilson, C.J., whether there was not evidence that the land was not sold in a "fair, open and candid manner." Observations on the impropriety of tax sales as now conducted under legislative authority. *Deverill* v. *Coe*, 11 O. R. 222.

No Notice of Assessment or of Intention to Sell.]—The Act provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with:—Held, that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed:—Held, also, that the deed could not be invoked in the present case to cure any defects in the proceedings as it was not delivered to the purchaser until after the suit commenced: therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void. *O'Brien* v. *Cogswell*, 17 S. C. R. 420.

Occupied Lot Assessed as Unoccupied.]—Held, that 27 Vict. c. 19, s. 4, cures all errors as regards the purchaser at a tax sale, if any taxes in respect of the land sold have been in arrear five years; and this rule applies where an occupied lot has been assessed as unoccupied. *Bank of Toronto* v. *Fanning*, 18 Gr. 391.

Occupied Land—*No Notice.*]—In 1882 a lot of land in the village of F., assessed for 1879 as "non-resident," was sold for the taxes of the latter year, the treasurer's deed therefor being executed in 1883. In an action of ejectment brought by the purchaser against the original owner in 1888, it appeared that in 1882 the list of lands liable to be sold for arrears of taxes required by s. 108, R. S. O. 1877 c. 180, and which contained the lot in question, was sent by the treasurer to the clerk of the village, but that it had been lost, and although the land was occupied at the time, it was not returned "as occupied," nor was the owner notified that it was liable to be sold for taxes as provided by s. 109, R. S. O. 1877 c. 180:—Held, that the sale was invalid, and that notwithstanding the lapse of time these defects were not cured by ss. 155 or 156, R. S. O. 1877 c. 180. Per Proudfoot, J.—The want of notice to the defendant of the arrears and of the liability of his land to be sold for them was the want of an essential requisite to the power of sale. Per Ferguson, J.—The land, having become occupied and having sufficient distress on it to satisfy the taxes, should, notwithstanding the errors of the municipal officers, be considered as if it had been returned "occupied," and the sale under such circumstances being forbidden by s. 130, R. S. O. 1877 c. 180, was not cured by s. 156 of that statute. *Dalziel* v. *Mallory*, 17 O. R. 80.

Proof of Arrears and Advertisement.]—Objection to a sale made in 1839, that the taxes were not shewn to have been properly imposed by the Q. S. under 59 Geo. III. c. 7, and later statutes, and that there was no sufficient evidence of the sheriff's advertisements of sale:—Held, under the evidence, to be cured by 29 & 30 Vict. c. 53, s. 156 (O.), and 32 Vict. c. 36, s. 155 (O.) The 33 Vict. c. 23, s. 2 (O.), was also applicable in favour of the sale, under the facts proved. *Jones* v. *Cowden*, 34 U. C. R. 345, 36 U. C. R. 495.

Proof of Due Advertisement.]—Under s. 155 of 32 Vict. c. 36 (O.), it is not essential to give evidence of lands sold for taxes having been duly advertised, where the two years have elapsed after the execution of the tax deed without its being questioned. *Wapels* v. *Ball*, 29 C. P. 403.

Proof that Taxes were Due.]—Where in order to sustain a party's case it is necessary to prove title under a sheriff's deed for taxes, he must shew that an actual sale did take place, and that at the time of the sale under which he claims there were some taxes due, notwithstanding the time limited by s. 155 of 32 Vict. c. 36 for questioning the deed has elapsed. *Proudfoot* v. *Austin*, 21 Gr. 566.

Sale Before Amending Act.]—Quære, whether the provisions of s. 155 of the Assessment Act of 1869 apply where a sale of land took place before the Act, but the deed was not executed until after; or whether it

applies only to a case where both were before or both after the enactment. *Ferguson* v. *Freeman*, 27 Gr. 211.

Sale For Too Much.]—Quære, whether since 32 Vict. c. 36 (O.), and preceding statutes, when some taxes are in arrear, but a sale has been made for more, the defect is cured. *Nelles* v. *White*, 29 Gr. 338. See *S. C., sub nom. White* v. *Nelles*, 11 S. C. R. 587.

Sale For More Than is Due.]—Semble, a sale for more taxes than are actually due, cannot be supported under s. 137, where s. 155 does not apply in consequence of the sale not having been openly and fairly conducted. Yokham v. Hall, 13 Gr. 335, and Edinburgh Life Ins. Co. v. Ferguson, 32 U. C. R. 253, followed. *Hall* v. *Farquharson*, 15 A. R. 457.

Separation of Counties.]—Where taxes had accrued due on certain lands in the county of Bruce, before the separation of that county from Huron:—Held, that the treasurer of the county of Huron, after the separation, could not advertise and sell such lands for the taxes. Held, also, that the sale was not made valid by 32 Vict. c. 36, s. 155 (O.), for it only applies to deeds given by the sheriff or treasurer authorized to sell. *Canada Permanent Building and Savings Society* v. *Agnew*, 23 C. P. 200.

Substantial Compliance — *Lists and Warrant — Indian Lands.*]—In September, 1857, a lot in the township of Keppel, in the county of Grey, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869 the Dominion Government, who retained the management of the Indians lands, issued a patent therefor to the plaintiff. In 1870 the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one D. K., who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrants were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By s. 128 of the Assessment Act, 32 Vict. c. 36 (O.), the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, etc., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.:—Held, (1) that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands, and upon being granted became liable to assessment; (2) that the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by s. 156 of R. S. O. 1877 c. 180. *Church* v. *Fenton*, 5 S. C. R. 239.

Time for Objecting.]—Held, that under s. 155 of 32 Vict. c. 36 (O.), the two years, after which the deed is made valid, must elapse after the execution of the deed and not from the time of sale. *Hutchinson* v. *Collier*, 27 C. P. 249.

Time When Right to Sell Accrues—*Application of Limitation Clause.*]—The land in question was sold for the taxes due for 1852, 3, 4, 5, and 6, under a warrant issued on the 6th July, 1857, the taxes for 1852 having been imposed by a by-law passed on the 25th September, 1852:—Held, that the sale was invalid, there being no portion of the taxes in arrears for five years when the warrant issued, as required by 16 Vict. c. 182, s. 55; and that this defect was not cured by 32 Vict. c. 36, s. 155 (O.) Quære, whether that section will extend to defects in the deed, or to preliminary defects only. *Kempt* v. *Parkyn*, 28 C. P. 123.

Time — *Proceedings Under the Quieting Titles Act.*]—Under s. 1 of 37 Vict. c. 15 (O.), a tax deed is valid and binding unless questioned before a court of competent jurisdiction within two years by a person interested. One O., the defendant herein, claiming under a sheriff's deed, given under an execution against lands, and also under a deed from one M., filed a petition under the Quieting Titles Act within two years from the obtaining of a tax deed by the plaintiff, who became contestant in the proceedings, and filed his claim under the tax deed, but, on the opposition of O., afterwards withdrew and abandoned it. Afterwards an order was made by the referee dismissing O.'s petition, which order was affirmed by a Judge on appeal, as she had failed to make out anything. At the time the execution issued under which O. purchased, one of the parties to the suit was dead, and the interest of the others had passed to M. by conveyance from them to M. in trust to sell and apply the proceeds to pay their creditors, and the deed from M. was a breach of trust by M. with O.'s knowledge:—Held, that O. was not a person interested within the meaning of the Act, for that one of the parties being dead the sheriff's deed conveyed nothing, and neither did the deed from M., being a breach of trust. Per Osler, J., the proceedings under the Quieting Titles Act were a questioning of the deed within the meaning of 37 Vict. c. 15. Per Wilson, C.J., the proceedings had no such effect, as the questioning must be a successful questioning. *McNab* v. *Peer*, 32 C. P. 545.

Time.]—Held, following Hutchinson v. Collier, 27 C. P. 249, that the two years given by s. 156 of R. S. O. 1877 c. 180, within which a tax deed can be questioned, is to be computed from the giving of the deed and not from the time of the sale. The court, though not satisfied with the decision as arrived at in that case, considered they were bound by it. *Lyttle* v. *Broddy*, 10 O. R. 550.

Time.]—Held, that the two years limited by s. 156, R. S. O. 1877 c. 180, for impeaching a tax sale, run from the time of making the tax deed, not from that of the auction sale. The word "sale" in that section can be properly understood only in the sense of conveyance. Hutchinson v. Collier, 27 C. P. 249, and Church v. Fenton, 28 C. P. 204, approved of. The contrary view expressed in Smith v. Midland, 4 O. R. 494, Lyttle v. Broddy, 10 O. R. 550, Claxton v. Shibley, 10 O. R. 295,

and Deverill v. Coe, 11 O. R. 222, dissented from. *Donovan* v. *Hogan*, 15 A. R. 432.

Validating Acts.]—Lands in Manitoba assessed for the years 1880-81, were sold in 1882 for unpaid taxes. The statute authorizing the assessment required the municipal council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all real and personal property mentioned in said roll, but no such by-law was passed in either of the years 1880 or 1881. The lands so assessed and sold were formerly Dominion lands which were sold and paid for in 1879, but the patent did not issue until April, 1881. The patentee sold the lands, and after the tax sale a mortgage thereon was given to R., who sought to have the tax sale set aside as invalid. 45 Vict. c. 16, s. 7 (Man.), provides that every deed made pursuant to a sale for taxes shall be valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from its execution, and 51 Vict. c. 27, s. 58 (Man.), provides that "all assessments heretofore made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby:"—Held, that the assessments for the years 1880-81 were illegal for want of a by-law, and the sale of taxes thereunder was void. If the lands could be taxed the defect in the assessments was not cured by 45 Vict. c. 16, s. 7, or by 51 Vict. c. 27, s. 58, which would cure irregularities but could not make good a deed that was a nullity as was the deed here:—Held, per Gwynne, J., Patterson, J., contra, that the patents for the lands not having issued until April, 1881, the said taxes accrued due while the lands vested in the Crown, and so were exempt from taxation:—Held, per Strong, J., following McKay v. Crysler, 3 S. C. R. 436, and O'Brien v. Cogswell, 17 S. C. R. 420, that the operation of 45 Vict. c. 16, s. 7, is restricted to curing the defects in the proceedings for the sale itself as distinguished from the proceedings in assessing and levying the taxes which led to the sale. *Whelan* v. *Ryan*, 20 S. C. R. 65.

Warrant Without a Seal.]—Land having been sold for taxes under a warrant issued without a seal:—Held, that the sale was invalid, and the defect not cured by 29 Vict. c. 26. *Morgan* v. *Quesnel*, 26 U. C. R. 539.

See the preceding sub-head.

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5. *Redemption.*

Assignee of Owner.]—The assignee of the original owner of property (sold for taxes) is entitled to redeem under ss. 9 and 12 of 16 Vict. c. 183. *Gilchrist* v. *Tobin*, 7 C. P. 141.

Attachment of Moneys Paid to Redeem.]—Moneys paid by the owners of land sold for taxes within one year from the day of sale, as redemption money to the county treasurer for the use and benefit of the purchaser, and banked in the name of the county treasurer, cannot be attached at the instance of a creditor of the corporation of the county as a debt due by the bank to the corporation of the county. *Wilson* v. *United Counties of Huron and Bruce*, 8 L. J., 135.

Deed Executed After Payment.]—The land was sold in October, 1860, for the taxes of 1855, 1856, 1857, and 1859, under a warrant dated 11th June, 1860, the amount paid by the purchaser being $31.51. In January, 1861, the plaintiff applied to the treasurer to know the amount of taxes then due on the lot, and was told $37.48 for the years 1855 to 1860, inclusive, which he paid, and took a receipt as for the taxes of those years. The treasurer, in March, 1861, went to the sheriff's office and caused an entry to be made in the book of sales opposite to this lot, that the taxes had been paid within two months after the sale, that he would pay the purchaser the redemption money, and that no deed was to be given. The sheriff and the treasurer afterwards saw the purchaser and told him what had been done; but, for some reason not explained, the sheriff subsequently executed to him a deed:—Held, that the land had been redeemed, the plaintiff having substantially complied with C. S. U. C. c. 55, s. 148. *Allan* v. *Hamilton*, 33 U. C. R. 109.

Part of Lot.]—An entire lot having been sold, one C. paid the redemption money on the east half, and one P. on the west half, but it being represented that P.'s payment had been made by mistake, the treasurer applied the money by P.'s authority to another lot:—Held, that under C. S. U. C. c. 55, s. 113, the owner of part of a whole lot sold for taxes might redeem such part on paying the proportionate amount chargeable against it; and that the clause did not merely allow such payment before sale. The east half was therefore held to have been properly redeemed; but, quære, if redemption of the whole had been necessary, as to the effect of P.'s payment by mistake. *Payne* v. *Goodyear*, 26 U. C. R. 448.

Payment by Stranger.]—Payment and redemption by a stranger before the year is out after the sale will prevent the forfeiture, though done without the knowledge of the owner. *Boulton* v. *Ruttan*, 2 O. S. 362.

Payment Direct to Purchaser.]—If the owner, instead of paying the redemption money to the county treasurer for the sheriff's vendee, pays it to the latter personally, and he accepts it, the payment is, in equity, effectual. *Cameron* v. *Barnhart*, 14 Gr. 661.

So if the sheriff's vendee verbally agree to accept payment personally at a distance from the county town, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. *Ib.*

Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Ib.*

Tender Before Sale.]—The defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of taxes on his own portion, which defendant refused to accept, and the land was sold:—Held, that an action would not lie against the treasurer for not accepting the redemption money, the

tender to and refusal by the latter being equivalent to payment, and that therefore the plaintiff had not lost his land. *Cunningham* v. *Markland*, 5 O. S. 645.

Time.]—The time of redemption excludes the day on which the sale takes place; and the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in the statute and the bearing and object of its provisions. *Boulton* v. *Ruttan*, 2 O. S. 362.

Time.]—When a sale took place upon the 7th October, 1840, and the money was not paid to redeem until the 8th October, 1841:—Held, too late. *Proudfoot* v. *Bush*, 12 C. P. 52.

Time—*Person to Pay.*]—Held, that the redemption money had been paid within the three years required by 13 & 14 Vict. c. 67, namely, by 6th March, 1855; and that although this was after the repeal of that Act, yet under 29 Vict. c. 26, the payment was made good. Under 13 & 14 Vict. c. 67, the redemption money was to be paid by the owner:—Semble, that this would include a person in possession claiming title as purchaser. *McDougall* v. *McMillan*, 25 C. P. 75.

Treasurer's Certificate of Non-redemption.]—Held, that the certificate of the treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and Lot No. 6 on Plan No. 589 in the County of York*, 7 O. R. 59.

Treasurer's Certificate of Redemption.]—If the treasurer certify a redemption improperly he is liable, and not the sheriff refusing to make the conveyance. *Boulton* v. *Ruttan*, 2 O. S. 362.

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6. *Miscellaneous Cases.*

Construction of Statutes.]—Tax statutes should not be construed as statutes creating a forfeiture, but rather in the same manner as statutes by which lands are sold under execution for debt, and the same rules which apply to sales under execution should govern tax sales. *Cotter* v. *Sutherland*, 18 C. P. 357.

Delay.]—Where the owner of land sold had paid no taxes thereon for ten years, and did not redeem within the year, and suffered four years after the sale to elapse before taking any steps to impeach the sale:—Held, that he was precluded by his laches from obtaining relief, supposing him to have been otherwise entitled to it. *Scholfield* v. *Dickenson*, 10 Gr. 226.

Division of Districts.]—A sale of lands made before 8 Vict. c. 22, in the district of Colborne for arrears of taxes, part of which had accrued due before the division of the district of Newcastle (of which Colborne was formerly a part), is legal. *Doe d. Earl of Mountcashel* v. *Grover*, 4 U. C. R. 23. Followed in *Cotter* v. *Sutherland*, 18 C. P. 357.

Dower.]—A sale of land for taxes destroys the right of the widow of the owner to dower. *Tomlinson* v. *Hill*, 5 Gr. 231.

Improvements.]—Held, that the plaintiffs in this case, claiming against the sale, were not bound to pay the value of improvements under 33 Vict. c. 23 (O.), for the sale was not void by reason of uncertain or insufficient description of the lands sold, and therefore not within the statute. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

Improvements and Purchase Money.]—Certain land was assessed, advertised for sale, described in the warrant, and sold at a tax sale, and conveyed, as part of lot 8—it being in fact part of lot 5. The treasurer, who conducted the sale, described the locality of the land intended to be sold, and the taxes were due on it:—Held, a case within 33 Vict. c. 23, s. 9 (O.), where land having been legally liable to be assessed, had been sold as for arrears of taxes, and such sale, &c., was invalid by reason of uncertain or insufficient description of the land; and that the purchaser was therefore entitled to his purchase money and interest and the value of his improvements, &c. *Churcher* v. *Bates*, 42 U. C. R. 466.

Improvements and Disbursements of Tax Purchaser.]—Held, that the defendant was entitled under R. S. O. 1877 c. 95, s. 4, though not under R. S. O. 1877 c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest, and expenses. *Haisley* v. *Somers*, 13 O. R. 600.

Land Described for Patent.]—Where land was returned under 59 Geo. III. c. 7, s. 12, as described for patent, it was liable for taxes, and having been regularly sold therefor, it was held that the sheriff's deed must prevail against a patent subsequently issued to the original nominee or his representative. *Charles* v. *Dulmage*, 14 U. C. R. 585; *Ryckman* v. *Van Voltenburg*, 6 C. P. 385.

Limitations Act.]—The Statute of Limitations does not begin to run against a tax purchaser until the period of redemption has expired. *Smith* v. *Midland R. W. Co.*, 4 O. R. 494.

Ottawa District.]—Quære, as to the effect of 3 Vict. c. 46, relating to tax sales in the Ottawa district, and of the payment of taxes made by defendant to the wrong officer, as stated in this case. *Cushing* v. *McDonald*, 26 U. C. R. 605.

Patented Land.]—On the evidence set out in this case, to sustain a title under a tax sale made in 1839, it was held sufficiently shewn that the land had been returned by the surveyor-general as described for patent. *Jones* v. *Cowden*, 34 U. C. R. 345.

Purchaser's Lien—*No Arrears.*]—R. S. O. 1877 c. 180, s. 165, does not apply in a case where there have been no taxes in arrear at the time of the sale of the land for taxes. *Charlton* v. *Watson*, 4 O. R. 489.

Purchase Money.]—Action by sheriff for purchase money—Right to maintain—Form of declaration. See *Jarvis* v. *Cayley*, 11 U. C. R. 282.

Recovering Back Purchase Money.]—Where lands not assessable were improperly sold for taxes: — Held, that the purchaser could not recover back the money in an action against the county. It did not appear in this case whether a conveyance had been executed to the plaintiff or not. *Austin* v. *County of Simcoe*, 22 U. C. R. 73.

Retroactive Effect of Act.]—The 8 Vict. c. 22 is a declaratory Act, retrospective as well as prospective. *Doe d. Earl of Mountcashel* v. *Grover*, 4 U. C. R. 23.

Sale of Mortgaged Land—*Purchase by Mortgagor.*]—Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife, and L., for foreclosure the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage:—Held, that L. could not claim to have been a purchaser for value without notice, as such defence was not pleaded, and it was not a case in which leave to amend should be granted:—Held, further, that the facts proved on the trial were sufficient to put L. on inquiry and so amounted to constructive notice. *Lawlor* v. *Day*, 29 S. C. R. 441.

XI. Statute Labour.

Action to Recover Payment Under Protest.]—The plaintiff, to prevent his lands from being sold for taxes as non-resident lands, paid under protest to the sheriff the sum claimed, including costs, and then sued the county to recover back part of the amount, consisting of commutation of statute labour, which he disputed:—Held, that he could not recover, for the sheriff was not the agent of defendants, and there was nothing to shew that he had paid it over to their treasurer. The non-resident land fund is so far the property of the county, that they may be liable for it in such an action. *Robertson* v. *County of Wellington*, 27 U. C. R. 336.

Commutation.]—Municipal corporations, under 12 Vict. c. 81, and 16 Vict. c. 182, could not fix the commutation for statute labour at a higher rate than 2s. 6d. per day. *In re Till and City of Toronto*, 13 U. C. R. 477.

Commutation.] — Held, that under 16 Vict. c. 182, and 22 Vict. c. 99, s. 409, statute labour was imposed on all persons assessed on the assessment roll of a town, whether residents or non-residents, and that in the case of the latter the commutation was fixed by the statute at 2s. 6d., no by-law being necessary unless the municipality intended to fix it at a higher or lower rate. *Robinson* v. *Town of Stratford*, 23 U. C. R. 99.

Expenditure of Commutation Receipts.]—A township council can provide for the performance of statute labour upon the roads of their township to the extent of the commutation tax charged in respect of non-resident lands, and for payment therefor out of the general funds of the municipality before such tax has been received from the county treasurer; and the performance of such work is not necessarily restricted to any particular statute labour division. *In re Allan and Township of Amabel*, 32 C. P. 242.

Fines.]—The municipality of a township by by-law enacted, that any person liable to perform statute labour, who, after being duly notified, should neglect or refuse to attend, should forfeit and pay 5s. for every day he should so neglect or refuse, and the payment of such fine should release such person from the performance of the duty required of him by the law:—Held, not an attempt to compel commutation at a rate exceeding 2s. 6d. per day; and that the by-law was good. *In re Bannerman and Township of Yarmouth*, 15 U. C. R. 14.

Fines.]—A by-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour before the reeve or the nearest justice of the peace, who upon conviction should impose a fine of 5s. for each day's neglect, with costs, and adjudge that the payment of the said fine and costs should not relieve him from performance of the labour; and in default of payment should issue a distress warrant:—Held, good. *In re Stoddard and United Townships of Wilberforce, Grattan, and Fraser*, 15 U. C. R. 163.

Imprisonment.]—Under C. S. U. C. c. 55, s. 86, a warrant may issue to imprison a person for non-payment of statute labour tax, without first summoning him to answer, or making a conviction. *Regina* v. *Morris*, 21 U. C. R. 392.

It is not necessary, under C. S. U. C. c. 126, to set aside such warrant before an action can be brought against the justice. *Ib.*

The point decided being new, the court discharged without costs a rule nisi obtained to quash the conviction. *Ib.*

Jurisdiction of County Judge.] — An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the court of revision and thence to the county Judge, on the grounds of over assessment, and that the property was not liable to statute labour. On an application to stay proceedings before the Judge:—Held, that though a county Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted. *Township of Washington* v. *Long Point Co.*, 5 P. R. 279.

Non-resident Land.]—Observations as to assessment of several parcels of non-resident land less than 200 acres for statute labour. See *Hall* v. *Farquharson*, 15 A. R. 457.

Place.]—A party must perform his statute labour when called upon within the division of the township in which he resides. *Gates* v. *Davenish*, 6 U. C. R. 261.

Place.]—A proprietor of land cannot be compelled to do statute labour in the township in which the land lies, unless he is himself resident there. *Moore* v. *Jarron*, 9 U. C. R. 233.

Road Company.]—The plaintiffs were incorporated by 10 & 11 Vict. c. 95, to make a road from the town of Streetsville to different points specified, and had the right to claim the statute labour, by commutation or otherwise, to the extent of one half concession on each side of their road, and to collect it from the persons liable. The village of Streetsville, incorporated in 1857, was within one-half concession of plaintiffs' road, which ran through it. In 1858 the village council imposed and collected a rate, of which a certain sum was for commutation for statute labour:—Held, that the plaintiffs were entitled to recover from the defendants, as money had and received, so much of this sum as was received in respect of persons or property forming no part of the village of Streetsville mentioned in the plaintiffs' Act of incorporation, but within half a concession on each side of their road. *Streetsville Plank Road Co.* v. *Village of Streetsville*, 19 U. C. R. 62.

Separate Lots.]—Held, under 13 & 14 Vict. c. 67, where a non-resident owns several lots in the same township or county, that he is chargeable with the rate of commutation estimated with reference to the value of such lots separately, and cannot claim to have them rated according to their aggregate value. *Canada Company* v. *Howard*, 9 U. C. R. 654.

Village.]—The municipal council of a village can impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants not otherwise assessed. *In re Dickson* v. *Village of Galt*, 9 U. C. R. 257.

Village.]—There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation was held ultra vires and void, and was quashed. *In re Stayner*, 46 U. C. R. 275.

XII. Miscellaneous Cases.

Constitutional Law — *Penalty for not Paying Taxes.*]—The Municipal Act of Manitoba provides that persons paying taxes before 1st December in cities and 31st December in rural municipalities shall be allowed 10 per cent. discount; that from that date until 1st March the taxes shall be payable at par; and after 1st March 10 per cent. on the original amount of the tax shall be added:—Held, that the 10 per cent. added on 1st March was only an additional rate of tax imposed as a penalty for non-payment, which the local Legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. Ross v. Torrance, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co.*, *South Dufferin* v. *Morden*, *Gibbins* v. *Barber*, 19 S. C. R. 204.

Correction of Roll.]—One S., from 1858 to 1861, inclusive, occupied as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots, and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot 24 had during these four years been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was applied to to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, $228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere. *In re Secker and Paxton*, 22 U. C. R. 118.

Effect of Plan.]—Quære, whether a person who has laid out land into town lots or village lots for sale cannot afterwards if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Allan*, 10 O. R. 110.

Fixtures.]—An engine and boiler in the hands of a receiver having been sold for taxes, and the establishment in which they were allowed to remain after the sale having been afterwards sold by order of the court in one lot as a going concern, it was held, under the facts stated in the case, that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realized at the chancery sale. *Gibson* v. *Lovell*, 19 Gr. 197.

Halifax Assessment Act.]—The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in the city a first lien thereon except as against the Crown:—Held, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed. *O'Brien* v. *Cogswell*, 17 S. C. R. 420.

Lease—*Building over Lane—Covenant to Pay Taxes.*]—A lease made in pursuance of the Short Forms Act of specifically described premises contained a provision that the lessee might at any time build or extend any building over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane:"—Held, per Hagarty, C.J.O., and Burton, J.A., affirming 26 O. R. 489, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane. Per Osler and Maclennan, JJ.A., that the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane:—Held, also, however, that this was at all events a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the assessment department. *Janes* v. *O'Keefe*, 23 A. R. 129.

Lease—*Covenant to Pay Taxes.*]—Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway com-

pany for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. *In re Canadian Pacific R. W. Co. and City of Toronto*, 27 A. R. 54.

Lease—*Taxes of Former Years—Tenant Primarily Liable.*]—By the Assessment Act, R. S. O. 1897 c. 224, s. 26, any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary: —Held, that under the above section a tenant is not at liberty to deduct from the rent, and to compel his landlord to pay, taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy. Heyden v. Castle, 15 O. R. 257, discussed. *Meehan* v. *Pears*, 30 O. R. 433.

List of Taxes.]—Held, that 13 & 14 Vict. c. 67, ss. 46 and 47, did not make the list of taxes directed to be prepared by the treasurer binding. *McAdie* v. *Corby*, 30 U. C. R. 349.

Montreal Harbour Improvements.]—A by-law passed in 1889 under the Quebec statute 52 Vict. c. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated $163,750 thereof for the construction of a tunnel with approaches as shewn on a plan annexed from Craig street, in a line with Beaudry street to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open cut approach, a high level roadway to give communication from Craig street to Notre Dame street, on the surface of the ground. These works constituted, in fact, an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel, and the remainder the high-level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the superior court held that it was authorized and legalized as an "existing roll," by the Act 57 Vict. c. 57, s. 1 (Que.), and this judgment was affirmed by the court of review. Held, that, notwithstanding the reference therein to "existing rolls," the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan. *White* v. *City of Montreal*, 29 S. C. R. 677.

Non-Resident Land Fund.]—Held, that all moneys received by the county treasurer from non-resident land tax, either from the owners or from the proceeds of tax sales, do not become in his hands the moneys of any particular municipalities, so as to entitle them to sue him at once as for their moneys, but that such funds must be considered as belonging to the county council, whose duty it is to appropriate them as by law directed; and therefore held, that an action for money had and received would not lie against the treasurer, at the suit of a township municipality, for moneys paid over by him, before such appropriation, to the township reeve, who had misapplied them. Quære, whether an action would lie against the treasurer in any case for non-payment, or whether he could discharge himself by payment to the reeve. *Township of Nottawasaga* v. *Boys*, 21 C. P. 306.

Non-Resident Land Fund.]—Sums were credited by the treasurer of a county in the corporation books to certain townships, in respect of the non-resident land fund. Portions thereof were paid over to the townships, and other sums were in the same books charged against one of the townships which the township considered itself not chargeable with. The treasurer's books, containing these entries, were audited and approved by the county council, but no by-law had been passed by the county council appropriating the fund: —Held, that the townships had no relief in equity. *United Townships of Mara and Rama* v. *County of Ontario*, 13 Gr. 347.

Payment by Sheriff.]—A sheriff returned to a ven. ex. and fi. fa. residue against goods that he had made $50, out of which he had paid a collector of taxes $48.39 claimed by the collector as taxes due by the defendant at the time of the seizure under the writ on land upon which the goods were, and of which the sheriff had notice prior to the sale, and that he had retained the balance towards his fees, &c. No distress had been made by the collector:—Held, that the sheriff must account to the execution creditor for the $50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute. *Adshead* v. *Grant*, 4 P. R. 121.

Percentage on Arrears.]—Under C. S. U. C. c. 55, the 10 per cent. charged upon arrears of taxes due upon land is to be charged upon the whole amount due at each annual settlement, thereby making it a compound computation of 10 per cent. each year, and not upon the amount of each year's taxes separately. *Gillespie* v. *City of Hamilton*, 12 C. P. 426.

Possession—*Tax Title.*]—Sub-section 4 of s. 5 of the Real Property Limitations Act, R. S. O. 1887 c. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to a title acquired under a sale for taxes. *Brooke* v. *Gibson*, 27 O. R. 218.

Provision for Losses.]—Quære, whether a township council is at liberty to provide for abatements and losses which may occur in the collection of the county rate in respect of personal property. *Grier* v. *St. Vincent*, 13 Gr. 512.

Purchase by Life Tenant—*Purchaser for Value without Notice.*]—One Tripp, being owner of certain land, executed a marriage settlement, under which his wife was entitled to the land for her life; the taxes afterwards fell into arrear, and the land was sold by the sheriff to pay them. By arrangement with the purchasers Tripp's widow became entitled to their interests in the property;

and she having sold it to the defendant G., the purchaser at sheriff's sale conveyed to G. In a suit by the assignee of Tripp's heirs to set aside this sale, G. claimed to be a purchaser for value without notice. The same solicitor acted for the vendors and vendee, G., in the transaction of the sale to G., and this solicitor knew then and before that Tripp had been the owner, and that he had executed a marriage settlement under which his wife was tenant for life: but he did not know or suspect she was bound to pay the taxes for which the land was sold, and he did not communicate to G. that she was under any such obligation:—Held, that G. was not affected by constructive notice of the liability; and the bill against him was dismissed with costs. *Monro* v. *Rudd*, 20 Gr. 55.

Quieting Titles Act.]—Under the Act for Quieting Titles the court has no jurisdiction to grant a certificate unless all taxes except those for the current year have been paid. *Ex parte Chamberlain*, 2 Ch. Ch. 352.

Seizure for Rent after Seizure for Taxes.]—C. owned a boiler and smoke pipe, which had been erected in a building of which he was sub-lessee. On the 19th February they were sold for city taxes due by him, and bought by the plaintiff; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord:—Held, that they were liable to such seizure:—Held, also, that the goods could not be considered as in the custody of the law after the sale on the 19th February. *Langton* v. *Bacon*, 17 U. C. R. 559.

Sinking Fund.]—Remarks as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due. *County of Frontenac* v. *City of Kingston*, 30 U. C. R. 584.

Sinking Fund.]—Mandamus to municipal corporation to levy sinking fund. See *Clarke* v. *Town of Palmerston*, 6 O. R. 616.

Tax.]—Every contribution to a public purpose imposed by superior authority is a "tax." *Ecclésiastiques de St. Sulpice de Montreal* v. *City of Montreal*, 16 S. C. R. 399.

Tenant for Life.]—Semble, a tenant for life of the whole estate of the testator, consisting of an improved farm and of wild lands, is bound to keep down the taxes upon the whole. *Biscoe* v. *VanBearle*, 6 Gr. 438.

Tenant for Life.]—A devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, and they form a first charge on the testator's interest. *Gray* v. *Hatch*, 18 Gr. 72.

Tenant for Life.]—As between a tenant for life in possession and a remainderman of property, part of which is productive and part unproductive, the life tenant will not be permitted to receive rents from part of the property while he allows taxes to accumulate on the vacant portion. Order made for a receiver of the estate of the tenant for life to pay the arrears of taxes out of the rents. *Re Denison, Waldie* v. *Denison*, 24 O. R. 197.

Title.]—The plaintiff, being in possession of a stock of goods, was assessed therefor in his own name, against which he appealed to the court of revision and to the county court Judge, when an indenture of assignment of the goods to one R. M. upon trusts for creditors was produced, and the plaintiff's name was erased and that of R. M. substituted therefor. The plaintiff alleged, however, that his name was not struck out on his application, for that his ground of appeal was that the goods were not equal to the debts due upon them, and so were exempt. The defendants having distrained upon the goods, the plaintiff replevied, and defendants avowed as for taxes due to them by the plaintiff, whose name did not appear on the collector's roll. It was contended that the plaintiff having denied his title, and his name being erased from the roll, he was debarred from replevying the goods distrained: but held, that under the assignment he had a right of possession in the goods, which, being coupled with actual possession, entitled him to maintain replevin under our statute: that he was not estopped: and that the plaintiff not being shewn to be indebted to defendants for taxes, the avowry failed. *Sargant* v. *City of Toronto*, 12 C. P. 185.

Vendor and Purchaser—*Proof of Tax Title.*]—The non-production of a certificate of no taxes in arrear is no objection to the title of a vendor. *Thompson* v. *Millikin*, 9 Gr. 359.

Vendor and Purchaser—*Unpaid Taxes.*] Compensation was granted to the purchaser of land out of the purchase money, for taxes due on the land and unpaid. *Stewart* v. *Hunter*, 2 Ch. Ch. 335.

Vendor and Purchaser—*Rate not Struck.*]—Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed. By an agreement, dated 4th November, 1881, between one Q. and defendants, for the sale of Q.'s business, after a recital to the same effect, the defendant covenanted to pay, satisfy, and discharge all the debts, dues, and liabilities, whether due or accruing, contracted by said Q. in connection with said business, &c. Q. was assessed for goods sold under the agreement before the making thereof, but the rate was not imposed, and the amount of taxes ascertained and fixed until May, 1882, thereafter:—Held, that there being no debt until the rate was struck in May, 1882, Q. when he sold the goods should have applied to have the purchaser's name inserted instead of his own, or have expressly provided in his agreement that the purchaser should indemnify him against this amount; and that the said taxes were not a debt contracted in connection with said business within the terms of the agreement. *Devanney* v. *Dorr*, 4 O. R. 206.

Vendor and Purchaser—*Evidence to Support Tax Deed.*]—On an application under the Vendors and Purchasers Act, R. S. O. 1877 c. 109, to compel a purchaser to carry out a purchase, it was shewn that the vendor claimed through a tax sale, and had declined to produce any further evidence of the validity of the tax sale than the treas-

urer's deed, and what might be obtained from the treasurer's books, returns, and warrants, to which he referred the purchaser:—Held, that the treasurer's lists of lands in arrear for taxes furnished to the warden would be as valid evidence of the non-payment as the treasurer's warrant to the sheriff under 16 Vict. c. 182, s. 55, was held to be by the judgment in Clarke v. Buchanan, 25 Gr. 559; and that coupled with the warrant from the warden they would be conclusive, and would afford evidence of non-payment up to the time of the sale. *Re Morton*, 7 O. R. 59.

Vendor and Purchaser—*Local Improvement Rates.*]—In a contract for sale and exchange of certain lands free from incumbrances, it was provided that "unearned fire insurance premium, interest, taxes, and rental" should be "proportioned and allowed to date of completion of sale:"—Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-law passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively:—Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it under 53 Vict. c. 50, s. 38 (O.) The substantial charge as a whole came into existence upon the finishing of the work. Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

Vendor and Purchaser—*Local Improvement Rates.*]—A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract. In an action to recover instalments under the contract:—Held, that local improvement rates imposed by municipal by-laws after, the work having been done before, the date of the contract, were incumbrances to be discharged by the vendor; but rates imposed and work done after the contract were not so. Re Graydon and Hammill, 20 O. R. 199, followed. Ecclésiastiques de St. Sulpice de Montreal v. City of Montreal, 16 S. C. R. 400, distinguished:—Held, also, that the covenant for payment of the instalments and the covenant against incumbrances were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into court so much of his purchase money as might be necessary to protect him against the incumbrances. McDonald v. Murray, 11 A. R. 101, and Tisdale v. Dallas, 11 C. P. 238, distinguished. *Armstrong* v. *Auger*, 21 O. R. 98.

Vendor and Purchaser—*Taxes Due up to Time of Sale.*]—A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated, amongst other things, that he was selling merely all his estate or interest under the second, subject to the first mortgage and interest; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration; and further, that the first mortgage could be paid off:—Held, that taxes due up to the sale should be paid by the vendor. *Re Wilson and Houston*, 20 O. R. 532.

Vendor and Purchaser—*Local Improvements.*]—Effect of local improvement rate created at the instance of covenantor (and others) upon his covenant against incumbrances. See *Cumberland* v. *Kearns*, 18 O. R. 151, 17 A. R. 281.

Vendor and Purchaser—*Special Tax—Ex Post Facto Legislation.*]—Assessment rolls were made by the city of Montreal under 27 & 28 Vict. c. 60, and 29 & 30 Vict. c. 46, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed. New rolls were made assessing the lands for the same improvements and the purchaser paid the taxes and brought suit en garantie to recover the amount from the vendor. Held, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvement had been legally imposed till after the vendor had become owner of the lands, and that the vendor was not obliged by her warranty and declaration that taxes had been paid to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *Banque Ville Marie* v. *Morrison*, 25 S. C. R. 289.

See MANDAMUS, II. 4 (a)—MUNICIPAL CORPORATIONS, XII. 4—PARLIAMENT, I. 12—RAILWAY, III.—STREET RAILWAYS, 1—WAY, IV. 3, 4.

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ATTACHMENT OF DEBTS.

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I. BY AND AGAINST WHOM AND FOR WHAT ATTACHING PROCEEDINGS MAY BE TAKEN.

Agent.]—May be attached when the garnishee resides out of the jurisdiction. *Brown* v. *Merrills*, 3 L. J. 31.

Agent—*Foreign Corporation.*]—But not where the garnishee is a foreign corporation, out of the jurisdiction, as the statute only allows an agent to be served with a writ of summons for the purpose of commencing an action. *Lundy* v. *Dickson*, 6 L. J. 92; *Bank of British North America* v. *Laughrey*, 2 C. L. J. 44.

Amount Actually Due.]—A garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order nisi is obtained and served. Where a final order for payment over has been issued, and it afterwards appears that the debt was assigned before the attaching order was moved for, the final order should be rescinded. *Beaty* v. *Hackett*, 14 P. R. 395; *Parker* v. *McIlwain*, 17 P. R. 84.

Annuity—*Breach of Trust.*]—A testator having bequeathed the sum of £500 per annum, payable out of the rents, income, and profits of his real and personal estates indiscriminately for the support of his widow and family (the widow having become sole executrix), her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like: and, semble, that where there is no form of legal proceeding or process whereby such a fund can be reached, the court of chancery has power, under 22 Vict. c. 22, s. 288, to apply a remedy, as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Gr. 486.

But see next case, and see *Blake* v. *Jarvis*, 17 Gr. 203.

Annuity.]—A bill was filed by judgment creditors alleging that their debtor was devisee and executrix of her husband; that she was entitled to an annuity under his will, and was a creditor of his estate for advances she had made to pay his debts, and claiming that these debts and claims should be ascertained, the estate administered, and sufficient land of the testator sold to pay what the estate owed, or so much of it as would cover the judgment debt:—Held, that the plaintiff was not entitled to relief. Bank of British North America v. Matthews, 8 Gr. 486, overruled. *Gilbert* v. *Jarvis*, 16 Gr. 265.

Assignment After Attaching Order.]—On 30th July, 1859, the garnishee executed a mortgage for £200 to the judgment debtor, payable in six annual instalments of £33 6s. 8d. each. About a month after this, he paid £50 on account of the mortgage. An attaching order was obtained before the first instalment fell due, and this on 29th June, 1860, was followed by an order that the garnishee should pay to plaintiff £34 11s. 8d. in the following manner:—£16 13s. 4d. on 30th July, 1861, and £17 18s. 4d. on 30th July, 1862. An application was made to set aside these orders upon a suggestion that the mortgage had been assigned; but it appearing that the assignment, if any, was made after the attaching order had been served, the application failed. *Worthington* v. *Peden*, 8 L. J. 48.

Assignment Before Attaching Order.]—Where it was made to appear that the debt sought to be attached was bonâ fide assigned before the issue of the garnishee order, the order was, on the joint application of the judgment creditor and his assignee, set aside. *Clark* v. *Clark*, 8 L. J. 107.

Assignment Before Attaching Order.]—An order to pay over was made upon a summons of which the judgment debtor had no notice. It appeared, on motion to rescind such order, that the debt had been assigned before the order, of which the garnishees had notice before the summons was served on them, to which they did not appear, and before they paid over the money under the order. The order was rescinded, with costs to be paid by the judgment creditor, who was also aware of the assignment. *Ferguson* v. *Carman*, 26 U. C. R. 26.

It was alleged, but held not sufficiently proved, that the judgment debtor was insolvent when he made the assignment; and quære, whether the judgment creditor could set that up. *Ib.*

Assignment Before Attaching Order.]—A debt duly assigned to another is not garnishable, and the attaching order will be set aside; and where the judgment creditor was aware that this answer would be made to his application by the judgment debtor, the latter was allowed the costs incident to such answer. *Macaulay* v. *Rumball*, 19 C. P. 284.

Assignment Before Attaching Order.]—Orders upon a garnishee to attach and pay over were set aside, on its being shewn

that the debt in question had been assigned by the garnishee before the judgment creditor had obtained his judgment; but no costs were given, as the assignees had neglected to give notice of the assignment to the garnishee. *Grant* v. *McDonell*, 39 U. C. R. 412.

Assignment Without Notice to Garnishee.]—Although an order is not intended to operate upon debts already assigned, yet, where the assignee had neglected to give the garnishee precise and distinct notice of the assignment, and his attorney stood by whilst such order was made, and the garnishee had paid the debt to the judgment creditor, the court relieved the garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor. *In re Jones, Ex parte Kelly*, 7 C. P. 149.

Assignees of Contract.]—N. had a contract with the corporation of Guelph for work, defendants being his sureties. After completing a portion he gave it up, and assigned to defendants all his interest in the contract, giving them power to finish the work and receive payment, the moneys to be applied to indemnify themselves and complete the work, and the residue to be paid to him. N. afterwards left the country, and they finished the job. The plaintiff, who had been N.'s foreman, and continued with defendants, recovered judgment against them for his services, and the defendants, having sued the corporation in N.'s name on the contract, obtained an award against them:—Held, that the plaintiff might attach the moneys which defendants, as assignees of N., were entitled to recover from the corporation. *Alden* v. *Boomer*, 2 P. R. 339.

Assignee of Judgment Creditor.] — The assignee of a judgment creditor can proceed in his name to attach a debt. *In re Smart* v. *Miller*, 3 P. R. 385.

Attorney of Absconding Debtor.]—The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Stover*, T. T. 3 & 4 Vict.

Award and Decree—*Untaxed Costs.*]—A debt is garnishable where it consists of money due under an award and decree of the court of chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes his liability, and the Judge is not bound to direct an issue. *In re Sato* v. *Hubbard*, 8 P. R. 445.

Balance After Set-off.]—In general, where there are opposite claims between the parties, only the balance can be attached. *Nedley* v. *Buffalo, &c., R. W. Co.*, 3 L. J. 111.

Building Contract—*Default.*]—McLeod contracted with Hawkins to erect a house, for which he was to receive $1,225; $300 when the frame was up, $300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd February, 1884. McLeod went on with the work and received the two sums of $300, but he had not completed the building on the 3rd February, 1884. He, however, continued the work till after that time, and until after the 1st April, when, the building being still unfinished, Hawkins entered, took possession, and completed it. McCraney & Son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th March, 1884:—Held, that at the time of serving the attaching order no debt existed according to the terms of the contract, and no promise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate. *McCraney* v. *McLeod*, 10 P. R. 539.

Claim in Litigation.]—Pending an appeal from the judgment herein by defendant, the amount thereof was paid into the court of common pleas under an order of that court. Before such payment, one F. obtained a garnishee summons in the division court against the plaintiff as primary debtor and the defendant as garnishee, but through some oversight no provision was made in the order for the result of the garnishee proceedings. After the appeal had been dismissed defendant applied for an order that the amount of the claim in the division court suit be retained out of the money in court, to abide the result of such suit. It was not shewn that this claim was a debt that could be garnished, or that the division court had jurisdiction in the matter, and it appeared that the plaintiff had assigned his claim to the money in court to a third party in ignorance of the garnishee proceedings, which he had not heard of until this application was made:—Held, that under these circumstances the defendant was not entitled to relief. *Parkinson* v. *Clendinning*, 7 P. R. 367.

Costs Not Taxed.]—By the judgment in this action the defendant was found to owe the plaintiff $115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued garnishment process from a division court, attaching all debts due from defendant to plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid $115 into the division court, having previously paid another sum of $115 to the sheriff to procure his release from arrest under a capias after judgment in this action:—Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process, and properly payable into the division court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into court, as it was by his own default; and therefore the money paid into court pursuant to the attachment was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff. *Macpherson* v. *Tisdale*, 11 P. R. 261.

Crown.]—The garnishee clauses of the C. L. P. Act do not extend to the Queen. The Crown, therefore, cannot under them attach a debt. *Regina* v. *Benson*, 2 P. R. 350.

Damages.]—The garnishees had given the judgment debtors a bond conditioned that one A., in their employment, should pay over all moneys received:—Held, that the liabilities in-

curred under this bond could not be attached. *Griswold* v. *Buffalo, Brantford, and Goderich, R. W. Co.*, 2 P. R. 178.

Damages.]—A verdict against an insurance company for unliquidated damages, even although not moved against, and which the company had promised to pay without entry of judgment, cannot be attached until it becomes a debt by judgment. *Boyd* v. *Haynes*, 5 P. R. 15.

Damages.]—The sum to be garnished was money awarded, of which part was for work done under a contract, and the remainder for damages sustained by having the work taken out of the execution debtor's hands:—Held, that as the latter was not a debt until the award was made, only the attaching orders, after the award would bind it, and not those before. *Tate* v. *City of Toronto*, 3 P. R. 181.

Damages.]—Claims for unliquidated damages cannot be attached before judgment, by which alone they become debts. *Bank of Toronto* v. *Burton*, 4 P. R. 56; *Gwynne* v. *Rees*, 2 P. R. 282.

Damages.]—The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered, before the account is determined by decree or otherwise. *Roberts* v. *City of Toronto*, 15 Gr. 236.

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

Debt Due to Judgment Debtor's Wife.]—Held, that the debt alleged in the bill being under a bond to the wife of M., the judgment debtor, and not to M. himself, was not such a claim as could be garnished under the C. L. P. Act. *St. Michael's College* v. *Merrick*, 26 Gr. 216.

The plaintiffs had obtained a verdict at law against J. D. M., and a rule nisi to set aside the verdict was pending, when the bill in this suit was filed on behalf of all the creditors of J. D. M. to impeach a transaction whereby S. M., the wife of J. D. M., was substituted for him in a contract in which he was interested with one A. M. It alleged that J. D. M. was insolvent, and that he had induced A. M. to admit S. M. as a partner in his stead for the purpose of defrauding the plaintiffs in the recovery of their debt: that A. M. afterwards purchased J. D. M.'s interest, and agreed to pay S. M. $10,000 therefor (which sum was not due at the commencement of this suit): that S. M. was merely a trustee for her husband in respect of this agreement. And the bill prayed for an injunction to restrain A. M. from paying $10,000 to each of the defendants, and that the money might be applied to the payment of their debt. A demurrer for want of equity was allowed on the ground that the A. J. Act, 1873, required the plaintiffs to pursue the remedy sought by the bill in the court in which the action was pending. On appeal, the judgment below was affirmed, on the ground that the bill was not sustainable, as the moneys could not be attached in equity. *S. C.*, 1 A. R. 520.

Debt Due to Two.]—A debt owing to two cannot be attached to satisfy a claim against one of them only. *In re Smart* v. *Miller*, 3 P. R. 385.

Debt Due to Two.]—A debt due to a judgment debtor jointly with another person cannot be attached. Macdonald v. Tacquah Gold Mines Co., 13 Q. B. D. 535, followed. *Parker* v. *Odette*, 18 P. R. 69.

Debt That May be Set Off.]—Any debt that a defendant could set off at law against his creditor may be attached. *McNaughton* v. *Webster*, 6 L. J. 17.

Discretion.]—Quære, has not a Judge a discretion, in the case of an attachable debt, to decline under special circumstances to make an order to pay over the amount, where such an order would be inequitable, or tend to give one creditor a preference, after the making by the judgment debtor of a general assignment in favour of his creditors without preference or priority. *Lee* v. *Gorrie*, 1 C. L. J. 76.

Discretionary Interest in an Estate.]—E. A. conveyed real and personal estate to one B. upon trust to convert the same into money and pay debts, &c., and as to any balance remaining, upon trust to pay the same to R. A., son of E. A., or if B. should see fit he might invest the same in the purchase of a homestead, and convey the same to R. A. in fee:—Held, that there was no debt due from B. to R. A. which could be garnished by the creditors of R. A. *McKindsey* v. *Armstrong*, 10 A. R. 17.

Division Court Bailiff.]—Semble, that money in the hands of a division court bailiff may be attached. *Lockart* v. *Gray*, 2 C. L. J. 163.

Division Court Jurisdiction.]—Semble, that debts of amounts within the jurisdiction of division courts will not be attached by superior courts, under s. 194, C. L. P. Act, 1856. *Topping* v. *Salt*, 3 L. J. 14.

Dividend in Insolvency.]—Quære, can a debt be attached in the hands of an assignee for the payment of debts, before a dividend has been declared by him. *Commercial Bank* v. *Williams*, 5 L. J. 66.

Dividend in Insolvency.]—A judgment creditor, seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a dividend; and before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.:—Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made. McCraney v. McLeod, 10 P. R. 539, explained and followed. *Parker* v. *Howe*, 12 P. R. 351.

Equitable Debt.]—A debt due by a garnishee to a person who is a trustee for it for the judgment debtor, cannot be attached to satisfy the judgment debt; there must be a legal debt due by a legal debtor to a legal creditor. *Boyd* v. *Haynes*, 5 P. R. 15.

Equity of Redemption.]—Semble, that an equity of redemption in mortgaged premises cannot be sold upon a garnishment execution sued out against a mortgagor, in respect of the mortgage debt, at the suit of a creditor of the mortgagee. *Vannorman* v. *McCarty*, 20 C. P. 42.

Executor.]—An order upon executors to pay a simple contract debt, pursuant to an attaching order, was refused, on the ground that they might be liable on specialty debts, after satisfaction of which they might have no assets, and before satisfaction of which they ought not to be ordered to pay a simple contract debt. The attaching order was also at the same time discharged. *Ward* v. *Vance*, 10 L. J. 269.

Executor.]—The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as such executor to the judgment creditor. *Tiffany* v. *Bullen*, 18 C. P. 91.

Foreign Corporation.]—Held, that the garnishees, being a foreign corporation, were not "within Ontario," and therefore not subject to the provisions of Con. Rule 935. *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 308.

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

Foreign Corporation.]—A foreign corporation incorporated under the laws of one of the United States, and not shewn to carry on one of the principal parts of its business in this Province, is not "within Ontario" within the meaning of Rule 935, and is not subject to garnishment process under that Rule. Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed. County of Wentworth v. Smith, 15 P. R. 372, distinguished. Macdonald v. Tacquah Gold Mines Co., 13 Q. B. D. 535, followed. *Parker* v. *Odette*, 16 P. R. 69.

Foreign Corporation.]—The garnishees, an English insurance company, had an agent or attorney and a chief agency in Ontario, and service of process could be made upon such attorney for the purposes mentioned in ss. 14 and 17 of 55 Vict. c. 39 the Ontario Insurance Corporations Act:—Held, that the garnishees were not "within Ontario," within the meaning of Rule 935. Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed. County of Wentworth v. Smith, 15 P. R. 372, distinguished. *Boswell* v. *Piper*, 17 P. R. 257.

Husband and Wife—*Purchase of Land by Wife*—*Action to Set Aside Fraudulent Transfer.*]—D., having entered into an agreement to purchase land, had the conveyance made to his wife, who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was attached in the hands of M., and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was by consent paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the resale as trustee for D.:—Held, that under the evidence given in the case, the original transfer to the wife of D. was bonâ fide; that she paid for the land with her own money and bought it for her own use; and that if it was not bonâ fide the supreme court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity. Held, further, that even if the proceedings were not bonâ fide, the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt it was not one on which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings, and that the only relief possible was by an independent suit. *Donohoe* v. *Hull*, 24 S. C. R. 683.

Income from Estate.]—The defendant's father devised his estate to trustees upon the trust, among others, "to pay my son A. (the defendant) the interest of the sum of $800 annually during the term of his natural life." An order was made by the master in chambers, directing the trustees to pay over the interest from time to time accruing, to the plaintiff, who was a judgment creditor of the son. *Lloyd* v. *Wallace*, 9 P. R. 335.

Insurance Loss.]—Moneys due or owing from an insurance company to a policy holder although unadjusted are garnishable under the enlarged provisions of Con. Rule 935. Webb v. Stenton, 11 Q. B. D. 518, and Stuart v. Grough, 15 A. R. 299, considered. *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 26, 308.

Insurance Loss.]—A claim under an insurance policy for a loss, the amount of which has been settled and adjusted, is not a debt which can be attached under s. 178 of R. S. O. 1887 c. 51.; and Con. Rule 935 does not apply to division courts. Semble, even if it did, that such a claim could not be attached as long as the insurance company's right to

have the money applied in rebuilding was open. *Simpson* v. *Chase*, 14 P. R. 280.

Interest in Estate.]—G. was entitled under the will of C. to a life estate in land, and to the proceeds of personalty to be paid to her by the executors. Judgment creditors of G. had had a fi. fa. goods returned nulla bona, but had not sued out a fi. fa. lands, when a receiver was appointed to the estate of C., whereupon the judgment creditors by petition, before the passing of the Ontario Judicature Act, applied for an order that the receiver might be directed to pay their judgment out of G.'s money in his hands; or that they might attach and sell G.'s life estate, or that the tenants of the realty might be directed to attorn to the petitioners and that they might be put in receipt of the rents and profits:—Held, that such petition had been properly dismissed, for the creditors were not in a position when they presented it either to garnish the personal estate, if that could have been done under the A. J. Act, 1873, or to seize the real estate under execution; and they had therefore no rights which the appointment of a receiver interfered with. But, held, following Re Cowan's Estate, 14 Ch. D. 638, that the petitioners might now garnish the moneys in the hands of the receiver, and it being alleged that a fi. fa. lands had since issued, the court upon payment of costs granted leave to the petitioners, under the prayer for general relief, to sue out such writs as they might be advised. *Leaming* v. *Woon*, 7 A. R. 42.

Interest in Estate.]—The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under Rule 370 relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in præsenti solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts. The case of Leaming v. Woon, 7 A. R. 42, is not to be followed, being founded on Re Cowan's Estate, 14 Ch. D. 638, which is now overruled by Webb v. Stenton, 11 Q. B. D. 530. The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of fi. fa. against goods or lands. *Stuart* v. *Grough*, 15 O. R. 66, 15 A. R. 299.

Judgment Debt.] — Where money, the proceeds of land belonging to some of the defendants, had been ordered to be paid into court, to meet a judgment held by plaintiff against one of these defendants, and the decree directed that the plaintiff should pay to the other defendants their costs of suit:—Held, that these defendants were entitled to a garnishee order against the money to be paid into court. *Grant* v. *Kennedy*, 2 Ch. Ch. 269.

Judgment Debt.]—A sum of money directed by a decree or order to be paid, is a debt which is attachable under C. S. U. C. c. 24, s. 19. *Cotton* v. *Vansittart*, 6 P. R. 96.

Judgment Debt.]—The recovery of a verdict for a debt which might have been attached before any action brought for its recovery, will not make it less a subject of attachment. *McKay* v. *Tait*, 11 C. P. 72.

Judgment for Costs.]—A judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. 1877 c. 50, s. 304, nor garnish debts due to him. *Ghent* v. *McColl*, 8 P. R. 428.

Judgment for Costs.]—A defendant who has obtained execution upon a rule of court for the payment of costs of the day by the plaintiff, is, under R. S. O. 1877 c. 67, s. 12, and c. 66, s. 72, a judgment creditor, and entitled to garnish moneys due by the plaintiff. *Elliot* v. *Capell*, 9 P. R. 35.

Judgment for Costs.]—The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay. Any doubt existing upon the English cases and the O. J. Act rules, is cleared up by R. S. O. 1877 c. 66, s. 72. *Re Irvine*, 12 P. R. 297.

Judgment for Costs—*Assignee of Judgment.*]—Under Rule 935 an order to attach debts may be founded on a judgment for costs only. Troutman v. Fisken, 13 P. R. 153, distinguished. Under the same Rule an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment. *McLean* v. *Bruce*, 14 P. R. 190.

Legacy.]—An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him. Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the court; and the way to bring them before the court is by administration proceedings. Quære, whether the assignee of a judgment would be entitled to administration. The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee. *McLean* v. *Bruce*, 14 P. R. 190.

Money in Court.]—The judgment debtors had leased from C. a lot of land on the river Humber, on which there was a stone quarry. Upon an arbitration under 20 Vict. c. 146, the Great Western R. W. Co. were directed to pay them £255 as a compensation for injury occasioned to them as such lessees by the erection of a permanent railway bridge over the river. Before the arbitration, one of them, being then sole lessee, had mortgaged to a building society his interest in the land, and all privileges as to quarrying stone contained in the lease, and the railway company, being notified by the society not to pay to the judgment debtors the amount awarded, paid it into the common pleas. The judgment creditors, having obtained judgment in the Queen's bench, attached the claim, and asked to be allowed to take the money out of court, or for an order on the company to pay it:—Held, that the money being in the common pleas, the court could not interfere, but that if they had power to dispose of it the mortgagees would be entitled before the judgment credi-

tors. Quære, whether the company were authorized, under 16 Vict. c. 99, to pay such money into court, and whether such debt could be attached. *French* v. *Lewis*, 16 U. C. R. 547.

On a subsequent application to the common pleas on behalf of the mortgagees, that court refused to interfere, on the ground that the company had no right to pay the money into court. *Ib.* 551, note.

Mortgage Surplus.]—The surplus money arising from sale of mortgaged premises in the hands of the mortgagee, may be attached on a judgment against the mortgagor. *McKay* v. *Mitchell*, 6 L. J. 61.

Mortgage Surplus.] — The Trust and Loan Company held a mortgage from one O., with power of sale for cash or for credit, and under it, on the 22nd November, sold the land to C. who paid them part in cash and gave a mortgage for the balance. There was a mortgage upon the land to one D., executed before, but registered after theirs, and they paid to D.'s assignee, out of the cash received, the surplus of the whole purchase money above their claim. The mortgage declared that they should stand seized of the proceeds of any sale in trust to apply it as there mentioned. A judgment creditor of O., having served his attaching order on the 25th November, sued the company as garnishees for such surplus:—Held, that he could not recover: for, 1. defendants were trustees, and could not be sued at law for the money, even if they had wrongfully paid it over to D.; and, 2. they were justified in so paying, notwithstanding the jury found that D.'s mortgage was fraudulently kept alive for O.'s benefit, for defendants had no knowledge of such fraud. *Smith* v. *Trust and Loan Co. of Upper Canada*, 22 U. C. R. 525.

Partnership.]—Thomas F. Park was a member of two firms, Park & McLeod, and Park & Park (Theodore, J.) Park & Park recovered judgment against M., a judgment creditor of Park & McLeod:—Held, that Park & Park could not on their judgment attach the debt due by M. to Park & Park. *McCormick* v. *Park*, 9 C. P. 330.

Partnership.]—One A. P. McD. entered into a written contract with defendants to execute certain work for them, and verbally agreed to give one A. McD. an interest in the contract. A. McD. did not sign the contract, and afterwards drew money on it under the authority of A. P. McD., and apparently as his agent. Upon a writ to attach a sum of money due upon the contract, in a suit by plaintiffs v. A. P. McD.:—Held, that it was not a partnership debt, and therefore was attachable against A. P. McD. *Bescoby* v. *Hamilton Water Commissioners*, 9 C. P. 81.

Promissory Note.]—A negotiable promissory note, not yet due, is not a debt which may be attached within the meaning of Rule 370 of the O. J. Act. *Jackson* v. *Cassidy*, 2 O. R. 521.

Promissory Note.]—Under the garnishee clauses of the C. L. P. Act of Prince Edward Island, transcripts of ss. 60 to 67 of the English C. L. P. Act, 1854, an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, and payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a Judge's order, is a valid discharge. *Robice* v. *Rankin*, 11 S. C. R. 137.

Promissory Note.]—The enlarged provisions of Rule 935 do not extend the right of attachment of debts to the case of money payable on negotiable securities; the claim of a judgment debtor to be paid the amount of a promissory note is not dependent on the doctrines of equitable execution. Jackson v. Cassidy, 2 O. R. 521, followed. What is to be garnished is not the note itself, but the money payable thereunder; therefore the maker of the note, and not the person holding it for the judgment debtor, should be made garnishee: and there is no warrant in the practice for ordering the holder to hand the note over to the judgment creditor. *Exley* v. *Dey*, 15 P. R. 353. See the next case.

Promissory Note.]—After the discharge of the attaching order the plaintiff, two days before the maturity of the promissory note in question, obtained a new order attaching the same debt, making the holder of the note and the makers garnishees. Upon a motion for payment over by the garnishees or for alternative relief, an order was made appointing the plaintiff receiver of all moneys due or accruing due upon the note, to apply on the judgment, and restraining the garnishees from paying over the moneys otherwise, and from parting with the note. Hyam v. Freeman, 35 Sol. J. 87, followed. *Exley* v. *Dey* (No. 2), 15 P. R. 405.

Rent.]—Where the debt was in respect of rent of land mortgaged with a power of sale, and power to receive rent, &c., and no rent was in fact due, and ejectment had been commenced by the mortgagee:—Held, not to be a case for an attaching order. *McLaren* v. *Sudworth*, 4 L. J. 233.

Rent.]—Rent to become due at a future time cannot be attached. *Commercial Bank* v. *Jarvis*, 5 L. J. 66.

Rent.]—The mere registry of a judgment against a husband's lands, before the passing of 22 Vict. c. 34 (Married Women's Protection Act), does not of itself give a right to the judgment creditor to garnish a debt due for rent of the wife's land since that Act. *Burton* v. *Kelly*, 7 L. J. 20.

Rent.]—R. S. O. 1877 c. 136, ss. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes. And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived:—Held, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order:—Quære, whether the rents could be garnished against a mortgagee of the landlord. *Massie* v. *Toronto Printing Co.*, 12 P. R. 12.

Rent.]—Rent accruing but not yet payable cannot be attached in the division court notwithstanding R. S. O. 1887 c. 143, s. 2. Massie v. Toronto Printing Co., 12 P. R. 12, not followed. *Christie* v. *Casey*, 15 C. L. T. Occ. N. 13.

Rent.]—The plaintiff, having an unsatisfied judgment against the defendant in the high court, obtained from the master in chambers, ex parte, two orders, under Rules 935 and 940, attaching as debts due to the defendant certain rents owing by his tenants, the garnishees, and summoning them to appear before a county court Judge to shew cause why such rents should not be paid over to the plaintiff. Upon the application of a company, mortgagees of the demised premises, who had served notice upon the garnishees to pay the rent to them, the master made an order rescinding the attaching orders:—Held, that if the garnishees, upon the return of the summons, neglected to suggest to the court the claim of the company, as provided by Rule 944, they would not be protected by an order to pay to the plaintiff. The Leader, L. R. 2 Ad. & Ec. 314, followed. And, therefore, the company was not a "party affected" by the ex parte orders, within the meaning of Rule 536. No fraud or imposition was practised upon the court in not informing the master of the claim which might be set up by the garnishees or the company; it was a matter for hearing and adjudication before the county court Judge. *Parker* v. *McIlwain*, 16 P. R. 555. See the next case.

Rent—*Mortgagee — Rights of Third Person.*]—Held, reversing 16 P. R. 555, that mortgagees who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of Rule 536, "parties affected" by ex parte orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. And semble, that, even without that Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders:—Held, also, that the attaching orders ought to be set aside; for (1) although the service of the notice upon the tenants was not in itself sufficient to cause the tenants subsequent to the mortgage to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and (2) the notice signed by the mortgagor under the words "I approve of the above," operated as an assignment of the rents to the mortgagees. An attaching order binds only such debts as the debtor can honestly deal with without affecting the interests of third persons. *Parker* v. *McIlwain*, 17 P. R. 84.

Representative Capacity.]—A debt due by the garnishee to the judgment debtor as executor is not garnishable. *Macaulay* v. *Rumball*, 19 C. P. 284.

Representative Capacity.]—A debt due to an administrator as such cannot be attached to answer a debt due by him in his private capacity. *Bowman* v. *Bowman*, 1 Ch. Ch. 172.

Revocable Gift.]—Money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons on the bank to pay over. The order was issued on 17th August, thirteen days before the bank agency at the place where the debtor resided was advised of the deposit:—Held, that the amount could not be attached. Semble, that the father might revoke the gift, and therefore it was not a debt. *Caisse* v. *Tharp*, 5 P. R. 265.

Salary—*Medical Officer.*]—The salary of a physician of a municipal corporation, holding his appointment at their will, at an annual salary, payable quarterly, cannot be attached. *Shanly* v. *Moor*, 3 P. R. 223.

Salary — *Municipal Officer — Advances.*] —An order having been made attaching all debts due to a judgment debtor by a city corporation, a person describing himself as "paying teller" of the corporation made an affidavit in answer to the judgment creditor's application for a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit, the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination:—Held, that the affiant should be compelled to answer all questions put to him bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion:—Held, also, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made:—Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof. *Wilson* v. *Fleming*, 19 P. R. 203.

Salary—*Police Magistrate.*]—The salary of a judgment debtor, not actually due or accruing due at the time of service of the attaching order, but which may thereafter become due, cannot be attached to answer the judgment debt; and the enlarged provisions of Rule 935 have made no difference in this respect. The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached. *Central Bank* v. *Ellis*, 20 A. R. 364.

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

C.J.—Assuming that the judgment debtor was tenant by the curtesy of the land sold, upon its sale he became entitled only to a life use of the purchase money, and this use could not be reached by garnishee process in the manner attempted. Per Street, J.—There was no debt due from the solicitor to the judgment debtor, nor could it be said that the moneys in the hands of the former were subject to any trust in favour of the latter, nor that any claim on his part affecting them existed. If he had an interest in the land, he, in effect, released it to his daughter without any consideration, and the money was hers unless the release to her should be set aside as voluntary and a fraud upon his creditors. *Palmer* v. *Lovett*, 14 P. R. 415.

Sheriff.]—Money made by a sheriff under an execution is attachable in his hands for the debt of the execution creditor. *In re Smart* v. *Miller*, 3 P. R. 385.

Sheriff.]—Where an execution creditor has, under the statute of Anne, paid rent demanded by a landlord upon an execution against the tenant upon the premises of the former, and the sheriff levies as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums, and liable to him in an action for money had and received, and so does a bailiff under the Division Courts Act; and therefore the execution money in his hands might be attached, to satisfy the demand of another execution claimant against the execution creditor. *Lockart* v. *Gray*, 2 C. L. J. 163.

Surrender of Policy—*Terms not Settled.*]—Where the judgment debtor, after making a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at its value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage by him on real estate, and held by the garnishees, and the garnishees accepted the surrender, but on terms different to those proposed, it was held, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor. *Lee* v. *Gorrie*, 1 C. L. J. 76.

Tax Redemption Fund.]—Moneys paid by the owners of land sold for taxes, as redemption moneys, to the county treasurer, for the use of the purchasers, and banked in the name of the county treasurer, cannot be attached by a creditor of the county as a debt due by the bank to the county. *Wilson* v. *Counties of Huron and Bruce*, 8 L. J. 135; *S. C., ib.* 136.

Third Person Interested.] — Under a submission between one R. and the city of Toronto, it was awarded that the corporation should pay R. £1,925, as compensation for land taken for the esplanade, and £825 for damages sustained by the construction of it, to be paid on or before the 28th January, 1858, on the title to the land taken being perfected in the corporation. On the 2nd January a notice was served on the city chamberlain that R. had assigned to H. all the damages awarded, and requiring the city to pay H. On the 9th an order was made attaching all debts due by the city to R. to answer a judgment recovered against him by one G., and a summons for them to pay; and on the 14th the garnishees were ordered to pay G. within ten days, or execution to issue. The attaching order and summons, and the order to pay, were duly served on the chamberlain, but no notice of them was given by him to the solicitor, or any member of the corporation; and on the 8th May an execution issued against the city, under which a levy was made. They then applied for relief on the above facts, and it was shewn that the land in question had been mortgaged for a large sum to one B., who claimed to receive the sum awarded: — Held, that this, being upon a claim for unliquidated damages, could not be attached before judgment obtained upon it: that the part assigned to H. could clearly not be garnished; and that all proceedings subsequent to the attaching order must be set aside, on payment of costs by the garnishees, the judgment creditor to be at liberty to apply for a summons on them to pay him the amount of his claim, under which all the parties claiming might be heard. *Gwynne* v. *Rees*, 2 P. R. 282.

Unsettled Partnership Accounts.] — An unsettled balance due by one partner to another cannot be attached; but otherwise if it has been fully ascertained. *Campbell* v. *Peden*, 3 L. J. 68.

Wife's Legacy.]—Where on a debt contracted in 1855, plaintiff on 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of a legacy deposited by the wife of M. in her own name in the bank of the garnishees, she having been married on the 28th May, 1859. *Hope* v. *Muir*, 1 C. L. J. 275.

II. EFFECT OF ATTACHING PROCEEDINGS.

Action by Debtor.] — Declaration for work and materials. The plea set up several attachment orders obtained by judgment creditors of the plaintiff, alleging as to one that it was directed that the creditor should be at liberty to proceed against defendants; and that the others were duly served upon defendant and plaintiff:—Held, bad. *McGinnis* v. *Village of Yorkville*, 21 U. C. R. 163.

Attaching Creditor is Not Creditor of Garnishee.]—A judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own creditor, the judgment debtor, until he has paid the amount owing into court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied: —Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the Brockville and Ottawa R. W. Co. to W. S., his judgment debtor (which railway was now represented by the defendants), was not a "creditor" of the said company, holding a bonâ fide claim against it within 27 Vict. c. 57, s. 10 (D.) *Wardrope* v. *Canadian Pacific R. W. Co.*, 7 O. R. 321.

Debt Not Attachable.]—To an action on the common counts defendants pleaded that

before suit the plaintiff assigned the claim to one G.; that one H. recovered judgment against G., and obtained an order to attach all debts owing by defendant to G. to answer said judgment, and this debt then became bound in defendants' hands to answer the judgment. Plea held bad, the debt not being attachable as by law due to G. *Arthur* v. *Clough*, 17 U. C. R. 302.

Different Claimants.] — The garnishee was indebted to a railway company, the judgment debtors, on two negotiable bills accepted by him and not yet due, and they, in order to induce R., a creditor, to release a chattel mortgage which he held against them, promised to pay him out of the proceeds of these bills; there were also other claims by some of the directors of the company, which were to be paid in the same way. The judgment creditors obtained a summons on the garnishee to pay their claim, which was less than the amount due on the bills, and M., another creditor, subsequently obtained an order to attach the balance, but no summons had issued upon it. With the assent of the judgment creditors, the judgment debtors, and the garnishee, M. being no party to the arrangement, the acceptances were handed into court, and afterwards delivered to Z. on his paying in the money. These facts were stated on the return of the summons obtained by the judgment creditors, and the Judge in chambers was asked to determine what should be done with the surplus after paying the judgment creditors. The Judge refused to decide this, as he had no power to determine summarily between the claimants; and held that the money having been paid in without any authority, he could only order the surplus to be returned to the garnishee. Semble, however, that M., who had obtained an attachment order, should be preferred to R. and the directors. Semble, also, that the best course would have been for Z. to pay the claim of the judgment creditors, getting it indorsed upon the bills, and then the sum due to M., when he had obtained an order for payment. *Mellish* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 2 P. R. 171.

Execution Against Garnishee.]—Action on a mortgage for £309. Plea, non est factum. Second count, on a judgment in Queen's bench for £78. Third count, on a judgment in the common pleas for £128. To the last two counts the defendant pleaded, on equitable grounds, that the judgments were obtained on confessions taken by plaintiff from defendant, while the plaintiff was defendant's attorney, by fraud, and given without consideration, and by undue influence; and—after setting out two judgments in the county court, amounting to £99, recovered against the plaintiff, by C. and M. respectively, that C. and M. had each obtained an order to attach all debts due to this plaintiff from defendant to satisfy said judgment, and had issued a fi. fa. lands on which the sheriff had taken in execution lands of defendant, more than enough to satisfy the said judgments recovered by them respectively; and that said judgments were in full force and unsatisfied,—the plea alleged that the indebtedness on the judgments in the two counts alleged (if any) due to the plaintiff had been attached to satisfy the other judgments. On demurrer held bad, 1. because pleaded in bar of the plaintiff's whole cause of action on the second and third counts, whereas it only shewed a partial answer, if good as to that. 2. That it did not shew any order requiring the garnishee to pay the judgment creditors. 3. For all that appeared on the pleas, the plaintiffs in the two attachments might issue execution and obtain satisfaction of their judgment against the present plaintiff, before defendant's lands could be sold under the executions. *Blevins* v. *Madden*, 11 C. P. 195.

Judgment Debt — *Execution—Solicitor's Lien.*]—A sheriff's return to a writ of fi. fa. goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute:—Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons: the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order; and this would have been equivalent to payment into court. It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice:—Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened and had the attaching order set aside by disclosing the assignment to himself of the debt attached. *Genge* v. *Freeman*, 14 P. R. 330.

Money in Court.]—Where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition en sous ordre. *Barnard* v. *Molson*, 15 S. C. R. 716.

No Order to Pay—*Payment into Court.*] —A garnishee is not discharged by payment to the judgment creditor merely upon the attaching order, without an order to pay. But he is, if, upon being served with a summons to pay, he forthwith pay the money into court. *Clark* v. *Clark*, 8 L. J. 107.

Notice of Claim of Third Person.]—Land which had been mortgaged by the owner was taken by the township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:—Held, that the mortgagee had the prior right: that his mortgage being a registered mortgage, the corporation must be taken to have acquired the land with notice of it; and that the mortgagee was entitled to recover the amount from the corporation with costs. *Dunlop* v. *County of York*, 16 Gr. 216.

Notice of Claim of Third Person.]—Upon A.'s insolvency in Montreal, T., a creditor residing in the county of Renfrew, proved his claim, and afterwards made an assignment. Subsequently F., A.'s assignee, not having heard of T.'s insolvency, collocated

him on the dividend sheet for the amount due on his claim, whereupon certain creditors of T. took proceedings in the superior court at Montreal to garnish this amount. Upon receipt of a letter from B., T.'s assignee, demanding payment of the dividend, F. informed him that certain persons in Montreal were endeavouring to get payment of this dividend from him, but he neither mentioned who they were nor the nature of their claim. In accordance with the practice of the courts in Quebec, F. made an affidavit of the position he occupied towards the principal debtor, in which he recited the above facts, but took no further action in the matter. He neither advised B. that this declaration had been made, nor held any further communication with him. No opposition being offered, an order was made for the payment of the debt and costs by F. within fifteen days, and without waiting for the expiration of this period, or giving B. any notice, F. paid the amount:—Held, that B. was entitled to recover the dividend from F.; and that F. could not protect himself on the ground that he had paid the money in obedience to the order of a court of competent jurisdiction, as under s. 125 of the Insolvent Act of 1875, the court had no authority to make such an order after T.'s assignment; and even if that court had possessed jurisdiction, the judgment could not defeat B.'s rights, as he was not a party to the proceedings or affected with notice thereof, and F. had been guilty of negligence in protecting himself. *Re Fair and Bell*, 2 A. R. 632.

Order in Favour of Sub-Contractor.]—The judgment debtor, through his sub-contractors, delivered to the garnishees certain railway ties, and gave the sub-contractors an order on the garnishees for all moneys coming to him therefor. Subsequently, but before the garnishees had notice of this order, they were served with the attaching order in this case:—Held, that the order in favour of the sub-contractors operated as an assignment of the fund to them, although there was no notice of it to the garnishees, they not having been led by the want of notice to alter their position. *Brown* v. *McGuffin*, 5 P. R. 231.

Order For Payment Reversed on Appeal—*Repayment.*]—An appeal from the order of a county Judge directing payment over to the plaintiff by a garnishee of moneys in his hands was allowed by the court in a former judgment (10 A. R. 17). It appeared that the garnishee had paid over the moneys in his hands before the appeal was initiated:—Held, that the certificate of the former judgment properly contained an award of restitution of the money so paid, which the court had authority to make under 45 Vict. c. 6 (O.) *McKindsey* v. *Armstrong*, 11 P. R. 200.

Overpayment by Garnishee—*Recovery Back.*]—Defendant, having a judgment against M. and others, obtained an order on C. and others, garnishees, to pay over, after deducting any contra claim they might have. The defendant received on this order $171, by cheque of the plaintiff's firm, the plaintiff alone being the assignee of C.'s estate. It was afterwards discovered that the order had been for too much, and it was therefore rescinded, except as to the proper sum, which the garnishees' admitted set-off more than covered, so that nothing in fact should have been paid:—Held, that the plaintiff might recover the $171 from defendant as money had and received:—Held, also, that the fact of the payment having been made by the cheque of plaintiff's firm, could not prevent the plaintiff alone from recovering, as the money was proved to have been the money of C.'s estate, in which the plaintiff's partners had no interest. *Sessions* v. *Strachan*, 23 U. C. R. 492.

Payment Not Made—*Action by Judgment Debtor.*]—It is no defence to an action for a debt that attaching orders have been served upon defendant for the claim, or that he has been ordered to pay it over. There must be payment on such orders, or execution levied on defendant. *Sykes* v. *Brockville and Ottawa R. W. Co.*, 22 U. C. R. 459.

Period of Credit.] — Where there has been a previous understanding that the garnishee should have a certain period of credit, he will not be ordered to pay until such period expires. *Harding* v. *Barratt*, 3 L. J. 31.

Priority—*Order of Payment Determined by Service.*]—Several judgment creditors proceeding against the same garnishee are entitled in the order in which their attaching orders are served, not ratably. *Tate* v. *City of Toronto*, 3 P. R. 181.

Priority—*Railway Bondholders — Attaching Creditors.*]—So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is the appointment of a receiver. The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment creditors of the road. *Phelps* v. *St. Catharines and Niagara Central R. W. Co.*, 19 O. R. 501, reversing 18 O. R. 581.

Priority—*Several Judgment Creditors.*]—Although the plaintiff's judgment be subsequent to others registered against the land sold under the mortgage, still if he first attach the surplus of proceeds of sale, he is entitled to the exclusion of the prior judgment creditors. *McKay* v. *Mitchell*, 6 L. J. 61.

There is no priority in respect to debts due to a judgment debtor, in favour of any judgment creditor. *Ib.*

Receiver Appointed After Order and Before Payment.]—After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:—Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them (other-

wise than by paying it to the receiver), without leave of the court. The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor to enforce the order to pay over pointed out. Wood v. Dunn, 2 Q. B. D. 72, considered. The effect of the appointment of a receiver upon the rights of an attaching creditor considered. Hawkins v. Gathercole, 1 Drew. 12, and Ames v. Birkenhead Dock Co., 20 Beav. 332, acted on. *Stuart* v. *Grough*, 15 A. R. 209.

Set-off.]—Quære, what effect has an attaching order on the party's right to set off. *McNaughton* v. *Webster*, 6 L. J. 17.

Solicitor's Lien.] — An award for an amount, together with costs, saving been made in favour of a party, the costs were taxed by consent, and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances a motion made to stay proceedings to enforce payment of the costs under the award, at the instance of the solicitor to whom they were payable, was refused with costs. *McLean* v. *Beatty*, 1 Ch. Ch. 138.

Solicitor's Lien.]—An attorney's lien for costs as between him and his client, the judgment debtor, will not be allowed to stand in the way of an attachment. *Regina* v. *Benson*, 2 P. R. 350; *Bank of Upper Canada* v. *Wallace*, *ib.* 352.

Solicitor's Lien.]—Upon the application of a solicitor, having a lien in respect of a debt attached, the attaching order will be discharged as against him; but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solicitor. *Cotton* v. *Vansittart*, 6 P. R. 96.

Solicitor's Lien.]—In garnishee proceedings a court of law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which, or by which, the debt attached has been recovered, where the garnishee has notice of the lien. *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437.

A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity, to the prejudice of the attorney's lien for costs in that suit. *Ib.*

See also, *Genge* v. *Freeman*, 14 P. R. 330, *ante*, *col.* 362.

Validity of Assignment.] — Judgment was recovered by B. & Co. against defendant, against whom the plaintiff afterwards likewise recovered judgment. B. & Co. first and the plaintiff afterwards put a fi. fa. against defendant's goods into the hands of the sheriff, who returned the plaintiff's writ nulla bona. Plaintiff then obtained an order for defendant's examination, and very shortly after being served with it, defendant assigned his book debts, accounts, and claims to B. & Co. A few days after, the plaintiff obtained the usual order to attach debts due to defendant, but no summons was shewn calling on the garnishees to pay. B. & Co. applied to set aside the order:—Held, that they had no right to intervene in the cause, and that they could not raise the question of the validity of the assignment to them on such an application. *Rittinger* v. *McDougall*, 10 C. P. 395.

III. PRACTICE AND PROCEDURE.

Action Pending Between Debtor and Garnishee.]—A suit was pending between the judgment debtor and the garnishees as to the claim sought to be attached:—Quære, as to the propriety of directing an issue, and as to the proper mode of procedure. *Bank of Toronto* v. *Burton*, 4 P. R. 56.

Agent's Affidavit.]—An order founded on the affidavit of "the agent for the above defendant," without any affidavit by the judgment creditor or his attorney, is irregular; and such order was set aside, but, the point being new, without costs. Semble, that had it been affirmatively shewn that the deponent was in fact the attorney of the judgment creditor, though not so described in the affidavit, the statute would have been complied with. *Tiffany* v. *Bullen*, 18 C. P. 91.

Appeal From County Court.] — See *Sato* v. *Hubbard*, 6 A. R. 546; *Henderson* v. *Rogers*, 15 P. R. 241; and *Teskey* v. *Neil*, 15 P. R. 244, *post*, COUNTY COURT.

Appeal From Order Directing Issue.]—Held, affirming 13 P. R. 26, that the garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached. *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 308.

Attorney's Affidavit.]—The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor or by a partner of the attorney. Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato* v. *Hubbard*, 8 P. R. 445.

Bill of Exchange—*Proof as to Holder.*]—On an application for an order for a garnishee to pay over to the judgment creditor the amount of an acceptance due by him to judgment debtor, it should be shewn that at the date of the order (if made) the acceptance is in the hands or under the control of the judgment debtor, and not in the hands of some innocent third party. *Mellish* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 2 L. J. 230.

Chamber Order.] — A garnishee order granted by the court on an application in chambers is regular. *Robertson* v. *Grant*, 3 Ch. Ch. 331.

Collusion.]—The executor of the garnishee having on affidavit denied the debt, and imputed collusion between the judgment creditor and debtor, which was not denied, the attaching order was rescinded, and an issue directed, on payment of costs. *Ward* v. *Vance*, 3 P. R. 210.

Costs.]—A judgment creditor was not allowed the costs of a garnishee application, either against the judgment debtor or the gar-

nishee. *Bank of Montreal* v. *Yarrington*, 3 L. J. 185.

Costs.]—But it is now the practice at law to grant such costs where there is a sufficient fund out of which to pay them, and this practice was concurred in in Chancery, reversing Evans v. Evans, 1 Ch. Ch. 248. *Evans* v. *Evans*, 1 Ch. Ch. 393.

Death of Garnishee.] — There is no power in the court or Judge to order or permit a suggestion to be entered of the death of a garnishee, so as to legalize execution against his executors or administrators. *Ward* v. *Vance*, 3 P. R. 323. See the next case.

Death of Garnishee.]—Where a summons to pay over was argued on one day, and judgment deferred till the next day, when the summons was made absolute (the garnishee having died during the interim), on an application to set aside the order, on the ground that it was made after the proceedings had abated by reason of the death of the garnishee, leave was given to the judgment creditor to amend his order nunc pro tunc, without costs, the delay being the delay of the Judge and not of the party. *Ward* v. *Vance*, 9 L. J. 244, 4 P. R. 210.

Death of Judgment Debtor.]—A debt due to a deceased defendant cannot be attached without reviving the judgment against his personal representatives. *Commercial Bank* v. *Williams*, 5 L. J. 66.

Discretion to Refuse Order.]—Quære, has not a Judge a discretion, in the case of an attachable debt, to decline under special circumstances to make an order to pay over the amount where such an order would be inequitable, or tend to give one creditor a preference after the making by the judgment debtor of a general assignment in favour of his creditors without preference or priority. *Lee* v. *Gorrie*, 1 C. L. J. 75.

Evidence by Judgment Debtor.]—The judgment debtor is admissible as a witness on behalf of the plaintiff in an action under a garnishee order. *Hutcheson* v. *Allen*, 9 L. J. 24.

Ex parte Order.] — An order will be granted ex parte, upon affidavit that on an oral examination of the debtor, he swore that the garnishee was indebted to him. *Macpherson* v. *Kerr*, 3 L. J. 49.

Facts to be Proved.]—An affidavit on which to ground an application for an order to attach debts under s. 194 of the C. L. P. Act, 1856, should shew that a judgment has been recovered, and to what amount it is still unsatisfied; that a person is indebted to defendant, and is within the jurisdiction of the court; and that the action is not against defendant as an absconding debtor. *Bullen* v. *Lingham*, 2 L. J. 231.

Facts to be Proved.]—An ex parte order to attach debts due to a judgment debtor will be granted in the first instance, upon affidavit that judgment has been recovered and is still wholly unsatisfied; that defendant has not sufficient goods to satisfy the same; and that third parties are indebted to defendant, and are within the jurisdiction. But, quære, whether such affidavit is sufficient. *Connor* v. *McBride*, 2 L. J. 232.

Final Order—*Notice to Judgment Debtor.*]—Where a judgment creditor obtains an order attaching debts due to the judgment debtor, notice of the application for a final order for payment over by the garnishee should be served upon the judgment debtor. Ferguson v. Carman, 26 U. C. R. 26, specially referred to. *Beaty* v. *Hackett*, 14 P. R. 305.

Form of Issue.]—The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Speaker of the Assembly to wait the action of the House with regard to the alleged bribery. The plaintiffs, judgment creditors of the defendant, issued an order attaching all debts due from the Speaker to the defendant, claiming that the money so handed to him became a debt payable to the defendant. The court, without expressing any opinion on the merits, directed an issue to be tried, under Rule 373, O. J. Act, as to the garnishee's indebtedness. The form of the issue was subsequently settled by the registrar, namely, whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to the defendant, which on appeal to the full court was held sufficient. *Stuart* v. *McKim*, 8 O. R. 739.

Fraud — *Issue—County Court.*]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised:—Held, also, that the Judge of the county court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a county court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county:—Semble, that the proper construction of Rules 917, 918, and 919 is, that the Judge of the county court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the county court or the division court, to order the garnishee to attend before the Judge of the county court or the clerk of the division within which he lives:—Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process. *Millar* v. *Thompson*, 19 P. R. 294.

Information and Belief.]—The affidavit required by s. 194 C. L. P. Act, 1856, will not be dispensed with; and must be positive and explicit. Under certain circumstances, however, an affidavit founded on belief will be sufficient. *Cataraqui Road Co.* v. *Dunn*, 3 L. J. 27.

Information and Belief.]—If sufficient grounds be shewn for such belief, it will be sufficient. *Jones* v. *DeRergue*, 3 L. J. 31.

Information and Belief.] — Quære, whether an affidavit of information and belief is sufficient:—Semble, an ex parte order will not at all events be granted on it, when no application for an oral examination of the defendant has been made. *McLaren* v. *Sudworth*, 4 L. J. 233.

Interpleader.]—An interpleader will not be granted to try the validity of an attaching order, or to determine amount due. *McNaughton* v. *Webster*, 6 L. J. 17.

Interpleader.]—Where, on an application under the C. L. P. Act for a garnishee order, the debt alleged to be due to the judgment debtor is claimed by a third person, and on such ground the garnishee disputes his liability to pay it over:—Held, that in the absence of any power to direct an interpleader issue, or summon such third person before the court, the issue of a writ under s. 291 is the proper course to adopt; and that the garnishee, where there are rival claimants for the debt, may file a bill in equity calling upon the parties to interplead. Remarks as to the necessity in this country of provisions similar to those contained in the English Act, 23 & 24 Vict. c. 125, ss. 28-30. *Spencer* v. *Conley*, 26 C. P. 274.

Managing Clerk — *New Affidavit.*] — An affidavit for an attaching order under R. S. O. 1877 c. 50, s. 307, must be made by the execution creditor or his attorney, and an affidavit made by a managing clerk is insufficient. *Builder* v. *Kerr*, 7 P. R. 323.

Where the debt attached was still in the hands of the garnishee, and still in statu quo, the judgment creditor was allowed to file a proper affidavit nunc pro tunc. *Ib.*

Nature of Indebtedness.]—The Judge should require the nature of the indebtedness to be fully stated; but where he granted an order without this the court refused to set the proceedings aside. *Tiffany* v. *Bullen*, 18 C. P. 91.

Notice to Garnishee.]—Where an application is made to compel a garnishee to pay over debts due by him to the debtor, which have been garnished, notice must be served on such garnishee. *In re English*, 1 Ch. Ch. 197.

Notice to Judgment Debtor.]—Notice of an application to garnish should always be given to the judgment debtor; but, quære, whether it can be imposed as a condition on the judgment creditor, the statute not requiring it. *Ferguson* v. *Carman*, 26 U. C. R. 26.

Plaintiff or Attorney's Affidavit.]—An order to attach should not be made without an affidavit either of the plaintiff or his attorney, stating the indebtedness of the garnishee. *Boyd* v. *Haynes*, 5 P. R. 15.

Prima Facie Case — *Discretion as to Issue.*]—The plaintiff, after recovering judgment against the defendant, issued an attaching order upon moneys in the hands of the Canada Company, which were admittedly not the moneys of the latter, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which were claimed by his son. There was nothing before the Judge of the county court to support the assertion of the plaintiff, and the examination of the claimant taken at the instance of the plaintiff, failed to shew that there was any reason to believe that the claim was not well founded:—Held, that the Judge had under Rule 375 a discretion, to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct and in rescinding the attaching order:—Semble, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the bona fides of the claim of the son, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it. *Johnson* v. *Moody*, 12 P. R. 203.

Questioning Judgment.] — Semble, the question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliot* v. *Capell*, 9 P. R. 35.

Security for Costs.]—Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs. *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121.

Security for Costs.] — The judgment creditor obtained an attaching order, which was set aside by the local Judge who granted it; the judgment creditor then appealed to a Judge in chambers unsuccessfully, and had given notice of a further appeal to a divisional court, when his proceedings were stayed by an order of the master in chambers requiring him to give security for costs, on the ground that he was insolvent and was proceeding for the benefit of another:—Held, that the order for security could not be sustained; the judgment creditor was not proceeding either by action or petition; and there was no authority for ordering security. Re Rees, 10 P. R. 425, overruled. *Palmer* v. *Lovett*, 14 P. R. 415.

Service of Order.]—23 Vict. c. 33 does not extend to the service of attaching orders, but only applies to the service of process, &c. *Bank of British North America* v. *Laughrey*, 2 C. L. J. 44.

Service of Order.]—An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance indorsed, was afterwards served in the same way as the order. On the return of it, another attorney appeared for the garnishee, and objected that the acceptance was without authority, and the service insufficient:—Held, that personal service of the summons and order was not indispensable. The service if moved against would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee; but held, also, that no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured:—Held, also, that the appearance of the garnishee by another attorney duly authorized was a waiver of any objection to the service. *Ward* v. *Vance*, 3 P. R. 130.

Adam Wilson, J., adhered to the above decision as to the service of the attaching order,

and held that the new affidavits set out rather tended to sustain such service than otherwise. *S. C.*, 3 P. R. 210.

Setting Aside Order.]—Where the garnishee (a deputy sheriff) after ten months applied to set aside an order to pay, upon the ground that when the garnishing order was made there was no such debt, and that he, the garnishee, was ignorant of the nature and effect of the proceedings taken against him, the application was refused. *Gordon* v. *Bonter*, 6 L. J. 112.

Setting Aside Order.]—The attorney of the defendant moved to rescind an order to pay over, so far as it regarded a judgment recovered by his client against the garnishee, on the ground that the judgment had been assigned to him as security for indorsements. The summons was served only on the judgment creditor:—Held, that all parties must have notice before the matter could be reopened on the ground of the assignment. *Bank of Upper Canada* v. *Wallace*, 2 P. R. 352.

Setting Aside Order.] — Practice—Motion by judgment debtor to set aside order—Garnishing salary of clerk of the peace. *Hanvey* v. *Stanton*, 13 C. L. J. 108.

Setting Aside Order.] — An attaching order will not be set aside for irregularity on the argument of the summons to pay over, but only on a substantive application. *Builder* v. *Kerr*, 7 P. R. 323; 14 C. L. J. 169.

Stating Amount.]—An order to attach will be granted, though the amount be not stated; but it must be stated in a summons to pay over. *Meldrum* v. *Tulloch*, 2 L. J. 184.

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

Staying Proceedings.] — In an action brought by an assignee in insolvency on a debt admitted to be due to the insolvent, defendants applied for a stay of proceedings and for an interpleader to try the rights of the assignee as against various creditors of the insolvent, who had served attaching orders and garnishing summonses prior to the insolvency:—Held, that the defendants should have had the garnishment proceedings disposed of in the courts in which they had been taken, instead of making this application, which was therefore refused. The assignee having given no assistance to the court by affidavit, and having made no attempt to adjust the claims, was refused his costs. *Picken* v. *Victoria R. W. Co.*, 44 U. C. R. 372.

Summary Trial.]—A Judge of the court will, when it appears proper, instead of directing an issue, himself try a question of fact arising on application before him in chambers. *Robertson* v. *Grant*, 3 Ch. Ch. 331.

Validity of Assignment.]—Where the debt is claimed by a third party as assignee, there is no power to direct an issue to try the validity of the alleged assignment. *Kerr* v. *Fullarton*, 3 P. R. 19.

IV. MISCELLANEOUS CASES.

Company — *Agreement to Attach.*] — A railway being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due to the company, the costs of which as between attorney and client the railway company was to pay:—Held, that the officers of the company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. *Hamilton and Port Dover R. W. Co.* v. *Gore Bank*, 20 Gr. 190.

Injunction to Restrain Attaching Creditor.]—Proceedings were taken before a county Judge to garnish certain moneys, payable by the county to the plaintiff, as clerk of the peace and county crown attorney, and which moneys that Judge ordered to be attached in favour of the creditor, the present defendant. Thereupon the debtor, then defendant in those proceedings, filed a bill in this court, seeking to restrain further action on such order:—Held, that this court had no jurisdiction to grant the relief asked; that the proper place to obtain such relief was by appeal to the court of appeal; and, without determining whether the claim of the debtor against the county, was such as could be garnished, the court refused the motion for injunction, with costs. *Van Norman* v. *Grant*, 27 Gr. 498.

Mistake — *Similarity in Name—Recovery by Rightful Owner.*]—In an action to recover a deposit of money to the credit of the plaintiff with the defendants, it appeared that the whole amount had been innocently but wrongfully paid by the defendants into court and also directly to the creditors of another person of the same name as the plaintiff, under garnishee proceedings in a division court:—Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover, or to protect the defendants against his claim, and that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff:—Held, also, that s. 195 of R. S. O. 1887 c. 51, only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person. *Andrew* v. *Canadian Mutual Loan and Investment Co.*, 29 O. R. 365.

Mortgagee—*Attaching Creditor is not an Incumbrancer.*]—A creditor of a mortgagee, who has sued out an attaching order against the mortgage debt, is not an incumbrancer within the terms of G. O. 448, of whose claim the master is to take an account. *Crosbie* v. *Fenn*, 26 Gr. 283.

Negligence of Attorney.] — Garnishee proceedings—Neglect of Attorneys in conduct of—Action for—Priority of orders—Service of—C. L. P. Act, s. 289, et seq. *Sweetman* v. *Lemon*, 13 C. P. 534.

No Equitable Remedy Before Attachment.]—A judgment creditor cannot attach or garnish by a suit in equity a debt for which he has not obtained an attaching order at law. But, semble, after obtaining and serving such an order, if a remedy in equity is needed for the realization of the debt so attached, the creditor is entitled to file a bill for the purpose. *Blake* v. *Jarvis*, 16 Gr. 295; 17 Gr. 201.

Proceeding in Equity.]—The plaintiff claimed to be a creditor of O., and as such filed a bill alleging that O. was mortgagee or otherwise entitled to some interest in the

lands of M., and that O. was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by O., and to restrain M. from paying O., and also an order for M. to pay plaintiff. At the hearing, the court made a decree referring it to the master to ascertain what was due by O. to the plaintiff, and if anything found due that O. should be ordered to pay the amount due to the plaintiff, with costs; but dismissed the bill as against M., with costs. *Menzies* v. *Ogilvie*, 27 Gr. 456.

Proceeding in Equity.]—The plaintiffs, who had recovered judgment against the defendant W., filed a bill alleging that W., being the owner of lands subject to a mortgage, conspired with his co-defendant whereby a second mortgage was executed by W. to one A., who paid the money to the co-defendant, which was held by him as agent or trustee for W. The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiffs proved their claim in that suit in the master's office, but received nothing. They alleged that they had been led to believe that the mortgage by W. to A. was bonâ fide, but had ascertained that such was not the fact; and prayed that the co-defendants might be ordered to pay over the amount paid out of the proceeds of the land to satisfy the mortgage in favour of A.:—Held, that the bill was in effect one to garnish the money due to W. in the hands of his co-defendant, and under the authority of Horsley v. Cox, L. R. 4 Ch. 92, and St. Michael's College v. Merrick, I A. R. 529; *S. C.*, 26 Gr. 216, could not be maintained. *Gilchrist* v. *Wiley*, 28 Gr. 425.

Security Held by Garnishee.]—A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money in pursuance of the report therein:—Held, that the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in this court, and payment of the proceeds towards satisfaction of the judgment. *Bank of Elgin* v. *Hutchinson*, 13 Gr. 59.

Stop Order.]—The court has no jurisdiction to grant a stop order at the instance of a judgment creditor of a party entitled to funds in court. *Lee* v. *Bell*, 2 Ch. Ch. 114.

Stop Order.]—The fact that the judgment creditor has obtained a garnishee order, will not enable the court to grant a stop order. *Purkiss* v. *Morrison*, 2 Ch. Ch. 117.

Writ of Sequestration.] — A creditor has a right under a writ of sequestration, to compel payment by a third party of a debt which he owes to defendant against whose estate the writ issues. *McDowell* v. *McDowell*, 1 Ch. Ch. 140.

Until the sequestrator, or the party claiming under the writ, take steps to obtain payment of the money, the chose in action is not bound by reason of the writ being in the sheriff's hand. *Ib.*

See DIVISION COURTS, II.

ATTACHMENT OF GOODS.

See DIVISION COURTS, III.

ATTACHMENT OF THE PERSON.

See ARREST, I.

ATTAINDER.

See CRIMINAL LAW, III.

ATTORNEY.

See SOLICITOR.

ATTORNEY-GENERAL.

Constitutional Questions.]—The questions in this case relating to the Fire Insurance Company Acts, so far as raised, were held not to be of such a constitutional character as to require notice to the Attorney-General of the Province, and the Minister of Justice of the Dominion. *Goring* v. *London Mutual Fire Ins. Co.*, 11 O. R. 82.

Costs.]—In an action in the nature of an information filed by the Attorney-General, costs will not be allowed to the defendant against the Crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

Costs.]—The Attorney-General is never made to pay costs even upon interlocutory applications. *Gibson* v. *Clench*, 1 Ch. Ch. 69.

Damages Against Relators — *Pleading.*]—In an action brought in the name of the Attorney-General upon the relation of certain persons to restrain the defendants from collecting tolls or keeping their tollgates closed upon their roads, the defendants alleged, by way of defence, certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—Held, that the relators were not in any sense plaintiffs; and that the allegations against them must be struck out. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516.

See this case, 21 O. R. 507, 19 A. R. 234, as to the right of the Attorney-General to maintain such an action.

Default in Pleading.] — Where the Attorney-General is a defendant and does not answer, the proper course is to obtain an order that he answer in a week, or that the bill be taken pro confesso. *Shea* v. *Fellowes*, 1 Ch. Ch. 30.

Delegation of Duty.]—On an indictment containing four counts for obtaining money by false pretences, was indorsed: "I direct that this indictment be laid before the grand jury. Montreal, 6th October, 1880:—By J. A. Mousseau, Q.C.; C. P. Davidson, Q.C.; L. O. Loranger, Attorney-General." Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term. A motion supported by affidavit was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by s. 28 of 32 & 33 Vict. c. 29 had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was held, that under 32 & 33 Vict. c.

29, s. 28, the Attorney-General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams* v. *The Queen*, 6 S. C. R. 10.

Drainage.]—To an action on a drainage by-law to compel a municipal corporation to complete a drain, and also to restrain a misapplication of moneys assessed, and for an account, the Attorney-General is not a necessary party. *Smith* v. *Township of Raleigh*, 3 O. R. 405.

Escheat.]—Held, affirming 26 Gr. 126, that the doctrine of escheats applies to Ontario; that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the Province; that the court of chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the court of chancery to enforce the escheat. *Attorney-General of Ontario* v. *O'Reilly*, 6 A. R. 576.

Expenditure of Rates.]—A writ of certiorari lies to remove orders of sessions relating to the expenditure of the district rates and assessments, at the instance of the Attorney-General, without notice. *Rex* v. *Justices of the Newcastle District*, Dra. 114.

Expropriation.]—The Attorney-General ordered to be made a party to a case involving the title to a roadway, in order to give protection to the Dominion Government in expropriating the land. See *Re Trent Valley Canal—"Re Water Street" and "The Road to the Wharf,"* 11 O. R. 687.

Highway.]—Semble, but for the language used in Guelph v. Canada Company, 4 Gr. 656, the proper frame of a suit by a municipality against a railway company for trespassing by running their track along one of the streets of the municipality without their consent would be by way of information in the name of the Attorney-General with the corporation as relators. *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4.

Information—*Code of Civil Procedure, Art. 997—Power of Attorney-General to Discontinue.*]—Article 997 of the Civil Procedure Code relates on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law. Where an information under that article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do:—Held, that this did not amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the article:—Held, also, that the court has jurisdiction under article 998 to prohibit the issue of a writ of information under article 997; but that after issue the Attorney-General is dominus litis, and can discontinue proceedings or control their conduct and settlement independently of any private relator. *Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282.

Information—*Pleading.*]—The proceedings in an ex officio information may be either at the suit of the Queen or the Attorney-General, but the defendant cannot be called upon to plead in vacation upon a rule to plead given in vacation, but is entitled to a regular rule to plead, and an imparlance. *Regina* v. *Burnham*, 1 U. C. R. 413.

Information—*Signature.*]—An information in the name of the Attorney-General not signed by him, but on which was indorsed a fiat, "Let the within information be filed,"—signed by the Solicitor-General:—Held, irregular. *Attorney-General* v. *Toronto Street Railway Co.*, 13 Gr. 441.

There is no precedent for dispensing with the signature of the Attorney-General to an information. *S. C.*, 2 Ch. Ch. 165.

Where in his absence from the Province an information was filed without his signature, but having indorsed thereon a fiat signed by the Solicitor-General, it was ordered to be taken off the files. *Ib.*

Where an information had been amended by merely adding a party by the direction of the court, a motion to take the amended information off the files because not signed by the Attorney-General, was refused. *S. C., ib.* 321.

Informations.]—See *Mewburn* v. *Street*, 21 U. C. R. 498; *Attorney-General* v. *McLachlin*, 5 P. R. 63; *Attorney-General* v. *Harrison*, 12 Gr. 466; *Attorney-General* v. *Toronto Street R. W. Co.*, 14 Gr. 673.

Injunction.]—*Breach of Charter.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. 1887 c. 171, which authorized them to construct and operate (on all days except Sundays) a street railway:—Held, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public or any interference with proprietary rights being shewn. *Attorney-General* v. *Niagara Falls, Wesley Park and Clifton R. W. Co.*, 19 O. R. 624; 18 A. R. 453.

International Bridge.] — Held, reversing 28 Gr. 65, that the Attorney-General for Ontario, as representing only a limited portion of the public, with whom, if at all, a contract existed for the construction of a bridge by a company incorporated by the Dominion Parliament, from Canada to the United States, across the Niagara River, had no locus standi. *Attorney-General* v. *International Bridge Co.*, 6 A. R. 537.

See also *S. C.*, 27 Gr. 37.

The work being one within the jurisdiction of the Parliament of Canada, that Parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information. *S. C.*, 6 A. R. 537.

Joint Stock Company—*Dominion Charter—Forfeiture.*]—Proceedings to set aside the charter of a company incorporated by Act of the Dominion Parliament may be taken by the Attorney-General of Canada. *Dominion*

Salvage and Wrecking Co. v. *Attorney-General of Canada*, 21 S. C. R. 72.

Navigation.]—Semble, a bill to remove a fixed bridge across a navigable river as impeding navigation, and to erect instead a drawbridge, as provided for by statute, should be by the Attorney-General; the statute referred to, 16 Vict. c. 37, being passed for the general benefit of the public. *Cull* v. *Grand Trunk R. W. Co.*, 10 Gr. 491.

See *Attorney-General* v. *Weston Plank Road Co.*, 4 Gr. 211; *Attorney-General* v. *Walker*, 25 Gr. 233.

Nuisance.]—As to the necessity for a public nuisance being moved against by the Attorney-General. See *Hathaway* v. *Doig*, 28 Gr. 461, 6 A. R. 204.

Ordnance Lands.]—To an information of intrusion filed by Her Majesty's Attorney-General for the Dominion, prosecuting for Her Majesty, the defendant pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada; but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate. Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the Crown, with leave to defendant to move to enter it for him:—Held, that the Crown was clearly entitled to recover, for, among other reasons, the plea set up no title in defendant, and admitted the Crown title by stating the lands to belong to this Province; and the fact of the Attorney-General for Canada prosecuting for the Crown could not shew that a Dominion title was necessarily claimed. *Attorney-General* v. *Harris*, 33 U. C. R. 94.

Patent of Invention.]—Semble, that on an application to question a patent under the Patent Act of 1872, the intervention of the Attorney-General is not essential. *In re Bell Telephone Co.*, 9 O. R. 339.

Precedence.]—A patent from the Crown appointing a barrister a Queen's counsel, directed that he should take precedence next after another Queen's counsel who was subsequently appointed Attorney-General:—Held, that such patent did not then entitle him to precedence before the Solicitor-General. *In re Boulton*, 1 U. C. R. 317.

Provincial Rights.]—The Attorney-General of the Province is the proper officer to sue in respect of all matters having locality in the Province. See *Attorney-General of Nova Scotia ex rel. Dickie* v. *Axford*, 13 S. C. R. 294.

Removal of Trustee.]—It is not necessary to make the Attorney-General a party to an action by an incorporated educational institute for the removal of one of the trustees for improper dealing with trust funds. *Wilberforce Educational Institute* v. *Holden*, 17 O. R. 439.

Res Judicata.]—Semble: There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit in which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca* v. *Attorney-General of Canada*, 17 S. C. R. 612.

Status.]—The Provincial Attorney-General, and not the Attorney-General of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of Ontario. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

The Provincial Attorney-General is the proper person to file an information in respect of a nuisance, caused by interference with a railway, and he is the officer of the Crown who is considered as present in the courts of the Province, to assert the rights of the Crown, and of those who are under its protection. *Ib.*

Venue.]—In an information for intrusion the venue may be laid in any district. *Attorney-General* v. *Dockstader*, 5 O. S. 341.

See CONSTITUTIONAL LAW, II. 4—PARTIES, II. 2.

ATTORNEY, POWER OF.

See PRINCIPAL AND AGENT, VI., VII.

ATTORNMENT.

See LANDLORD AND TENANT, VI.

AUCTION AND AUCTIONEER.

Acceptance of Goods.]—An offer by a purchaser at auction to sell to another person the goods purchased by him, does not constitute an acceptance of them to take the case out of the Statute of Frauds. *Clarkson* v. *Noble*, 2 U. C. R. 361.

Action by Auctioneer—*Clerk's Entry.*]—Any auctioneer may maintain an action in his own name for goods sold by him at auction: and an entry by his clerk, who attended the sale, in the sales-book, is a sufficient memorandum of the contract within the Statute of Frauds. In this case the sales-book consisted of a file of sales-books, or sheets, fastened in a book, on the inside of which the conditions of sale were written, and at the end of the conditions it was stated that the terms of payment would be found at the head of each sale. At the head of the sheet in this case was the following: "Sale of groceries, wines," &c. The terms of payment were then given, and the entry of the sale was as follows: "Morrison—3 cases Booth & Co.'s gin, Terry, $5.35 . . . . $15.75;" and the evidence shewed that the name Morrison was that of the seller, and Terry of the purchaser:—Held, that the conditions of sale sufficiently referred to the sales-book or sheet, and that the evidence sufficiently shewed who was the seller and who the purchaser, so as to satisfy the statute. *Coate* v. *Terry*, 24 C. P. 571.

Agreement not to Bid.]—An agreement to pay money on a party's not bidding at a sheriff's sale is not void as being contrary to

public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land. *Waddel* v. *McCabe*, 4 O. S. 191.

Approved Notes—*Period of Credit—Set-off.*]—By an auctioneer's conditions of sale, purchasers to an amount exceeding £30, were to have "six months credit, giving approved indorsed notes:"—Held, that a purchaser over £30, upon these terms, was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash upon his refusal to furnish the indorsed note; and as he could not consequently be sued on the common count for goods sold and delivered until after the expiration of the credit, that to a special action brought by the auctioneer against the purchaser before the credit had expired, for not giving the indorsed note when requested, a plea of set-off would be inadmissible. *Wakefield* v. *Gorrie*, 5 U. C. R. 159.

Approved Notes—*Statute of Frauds.*]—The conditions of sale required approved notes for the purchase money. The morning after the sale the purchaser called on the seller and drew a note, signed by himself only, for the goods he said he had purchased. A dispute arose as to the goods to which he was entitled, and he went away leaving the note. Some days after he returned and offered another note with sureties, which was refused, and the seller on the same day sent back the first note:—Held, clearly insufficient to take the case out of the Statute of Frauds. *Kaitling* v. *Parkin*, 23 C. P. 569.

Assignee of Insolvent.]—A by-law of a county municipality passed under s.-s. 2 of s. 495 of the Municipal Act, R. S. O. 1887 c. 184, enacted that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, &c., "by public auction," unless duly licensed:—Held, that the agent of an assignee of an insolvent estate, selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

Authority to Bid — *Negligence.*] — The plaintiff before the sale gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land:—Held, that the plaintiff had clearly no ground of action against him for so doing; and—Quære, whether the writing could be construed as more than an authority, and whether, if the defendant had disregarded it altogether, any action could have been maintained. *Markle* v. *Thomas*, 13 U. C. R. 321.

Clerk's Signature.] — The auctioneer himself need not sign the purchaser's name, it may be done by his clerk at the time; and the clerk of the owner of the goods sold, acting openly at the sale for the auctioneer, is his clerk to bind the purchaser. *Sandford* v. *O'Donohue*, M. T. 4 Vict.

Clerk's Signature.]—The signature of the clerk of an auctioneer on behalf of a purchaser, is sufficient to charge the party purchasing, within the statute. *Clarkson* v. *Noble*, 2 U. C. R. 361.

Clerk's Signature.]—A paper used at the sale by auction of certain lands contained the conditions of sale, and the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, and afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers:—Held, a sufficient signing of the contract within the Statute of Frauds. *Crooks* v. *Davis*, 6 Gr. 317.

Compensation.] — Compensation in case of mistake as to quantity of land sold. See *Cottingham* v. *Cottingham*, 11 A. R. 624.

Conditions of Sale.]—Where the conditions of sale by auction are stated in the declaration as being imposed at the time of sale, the defendant cannot be discharged from them by an agreement before the sale; and a plea containing such defence is bad on general demurrer. *Mead* v. *Hendry*, 1 U. C. R. 238.

Conditions of Sale.]—The conditions of sale must be annexed to the list of purchasers, so as to make a complete contract to bind the vendee under the Statute of Frauds. *Sandford* v. *O'Donohue*, M. T. 4 Vict.

The signed list should shew the weight and value of the articles purchased, and the price given for them. *Ib.*

Conditions of Sale.]—A signed agreement expressed that the subscribers had purchased at auction the lots of land set opposite to their names respectively, according to the terms of sale, made known at the time of sale, and they agreed to take the deed, bond, or agreement, or lease, as the case might be, to each of them individually, on condition of their having made the payments according to the conditions of sale. The conditions of sale, thus referred to, had been printed and distributed in hand-bills, and were read to the purchasers at the auction:—Held, that the conditions of sale were sufficiently referred to by, and incorporated with, the signed agreements, so as to constitute a binding contract in writing, within the Statute of Frauds. *Dalton* v. *McBride*, 7 Gr. 288.

Conditions of Sale.]—The conditions of sale appeared in the printed bill of the sale, and were announced by the auctioneer. The purchaser's name was entered by the auctioneer's clerk on one of several sheets of paper used by him at the sale for entering the purchasers' names, but these sheets were not attached to the printed bill:—Held, that there was no contract within the Statute of Frauds. *Kaitling* v. *Parkin*, 23 C. P. 569.

Contract—*Letters.*]—Contract not signed by the vendor, but subsequently admitted by letters. See *O'Donohoe* v. *Stammers*, 11 S. C. R. 358.

Conversion of Goods—*Chattel Mortgage.*]—An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value. Cochrane v. Rymill, 27 W. R. 776, 40 L. T. N. S. 744, followed. National Bank v. Ry-

mill, 44 L. T. N. S. 767, and Barker v. Furlong [1891] 2 Ch. 172, distinguished. *Johnston* v. *Henderson*, 28 O. R. 25.

Declaration of Agency.]—A person attended on a sale of land, and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser, but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands. The court declared the plaintiffs entitled to redeem, and ordered the defendant to pay all the costs of the suit. *Watson* v. *James*, 19 Gr. 355.

Factor.]—Power of factor to sell by auction for repayment of advances without special authorization. See *Mitchell* v. *Sykes*, 4 O. R. 591.

Inducing Persons not to Bid.]—When out of an audience or attendance at a sale of twenty-five or thirty persons, three or four were induced to refrain from bidding because they were informed that a person who was attending at the sale intended to buy the property for the family of the debtor, the court refused to set aside the sale which was made to such person upon a small advance upon the upset price, although the person purchasing did so for the benefit of persons other than the family of the debtor. *Brown* v. *Fisher*, 9 Gr. 423

Lease of Premises as Dwelling and "Gents' Furnishing Store"—*Right to have Auction Sales.*]—By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store";—Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction. *Cockburn* v. *Quinn*, 20 O. R. 519.

Leave to Bid.]—Liberty to mortgagee and trustee to bid at sale. See *Ricker* v. *Ricker*, 7 A. R. 282.

Leave to Bid.]—A master has no power to give leave to bid to a party conducting a sale; application must be made to the court. *Re Laycock, McGilliveray* v. *Johnson*, 8 P. R. 548.

Lien.]—An auctioneer has no lien on maps left with him to sell land by—such plans not being regarded as title deeds, which are quasi part of the land. *Blackburn* v. *Macdonald*, 6 C. P. 380.

Loss on Re-sale.]—Where goods were sold by auction, but being left by the purchaser were re-sold at a loss, and were purchased by a partner of the auctioneer, though in another business totally distinct from that of the auctioneer; and an action was afterwards brought by the auctioneer to recover from the first purchaser the loss on the re-sale:—Held, that it was no good ground of objection to such action that the goods on the re-sale had been purchased by such partner. *Clarkson* v. *Noble*, 2 U. C. R. 361.

Misrepresentations.] — As to effect of misrepresentations in sale of land by auction. See *Stammers* v. *O'Donohoe*, 28 Gr. 207; 8 A. R. 161; *S. C. sub. nom. O'Donohoe* v. *Stammers*, 11 S. C. R. 358; *Re Murray and Kerr*, 13 O R 414.

Municipal Corporation—*Right to Issue License.*]—Section 495, s.-s. 2, of the Municipal Act, R. S. O. 1887 c. 184, which empowers any city, &c., to pass by-laws for the "licensing, regulating, and governing of auctioneers," &c., is only for the purpose of raising a revenue and does not confer any right of prohibition so long as the applicant is willing to pay the sum fixed for the license. Where, therefore, a city refused to license the plaintiff as an auctioneer on the ground that he was a person of notoriously bad character and ill-repute, a mandamus was granted, compelling the issue of the license to him. *Merritt* v. *City of Toronto*, 25 O. R. 256; 22 A. R. 205.

Municipal Act—"*Regulating and Governing.*"]—Neither under s. 580, nor under s. 583 (2), of the Municipal Act, R. S. O. 1897 c. 223, can the municipal council of a city prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. *Bollander* v. *City of Ottawa*, 30 O. R. 7; 27 A. R. 335.

Negligence.]—An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury find that he has acted negligently and disregarded his duty; and it is no misdirection to tell the jury that the low price obtained is evidence to go to them of negligence. *Cull* v. *Wakefield*, 6 O. S. 178.

Part Payment—*Re-sale.*]—Where at a sale by auction defendant purchased goods on the condition of furnishing indorsed notes for the amount, with the option of obtaining a discount of ten per cent. for cash, and that if the conditions were not complied with the goods were to be re-sold at the risk of the purchaser, and after the sale the defendant paid £15 on account, but performed no other part of the conditions, and the plaintiff re-sold the goods at a loss:—Held, that the part payment took the case out of the Statute of Frauds, so as to dispense with the necessity of proof of a written contract: and that such payment could not be considered as depriving the plaintiff of the right to re-sell and make the defendant responsible for the loss on the re-sale. *Furniss* v. *Sawers*, 3 U. C. R. 77.

Puffing — *Fictitious Bids.*] — A sale of lands by auction being about to take place, an intending purchaser, in conversation with a person who had previously purchased a portion of the same property, was told by him that he intended buying additional portions thereof, and that he expected the property would fetch about £70 or £80 an acre, and that he was prepared to go as high as £100 per acre for that portion which he intended to buy. It was shewn that by an arrangement between the owner of the estate and this person it was agreed that he should have the lots desired by him at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him; and they were accordingly bid off by him at a rate much higher than that formerly paid by him:—Held, that this was not puffing, although it might have the effect of misleading the intending purchaser, who swore that he had reliance on the opinion of this party: but as he did not swear that he had been influenced by the example of this person or the information thus given by him, the court decreed a specific performance of the contract

for the purchase of certain portions of the estate bid off by him at the auction. *Crooks* v. *Davis*, 6 Gr. 317.

Purchase Money of Land—*Statute of Frauds.*]—In an action on the common count for land sold, it appeared that the land in question was put up at auction under hand bills signed by the plaintiffs, and having been knocked down to the defendant, his name was entered as purchaser in a book by the auctioneer's clerk, and he paid the deposit required down, but he afterwards refused to pay the subsequent instalments. A bond to convey had been executed by the plaintiffs, and left ready for defendant, with a bond for payment of the money, which defendant did not execute:—Held, that the plaintiffs could not recover, for the land was not conveyed, and therefore an action on the common count would not lie:—Held, also, that there was no contract for sale sufficient to satisfy the Statute of Frauds. *Thomas* v. *Ross*, 19 C. P. 370.

Refusal to Accept Bid.]—An auctioneer is not bound to accept all bids, as a matter of course, from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale. *Holder* v. *Jackson*, 11 C. P. 543.

Representations as to Objects of Sense.]—By the advertisement of an intended sale of land in lots, it was stated: "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen and various other kind of trees." A purchaser at the sale, which took place on the property, set up as a defence to a suit for specific performance that the soil was not such as represented, and was unfit for gardening purposes, and that the trees upon the property were not of the description set forth in the advertisement:—Held, that these representations having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract. *Crooks* v. *Davis*, 6 Gr. 317.

Representations and Warranty.]—See *Coate* v. *Terry*, 26 C. P. 35.

Revocation of Authority.] — If goods are sent to an auctioneer to sell, and the principal afterwards directs him not to sell, but the goods remain in his possession, and are purchased bonâ fide by a third party, who has no notice whatever of the revocation of the authority, such sale is good. *Gunn* v. *Gillespie*, 2 U. C. R. 151.

Set-off by Purchaser Against Vendor.]—See *Wakefield* v. *Gorrie*, 5 U. C. R. 159, *post* SET-OFF, I.

Sheriff's Sale — *Signature by Sheriff or Bailiff.*]—A sale of goods by the sheriff or his bailiff under execution is within s. 17 of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing, in the same manner as an auctioneer or his clerk. *Flintoft* v. *Elmore*, 18 C. P. 274.

The entry of defendant's agent as the purchaser is sufficient, if the defendant afterwards acknowledge the agent's authority, as was done here. *Ib.*

In this case a person requested by the bailiff to act as his clerk noted in pencil on the back of a letter the name of each purchaser, the article sold, and the amount bid; and after the sale was over, but on the same day, the bailiff made out a more extended memorandum headed "List of goods sold and by whom bought, 17th October, 1866," and containing the article, the purchaser's name and the price. This he signed "D. Howard, bailiff:"—Held, insufficient, for it did not appear who the seller was, or the terms of sale, and the second memorandum could not bind, for the bailiff's authority continued only during the sale. *Ib.*

The purchaser after the sale wrote to the deputy sheriff, speaking of the engine, one of the articles alleged to have been sold to him, as being on his lot, which belonged to him, and having been bid in for him by Mr. T. (the agent who had purchased at the sale), and saying that he had heard the sheriff's fees had not been paid, and that he intended to sell again:—Held, insufficient, for it did not shew the terms of the sale, and it was not evidence of a delivery to satisfy the statute, which the other evidence tended strongly to disprove. *Ib.*

Spoiling Sale — *Damages.*]—In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son's securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of B.'s refusal to make the promised advance, the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great undervalue to the loss of the plaintiff:—Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff. *Campion* v. *Brackenridge*, 28 Gr. 201.

Warranty in Catalogue.]—In a printed catalogue of articles for sale a bull was stated to be "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller (defendant) warranted nothing:—Held, that the plaintiff (the purchaser) in an action as for a breach of warranty, was obliged to shew that the warranty, if any, contained in the catalogue was imported into the sale at auction at which he bought. *Craig* v. *Miller*, 22 C. P. 348.

Warranty of Title.]—An auctioneer at an attempted sale of goods warranted them, saying they were his own, and he would stand between the purchaser and loss. Having sold the property by auction a few days subsequently to a bidder on the former occasion, and the goods having been claimed and taken by a third party under a chattel mortgage which covered them, the auctioneer, upon an action for money had and received, was held responsible to the purchaser. *Somers* v. *O'Donohoe*, 9 C. P. 208.

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AUCTIONEER.

See AUCTION AND AUCTIONEER—SET-OFF, I. 1.

AUDIT.

See MUNICIPAL CORPORATIONS, V.

AUTHORITY.

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BAIL.

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I. BAIL TO THE LIMITS.

[See Rule 1057 of Con. Rules 1897.]

1. *By Whom Given.*

Attachment.]—A bond to the limits may be taken on an attachment for non-payment of money, and may be assigned. *Montgomery* v. *Howland*, E. T. 2 Vict.

Attachment.]—Semble, that before the return of the attachment for contempt the sheriff cannot properly take bail for appearance without the order of a Judge; but after the return, if the party is in upon an attachment merely to compel the payment of money, the sheriff, as of course, may take bail to the limits. *Lane* v. *Kingsmill*, 6 U. C. R. 579.

Attachment.]—A party arrested upon an attachment out of this court is entitled to the gaol limits under 10 & 11 Vict. c. 15. *Davis* v. *Casper*, 1 Gr. 354.

Quære, whether this Act would repeal 11 Geo. IV. c. 3. *Ib.*

Certificate to Sheriff.]—As to when the court would direct the clerk of the Crown to give a certificate under 10 & 11 Vict. c. 15, to the sheriff to admit to the limits. *Mills* v. *James*, 5 U. C. R. 216.

Certificate to Sheriff.]—Where a sheriff returns cepi corpus to a writ of ca. sa., and the plaintiff rules the sheriff to bring in the body, and the sheriff not complying with the terms of the rule, the plaintiff then obtains a rule for an attachment against the sheriff for not bringing in the body of the defendant at the return of the rule to that effect:—Held, that it is a good answer to such rule for an attachment, to shew by affidavit that the defendant was arrested under a ca. sa. and placed in close custody, and was afterwards discharged from close custody and admitted to the limits by virtue of a certificate from the clerk of the Crown and pleas annexed to the affidavit, and that he had not since been committed to close custody by any process whatever. *White* v. *Petch*, 7 U. C. R. 1.

Contempt.] — A prisoner in custody for contempt may have the benefit of the limits. *Rex* v. *Kidd*, H. T. 6 Will. IV.

Contempt.]—A sheriff may, under s. 302, C. L. P. Act, 1856, take a bond to the limits from a prisoner in close custody under an attachment for contempt in non-payment of money pursuant to an award, and a Judge of a county court may, if such bond be taken, allow it pursuant to ss. 25 and 26 of C. L. P. Act, 1857. *In re T. D.* v. *A. H.*, 4 L. J. 285.

Gaol.]—It is not necessary under C. S. U. C. c. 24, that a debtor be actually conveyed to gaol before bail can legally be taken by the sheriff. *Smith* v. *Foster*, 11 C. P. 161.

Mesne Process.]—Debtors in custody on mesne, as well as on final process, may have the benefit of the limits. *Montgomery* v. *Howland*, E. T. 2 Vict.; *Clegg* v. *McNab*, 1 P. R. 150.

Person not in Custody.]—A bond conditioned that a debtor shall confine himself to the limits of the gaol is void under 23 Hen. VI. c. 9, if at the time of its execution the debtor was not in custody nor on the limits. *Campbell* v. *Lemon*, 2 O. S. 401.

2. *Bond.*

(a) *Allowance.*

Bail Absconding.]—A rule for allowance was refused, where since their justification one of the bail had absconded. *Billings* v. *Loucks*, 5 O. S. 78.

Certificate of Allowance.] — A. being arrested on a ca. sa. gave bail to the limits by bond to the sheriff, with B. & C. as sureties, and afterwards entered into a recognizance under 16 Vict. c. 175, with B. & D. as sureties, which was improperly allowed, being defective in form, and executed before a person not authorized. The plaintiff having failed in his suit against the sureties in the recognizance, sued the sureties in the bail bond to the sheriff, having first obtained an assignment from him:—Held, that they were released from liability by the filing of the certificate of allowance under 16 Vict. c. 175, although the recognizance itself was void and ought not to have been allowed. *McFarlane* v. *McWhirter*, 9 C. P. 334. See also, *Macfarlane* v. *Allan*, 6 C. P. 496.

Objections to Form.] — Bail to the limits — Allowance of—Insufficiency of affidavit of justification as to amount—Venue in bail piece omitted. *Ross* v. *Bryan*, 2 L. J. 91.

Recognizance not in Accordance with Notice.]—Where the notice given to the plaintiff was that special bail had been put in, and the recognizance produced was only for defendant remaining on the limits, the application for allowance was refused with costs. *Clegg* v. *McNab*, 1 P. R. 150.

Right of Action.]—Under 10 & 11 Vict. c. 15, and 16 Vict. c. 175, it was not necessary to an action on recognizances to the limits, that the bail should be allowed. *Kerr* v. *Reid*, 18 U. C. R. 254.

Setting Aside Allowance.]—Defendant being arrested gave bail to the sheriff, under 16 Vict. c. 175, s. 7; within thirty days a recognizance was entered into as bail to the limits, and a certificate of its allowance given by the deputy clerk. An action was commenced on the recognizance but failed, it having been entered into before a person not authorized to take it. The plaintiff then got a Judge's order to set aside the certificate of allowance. This order was rescinded by this court. *Macfarlane* v. *Macwhirter*, 8 C. P. 76.

Time.]—Section 25 of the C. L. P. Act, 1857, requiring the condition of allowance of bond within thirty days, applies to the county as well as to the superior court. *Arnold* v. *Murgatroyd*, 8 C. P. 87.

Time.]—The fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits. *Dougall* v. *Moodie*, 19 U. C. R. 568.

(b) *Assignment of Bond.*

Death of Sheriff.] — The plaintiff declared, as assignee of G., the sheriff of Middlesex, on a bond to the limits given to H., the late sheriff, alleging that after the making of the bond H. died, and that the defendant on several occasions departed from the limits; but it was not stated whether the departure was before or after the death of H., or the appointment of G., or whether the bond had been allowed:—Held, that the declaration was bad, as for all that appeared the departure might have been at such a time as to render the late sheriff liable, and if so his successor could not assign the bond. *Osborne* v. *Cornish*, 20 U. C. R. 47.

Permission to Leave Limits.]—To action by the assignee of the sheriff under 16 Vict. c. 175, averring a departure, it is a good defence that the debtor left the limits by the leave and license of the plaintiff. Such a plea need not allege that the departure allowed is the departure complained of. *Whittier* v. *Hends*, 18 U. C. R. 295. See *S. C.* 19 U. C. R. 170, 172. *Hicks* v. *Godfrey*, 15 C. P. 262.

Time.]—In an action by the assignees of the sheriff against the sureties of one S. on a bond to the limits under 15 Vict. c. 175:—Held, that the bond continued in force after the expiration of the thirty days, and might be assigned and sued upon for a breach committed by departure after that period. *Brown* v. *Paxton*, 19 U. C. R. 426.

Witness.]—The deputy sheriff is, under 4 Anne c. 16, s. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits. *Whittier* v. *Hands*, 19 U. C. R. 172.

(c) *Breach of Bond.*

Cancellation of Bond.]—To debt on a bond by the sheriff's assignee, it is a good plea, that after breach and before assignment to the plaintiff, the sheriff delivered up the bond to the debtor to be cancelled; but a surrender after breach is not if the bond were not cancelled. *Le Mesurier* v. *Smith*, 2 O. S. 479.

Interrogatories—*Default.*]—The declaration upon a bond to the sheriff conditioned that the debtor should observe and obey all notices, orders, and rules of court touching and concerning him or his answering interrogatories, &c., assigned as a breach that the said debtor being released from close custody, the plaintiff duly filed certain written interrogatories for the purpose, &c., and caused a copy to be served on said debtor, requiring him to file his answers under oath thereto, within ten days after service thereof * * * and thereupon it became the duty of said debtor to file his answers on oath within the said time; yet said debtor did not file his said answers within the said time, whereby the bond became forfeited, and the sheriff assigned said bond to the plaintiff:—Held, on demurrer, declaration bad; 1. because the only breach shewn was the omission to comply with the notice requiring the defendant to answer the interrogatories within ten days, which was not authorized by the statute; and, 2. That inasmuch as no sufficient breach was shewn, the sheriff could not assign the bond, so as to enable the assignee to sue in his own name. *Hicks* v. *Godfrey*, 15 C. P. 262.

Semble, that the failure of the debtor to answer interrogatories or to attend to be examined, upon notice given by the plaintiff of his own mere motion, would not forfeit the

bond: but that there must be a Judge's order or rule of court requiring the debtor so to answer or attend. *Ib.*

Mistake as to Limits.]—Semble, that a bond to the limits is not broken where the debtor has not willingly withdrawn, but has been misled as to their extent. *Lewis* v. *Grant*, 1 U. C. R. 290.

Mistake as to Limits.]—Where a defendant has left the limits, it is no defence that he was informed and believed that the place he went to was within his limits, unless such was the general impression, or the boundary was disputed. *Hedden* v. *Gregory*, 10 U. C. R. 334.

Neglect to Tax Costs.]—A rule to tax costs was taken out on the 26th June, 1855, and served on the 26th February, 1856, under the provisions of 18 Vict. c. 69, which provides for relief of bail which have been sued by reason of the debtor having travelled from one county to another of a union of counties, or continued to reside in one county after the dissolution, by enacting that the proceedings shall be discontinued on payment of costs. The plaintiff not having produced his bill the defendant, on the 28th February, 1856, taxed a nominal bill. On the 17th March, 1857, the plaintiff made up and delivered his bill, and demanded payment, which was refused. In Easter term, 1857, relief was sought by plaintiff by application to set aside the taxation and all subsequent proceedings, which was enlarged by consent of the parties till Easter term, 1858:—Held, that the plaintiff was entitled to succeed, notwithstanding the delay. *Macdonell* v. *Farewell*, 8 C. P. 54.

Obedience to Speaker's Warrant.]—To an action on the bond, alleging a departure, defendants pleaded that the debtor, by virtue of a warrant of the speaker of the house of assembly, then in session, was required to attend as a witness before said house, and that to obey the warrant he left the limits and remained away ten days:—Held, no defence, as it was not shewn that the speaker knew the debtor to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of any officer while absent. *Brown* v. *Paxton*, 10 U. C. R. 170.

Obedience to Writ.]—Debt on bond to the limits. Plea, that defendant was taken from the limits by the sheriff, in whose custody he was, under a writ of habeas corpus ad test. issued on the equity side of the county court and directed to said sheriff:—Held, a good defence, for the writ was valid; and if not, the departure was involuntary, and therefore not a breach. *Ross* v. *Reid*, 18 U. C. R. 631.

Plaintiff's Permission.] — The plaintiff's attorney cannot authorize a departure from the limits when committed on a ca. sa.:—Semble, that if defendant departs by plaintiff's permission, and returns, the bond is not thereby gone. *Whittier* v. *Hands*, 19 U. C. R. 170.

The debtor applied to the plaintiff's attorney for permission to go to Toronto and obtain the money, and the attorney told him he would take no advantage if he wished to go for that purpose. He thereupon went, returned without effecting his object, and after remaining some time left the Province. The plaintiff then sued upon the bond:—Held, that there was no evidence to sustain a plea that the debtor departed with plaintiff's leave, and that it was unnecessary to new assign the second departure. *Whittier* v. *Hands*, 19 U. C. R. 172.

Return to Limits.]—In an action by the assignee of the sheriff of a bond to the limits, a voluntary return, and a surrender before action and before assignment, are not good pleas in bar. *Evans* v. *Shaw*, Dra. 14.

Return to Limits.]—It is no defence by the sureties, that the debtor before the assignment left the limits for an hour without their knowledge or consent, and afterwards and before action returned to the limits, and still continued thereon. *McMahon* v. *Masters*, 6 O. S. 579.

Separation of Counties.] — The limits of the gaol of the united counties of York, Ontario, and Peel, mean the limits for the time being, and when Ontario was separated, a debtor on the limits continuing in that county, his bail were held liable. *Ross* v. *Farewell*, 5 C. P. 101.

Under 18 Vict. c. 60, s. 5, defendants in actions on bail bonds, where the breach has arisen by the separation of counties by the legislature, are entitled to have all proceedings stayed upon payment of costs. *Ib.*

(d) *Form.*

Statutory Requirements.]—Section 29 of C. S. U. C. c. 24, (taken from 22 Vict. c. 33) does not repeal s. 25, (taken from 19 Vict. c. 43, and 20 Vict. c. 57), and the two are not so inconsistent as to be incapable of standing together, in some respects at least. The 25th governs where the bond was taken before the 4th May, 1859, the 29th after; and where the two are at variance the latter must prevail. Section 29 therefore does not contain all that is required in the condition of bonds since that date, but the requirements of s. 25, where not inconsistent, must be incorporated with it. *Kingan* v. *Hall*, 23 U. C. R. 503.

The sheriff cannot admit a debtor to the limits except by statute, and where he does so on a bond not in accordance with the Act, he is liable as for a voluntary escape. *Ib.*

Where, therefore, in the condition the words, "to be examined vivâ voce or otherwise," were omitted:—Held, that the bond afforded no justification:—Held, also, that the creditor by having required and taken an assignment of such a bond was not estopped from looking to the sheriff. *Ib.*

The introduction in the condition of a bond given since the 4th May, 1859, of a provision that the debtor should remain within the limits, which that section says the condition "shall not contain:"—Held, fatal. *Ib.*

The omission of the word "close" before "custody" in such condition:—Held, immaterial. *Ib.*

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3. *Commitment to Close Custody.*

Committal Order.]—An order for such committal should be directed to the sheriff, and follow the form in the statute. *Hamilton* v. *Anderson*, 2 U. C. R. 452.

Demand of Effects.]—The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served. *Meighan* v. *Reynolds*, 4 O. S. 19.

Escape—*Re-arrest.*]—A prisoner on bail to the limits, having been rendered to the sheriff, made his escape while the officer in whose custody he was placed was otherwise engaged:—Held, that the sheriff was justified in re-taking and committing him to close custody; and that when the defendant endeavoured to shew he was improperly held, he must swear positively there was no process, and not leave it to be inferentially inferred. *Arnold* v. *Andrews*, 8 C. P. 467; *Scatcherd* v. *Andrews*, *ib.* 473.

Offer to Assign.]—Where a defendant on the limits offered to assign his whole property for all his creditors, but refused to give up any part to the plaintiff alone, he was committed to close custody under 4 Will. IV. c. 10. *Bruneau* v. *Joyce*, 6 O. S. 479.

Right of Appeal.]—A Judge, when applied to in vacation under 4 Will. IV. c. 10, s. 4, for the commitment of a debtor on the limits, disposes of the case without the power of appeal by declining to interfere. *Shaw* v. *Nickerson*, *Gillespie* v. *Nickerson*, 7 U. C. R. 541.

Unsatisfactory Answers.]—A defendant on the limits re-committed for unsatisfactory answers under 4 Will. IV. c. 10. *Kirby* v. *Mitchell*, 1 C. L. Ch. 137; *Leavens* v. *Ostrom*, *ib.* 261.

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4. Proceedings on Bond.

Assessing Damages.] — The plaintiff must assess his damages after interlocutory judgment, in debt on a bond to the limits. *Callagher* v. *Strobridge*, Dra. 158.

Assessing Damages.]—A recognizance of bail to the limits is not within 8 & 9 Will. III. c. 11; and when there is no plea, but a breach is assigned in the declaration, the plaintiff may enter final judgment without assessing damages. *McNamee* v. *Reilly*, 13 U. C. R. 197.

Attorney's Liability.]—An attorney will not be ordered to pay costs of suit on a bond to the limits signed by him on behalf of an obligor. *Leonard* v. *Glendennan*, M. T. 1 Will. IV.

Consolidating Actions.] — Several actions having been brought on a bond to a sheriff for the gaol limits, the court granted a rule to consolidate them. *Leonard* v. *Merritt*, Dra. 190.

Contribution.]—Where judgment is recovered against two parties jointly liable, and at the instance and for the benefit of one of them, who pays the debt without the costs, the plaintiff proceeds to enforce payment of the whole amount from the other party—the court will order the damages assessed by a jury on the breach assigned, in an action on a limit bond given by that other party, to be reduced to the costs and charges in the original action. *Gooderham* v. *Chalmers*, 1 U. C. R. 172.

Neglect to Have Bond Allowed.]—Bail to the limits had been given under s. 302, C. L. P. Act, 1856. The bail omitted to have the bond allowed as required by s. 25 of C. L. P. Act, 1857, and plaintiffs took an assignment of the bond and sued upon it. The bail applied to stay proceedings upon their getting the bond allowed and on payment of costs, which was refused, but leave was given to apply to the full court after verdict. *Barber* v. *St. Amour*, 4 L. J. 138.

Particulars of Breach.]—In debt on bond to the limits, an order for particulars of breach will be granted. *Church* v. *Barnhart*, Dra. 213.

Pleading.]—A blank having been left in the bond, which was afterwards filled up with the consent of the debtor, although not in his presence, was held no variance on non est factum. *Leonard* v. *Merritt*, Dra. 281.

Where in declaring on a bond the condition set out was, that the debtor should not depart from the limits, and the defendant on oyer shewed the condition to be that the debtor would remain on the limits until the debt was paid or he should be legally discharged from the limits, and demurred:—Held, a fatal variance. *McGuire* v. *Pringle*, M. T. 3 Vict.

The declaration on a bond to the limits given by a debtor in execution must shew the judgment, writ, and arrest of the debtor, and the execution of the bond while he was in custody: and the recital of those facts in the bond set out will not suffice. *Leonard* v. *McBride*, 3 O. S. 1.

An averment that the justices in quarter sessions assigned limits to the gaol is sufficient on general demurrer; and the bond is not avoided altogether because part of the condition is contrary to the statute. *Stebbins* v. *O'Grady*, 5 O. S. 742.

It should be shewn expressly, and not by implication, that the defendant became bound, and where it did not so appear and no profert of any bond was made, a plea of nil debet was held good. *Douglass* v. *Murchison*, 6 O. S. 48.

In an action by a sheriff on a bond to the limits, if defendants plead that the debtor left the limits, but afterwards returned to them, and always remained on them after his return, the sheriff may take issue on the subsequent remaining, and need not new assign; but he cannot do so if defendants by their plea do not admit the bond to have been broken before the debtor's return, as the plea would then amount to the general issue. And where the plaintiff declared that the debtor left the limits in February, and defendants pleaded that the plaintiff, as sheriff, removed him in November, and that the debtor returned and always afterwards remained thereon: and the plaintiff replied that he did not always afterwards remain, on which issue was joined, and the plaintiff obtained a verdict, the court refused to arrest the judgment, the verdict, according to the time stated, being consistent with the plaintiff's right, and the issue having been in fact on the subsequent remaining only. *Cameron* v. *McLeod*, T. T. 4 Vict.

A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer: and on pleas of nul tiel record to the judgment and no ca. sa., a judgment varying in the term from that stated in the declaration, and a ca. sa. in a form of action different from that stated in the replication, constitute a fatal variance. *Burns* v. *Grier*, 5 O. S. 509.

Debt on bail bond. Plea, that the principal put in bail to the action according to the condition. Replication, that he did not cause special bail to be put in for him in said action:—Held, an issue of nul tiel record, which could not be tried by a jury. *Dusolme* v. *Hamilton*, 15 U. C. R. 183.

A plea that after a ca. sa. against their principal the plaintiff gave notice to the sheriff not to arrest him, is bad on general demurrer. *Burns* v. *Donelly*, 5 O. S. 495.

Principal Going Beyond Limits.]—Where in an action on a bond to the limits, it was proved that the principal had been seen fifty yards beyond the limits, and the jury notwithstanding found for the defendant, a new trial was granted on payment of costs. *Chesley* v. *McMillan*, E. T. 3 Vict.

Principal Going Beyond Limits.]—An admission by a debtor on the limits that he had gone beyond them, is not admissible to charge his sureties. *Freeland* v. *Jones*, 6 O. S. 44.

Quantum of Damages.]—In an action by a sheriff on a limit bond it is not necessary to shew actual pecuniary damage. *Kingsmill* v. *Gardiner*, 1 U. C. R. 223.

Quantum of Damages.]—In an action by the assignees of a sheriff against the sureties of one F., on a bond that F. should remain within the limits:—Held, that the measure of damages was the amount for which the debtor was in custody, with interest thereon, notwithstanding the debtor was insolvent from the time of the arrest until the breach of the condition. *Kerr* v. *Fullarton*, 10 U. C. R. 250.

Quantum of Damages.]—In an action by the assignees of the sheriff against the sureties of one S. on a bond to the limits under 16 Vict. c. 175:—Held, that the plaintiffs were not entitled as of course to the full amount of their debt and costs, but only to the loss actually sustained by the breach; and that in this case, as it was proved that the debtor was insolvent from the time of his arrest till his death, the verdict should be reduced to nominal damages. Calcutt v. Ruttan, 13 U. C. R. 220, commented upon. *Brown* v. *Paxton*, 19 U. C. R. 426.

Relief Against Forfeiture.] — The court cannot relieve against forfeiture of a bail bond by neglecting to procure its allowance within thirty days, according to the C. L. P. Act, 1857, s. 25. *McKay* v. *Hudson*, 2 P. R. 222.

Representative Capacity.]—Where in debt on a bail bond, taken in a suit brought by an executrix, the declaration shewed the cause of action to have accrued and the bond to have been given to the plaintiff as executrix, and on a plea of non est factum it appeared that the bond was given to the plaintiff in her individual right:—Held, that she could not recover. *Haw* v. *Montgomery*, T. T. 3 & 4 Vict.

Suggesting Breaches.]—Where the condition of a bond is set out on oyer, and it appears on the record by that means that the bond is within 8 & 9 Will. III. c. 11, the plaintiff ought to suggest his breaches before trial, and cannot take a verdict for the penalty, and suggest breaches afterwards. *Campbell* v. *Lemon*, 2 O. S. 401.

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5. Sheriff's Duties and Liabilities.

Bail Not Given—*Proceeding With Action.*]—Semble, that the plaintiff though the defendant will not put in bail, may go on with his action against him, and pursue his remedy against the sheriff at the same time. *Regina* v. *Sheriff of Hastings*, 1 C. L. Ch. 230.

Benefit of the Limits.]—The sheriff cannot of his own mere motion allow a prisoner charged in execution, and in his custody, the benefit of the limits. A debtor who is admitted to the limits on giving a bond to the sheriff under 16 Vict. c. 175, is bound to enter into and file the recognizance required by 10 & 11 Vict. c. 15, within a month from such bond. If he does not, the sheriff must re-commit him to close custody or he will be liable as for an escape. If the certificate of filing such recognizance, &c., be not delivered to the sheriff within a month, the bond to him is forfeited:—Semble, the sheriff must take a bond under 16 Vict. if the sureties are sufficient. *Calcutt* v. *Ruttan*, 13 U. C. R. 220.

Bond Wrong in Form.] — The sheriff cannot admit a debtor to the limits except by statute, and where he does so on a bond not in accordance with the Act he is liable as for a voluntary escape. *Kingan* v. *Hall*, 23 U. C. R. 503.

Where, therefore, in the condition the words "to be examined vivâ voce or otherwise," were omitted:—Held, that the bond afforded no justification:—Held, also, that the creditor, by having required and taken an assignment of such a bond, was not estopped from looking to the sheriff. *Ib.*

Until the bond has been allowed the creditor may either take an assignment of it or hold the sheriff responsible. The mere taking the bond, therefore, without allowance, is no defence for the sheriff; he must shew that the debtor has fulfilled its condition. *Ib.*

Loss of Bond—*Bond Not Allowed.*]—One L. was arrested under an attachment for certain interlocutory costs, and gave the usual bond to the limits. He had never left the limits, but neglected to get the bond allowed within thirty days, and the plaintiffs thereupon called upon the sheriff to assign the bond. Having lost it, the sheriff was unable to assign by indorsement in the usual form, but he offered to prove the loss, and execute a separate assignment, or to give the plaintiffs authority to sue in his name. The plaintiffs declined this, and brought an action against him, alleging in one count refusal to assign, and in another charging an escape. Defendant

pleaded to the first count that he was always ready to assign, but that the plaintiffs never required or tendered to him any assignment for execution, and that he gave them notice that they might sue on the bond in his name; and to the other count not guilty. On leave reserved to move to enter a verdict for the plaintiffs, if the court, drawing the same inferences as a jury, should think them entitled to recover:—Held, that the defendant was entitled to a verdict on the first count, for though the plea might be immaterial, because the sheriff is bound to prepare the assignment himself, yet the plaintiffs had not demurred, but taken issue; and the action being without merits, if the jury had found for defendant judgment non obstante would not have been granted. But, semble, that the issue was not immaterial, for the plea might be taken to deny that the plaintiffs required the sheriff to assign, and the evidence shewed that on such an issue defendant should succeed:—Held, also, that on the second count the plaintiffs could not recover, for the fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits. *Dougall* v. *Moodie*, 19 U. C. R. 568.

Sheriff's Action.]—A sheriff may sue bail to the limits for the escape of a debtor before he has been sued or paid the money for which the debtor was in execution. *Ruttan* v. *Wilson*, M. T. 3 Vict.

Sheriff's Action—*Forum.*]—Semble, that the sheriff, if suing on a bail bond, is not restricted to the district court of the district in which the bond was taken, but may sue in the court of Queen's Bench. *Hamilton* v. *Shears*, 5 U. C. R. 306.

Sheriff's Costs.]—Where one of the bail to the limits, hearing of the debtor's escape, paid to the sheriff the debt and costs for which he was imprisoned, exclusive of the sheriff's own fees, and the sheriff nevertheless sued the other obligor in the limit bond to recover the costs in an action which the plaintiff in the original action had brought against the sheriff:—Held, that after the receipt by the sheriff of the money paid by the other of the bail he could not recover for those costs, since he ought to have paid over the money, and not defended the action nor allowed it to proceed. *Corbett* v. *Lake*, 5 U. C. R. 454.

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6. *Miscellaneous Cases.*

Certificate of Clerk of Crown.]—Quære, should the clerk of the Crown and pleas grant a certificate until he is satisfied that due notice of bail has been given to the plaintiff in the cause. *White* v. *Petch*, 7 U. C. R. 1.

County Court.]—The provisions of 10 & 11 Vict. c. 15, s. 5, as to gaol limits, apply to cases in which county court ca. sas. are issued under 13 & 14 Vict. c. 52, to the sheriffs of other counties than that in which judgment has been obtained. *Gibson* v. *Thomas*, 7 C. P. 163.

Toronto Limits.]—The gaol limits of the city of Toronto do not include the liberties of the city. *King* v. *Latham*, 5 O. S. 488.

II. Bail Bond.

Form.]—A bail bond conditioned that the defendant shall enter special bail at the return of the writ, or surrender himself to the sheriff, is bad, though the first part of the condition alone would be good. *Wilson* v. *McCullough*, 5 O. S. 680.

Process not Bailable.]—A bail bond is irregular in a case where the action was commenced by process not bailable, and the arrest made on bailable process after appearance entered. *Douglass v. Powell*, 2 O. S. 219.

III. Bail Piece.

Amendment of Names.]—A bail piece in which the plaintiff or defendant is incorrectly named may be amended with the consent of the bail. *Daniell* v. *James*, 2 P. R. 195.

Form.]—The bail piece need not set out the writ on which the defendant has been arrested; it is not therefore necessary that the certificate of the clerk of the Crown and pleas, of the defendant having filed a recognizance of bail, and affidavit of the justification of bail, under 10 & 11 Vict. c. 15, s. 5, should state the writ on which the defendant has been arrested. *White* v. *Petch*, 7 U. C. R. 1.

Irregularity in Names.]—Where there are two plaintiffs with the same surname, the non-repetition of the surname after the Christian name of each in a bail piece is only an irregularity, and will not warrant the plaintiffs in taking an assignment of the bail bond. *Meighan* v. *Brown*, Dra. 167.

Issuing District.]—A bail piece may be intituled of a term preceding that in which the ca. re. is returnable: but the bail piece must state in the margin the district from which the process issued with that in which the bail is taken, as thus: "Testatum from the Home district to the Niagara district." *Ward* v. *Skinner*, 3 O. S. 163.

Place of Filing.]—In the warning to defendant in a writ of capias it is proper to direct the bail piece to be filed in the office of the clerk or deputy clerk of the Crown and pleas for the county from which process issued, although a county different to that in which the arrest is made or bail given. *Hubbard* v. *Milne*, 1 C. L. J. 14.

Transmitting.]—According to the old practice, a bail piece must have been transmitted from the country to a Judge of the King's Bench. *Whitney* v. *Stone*, Dra. 235.

IV. Discharge of Bail.

1. *Acts of Plaintiff or Principal.*

Delay.]—Where plaintiff agreed to discharge the bail on certain terms, and after three years, the conditions not having been performed, proceeded against the bail:—Held, that they were not entitled to an exoneretur for laches. *McQueen* v. *Pratt*, 2 P. R. 196.

Delay.]—The fact that a plaintiff has not charged in execution within two terms after

judgment a debtor who has given bail to the action, is no ground for an exoneretur. *Torrance v. Holden*, 10 L. J. 298.

Enlargement by Principal.]—Where a verdict was taken for plaintiff subject to a reference, and the time for making the award was afterwards enlarged beyond the time when the plaintiff would regularly have been entitled to judgment:—Held, that the bail were not therefore entitled to an exoneretur. *Whiting* v. *Nicoll*, E. T. 3 Vict.

Enlargement.]—The acceptance of a cognovit with stay of execution until a period not later than the plaintiff could in the ordinary course have obtained execution will not discharge bail. *Carter* v. *Sullivan*, 4 C. P. 208.

Enlargement by Bail.]—The court refused to allow an exoneretur on the ground of laches, where an agreement, out of which the laches grew, had been entered into with the assent of the bail, and was such that a length of time must necessarily have elapsed before the principal could complete it. *Spencer* v. *Gifford*, E. T. 3 Vict.

Enlargement by Principal.] — Where the trial of an action of replevin had been postponed at the instance of the defendant, but without the direct assent or concurrence of the bail:—Held, that the bail were discharged. *Canniff v. Bogert*, 6 C. P. 474.

Irregularity.]—Where the plaintiff, after service of notice of application, allowed an exoneretur to be entered on the bail piece without opposition, and then, six years afterwards, applied to rescind the order for the exoneretur for irregularity, the application was refused on the ground that the plaintiff's acquiescence in the order for six years must be considered as waiving the irregularity and discharging the bail. *Roberts* v. *Fox*, 1 C. L. Ch. 146.

Waiver.]—The defendant in the original action having given bail to the sheriff, the plaintiff went on and obtained judgment:—Held, that he had waived bail above, and could not afterwards take an assignment of the bail bond and proceed against the bail. *Dusolme* v. *Hamilton*, 15 U. C. R. 574.

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2. *Discharge in Insolvency of Principal.*

An exoneretur may be entered on the bail piece (for the limits), where the defendant has been discharged by order of the insolvent court, and the debt in the action included in the schedule. *McCarthy* v. *Leonard*, 1 C. L. Ch. 135.

Leave to enter an exoneretur upon a final order of discharge in bankruptcy of a debtor on the limits was refused, and the bail were left to plead it. *Wilson* v. *Downing*, 3 L. J. 49.

The fact of a defendant on the limits having obtained his discharge from the insolvent court, is no ground for entering an exoneretur. *Nordheimer* v. *Grover*, 2 P. R. 167.

An interim order of protection under the Insolvent Debtors' Act, does not prevent bail from surrendering their principal; nor does the final certificate discharge them from liability if the bail be previously fixed. *Ross* v. *Brooks*, 3 L. J. 110.

The defendant B. having been arrested gave bail. A verdict was rendered against him in the suit, and a ca. sa. issued was returned non est inventus. A writ of summons was then issued on the recognizance against J., his surety, but prior to the service upon J., the defendant B. applied under 19 Vict. c. 93, as an insolvent debtor, and on the 16th February, obtained the interim order to protect him from arrest; on the 17th J. was served. It was contended that the ca. sa. having been received and the return made after the interim order, the bail were not fixed by the return non est inventus:—Held, that the bail were liable. *Ross* v. *Brooks*, 7 C. P. 366.

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3. *Surrender of Principal.*

Attempt to Surrender.]—The bail before action took the debtor to an office some distance from the court house, where the deputy sheriff transacted business with practitioners, and there tendered him in their discharge. The deputy referred them to the sheriff's office, where they went, but found only a clerk, who had no authority in such matters. They then tendered him to the gaoler's wife at the gaol, the gaoler being absent, but she refused to receive him. Afterwards the plaintiff sued on the recognizance. Defendants applied without success in chambers to stay proceedings, and at the end of three months surrendered the principal. A verdict having been found for the plaintiffs:—Held, that the court could not interfere. *Read* v. *Scovill*, 16 U. C. R. 453.

Certificate of Sheriff.]—The court will not allow an exoneretur, where bail have surrendered their principal, without a certificate from the sheriff to whom he was rendered. *Linley* v. *Cheeseman*, Dra. 53.

Copy of Bail Piece.]—Where a defendant is arrested by a sheriff under a ca. re. and after verdict is surrendered by his bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail piece before receiving the prisoner into custody; and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender. *Grierson* v. *Corbett*, 8 P. R. 517.

Costs.]—When bail surrender within the time allowed after return of process against themselves, they are not liable for costs. *Lewis* v. *McDonald*, T. T. 2 & 3 Vict.

Doubt as to Surrender.]—Where there is any doubt as to the validity of the surrender, a Judge in chambers will not order an exoneretur, but will leave the bail to plead it. *Blackman* v. *O'Gorman*, 5 L. J. 161.

Insolvent Debtors' Act.] — An interim order of protection under the Insolvent Debtors' Act does not prevent bail from surrendering their principal. *Ross* v. *Brooks*, 3 L. J. 110.

Judge in Chambers—*Place for Surrender.*]—Under C. L. P. Act, s. 37, a Judge

in chambers cannot order an exoneretur unless he be "a Judge of the court in which the action is pending." *Roszel* v. *Strong*, 2 C. L. J. 48.

A surrender to the sheriff elsewhere than at the gaol, if within his county, is sufficient for the purposes of that section. *Ib.*

Ne Exeat Provincia.]—The sureties on a statutory bail bond under a writ of ne exeat provinciâ have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for repayment of the money paid to the sheriff as collateral security was refused. *Richardson* v. *Richardson*, 8 P. R. 274.

Order for Exoneretur.]—The defendants were special bail for one S. upon a recognizance in an action by the plaintiffs against S. The proceedings in the original action were begun and carried on in the county of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, &c., or render himself to the custody of the sheriff of Middlesex; or the cognizors, the present defendants, would do so for him. R. S. O. 1877 c. 50, s. 40 (Con. Rule 1062) provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought; and s. 42 of the same Act (Con. Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail piece, and thereupon the bail shall be discharged. The defendants on the 7th February, 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render, but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th April, 1888, and on the 16th April, 1888, the defendants served on the plaintiffs a notice of the render of S. to the sheriff of Norfolk:—Held, that the bail were not entitled to be discharged, and that the plaintiffs were entitled to bring this action upon the recognizance, because no order for an exoneretur had been obtained, notwithstanding the notice of render; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms. The court ordered that upon the defendants filing an order for an exoneretur within two weeks and paying the costs of the action within ten days after taxation, the judgment for the plaintiffs should be set aside and all further proceedings stayed; otherwise judgment to be entered for the plaintiffs with costs. *Laing* v. *Slingerland*, 17 O. R. 392.

Pretended Surrender.]—A debtor on the limits comes to the sheriff's office and tells the clerk there that he wishes to surrender himself; the clerk tells him to remain till he finds the sheriff or his deputy, and leaves the debtor in the office, but before he finds the sheriff and returns, the debtor absconds:—Held, that this being a mere pretended and fraudulent render, it could not fix the sheriff and support a plea of remedy by the bail. *Kennedy* v. *Brodie*, 4 U. C. R. 189.

Proceeding after Surrender.]—Where a defendant presented himself to the sheriff in discharge of his bail before the return of the ca sa., which had been lodged in the office merely to fix the bail, and the plaintiff nevertheless proceeded against them, the court set the proceedings aside. *Ward* v. *Stocking*, Tay. 216.

Proceeding after Surrender.] — Bail surrendered their principal and gave due notice within eight days after the return of proceedings on recognizance: the plaintiffs nevertheless proceeded to judgment. The court stayed proceedings without exacting costs up to the notice. *Wright* v. *Tucker*, 6 U. C. R. 24.

Right to Surrender.]—The sureties in a bond taken under C. S. U. C. c. 24, s. 29, may surrender their principal under the power given by s. 24. *Kingan* v. *Hall*, 23 U. C. R. 503.

Time.]—Bail are fixed after eight days in full term after the return of process against them, and the court will not relieve by allowing a render. *McPherson* v. *Mosier*, 2 O. S. 491.

Time.]—Bail have eight days in full term after the return of process against themselves to surrender their principal, and the plaintiff is bound to stay proceedings on receiving notice of the render, although the costs be not paid. *Ives* v. *Robinson*, M. T. 2 Vict.

Time.]—Held, that under s. 35, C. S. U. C. c. 22, read with s. 37, if the bail render their principal to the sheriff of the county in which the action is brought they are entitled to have an exoneretur entered on the bail piece, and it is immaterial whether the render be before or after judgment. *Ballantyne* v. *Campbell*, *Ballantyne* v. *Martin*, 13 C. L. J. 224.

Time.]—Where there is any doubt as to the legality of the render, proceedings on a bail bond will not be stayed under R. G. 88, simply on payment of costs. The render had been made to an acting sheriff at the sheriff's office, within eight days after action, and was refused on the ground that the ca. sa. had been returned. An order was made staying proceedings on the bail rendering their principal within eight days, and on payment of costs. The ca. sa. had been lodged with the sheriff on the 26th October, and returned on 1st November:—Held, that it had been long enough in his hands to charge the bail. *Potts* v. *Baird*, 7 P. R. 113.

Vacation.] — In case of a surrender after judgment, plaintiff must proceed to execution within two terms after the surrender and notice, and a render in vacation is to be deemed as of the preceding term, so as to make that term count as one. *Torrance* v. *Holden*, 10 L. J. 332.

Where judgment was obtained on 14th January, defendant being on bail, and he was on 21st May following, in the vacation preceding Trinity term, surrendered by his bail, of which notice was given to plaintiff, and the whole of Trinity term allowed to elapse without any thing being done towards execution, defendant was superseded. *Ib.*

4. *Miscellaneous Cases.*

Escape.]—Where a sheriff is requested to return non est inventus, he need not seek the debtor, but if he do, and arrest him, the bail are discharged: and if the debtor escape, no matter from what cause, their liability does not revive. *Reid* v. *Hilts*, 4 U. C. R. 175.

Repeal of Act.]—Under 7 Vict. c. 31, the recognizance was not forfeited by the non-payment of the condemnation money on the recovery of judgment, unless the alternative condition was not complied with. The legislature having made no provision in the Act repealing 7 Vict. c. 31, for continuing the proceedings commenced under it, no proceeding can now be taken against bail under such recognizance. *Hardy* v. *Hall*, 2 U. C. R. 276.

Repeal of Act.]—Since the repeal of that Act:—Held, that the recognizances taken under it are not binding, except where the debtor has been notified, and has made default while the Act was still in force. *Macdonald* v. *Weeks*, 3 U. C. R. 441.

Second Arrest.]—Where a defendant had been arrested by one of two plaintiffs for £18, and was afterwards arrested in the name of both for £18 10s., the former amount being included in the second, the court ordered the bail bond to be cancelled. *Ransom* v. *Donaghue*, Tay. 493.

V. Indorsement of Bailable Writs.

A bailable writ must be indorsed with the sum sworn to. *Armstrong* v. *Scobell*, 3 O. S. 78.

Although it be sued out by an attorney in person. *Washburn* v. *Walsh*, 4 O. S. 322.

The claim must also be indorsed on the bailiff's warrant, as well as on the writ. *Steele* v. *Lameux*, E. T. 6 Will. IV.

Semble, that an alias bailable writ must be indorsed. *Ross* v. *Balfour*, 5 O. S. 683.

A rule to set aside process for want of an indorsement of the plaintiff's claim was refused, where the omission had been supplied two hours after the arrest, and before bail was put in. *Smith* v. *Smith*, 4 O. S. 10.

The arrest was set aside, although the omission was supplied immediately after it. *Gibbs* v. *Kimble*, 1 U. C. R. 408.

On such an application, the defendant must shew by affidavit that the cause of action is a debt. *Leggatt* v. *Marmott*, E. T. 3 Vict.

Where the indorsement directed the sheriff to take bail for too large a sum, the court allowed it to be amended on payment of costs. *Grantham* v. *Peters*, E. T. 3 Vict.

Semble, if the sum be mentioned in the affidavit and written in the margin of the writ, that would be sufficient, without indorsing it on the writ. *Sligh* v. *Campbell*, 4 U. C. R. 255.

Where a ca. sa. in debt has been issued on a judgment in assumpsit, and not indorsed as required by the rule of court, it may be amended. *Keefer* v. *Hawley*, 1 P. R. 1.

VI. Justification.

The affidavit of justification cannot be sworn before defendant's attorney. *Koyle* v. *Wilcox*, 2 O. S. 113.

Bail may justify by the affidavit made at the time of the acknowledgment, though an exception to them be entered, where nothing is shewn to repel such affidavit. *Duggan* v. *Derrick*, 5 O. S. 75.

Since 4 Will. IV. c. 5, bail excepted to in vacation must justify in vacation, and have not till the term. *McKenzie* v. *Macnab*, E. T. 2 Vict.

It is not sufficient ground to reject one of two bail, that one of his creditors agreed to compound for his debt for 2s. in the pound. *Daniell* v. *James*, 2 P. R. 195.

VII. Proceedings Against Bail.

Action on Bill or Note.]—The bail of any of the parties who are sued upon a bill or note, or any persons who pay the bill or note on account of any of the parties, become on payment holders; and they hold as upon a transfer from the person for whom they made the payment, not as a transfer from the person they have paid; and they stand, with respect to other parties to the bill or note, in the situation of the party for whom they have made the payment; and consequently unless he could have sued upon the bill or note, they cannot. *Hutchinson* v. *Munroe*, 8 U. C. R. 103.

Action on Bond—*Pleading.*]—The plaintiff having arrested the defendant, proceeded in the suit and obtained a verdict. After verdict, the plaintiff obtained an order to set aside the recognizance of bail and to take the same off the files, on account of an alteration made after filing. The plaintiff, notwithstanding his proceeding in the action, had taken an assignment of the bail bond from the sheriff, and sued upon it as well; and the defendant in this action pleaded that special bail had been entered in the original action and demanded a replication, and the plaintiff not replying, signed judgment of non pros.:—Held, that such judgment was regular. *Caspar* v. *Herschberg*, 1 P. R. 175.

Alimony.]—Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs; and, semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham* v. *Needham*, 29 Gr. 117.

Allowing in to Defend.]—Where judgment and execution have been obtained against bail by returns of nihil to sci. fas. without their knowledge, the court, although they can-

not set aside the proceedings, will let them in to defend upon payment of costs. *Read* v. *Hilts*, 4 U. C. R. 175.

Alteration of Bond.]—In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute:—Held, that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed. *Woodworth* v. *Dickie*, 14 S. C. R. 734.

Held, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this court. *Ib.*

Attorney Acting Without Authority.]—Defendant was arrested and gave bail, who to relieve themselves put in special bail. The attorney for the bail gave notice, and signed himself "defendant's attorney," and all the subsequent papers in the cause were served on him. Judgment was obtained, and defendant arrested on ca. sa., when it was shewn that defendant had never employed the attorney. The court set aside the whole proceedings. *McMartin* v. *McKinnon*, 5 O. S. 72.

Ca. Sa. Not Returned.]—It is no ground for setting aside or staying proceedings on a fi. fa. against bail, that the ca. sa. against their principal has not been returned and filed. *Hugill* v. *McCarthy*, 2 O. S. 495.

Commissioner—*Estoppel.*] — Defendants had gone before one Allan, who was bonâ fide supposed to be a commissioner for the county of Lennox, and acknowledged a recognizance:—Held, there was no estoppel to prevent the defendants from disputing the authority of Allan as commissioner, and that the court would not favour an amendment for the purpose of shutting out evidence, and by estoppel preventing the truth being known. *Macfarlane* v. *Allan*, 6 C. P. 496.

Declaration.]—Where a defendant was committed to prison on a bailable writ, and afterwards, and before the return day of the writ, was released on bail, and on the return day of writ entered special bail, he was held not entitled to be served with a declaration before the end of the term then next after such arrest. *Glenn* v. *Box*, 3 U. C. R. 182.

Defendant Misled.]—Where a defendant had neglected to put in special bail upon the plaintiff's representation that it was unnecessary (they being about to compromise), proceedings on the bail bond were stayed for one month to let him put in such bail. *Myers* v. *Rathburn*, Tay. 202.

Delay.]—This court will set aside a recognizance roll not warranted by the proceedings, after comperuit ad diem pleaded to an action on the bail bond. *McDonnell* v. *Rutter*, 2 O. S. 340.

Delay.]—Where there was an irregularity both in the special bail piece and in the notice of bail, and the plaintiffs took an assignment of the bail bond and obtained judgment and execution, the court refused to set aside the proceedings on the bail bond on payment of costs, the defendant in the original action being insolvent, and the plaintiffs having lost two assizes. *Lyman* v. *Binge*, H. T. 5 Vict.

Delay.]—Delay in issuing a ca. sa., to fix the bail, cannot be pleaded in bar to an action against them on the recognizance. *Carroll* v. *Berryman*, 16 U. C. R. 520.

District Court.]—Where an action was brought on a recognizance of bail taken in a district court, and on application to set aside proceedings facts were shewn upon which the court might have ordered an exoneretur to be entered on the bail piece, if the original action had been brought in this court:—Held, that the application should have been made to the court below. *Morgan* v. *Mosier*, T. T. 4 & 5 Vict.

District Court.]—In an action upon a bail bond given in a district court, the plaintiff (if the plaintiff in the original action) should sue in the district court; and if he sue in the Queen's Bench, the defendant may take advantage of the error in one of three ways—either by applying to the court to set aside the proceedings, or by pleading in abatement to the jurisdiction, or by demurring generally to the declaration: he cannot have a replearder. *Hamilton* v. *Shears*, 5 U. C. R. 306.

In order to proceed against the bail, the ca. sa. must be in the hands of the sheriff four days (exclusive) before the return day. *Ib.*

Enrolling Recognizance.]—Where a recognizance is not enrolled until after nul tiel record pleaded, the plaintiff must pay the costs of plea, and the defendant be at liberty to plead de novo. *Smith* v. *Morcton*, 5 O. S. 551.

Forum—*Pleading.*]—In debt on a recognizance, the declaration will be bad if it appear that the plaintiff is suing in an outer district, upon a record of this court remaining in Toronto. *Manning* v. *Proctor*, 7 U. C. R. 22.

The declaration must shew the recognizance to have been filed where it was taken. *Ib.*

Joint and Several Recognizance.]—On a joint and several recognizance, one may be sued alone. A plea that defendant was jointly bound means that his undertaking was joint only, not several. *Ross* v. *Jones*, 15 U. C. R. 598.

Misapprehension by Surety.]—Where one of the bail to the sheriff had, in consequence of defendant leaving the Province, and under an apprehension that he would not return to defend the cause, given a cognovit in his own name to the plaintiff, the court, upon an affidavit of merits, stayed the proceedings upon the cognovit. *Roberts* v. *Haslcton*, Tay. 32.

Money in Court.]—Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited: and where in an alimony suit the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony. *Richardson* v. *Richardson*, 8 P. R. 274.

Plaintiff's Delay and Waiver.]—The court will stay proceedings on a bail bond after judgment and execution, on payment of costs, where the plaintiff has delayed for three years to proceed against the bail; and they will not keep the bail to terms accepted by them when obtaining a Judge's order, which was abandoned and never acted upon. *Young* v. *Shore*, 2 O. S. 314.

Plea in Abatement.]—Where in an action on a recognizance the declaration shewed that others besides defendant were jointly bound, the objection was held fatal without a plea in abatement. *Mills* v. *McBride*, 10 U. C. R. 145.

Plea in Abatement.]—The declaration alleged that the defendant by a recognizance became bail for C. to the limits of, &c. Plea, nul tiel record. On the recognizance roll, it appeared that C. had also joined with defendants, which was objected to as a variance:—Held, that the objection, if any, should have been taken by plea in abatement. *McFarlane* v. *Allen*, 6 C. P. 143.

Pleading.]—When bail rely upon performance of their undertaking, they must plead it; they cannot apply for summary interference. *Mitchell* v. *Noble*, 1 C. L. Ch. 284.

Held, declaration bad on special demurrer, in not averring that the recognizance was filed in the office of the deputy clerk of the Crown in which it was taken, as directed by s. 40. 2 Geo. IV. c. 1. *Gillespie* v. *Grant*, 3 U. C. R. 400.

Mistake in averment of indorsement of ca. sa. as to amount:—Held, no ground of special demurrer. *Easton* v. *Longchamp*, 3 U. C. R. 475.

Held, not necessary to aver, in an action by the assignees of a bail bond, that the sheriff did not receive the money after the assignment; nor that the defendant had notice of the assignment. *Ib.*

Debt on a recognizance of bail. Plea, no ca. sa. Replication, setting out a ca. sa. directed to the sheriff of the Newcastle district, averring that the venue had been laid there, and concluding with a prayer to the court to inspect the record, and giving a day for that purpose. Rejoinder, traversing the venue been laid in Newcastle, and averring it to have been laid in the Victoria district:—Held, on demurrer, rejoinder good. *Robertson* v. *Goin*, 5 U. C. R. 72.

Debt on a recognizance entered into in a district court.—Plea, no ca. sa. sued out of that court.—Replication, that the plaintiff did sue out and prosecute a ca. sa., setting it out, and praying that a day might be given to bring in the record. The record certified to this court, by the Judge of the district court, agreed with the replication:—Held, therefore, 1. that under the issue no objection could be taken to the ca. sa., as varying from the judgment. 2. No objection that it did not appear upon the record that the ca. sa. had lain four days in the sheriff's hands before the return day, this being matter of practice of another court. *Cochrane* v. *Eyre*, 6 U. C. R. 594.

Debt on a recognizance of bail:—Held, on special demurrer to the pleas, that it was sufficiently averred in the declaration that the recognizance was entered into in a suit then pending between the plaintiff and the principal; and that the defendants were therefore estopped from pleading that at the time of making the recognizance there was no such action. Plea of render and discharge as an insolvent debtor:—Held, bad on special demurrer. *Mitchell* v. *Noble*, 9 U. C. R. 555.

The plaintiffs issued a writ of capias, irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money, in which the defendant "shall be condemned in this action." The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in:—Held, that the defendant and his sureties had, by putting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after such an appearance was therefore regular:—Semble, s. 34 of the C. L. P. Act, (R. S. O. 1877 c. 50, s. 39,) has not been repealed by Rule 5, O. J. Act. *Cochrane Manufacturing Company* v. *Lamon*, 11 P. R. 162.

Principal's Attorney.] — Semble, that bail are not bound by what the attorney for their principal may choose to do, as being the attorney for the principal. *Mitchell* v. *Noble*, 1 C. L. Ch. 284.

Quantum of Damages.]—A Judge's order to hold to bail in the sum of $300, was obtained in an action of tort, in which the plaintiff swore to a cause of action for $500. The bail piece was in the usual form, stating: "Bail for $300 by order of," etc. The recognizance of bail was in the words of the statute, namely: "You," the bail "do jointly and severally undertake that if" the defendant in the original action "shall be condemned, then he shall pay the costs and condemnation money, or render himself to the custody of the sheriff," &c., "or you will do so for him." Rule 89 of T. T. 1856, (Con. Rule 1085), provides that "the bail shall only be liable for the sum sworn to by the affidavit of debt and costs of suit not exceeding in the whole the amount of their recognizance." In the original action a verdict was obtained against the defendant for $400, and $125.27 costs. In an action on the recognizance against the bail:—Held, that the undertaking in the recognizance to pay the condemnation money, read in connection with Rule 89, (Con. Rule 1085) meant the amount mentioned in the Judge's order; and therefore the bail in this action were only liable for the $300, the amount mentioned in the Judge's order, and the costs of the original action and of this action. The reasonableness of having the recognizance express its meaning in simple language, instead of adhering to a form of words adapted to meet a different practice, suggested. *Baker* v. *Jackson*, 9 O. R. 661.

Quantum of Damages.]—Held, that under Rule 89 of T. T. 1856, (Con. Rule 1085) the liability of bail is limited to the amount

of their recognizance; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than the former amount. *Laing* v. *Slingerland*, 17 O. R. 592.

Recognizance — *Principal Debtor not Joining.*]—The principal debtor need not be joined in a recognizance under 10 & 11 Vict. c. 15, nor need the sum for which the debtor was arrested be mentioned. The averment of enrolment in the declaration was held sufficient. *McFarlane* v. *Allen*, 4 C. P. 438.

Return Day.]—Proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made returnable immediately after the execution thereof. For such purpose it is necessary that the writ should be returnable on a day certain. *Proctor* v. *Mackenzie*, 11 A. R. 486.

Setting Aside Ca. Sa.]—Bail need not move to set aside a ca. sa. against their principal until proceedings are instituted against them. *Beattie* v. *McKay*, 2 C. L. Ch. 56.

On an application to set aside a ca. sa. in the original action, or proceedings against bail, the affidavits are rightly entitled in the action against the bail. *Ib.*

Stay After Action.]—Plaintiff had R. arrested on mesne process on 14th November, 1869. P. and H. becoming his bail to the sheriff. On 25th November plaintiff took an assignment of sheriff's bail bond, and brought an action upon it. Special bail was put in and perfected upon 28th November, and notice given:—Held, that the bail were entitled to have the proceedings stayed on payment of costs. *Hall* v. *Remily*, 4 P. R. 177.

Summary Relief to Bail.]—When bail rely upon performance of their undertaking they must plead it; they cannot apply for summary interference. *Mitchell* v. *Noble*, 1 C. L. Ch. 284.

Time for Return.]—There must be fifteen days between the teste and return of a ca. sa. to charge bail. *Ferrie* v. *Mingay*, M. T. 5 Vict.

But see *Beatty* v. *Taylor*, 2 P. R. 44.

Time for Stay.]—Bail must not only be put in, but perfected, before moving to stay proceedings upon the bail bond on the usual terms. *Gould* v. *Birmingham*, 3 O. S. 298.

Variance.]—Variance between a recognizance of bail, entered into in a foreign country, as stated in the declaration, and proved:—Held, fatal. *Short* v. *Kingsmill*, 7 U. C. R. 350.

VIII. Miscellaneous Cases.

Affidavit of Taking Recognizance.]—A commissioner who takes a recognizance cannot himself make the affidavit of such taking. *Walbridge* v. *Lunt*, Tay. 462.

Constable Taking Bail.]—A constable who arrests under a commissioner's writ may refuse to take bail, and if he does take bail the sheriff may reject them as the constable's duty under such a writ is only to deliver the defendant to the sheriff; but if the sheriff accept them, the bail bond is good. *Price* v. *Sullivan*, 6 O. S. 640.

Conveyance to Surety to Enable Him to Justify.]—The owner of real estate being under arrest upon civil process conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action, and after the same had been settled the lands were reconveyed, but in the meantime a writ against the lands of the grantee had been placed in the hands of the sheriff, and a sale was effected thereunder after such reassignment, and a conveyance made to the purchaser (the plaintiff in the writ), who had notice of the claim set up by the original owner:—Held, that the transaction was one against public policy and morality, and that the court would not lend its aid to the grantor in getting back his estate; but the purchaser at sheriff's sale having in his answer disclaimed any interest in the lands other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of such judgment and expenses, together with interest and the costs of suit; and the defendant having also by his answer alleged that the conveyance was made for the purpose of enabling the grantee therein to justify as bail, and that he did justify as such bail upon the lands so conveyed, and submitted that "the plaintiff under the circumstances ought to be estopped and precluded from saying that the said lands are not the lands" of the grantee:—Held, also, that although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated. *Langlois* v. *Baby*, 10 Gr. 358, 11 Gr. 21.

Costs Paid by Bail.]—Bail who have paid the costs of an action against themselves, cannot recover them from their principal as money paid; they must declare specially. *Shore* v. *Burrill*, M. T. 3 Vict.

Custody on Mesne Process.]—A defendant rendered by his bail after the return of non est inventus to the capias ad satisfaciendum, is not in custody on mesne process, nor is he charged in execution so as to obtain the weekly allowance. *Lyman* v. *Vandecar*, M. T. 2 Vict.

Two Defendants.] — Bailable process issued against two, the plaintiff allowed to proceed against one. *Laing* v. *Harvey*, Tay. 414.

See Criminal Law, IV.—Misnomer, I.—Recognizance, III.

BAIL BOND.

See Bail, II.

BAIL PIECE.

See Bail, III.

BAILIFF.

Escape.]—An action for escape should be brought against the sheriff, not against the bailiff who arrested, unless the act complained of amounts in effect to a rescue. *Wilson* v. *McCullough*, M. T. 2 Vict.

False Affidavit of Service.]—An action on the case was held to be maintainable against a bailiff of a court of requests for falsely swearing to the service of a summons, which had not been served, whereby judgment was given against the plaintiff; and the common law remedy is not taken away by the action given against the bailiff on his covenant under the Court of Requests Act. *Cline* v. *McDonald*, E. T. 2 Vict.

Indemnity by Plaintiff's Attorney.]—The attorney for an execution creditor, who indemnified the bailiff who executed the fi. fa., is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized as his property. *Eadus* v. *Dougall*, 14 C. P. 352.

Negligence.]—An action on the case lies in favour of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages; and semble, that in such an action the sheriff is allowed to recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the bailiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name. *Ruttan* v. *Shaq*, 7 U. C. R. 210.

Under the plea of not guilty the bailiff can only prove that he was not guilty of the negligence. He cannot give in evidence any special contract of service. *Ib.*

Sale — *Statute of Frauds.*] — A sale of goods by a sheriff or his bailiff under execution is within s. 17 of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing, in the same manner as an auctioneer or his clerk. *Flintoft* v. *Elmore*, 18 C. P. 274.

Statutory Protection.]—Action to recover the value of a mare which had been taken and the plaintiff arrested by defendant as a bailiff, acting under a search warrant against the plaintiff issued by a justice of the peace, which commanded the bailiff to take and safely keep the mare until he was ordered to deliver up the same by due course of law. The indictment against the plaintiff having been ignored by the grand jury he was discharged, and the defendant then being instructed by the Crown counsel to deliver the mare to the plaintiff, refused to do so, saying he had given her to his brother, taking a bond to indemnify himself from loss. The plaintiff then obtained a copy of the bond and sued thereon in the name of defendant, which the defendant as the obligee stayed:—Held, that the facts as proved raised a question of bona or mala fides of the defendant acting in the discharge of his duty as a bailiff, which was properly left to the jury, and that the jury having found against him, he had no right to invoke the aid of the statute. *McCance* v. *Bateman*, 12 C. P. 469.

Tax Collector.]—A collector of taxes is responsible for the acts of his bailiff, holding legal authority (by warrant) from him so to act, and an action will lie against them jointly. *Corbett* v. *Johnston*, 11 C. P. 317.

But see, also, *Fraser* v. *Page*, 18 U. C. R. 227.

Trespass.]—If a stranger having no legal process goes to a defendant in execution, and takes down in his presence a list of his goods, and tells him he must not remove them, and does nothing more, he cannot be sued in trespass. So if, instead of a stranger, a bailiff has so acted under a legal process, he may have bound the property as against other writs, but he cannot be sued in trespass, as he neither removed, detained, nor handled the goods. *Cameron* v. *Lount*, 4 U. C. R. 275.

The writ of fi. fa. and warrant to the bailiff must be proved, or its production accounted for, in order to charge the plaintiff in the execution with an act of trespass committed by the bailiff. *Ib.*

Volunteer.]—A person acting in aid of a bailiff may plead the general issue by statute, but not if he be a mere volunteer interfering from the interest which he has in the process. *Dale* v. *Coon*, 2 P. R. 150.

Warrant to Two.]—When the warrant to arrest is addressed to two bailiffs as if jointly, one may, nevertheless, arrest. *Hetherington* v. *Whelan*, 1 C. L. Ch. 153.

See DIVISION COURTS, IV.

BAILMENT.

Action Against Wrong-Doer.] — A mare was in the plaintiff's field, where it was killed by defendant's bull which had broken into the plaintiff's close; the mare had been put there by plaintiff's father, who said he had given it to the plaintiff. Semble, that the right of property was immaterial, as the plaintiff, even if only a bailee, could recover its value against a wrong-doer. *Mason* v. *Morgan*, 24 U. C. R. 328.

Agency.]—Where possession is changed it need not be given personally to the creditor, purchaser or mortgagee; it may equally be given to a trustee or bailee for him, and the debtor may increase the claim of such bailee or may charge the goods with further sums in favour of other persons. *McMaster* v. *Garland*, 31 C. P. 320.

Agreement to Return—*Damage Occasioned by Unforeseen Accident.*]—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible. The defendants hired the plaintiff's scow and pile-driver, at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile-driver were driven from their moorings and damaged:—Held, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair. Taylor v. Caldwell, 3 B. & S. 826, followed. Harvey v. Murray, 136 Mass. 377, approved. *Grant* v. *Armour*, 25 O. R. 7.

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

Delivery of Seed on Contract to Plant—*Damages to Land from Impurity of*

Seed.]—Where seed is delivered by one person to another without any warranty, honestly believing it to be clean, to be grown on the land of the latter, the produce thereof to be returned and paid for at a fixed price per bushel, the transaction is a bailment and not a sale; and damages arising from other innocuous seed having been mixed therewith, and on harvesting having become scattered on the ground and coming up the following year on the land, are too remote, and not within the rule laid down in Hadley v. Baxendale, 9 Exch. 341, and Cory v. Thames Ironworks Co., L. R. 3 Q. B. 181. McMullen v. Free, 13 O. R. 57, and Smith v. Green, 1 C. P. D. 92, distinguished. The plaintiff, having received seed from the defendant to be grown under the circumstances and conditions above mentioned, became aware while it was growing that vetches were coming up with it, but did not inform the defendant of the fact, and permitted them to grow, and delivered the produce mixed to the defendant, and was paid for it:—Held, that he could not recover damages for an injury which his own conduct was responsible for. McCollum v. Davis, 8 U. C. R. 150, specially referred to. *Stewart* v. *Sculthorp*, 25 O. R. 544.

Disputing Title.]—A bailee of goods is not estopped from disputing the bailor's title. *White* v. *Brown*, 12 U. C. R. 477.

Jus Tertii — *Eviction by Title Paramount.*]—Where a bailee accepts a bailment and undertakes to redeliver to his bailor, but is evicted by title paramount, he is not, unless there is a special contract or he is in some way to blame for the loss, responsible to the bailor for injury suffered by the latter. Biddle v. Bond, 6 B. & S. 225, followed. *Ross* v. *Edwards*, 11 R. 574.

Jus Tertii.]—M. & Co., at Guelph, bought a car load of wheat on commission for C. They paid for it themselves, and shipped it by defendant railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C., at Waterdown; M. & Co. being aware that it was to be ground there for C. The receipt was indorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown, the wheat was delivered by defendants upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, were delivered by him to defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt reindorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co.:—Held, that the defendants were entitled to set up the title of M. & Co. as a defence. *Mason* v. *Great Western R. W. Co.*, 31 U. C. R. 73.

Jus Tertii.]—Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the non-delivery:—Held, that defendants could not set up M.'s title to the goods as against the plaintiff. It further appeared that though M. had notified defendants of his claim and made a demand for the goods, he had in fact sued plaintiff and recovered his whole claim from him. Held, also that the case could not be brought within the principle of a bailee setting up the jus tertii against the plaintiff, for they were not bonâ fide defending in right of such third person. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

Jus Tertii.] — The defendant, who held the wheat in question in store, on receiving a delivery order signed by A. D., undertook to hold the wheat for the plaintiff, and negotiated with him for the purchase of it, but afterwards repudiated the plaintiff's title on being indemnified for A. D., and refused to give the wheat up to the plaintiff:—Semble, that the defendant, after what he had done, could not be permitted to set up A. D.'s title against the plaintiff. *Murphy* v. *Yeomans*, 20 C. P. 421.

Jus Tertii.]—T. sold to plaintiff 2,000 out of 3,000 bushels of wheat owned by him and lying in two bins in the warehouse of S., whose receipts he held for the same, and which he indorsed to plaintiff who paid him for the quantity sold to him. The wheat remained in the warehouse for some time. T. and S. left the country, when defendants seized and converted the whole quantity to their own use, and plaintiff sued them in trover and detinue. The evidence of T., so far from shewing that he repudiated the sale, fully upheld it, and proved that he told S. to appropriate all the wheat in one of the bins to plaintiff, and S. stated that he would not, after the notice of the sale to plaintiff, have delivered any of the wheat in the two bins to any one but plaintiff, without retaining enough to satisfy plaintiff's 2,000 bushels. Quære, whether defendants, as wrong-doers, could set up the objection of the property not passing by reason of non-appropriation or non-severance. *Coffey* v. *Quebec Bank*, 20 C. P. 110.

Liability of Gratuitous Bailee.]—It is not illegal to deliver a money letter to a private friend on his way, journey, or travel, provided such letter be delivered by such friend to the party to whom it is addressed. Such friend, as a gratuitous bailee, would be bound to take as much care of the letter as he would of his own; but if lost, where he does take such care, he is not responsible. *Tindall* v. *Hayward*, 7 L. J. 243.

Lien.]—A factor has no lien on goods assigned to him until they actually come into his possession. *Clark* v. *Great Western R. W. Co.*, 8 C. P. 191.

Milling Wheat—*Claim in Insolvency.*]—The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with:—Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent; that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground; that they might waive the

tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages. *In re Williams*, 31 U. C. R. 143.

Negligence.]—The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing baggage, &c. The plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost. There was no other evidence of any negligence in the matter:—Held, that the plaintiff could not recover. *Palin* v. *Reid*, 10 A. R. 63.

Negligence.]—Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer:—Held, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover. *Reynolds* v. *Roxburgh*, 10 O. R. 649.

Negligence.]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug * * to tow two barges from * * for which I agree to pay * * owner to supply engineer and captain * * ." The tug on the voyage was run on a rock through the negligence of the captain:—Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage. *Thompson* v. *Fowler*, 23 O. R. 644.

Storage of Wheat—"*At Owner's Risk*"—*Loss by Fire.*]—A quantity of wheat was delivered by the plaintiff to the defendant, a miller, under a receipt stating that the same was received in store "at owner's risk," and that the plaintiff was entitled to receive the current market price therefor when he called for his money. The wheat to the plaintiff's knowledge was mixed with wheat of the same grade and ground into flour. The mill with all its contents was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer plaintiff's receipt:—Held, that the receipt and the facts in connection therewith constituted a bailment of the wheat and not a sale. South Australian Ins. Co. v. Randall, L. R. 3 C. P. 101, distinguished. *Clark* v. *McClellan*, 23 O. R. 465.

Warehouseman — *Collapse of Warehouse.*] — A building erected for a billiard table manufactory was converted into a warehouse and used as such for about nine months, when the rear portion of it collapsed through the breaking of a beam supporting the ground floor, occasioned by dry rot in one of the beams, and a quantity of goods stored therein was damaged. No negligence was shewn in the construction of the building or the selection of the material used therein, or in not discovering the existence of the dry rot, and except therefor the building would have been capable of sustaining the weight put on it, as the front portion with a greater weight in it remained intact. In actions for the damages sustained to the goods warehoused in the building:—Held, that the defendant was not liable. *Page v. Defoe, Brown* v. *Defoe, Ashdown* v. *Defoe*, 24 O. R. 569.

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I. ASSIGNMENTS AND PREFERENCES IN GENERAL.

1. *Assignee's Liabilities and Rights.*

Accounts—*Costs.*]—It is the duty of a trustee to use reasonable diligence to have the accounts of the trust ready, and to render them within a reasonable time after they are asked for on behalf of the cestuis que trust; and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of suit up to the hearing. *Randall* v. *Burrowes*, 11 Gr. 364.

Accounts — *Costs.*] — Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it. *Sandford* v. *Porter*, 16 A. R. 565.

Action by Creditor for Account—*Parties.*]—Where a bill was filed by one of several creditors of a debtor, who had assigned his estate for the benefit of his creditors, against the debtor and the trustees, seeking an account of the estate and payment, without making any other creditor a party, the court overruled an objection for want of parties, on the ground of the absence of any such creditor. *Wood* v. *Brett*, 9 Gr. 78.

An assignment having been made to trustees for the benefit of creditors, a bill was filed against the assignor and his trustees by a privileged firm of creditors, for an account of the trust estate, and payment of their claim; in answer to which the defendants alleged that certain bills and notes had been taken in payment of their demand, not as collateral security only. The evidence on this point was contradictory, and the court referred it to the master to take an account of the claim of the plaintiffs against the estate, and to inquire as to the dealings of the trustees under the assignment. *Ib.*

Action to Impeach Assignment.]—Where a bill is filed to impeach a conveyance to the trustees for the benefit of creditors, whether such an assignment is or is not in insolvency, the trustees are necessary parties: therefore where the cause of demurrer assigned was, that one G., to whom it was alleged in the bill that M. had conveyed his estate and effects for the benefit of his creditors, was not made a party, the court allowed the demurrer. *Wylie* v. *McKay*, 20 Gr. 421.

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

Attacking Preference.] — A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee. *Lumsden* v. *Scott*, 4 O. R. 323.

Book Debts.]—An assignee for creditors under R. S. O. 1887 c. 124, and amendments, is not in the position of a purchaser for value without notice, and takes no higher rights under the assignment than his assignor had. Where, therefore, certain book debtors were notified by the assignee for creditors under the Act, of the assignment to him, before notification by certain creditors to whom such debts had been previously assigned, it was held that he did not gain priority thereby. *Thibaudeau* v. *Paul*, 26 O. R. 385.

Bound by Equities.]—In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not, by a plea in his own name, ask to have a conveyance, made by the debtor to the plaintiff prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors. The nullity of a deed should not be pronounced without putting all the parties to it en cause en declaration de judgment commun:—Semble, that plaintiff being a second purchaser in good faith and for value, acquired a valid title to the property which he could set up even against an action brought directly by the creditors. *Burland* v. *Moffatt*, 11 S. C. R. 70.

But see *Porteous* v. *Reynar*, 13 App. Cas. 120.

Chattel Mortgage—*Renewal.*]—An assignee for the benefit of creditors, under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. 1887 c. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient. *Fleming* v. *Ryan*, 21 A. R. 39.

Chattel Mortgage—*Renewal.*]—Section 2 of 55 Vict. c. 26 (O.), does not enable an assignee for the general benefit of creditors to question the validity of the renewal of a chattel mortgage. *Tallman* v. *Smart*, 25 O. R. 661.

Chattel Mortgage.] — An assignee for the general benefit of creditors is, by virtue of 55 Vict. c. 26, s. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the

same extent as an execution creditor, where such mortgage is by reason of such defect "void against creditors." *Kerry* v. *James*, 21 A. R. 338.

Chattel Mortgage — *Possession.*] — N. executed a chattel mortgage of his effects, and shortly afterwards made an assignment to one of the mortgagees, in trust for the benefit of his creditors. The assignee took possession under the assignment:—Held, that there was no delivery to the mortgagees under the mortgage, which transferred to them the possession of the goods. *Reid* v. *Creighton*, 24 S. C. R. 69.

Chattel Mortgage — *Possession.*] — By the Act relating to chattel mortgages, R. S. O. 1887 c. 125, a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict. c. 26, s. 2 (O.) that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences, R. S. O. 1887 c. 124. By s. 4 of 55 Vict. c. 26 (O.) a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors * * * before such taking of possession:" —Held, reversing 22 A. R. 138, that under this legislation a mortgage so void is void as against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set it aside, and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession. *Clarkson* v. *McMaster*, 25 S. C. R. 96.

Commission and Expenses — *Deputy Resident out of Ontario.*]—Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the Province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses. *Tennant* v. *Macewan*, 24 A. R. 132.

Compromise of Claim.]—A plaintiff, a creditor, served a notice on an assignee for creditors, pursuant to R. S. O. 1887 c. 124, s. 7, s.-s. 2, requiring him to take proceedings to set aside a certain bill of sale made by the insolvent, and afterwards served on him a notice of motion for an order giving him, the creditor, permission to bring the action. After being served with the notice, however, the assignee, believing that he had authority to do so, with the approval of a majority of the inspectors and creditors present at a meeting called for the purpose, made a settlement with the grantee of the bill of sale, which settlement, it also appeared, was advantageous to the estate. The plaintiff then, pursuant to his notice of motion, obtained an order from a Judge, giving him leave to bring this action impeaching the bill of sale, without, however, the settlement being brought to the notice of the Judge:—Held, that the settlement was valid and binding. *Keyes* v. *Kirkpatrick*, 19 O. R. 572.

Contempt.] — As to power of Judge to issue attachment against assignee for contempt. See *Re Pacquette*, 11 P. R. 463.

Costs.]—An assignee for the benefit of creditors may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be. *Macdonald* v. *Balfour*, 20 A. R. 404.

Costs.]—An assignee for the benefit of creditors, on instructions of the inspectors, contested the plaintiff's claim, who then brought an action, which was dismissed with costs, but, on appeal to the divisional court, this decision was reversed, with costs to be paid by the defendant, the assignee. The creditors, after taking counsel's opinion, resolved to appeal to the court of appeal, but the appeal to that court was dismissed with costs. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings:—Held, that he was entitled so to do. *Smith* v. *Beal*, 25 O. R. 368.

Costs — *Litigation with Preferred Creditor.*]—W. assigned all his estate by deed to B., one of his creditors, in trust for his creditors generally. Afterwards, at a meeting of creditors it was resolved, with B.'s consent, that M., as an execution creditor of W., should bring an action on behalf of all the creditors of W., to contest the validity of a certain chattel mortgage made to H. & Co., by W., prior to the above assignment to B., the costs of which the creditors present agreed should be borne by the estate. H. & Co. were not present at the meeting. This action by M. was dismissed with costs, and B., who had retained the solicitor and really managed and controlled the action, paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, $462 in all. H. & Co., as creditors of W., now brought this action, asking that the executors of M. should pay the $462 to B. to be distributed among the creditors of W. There was no evidence of M. or his executors having requested B. to pay the $462 of costs:—Held, that as to the $300 paid to M.'s solicitor, no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, and M. was not liable to the solicitor as to those costs, and therefore the plaintiff failed as to that sum, though, semble, B. had no authority to expend moneys of the estate in endeavouring to get or obtain property not assigned to him: —Held, also, that the plaintiffs could not succeed as to the balance, $162, for there could be no reasonable doubt that they knew that this $162, which was paid to them by B. as their costs of defence, was moneys of the estate of which B. was trustee, and must be held to have assented to its being so paid. *Hyman* v. *Howell*, 13 O. R. 400.

Costs of Action—*Remuneration and Disbursements—Indemnity.*] — An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so,

too, with regard to his remuneration for, and disbursements in, winding up the estate. *Johnston* v. *Dulmage*, 30 O. R. 233.

Costs—*Taxation of Bill of Costs by Assignee for Creditors of Client.*]—The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation. And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth:—Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill. *Re Rogers and Farewell*, 14 P. R. 38.

Creditor Assignee.] — The defendant, who was assignee for creditors of the mortgagor, was threatening to remove certain of the property comprised in the mortgage, acting, as he said, for the benefit of the creditors. The plaintiffs claimed an injunction to restrain him. In his defence he alleged that he was a creditor of the mortgagor at the time of the execution of the mortgage in question, and that after the commencement of this suit he recovered a judgment for the amount of his debt, and he claimed a right to the property taken by him as against the plaintiffs as such creditor:—Held, that he was entitled thus to avail himself of his position as a creditor at the date of the mortgage, notwithstanding the fact that in removing the goods he alleged that he had acted for the benefit of the creditors, and although he did not recover his judgment and execution before the commencement of the suit. *Robinson* v. *Cook*, 6 O. R. 590.

Declaration of Trust—*By-law—Calls—Forfeiture of Stock.*]—The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for the plaintiff, to transfer the shares in such a way as he should direct. In this action the plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R. S. O. 1897 c. 191, and that he was entitled to pay the balance of calls made thereon:—Held, that he was not entitled to call on the company to account to him for the shares or any dealings therewith. Under s. 35 of the above statute, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by the letters patent, or by a by-law of the company. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual. *Armstrong* v. *Merchants' Mantle Manufacturing Co.*, 32 O. R. 387.

Different Estates.]—The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vict. c. 26 (O.), for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt supposed to be due from the defendants to R. & Co., for the price of the goods supplied, and also the interest of R. & Co. in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same. The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold, were remitted to H. & Co., to whom they had been assigned by R. & Co. At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The learned Judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties. The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference:—Held, 1. That these questions were "questions involved in the action" within the meaning of Rule 103, Ontario Judicature Act (Con. Rule 324) having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule, but that the amendment must be confined to the plaintiff's possible rights. 2. That by s. 7 of 48 Vict. c. 26 (O.), E. was the only person entitled to enforce the right of the creditors of H. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. which assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void; that the plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co. The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt, and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendant's whole costs to be a condition precedent. *Adams* v. *Watson Manufacturing Co.* (*Limited*), 15 O. R. 218; 16 A. R. 2.

Discovery.]—In an action by creditors of a firm to establish the liability of the defendant as a partner therein, it appeared that the assignee of the firm for the benefit of creditors (who had received all the papers of the firm) was interested in the success of the action, had instigated its being brought, and was providing material in the way of documents, &c., to the plaintiffs for its efficient prosecution:—Held, that although the assignee might have no direct beneficial interest in the result, he was to be regarded for the purposes of discovery as a quasi-plaintiff, and the defendant was entitled to have production of all documents in the possession of the assignee, and to examine him for the purpose of such production. *Frothingham* v. *Isbister*, 14 P. R. 112.

Fraudulent Sale of Assets of Estate.]—Section 7 of the Assignments Act, R. S. O.

1887 c. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale by the latter of the assets of the estate, as fraudulent. Reid v. Sharpe, 28 O. R. 156 *n.*, followed. *Hargrave* v. *Elliot*, 28 O. R. 152.

Mortgage Debt—*Priority—Costs.*]—The mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of the creditors under a trust deed, excluding all preference and priority, praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee, with the view of charging the trustee with all payments made by him to simple contract creditors before satisfying specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency. The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the right of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than as on a præcipe decree:—Held, that as the trust deed excluded all preference and priority as to the payment of the debts, the rules applicable to the administration of the estates of intestates did not apply, and the mortgagee, for anything beyond what his mortgage would realize, could claim only the same as other creditors; and as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe he was declared entitled only to the costs of such a decree, and was ordered to pay to the trustee his costs of defending the trust estate. *Gore Bank* v. *Sutherland*, 1 C. L. J. 159.

Mortgage Foreclosed before Assignee's Action.]—Where in an action by the assignee of C. for the benefit of his creditors under 48 Vict. c. 26 (O.), stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counterclaim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counterclaim was refused, and the plaintiff was left to demur:—Semble, that the counterclaim was not inadmissible. *Glass* v. *Grant*, 12 P. R. 480.

Negligence.]—A., being accommodation indorser for B. to a large amount, obtained from him, as indemnity, a confession, upon which judgment was entered up and duly registered. C. also recovered a judgment against B., which was registered subsequently on the same day, contemporaneously with the confession. B. also assigned to A. all his chattels and effects, and all debts due him. On hearing of the assignment C. notified A. that he would be holden accountable for what was assigned to him, but A. nevertheless permitted B. to use the property, and to receive the debts, just as if no assignment had been made, whereby C. was deprived of any benefit. On the usual reference to the master in a suit for foreclosure of lands of B., A. and C. both proved their debts, and in settling priorities the master reported A. prior to C. On appeal by C. from the report, the court declared A. to be a trustee of the property assigned for C., and that having by his negligence permitted the property to become lost, A. ought to be postponed as to the lands, the common fund of both. *Huntingdon* v. *VanBrocklin*, 8 Gr. 421.

Payment of Unpaid Purchase Money.]—A mortgagee of unpatented land, after judgments were registered against him, assigned all his estate for the benefit of his creditors. The trustee paid to the government out of the trust estate the balance of the purchase money:—Held, that in respect of the sum so paid, he was entitled to priority over the judgment creditors. *McIntyre* v. *Shaw*, 12 Gr. 295.

Personal Liability to Pay Claims.]—The declaration charged that the plaintiff, having recovered judgment against A. & Co., had seized and was about to sell their goods under a fi. fa., and in consideration that the plaintiff would withdraw his writ defendants promised to pay the amount. A count was added for money had and received. It appeared that A. & Co., being indebted for rent, and three executions, of which this was one, having issued against them for other claims, made an assignment to the defendants of all their goods, in trust out of the proceeds to pay the landlord and these executions, according to their legal priority, then to pay two preferential creditors named, and lastly to divide the surplus money among the other creditors executing the assignment. This assignment was executed by the defendants, but not by the plaintiff. It was put in at the trial by the plaintiff, and it was proved that the defendants had received moneys under it, but no promise was shewn by them except what was contained in the deed, in which it was recited that the defendants had agreed to pay the claims above mentioned out of the proceeds of the property assigned, if sufficient:—Held, that the plaintiffs could not recover; that the first count was not proved, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods; and upon the second count, defendants, as trustees, could be liable only in equity, or if at law in a special action on the deed. *Harris* v. *Buntin*, 16 U. C. R. 59.

Personal Liability to Pay Claims.]—F. had a demand against one T. on notes and acceptances of about $20,000. The plaintiffs agreed to transfer to him certain bank stock worth $2,550 as a loan, to secure which he agreed to assign, and afterwards delivered to them, $14,290 of these notes, all of which were negotiable, but some only were indorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect for them there. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $300 excepted) came into the defendant's hands:—Held, that the plaintiffs might recover from the defendant, as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt. *Lee* v. *Woodside*, 22 U. C. R. 15.

Pledge—*Right of Curator—Quebec Law.*]—See *Société Canadienne Française de Montreal* v. *Barclay*, 20 S. C. R. 449; *Rolland* v. *Caisse d'Economie de Quebec*, 24 S. C. R. 405.

Pledge of Goods—*Banking Act.*]—The plaintiff, a creditor of an insolvent, alleged that in regard to certain pledges made by the latter to a bank, there had been no contemporaneous advances, and that the pledges were invalid under s. 75 of the Banking Act, 53 Vict. c. 31 (D.), and claimed to be entitled to obtain moneys received through disposal of the pledges and to apply them in payment of creditors' claims, by virtue of the provisions of s. 1 of 58 Vict. c. 23 (O.):—Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors, quâ creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors. Held, also, that the last named Act did not apply, because the money had been received by the bank before it was passed, and it was not retrospective. The insolvent had been in the habit of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held, there being no further advance made when the new securities were given:—Held, that this exchange of securities should be treated as authorized under s.s. 2 of s. 75 of the Banking Act. The plaintiff asked for a declaration that advances made by the bank upon a mortgage by the insolvent to a third person, and by him assigned to the bank, were contrary to the Banking Act, and that the property was free from the mortgage:—Held, that no such declaration should be made in the absence of the mortgagee, who was liable to the bank as indorser of a promissory note of the insolvent, collateral to the mortgage. *Conn* v. *Smith*, 28 O. R. 629.

Pledge of Goods—*Banking Act.*]—As to assignee's right to attack: See *Halsted* v. *Bank of Hamilton*, 27 O. R. 435, 24 A. R. 152, 28 S. C. R. 235.

Power of Attorney.]—The assignment, in addition to the conveyance of the property, contained a power of attorney to the assignee to take and hold it, but was void under the statute as an assignment for want of filing:—Held, that the assignee's right could clearly not be sustained under the power of attorney. *Wilson* v. *Kerr*, 18 U. C. R. 470.

Previous Agreement — *Change in Statute Law.*]—An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given. Kerry v. James, 21 A. R. 338, considered. After judgment in the assignee's favour the Act 59 Vict. c. 34 (O.) was passed, and the agreement in question was registered:—Held, that this did not validate it. *Hope* v. *May*, 24 A. R. 16.

Principal and Agent—*Replevin—Equitable Title.*]—If an agent is intrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance. The equitable title is enforceable against the agent's assignee for the benefit of creditors. Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin. *Carter* v. *Long*, 26 S. C. R. 430, 23 A. R. 121.

Purchasing Goods.]—A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, &c., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom, on some occasions, he gave notes signed "J. A. & Sons, H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F. the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A.:—Held, that the evidence at the trial of the action clearly shewed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate: that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given, or as an undisclosed principal. Held, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action. *Hechler* v. *Forsyth*, 22 S. C. R. 489.

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

Recovery of Debts.]—M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection he assigned all the wood that belonged to him, with other property, to the plaintiff for the benefit of his creditors. He at the same time made over his interest in the contract to the defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords as well as for what he had himself supplied:—Held, that the plaintiff might recover this sum as money had and received. Held, also, that defendant could not object that the assignment to the plaintiff was not properly filed. *Scott* v. *Kelly*, 17 U. C. R. 306.

Removal of Assignee.]—Where a Judge of a county court, acting under R. S. O. 1887 c. 124, s. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as persona designata, and has no power to order payment of costs. The proceedings in such a case are not in any court; and Rule 1170 (a) does not apply to them. Re Pacquette, 11 P. R. 463, followed. *Re Young*, 14 P. R. 203.

Sale after Agreement to Assign.]—A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment to trustees, for the benefit of his creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the date of the agreement to assign and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Thereupon the trustees filed a bill seeking to have this sale set aside as fraudulent and void as against them:—Held, that the trustees, being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor and those claiming under him, the trustees were not entitled to the relief prayed. But, semble, that this sale would not have been sustained as against a judgment creditor who had sued out execution. *McMaster* v. *Clare*, 7 Gr. 550.

Selling Estate of Insolvent by Auction.]—A by-law of a county municipality passed under s.-s. 2 of s. 495 of the Municipal Act, R. S. O. 1887 c. 184, enacted that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, &c., "by public auction" unless duly licensed:—Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

Sheriff—*Statute of Frauds.*]—A sheriff, selling lands as assignee for creditors, under R. S. O. 1887 c. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

Sheriff—*Death.*]—An assignment for the benefit of creditors made to a sheriff under R. S. O. 1887 c. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee. *Brown* v. *Grove*, 18 O. R. 311.

Time for Realizing—*Administration.*]—Where a debtor assigned his estate to trustees on trust to sell for the benefit of creditors; and the trustees were guilty of delay in selling, and of other misconduct, it was held that the court had jurisdiction at the suit of a creditor to execute the trusts of a deed. *Quebec Bank* v. *Shure*, 16 Gr. 681.

Time for Realizing.]—The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the court will consider that a year is the proper time within which the sale of the property assigned is to be made, where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the onus will be cast on the assignee of satisfying the court of his bona fides in seeking further delay. *Ontario Bank* v. *Lamont*, 6 O. R. 147.

Title Passing.]—An assignee for the benefit of creditors takes only such title as his assignor had to the property. *Robinson* v. *Cook*, 6 O. R. 590.

See Sub-Head 8, "Preferential Transactions."

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2. *Construction and Effect of Assignments.*

Benevolent Society—*Interest of Debtor in Fund.*]—An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. 1887 c. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of s. 11 of the Benevolent Societies Act, R. S. O. 1887 c. 172, such an assignment does not pass to the assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act. *Re Unitt and Prott*, 23 O. R. 78.

Confined to Personal Estate.]—An assignment for the benefit of creditors though confined in terms to the assignor's personal estate, professed to be drawn under 48 Vict. c. 26 (O.):—Held, it was not within the Act; and an action brought by the assignee to set aside a chattel mortgage was dismissed. *Blain* v. *Peaker*, 18 O. R. 109.

It is clear it was intended under the Act to bring all the estate of the assignor into the hands of the assignee for general distribution. *Ib.*

Covenant of Indemnity.]—The benefit of a covenant by a third person to indemnify the assignor against a mortgage made by him does not pass to his assignee under an assignment for the general benefit of creditors, at all events not where there has been no breach of the covenant before the making of the assignment. Even if the covenant passd, the assignee would hold it as bare trustee for the assignor, or for the mortgagees if subsequently assigned to them by the assignor. *Ball* v. *Tennant*, 21 A. R. 602, reversing 25 O. R. 50.

Creditors Named in Schedule.]—The plaintiffs assigned all their effects to defendant, to sell the same and pay all their creditors, a list of whom was handed to defendant on the execution of the deed of trust. Subsequently the plaintiffs furnished another schedule of their liabilities, embracing several persons not mentioned in the original list.

Defendant had paid several of those first named, and in doing so had expended a sum greater than he had collected, and had become answerable for more than the residue of the estate would realize. He refused to recognize the claims of the additional parties in the second list, and thereupon the plaintiffs filed a bill praying an account of the defendant's dealings with the estate and for an execution of the trusts of the deed; alleging that they had not any estate other than that assigned to defendant, and that they were insolvent and personally unable to pay anything. The court, in view of the facts that no fraud or improper conduct was alleged, that even if the whole estate were realized, defendant would still be a loser, that all the defendant had done, up to a date shortly before the filing of the bill, had been approved of by the plaintiffs, and that he had received but a small sum since, and not enough to repay himself,—refused the relief prayed, and dismissed the bill with costs. In such a case the defendant sought to shew that the creditors mentioned in the original schedule were the only ones he had agreed to pay, and that such was the agreement between himself and the plaintiffs on his acceptance of the trust: —Held, that he was not at liberty to shew this, not having asked for a reformation of the deed of trust; and that even if he had, the absence of the parties sought to be excluded from the benefits of the trust, was an insuperable barrier to the defendant being permitted to do so. *Liddell* v. *Deacon*, 20 Gr. 70.

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

Crown — *Chose in Action.*] — Where a chose in action was assigned, inter alia, for the general benefit of creditors, all the parties interested being before the court, and the Crown making no objection, the court gave effect to such assignment. Quære, in the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Interest as Mortgagee.]—On the 26th May, 1880, two chattel mortgages were executed by the plaintiff to one J. G. One mortgage was to secure $215 and interest; the other being a security for certain promissory notes of the mortgagor indorsed by the mortgagee, which had been discounted by the defendant, who was the holder thereof. On 24th July, both the mortgages, together with the goods and chattels comprised therein, were assigned to defendant by J. G. On the 22nd July, previously, R. G. and J. G., who had been trading in partnership, assigned to O. & K., upon trust for the benefit of creditors, amongst other things, all mortgages and all other personal estate wheresoever situate of the said assignors, or either of them, or in which any of them had any right or interest: —Held, that the terms of the deed of assignment to O. and K. were sufficient to include these mortgages and the goods comprised in them, and therefore, as regarded the first-named mortgage, there being no contrary intention, it passed under the deed, so that the subsequent assignment of that mortgage to the defendant was of no avail; but as regarded the other mortgage, the defendant being the beneficial owner thereof, as holder of the notes secured thereby, and the mortgagee having no interest therein, there could be no intention that it should pass under the deed, and therefore it passed to the defendant under the assignment to him. *Sutton* v. *Armstrong*, 32 C. P. 11.

Lease—*Forfeiture.*]—The provisions of s. 11 of R. S. O. 1887 c. 143, do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is therefore enforceable without notice served upon the lessees. *Argles* v. *McMath*, 26 O. R. 244; 23 A. R. 44.

Lease—*Fixtures.*]—A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purpose of his business, even though they are fastened to the building, provided, however, the removal can be effected without substantial injury, and the covenant in the Short Forms of Leases Act, R. S. O. 1887 c. 106, to leave the premises in repair, does not restrict this right. Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed after the election to forfeit. *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44.

Life Insurance.]—Quære: Are the words "all bills, bonds, notes, securities, accounts, books, book debts, and documents securing money," contained in a general assignment for the benefit of creditors, sufficient to pass a policy at the time existing on the life of the assignor and held by him for his own benefit. *Lee* v. *Gorrie*, 1 C. L. J. 76.

Mistake in Creditor's Claim.]—A trader assigned his estate and effects to trustees for his creditors, some of whom were declared to have preferred claims, and to be paid in full. The claim of one was stated by the debtor to be "£3,500, or thereabouts," no account having been settled between the debtor and the creditor for a long time; and this sum was stated in the schedule as the amount, and the several creditors executed the assignment. The creditor afterwards, on balancing his account, ascertained that his claim was £5,062, which the trustees refused to pay; whereupon the creditor filed a bill to reform the deed, by introducing this sum as his claim, on the ground that the words "or thereabouts," were sufficient to include it. The court dismissed the bill with costs. *Chapin* v. *Clark*, 7 Gr. 75.

Omission of Property.]—A debtor conveyed his lands to a trustee for his creditors, and a schedule annexed purported to contain the whole thereof, but it was afterwards discovered that, either designedly or by mistake, some of the lands had been omitted:—Held, that a bill would lie to correct the schedule, on the ground of fraud or mistake. *Gillespie* v. *Grover*, 3 Gr. 558.

Reservation of Remedies.]—An assignment for the benefit of creditors generally, which contains a clause reserving all rights and remedies against third parties, but releasing the assignor from his liability, operates only as a covenant not to sue, and not as a release. *Hall* v. *Thompson*, 9 C. P. 257.

Reservation of Rights.]—Declaration upon four bills of exchange, for £500 each, drawn by R. H. & Co., upon one J. C., payable to and indorsed by defendant. Defendant pleaded, 1. Payment. 2. An assignment made by J. C. to one T. P., for the benefit of his creditors, with plaintiffs' assent and concurrence, and that T. P., with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied, on equitable grounds, that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a nolle prosequi as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500. Upon demurrer, held, that the executing of an assignment by the holder of a bill, without a special reservation of rights as to sureties, discharges them; and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C., in their hands to be applied upon the bills declared on, and until they had done that no cause of action accrued against the defendant. For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bill sued upon, and therefore the replication was bad. *Commercial Bank of Canada* v. *Wilson*, 11 C. P. 581.

Right to Stand in Preferred Creditor's Place.]—E. L., being embarrassed, in June, 1857, assigned his goods, lands, &c., to trustees, giving preference to certain creditors. Afterwards, wishing to resume business, he proposed that the personal estate should be re-conveyed to him, and time given under certain conditions for payment of the debts, the lands being conveyed to two creditors in trust for all. This was agreed to by the trustees and most of the creditors, and re-conveyances executed. The plaintiffs were indorsers on paper of E. L. held by M., a creditor preferred in the first assignment. M. refused to reconvey unless the plaintiffs renewed their liability to him on the paper then overdue, which they did, and M. then signed the re-conveyances. Plaintiffs had afterwards to pay the notes held by M., whereupon they filed their bill, claiming to stand in the place of M. as preferred creditors under the original assignment:—Held, that they could not claim such priority, or the priority provided for them by the first assignment, but must rank *pari passu* with the other creditors. *Lawson* v. *Moffatt*, 10 Gr. 328.

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3. *Creditors.*

(a) *Entitled to Rank on Estate or Attack Transactions.*

Attacking Assignment.] — Certain creditors, with the concurrence of the debtor, and after notice of an assignment by him of everything for the benefit of his creditors *pari passu*, entered up judgment, seized goods covered by the assignment, and refused to execute or have anything to do with it. It having been subsequently decided that the assignment was valid as against their execution, they desired to rank as creditors under the deed, and the trustee refusing to consent, and having divided most of the trust funds amongst the creditors, the excluded creditors filed a bill to have the benefit of the deed, the debtor being willing, and on the coming in of the answers moved for payment into court of the balance in the trustees' hands unappropriated; but the court considered the plaintiffs' equity so doubtful, that they refused the motion with costs. *McKay* v. *Farish*, 1 Gr. 333.

Attacking Assignment.] — The mere fact that a creditor disputes the validity of an assignment made by his debtor for the general benefit of his creditors, is no ground for the assignee refusing to pay such creditor his dividend out of the money realized from the estate; the assignment having been sustained in the action brought by the creditor to impeach it. The law on this question under assignments for the benefit of creditors prior to 22 Vict. c. 96, and the cases thereunder, considered. *Klocpfer* v. *Gardner*, 14 A. R. 60 15 S. C. R. 390; reversing 10 O. R. 415.

Creditor Not Executing.] — A creditor who does not execute an assignment, but does some act which amounts to acquiescence, is entitled to the benefit of the deed. *Pyper* v. *McDonald*, 5 L. J. 162.

Creditor Not Executing.]—The assignor, being the party of the first part, the defendants, the assignees, of the second part, and "the several other persons whose names and seals are hereunto subscribed and fixed, creditors of the said C. B., of the third part." No creditor executed the assignment, but the defendants (assignees) admitted part of the plaintiff's claim by letter:—Held, that such admission made him a party to the assignment, although he had not executed it, and that they were liable for money had and received. *Burrows* v. *Gates*, 8 C. P. 121.

Creditor Not Executing Within Time Limited.]—An assignment was made for the benefit of such creditors as should execute within a time named in it. One creditor, instead of executing, sued the debtors, and an interpleader issue having been found against him, a motion for a new trial was refused. Thereupon after the time limited for signing, the trustees allowed him to execute the deed. Upon a bill filed by a creditor who had previously recovered judgment and registered the same against the trust estate, the court declared the plaintiff entitled to payment of his claim out of the proceeds of the estate in the hands of the trustees; and that the creditor who had tested the validity of the deed, had thereby forfeited all right to participate in the benefit of the assignment. *Joseph* v. *Bostwick*, 7 Gr. 332.

Creditor Not Executing Within Time Limited.]—In a suit instituted by the creditor of the estate of a deceased debtor who had made an assignment for the benefit of his creditors, certain other creditors, who had not signed or accepted the deed of assignment, sought to come in under the decree and partake of the benefit of the trusts. The trust deed had been made in 1857. The assignor had died in 1863, and the assignment was to be executed by the creditors within two

months of its date. The accountants declined to receive proof of the claims; and an application in chambers for leave to come in and sign the deed, and participate in the residue of the estate, was refused. *Schreiber* v. *Fraser*, 2 Ch. Ch. 271.

Creditor Not Executing Within Time Limited.]—Where a debtor made an assignment to trustees for the benefit of those creditors only who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and neglected to sign it, but had notified one of the trustees of his assent; and another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and another, though aware of the deed and its provision, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it:—Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse. It being objected that the application was made by petition in chambers, and not by a separate suit:—Held, that it was properly made in chambers by petition in the original suit. The statute of limitations being urged against the admission of the claims:—Held, that the relation of trustee and cestui que trust had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in two cases that the statute had never begun to run, owing to the creditors' right of action having arisen after the debtor had absconded. *Gunn* v. *Adams*, 8 C. L. J. 211.

Damages.] — A conveyance made by a debtor in good faith, of his assets to pay his existing debts, cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment, even though the conveyance is made because of the threatened action. Judgment in 18 O. R. 529, reversed. *Cameron* v. *Cusack*, 17 A. R. 489.

Damages.]—One who has a right of action for tort and subsequently recovers judgment is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack, under that Act, a transaction entered into by the tort feasor before the action was commenced. *Ashley* v. *Brown*, 17 A. R. 500; and see *Gurofski* v. *Harris*, 27 O. R. 201; 23 A. R. 717.

Damages.]—A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Assignments and Preferences Act, R. S. O. 1887 c. 124, and cannot, after the assignment, bring an action to ascertain the damages and rank for the amount against the estate in the hands of the assignee. *Grant* v. *West*, 23 A. R. 533.

Contingent Claim — *Advertising Contract.*]—Where an estate is being administered under the Assignments and Preferences Act, R. S. O. 1887 c. 124, claims depending upon a contingency cannot rank, but only debts strictly so called. An advertising contract gave the advertiser in consideration of the sum of $1,000 the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month, and at the expiration of twelve months, whether the space had been used or not, to pay $1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to R. S. O. 1887 c. 124:—Held, reversing the judgment below, 28 O. R. 326, that the $1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank. Grant v. West, 23 A. R. 533, applied. *Mail Printing Co.* v. *Clarkson*, 25 A. R. 1.

Loan to Pay Creditor.]—If a person borrow money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage in this case, he can charge the money so lent on such security. *Court* v. *Holland*, 4 O. R. 688.

Other Securities.]—Where a trust deed for the benefit of creditors contains no release clause, creditors who subsequently sue the settlor on both securities are not thereby precluded from claiming the benefit of the trust deed. *Andrews* v *Maulson*, 1 Ch. Ch. 316.

Promissory Note—*Indorser—Incomplete Instrument — Suretyship — Maturity after Assignment for Creditors*] — The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president in a letter addressed to the plaintiffs to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors, under R. S. O. 1897, c. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee:—Held, following Jenkins v. Coomber, [1898] 2 Q. B. 168, that, upon the Statute of Frauds, no action could be maintained on the notes against the president, as to whom the instrument was incomplete. And although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment. Grant v. West, 23 A. R. 533, and Purefoy v. Purefoy, 1 Vern. 28, followed. *Clapperton* v. *Matchmor*, 30 O. R. 559.

Secured Creditor.]—H., a creditor of S., in respect of a debt for which he held security on the lands of S., sought to have a chattel mortgage made by the latter declared void as a fraudulent preference:—Held, that in the absence of proof that the security held by him was inadequate he could not succeed. *Clark* v. *Hamilton Provident and Loan Society*, 9 O. R. 177.

Simple Contract Creditor.]—Held, following Macdonald v. McCall, 12 A. R. 593, that a creditor to maintain an action to set

aside a mortgage as a fraudulent preference, need not be a judgment creditor. *Rae* v. *McDonald*, 13 O. R. 352.

Simple Contract Creditors—*Debt not Due.*]—C., who was in insolvent circumstances, made a chattel mortgage of his stock-in-trade to the defendants M. & Co., to secure a debt, and afterwards executed a general assignment to the defendant F. for the benefit of his creditors. The plaintiffs, who were simple contract creditors of C., and whose debts were not due, brought this action on behalf of themselves and all other creditors of C. except the defendants M. & Co., to have the mortgage declared void under R. S. O. 1877 c. 118:—Held, affirming 9 O. R. 185, that the mortgage was void under the said statute; that the plaintiffs could maintain the action, and it was no objection that they did not include the mortgagees among the creditors, on whose behalf they professed to sue. Longeway v. Mitchell, 17 Gr. 190, followed. *Macdonald* v. *McCall*, 12 A. R. 593; *S. C. sub. nom. McCall* v. *McDonald*, 15 S. C. R. 247.

Held, also that the circumstances that C.'s equity of redemption in the goods had been assigned to F. did not deprive the plaintiffs of the right to maintain the action to avoid the mortgage. The goods having been sold by consent, pending the action, and the money paid into court, the judgment in the court below directed the payment out of the money to F., the assignee, for distribution by him under the trusts of the assignment. The judgment in this particular, was varied on the ground that the goods had not passed to F. by the assignment and the money was left to be dealt with by the court below on application of the parties claiming it. *Ib.*

Unliquidated Claim — *Double Value—Overholding Tenant.*]—A claim for damages against an overholding tenant for double the yearly value of the land under 4 Geo. II. c. 28, s. 1, is an unliquidated claim, and therefore is not provable against an estate in the hands of an assignee for creditors under R. S. O. 1897 c. 147. *Magann* v. *Ferguson*, 29 O. R. 235.

Wife.]—Claim by wife of insolvent for money lent and used in his business. See *Warner* v. *Murray*, 16 S. C. R. 720.

(b) *Proof of Claims.*

Action to Enforce Claim.] — Assignment in trust for creditors—Action by creditor against trustees for plaintiff's claim—Transfer of suit to Chancery—A. J. Act, 1873, ss. 2, 9. See *Leys* v. *Withrow*, 38 U. C. R. 601.

Action to Prove Claim—*Jurisdiction.*]—An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the county court. *Whiddes* v. *Jackson*, 18 A. R. 439.

Claim Known but not Proved.] — A debtor, being unable to pay his creditors in full, made an assignment to defendant for their benefit. Defendant advertised in the Ontario Gazette and a local paper, under R. S. O. 1877 c. 107, as amended by 46 Vict. c. 9 (O.), for all creditors to send in their claims and by his clerk sent notices to each creditor from a list furnished by the assignor to said clerk, which list he said must have contained the names of the plaintiffs and C. & Co., who had assigned a claim they had to the plaintiffs. No claim was sent in under the notice by either the plaintiffs or C. & Co., and the defendant distributed the estate without regard to the plaintiffs or C. & Co. At the trial it appeared that defendant had the debtor's books, in which there was a credit to the plaintiffs and C. & Co.; that the debtor told him before he divided the estate that C. & Co. had sued him, and on the day of the division he received a letter from plaintiffs' solicitor notifying him. No proof was given of the posting of the individual notices to either plaintiffs or C. & Co.:—Held, that the defendant had notice of the plaintiffs' claim, and that he was liable to the plaintiffs for their and C. & Co.'s proper dividend on the estate. A trustee is not exonerated by the Act if he had actual notice of the claim before distribution, even though he may have sent the notice prescribed, and received no response to it. *Carling Brewing and Malting Co.* v. *Black*, 6 O. R. 441.

Creditor Confined to Affidavit.] — A creditor is confined, in an action to establish his contested claim, to the quantum and items set out in the affidavit of claim filed with the assignee. *Grant* v. *West*, 23 A. R. 533.

Form of Judgment.]—Proper form of judgment in an action establishing a right to rank on the estate of an insolvent explained. *Grant* v. *West*, 23 A. R. 533.

(c) *Rights and Liabilities.*

Action by Creditors—*Right to Continue after Assignment.*] — An action begun by creditors of an insolvent to set aside a transaction in fraud of creditors, before an assignment by the insolvent for the benefit of creditors under R. S. O. 1887 c. 124, can be prosecuted by the creditors after an assignment has been made; for the assignment has not the effect, under s. 7, s.-s. (1), of transferring the existing cause of action to the assignee. Section 7, s.-s. (2), may be read so as to apply to pending litigation instituted by the assignee or into which he has been introduced; and an order was made under that enactment in an action begun by creditors before an assignment, in which the assignee was after the assignment added as a co-plaintiff, authorizing the original plaintiffs and other creditors to continue the action as constituted for their own benefit, upon indemnity to the assignee. *Gage* v. *Douglas*, 14 P. R. 126.

Action by Creditors — *Repayment by Creditors Paid Out of Turn.*]—Trustees made payment to one class of creditors over whom another class had priority, without providing for the prior class; and a suit for the administration of the trust estate having been instituted, the creditors paid were ordered to repay, and the unpaid creditors were held entitled to a lien on the trust funds in court in priority to the claims of the trustees, and all subsequent creditors, for debt and costs. *Wood* v. *Brett*, 14 Gr. 72.

Action in Assignee's Name—*Compromise by Assignee.*]—Where a creditor obtains an order under s.-s. 2 of s. 7 of the Assignments and Preferences Act, R. S. O. 1887 c.

124, authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order. A creditor suing in the name of the assignee under this sub-section cannot attack the bona fides of a compromise, entered into before his action was brought, between the assignee and the defendant, when the defendant cannot be restored to his original position. Whether s.-s. 2 is not confined to cases in which an exclusive right of suing is given to the assignee by s.-s. 1: quære. *Campbell* v. *Hally*, 22 A. R. 217.

Action in Assignee's Name — *Amount of Recovery.*]—If a preferential security is successfully attacked by a creditor suing on his own behalf under an order of the court in the name of the assignee he can recover no more than his own claim and costs. A creditor cannot, after obtaining such an order, increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to take part in the proposed proceedings. The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity. *MacTavish* v. *Rogers*, 23 A. R. 17.

Action in Assignee's Name — *Undisclosed Assets—Release.*] — A creditor may, after an assignment for the benefit of creditors, and after the execution by him and the other creditors of the assignor of a release of their debts in consideration of payment of a composition, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment. Such an action may be brought with the assignee's consent in his name without any order under s.-s. 2 of s. 7 of the Assignments Act, but without such an order the recovery will be for the benefit of the estate. *Doull* v. *Kopman*, 22 A. R. 447.

Action in Assignee's Name—*Right of Attacked Creditor to Share in Proceeds.*]—When proceedings are taken under s. 7, s.-s. (2), of R. S. O. 1887 c. 124, by a creditor, on behalf of himself and all those who, within a limited time, should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security, join with the attacking creditor in indemnifying the assignee, so that, in the event of his failing to retain his security, he may participate in the fruits of the litigation. *Barber* v. *Crathern*, 28 O. R. 615.

Adding Subsequent Assignee As Plaintiff.]—The action was brought to set aside a conveyance as fraudulent against creditors. The plaintiffs sued on behalf of themselves and all other creditors of the defendant R. W., and began this action in July, 1888. The statement of defence filed in December, 1888, alleged that in August, 1888, R. W. executed an assignment for the benefit of his creditors under 48 Vict. c. 26 (O.), whereby the exclusive right of action became vested in the assignee. In February, 1889, the plaintiffs obtained an order under R. S. O. 1887 c. 124, s. 7, s.-s. 2, giving them leave to take proceedings, in the name of the assignee but for their own exclusive benefit, to set aside the conveyance in question; and then applied for an order adding or substituting the assignee as plaintiff in this action. The consent of the assignee was not filed:—Held, that the assignee could not be added as a plaintiff without his consent in writing being filed, under Con. Rule 324 (b); but that the plaintiffs had the right to proceed under the order they had obtained by bringing a new action in the name of the assignee, to which his consent would not be necessary. *Bank of London* v. *Wallace*, 13 P. R. 176.

Administration—*Rehearing.*]—In a suit for the administration of a debtor's estate under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause. *Mulholland* v. *Hamilton*, 12 Gr. 413.

Attack on Assignment.]—An assignment was made for the benefit of creditors. Some of the creditors signed it; others sued out attachments and placed them in the sheriff's hands. Others obtained executions and sought to enforce them against the signing and attaching creditors. The assignment was submitted to a legal tribunal and declared invalid. The signing creditors applied to have the deed upheld, and the other creditors to pay their own costs:—Held, that the deed should be upheld; and that the attaching creditors having sought to enforce their legal rights should have their costs, but not the execution creditors, they having sought to enforce their priority. *Harris* v. *Beatty*, 5 L. J. 18.

Attacking Preference.]—The defendant W., who was an executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given, and continued to be, in insolvent circumstances, but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage:—Held, that no assignment having been made, an execution creditor might attack the security and take advantage of s. 2 of the Act, R. S. O. 1887 c. 124. Held, that neither H., nor H. and W. as executors, were, in the strict sense of the word, creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another. *Molsons Bank* v. *Halter*, 16 A. R. 323, 18 S. C. R. 88.

Composition — *Fraud — Contestation of Claim — Dissentient Creditor — Promissory Note—Indorsement.*]—An insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount and giving to the creditor for his composition payment and the bonus her promissory notes indorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors:—Held, per Burton, C.J.O., agreeing with the judgment of MacMahon, J., at the trial, that the transaction with the wife

was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes against the estate in the hands of the assignee as far as this question was concerned. But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been indorsed by the insolvent before they were handed to the creditor:—Held, per curiam, no objection taken in this court, that the insolvent was not liable as indorser and that the creditor could not rank on his estate. Semble, per Burton, C.J.O. An objection on either ground to such a claim to rank cannot be taken under s. 9 of the Act by a dissentient creditor for his own benefit against the wishes of the assignor and the majority of the creditors, and an order purporting to be made under that section allowing the dissentient creditor to contest the claim in the assignee's name is invalid. *Small* v. *Henderson*, 27 A. R. 492.

Death of Assignee—*Subsequent Action by Creditor.*]—Where an assignment under the statute had been made to a sheriff, who died shortly after, and proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent:—Held, that the plaintiffs, suing alone, had no locus standi to maintain the action. *Brown* v. *Grove*, 18 O. R. 311.

Duty to Give Information—*Costs.*]—Where a bonâ fide transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and afford to the other creditors reasonable satisfaction, as to the moral character of the transaction; and, if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this court by the other creditors whom it disappointed. *Healey* v. *Bawden*, 14 Gr. 633.

Election of Remedies — *Inconsistent Remedies.*]—A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent. An assignee for the benefit of creditors has no higher right in this respect. A creditor suing in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase money of his stock-in-trade:—Held, that it was then too late for him to attack the sale as fraudulent. Beemer v. Oliver, 10 A. R. 656, referred to. *Wood* v. *Recsor*, 22 A. R. 57.

Estoppel.]—A creditor who attended a meeting of creditors after the execution of a deed of assignment, and assented to be appointed an inspector to aid the assignee in winding up the estate was—Held estopped from afterwards denying the validity of the assignment. *Gardner* v. *Kloepfer*, 7 O. R. 603.

See *Kloepfer* v. *Gardner*, 14 A. R. 60, 15 S. C. R. 390.

Estoppel.]—As to the effect of receipt of a dividend See *Miller* v. *Hamlin*, 2 O. R. 163; *Beemer* v. *Oliver*, 10 A. R. 656.

Preferred Creditors—*Money Paid under Voidable Assignment — Levy and Sale under Execution.*]—Where an assignment has been held void as against the statute, 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor, and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible. *Cummings & Sons* v. *Taylor*, 28 S. C. R. 337.

Purchase of Assets.]—Semble, that a private sale by an assignee to any creditor, without the consent of the others, would be open to objection. *Thompson* v. *Clarkson*, 21 O. R. 421.

Purchase of Insolvent Estate —*Liability to Account.*]—An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. 1887 c. 124, his stock-in-trade was purchased by his wife from the assignee; the defendants, who were creditors of his, and one of them the sole inspector of the estate, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband. In an action by another creditor for an account:—Held, that the estate was entitled to the benefit of whatever advantage the defendants derived from the transaction, and that they should account to the assignee for the difference between the amount of their claims and the amount they would have received by way of dividend from the estate:—Held, also, that the assignee was a necessary party to the action. *Segsworth* v. *Anderson*, 23 O. R. 573. Upon appeal to the court of appeal this judgment was reversed, 21 A. R. 242, but upon further appeal to the supreme court of Canada the plaintiffs were held entitled to relief and the defendants were ordered to account for the profit, if any, derived by them from the transaction. 24 S. C. R. 699.

Surplus After Settlement by Certain Creditors.]—A trust was created for the benefit of creditors pro ratâ, in consideration of their discharging the debtor; all the creditors, except the plaintiffs, accepted from two creditors who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands in full: the estate yielded more:—Held, that the plaintiffs had no right to the whole of the difference. *Baldwin* v. *Thomas*, 15 Gr. 119.

(d) *Valuing Security.*

Accommodation Maker of Note.]—A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict. c. 22, s. 1, s.s. 1, but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in re-

spect to the firm's liability. *Bell* v. *Ottawa Trust and Deposit Company*, 28 O. R. 519.

Bank Notes Discounted by Customer.]—The debtor agreed with the Bank of Montreal for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he indorsed and delivered to the bank. He also arranged with the Merchants' Bank to discount his own notes to be secured by the deposit of his customers' notes as collateral. He then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor, entitled to share under the assignment, against the banks and the assignee, it was held, following Rhodes v. Moxhay, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole, without prejudice to his rights against securities he may hold, subject to the qualification that he must not ultimately receive more than 20s. in the £. The state of the accounts, at the time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee, as at that date. Any moneys received prior to that from collaterals are to be credited; those received afterwards from such sources need not to be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cents on the $. That substantially both banks were in the same position as to the securities in their hands. That there was a distinct contract for a line of credit to the debtor by the Bank of Montreal, and as long as that line was not exceeded, the bank could prove on the footing of that contract as the original debt, and hold the customers' notes discounted in pursuance of it as securities. *Eastman* v. *Bank of Montreal*, 10 O. R. 79.

Chattel Mortgage.]—The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge:—Held, that the debt under the chattel mortgage was not extinguished. A subsequent common law assignment for the benefit of creditors was made by the debtor of all his property to the defendant in trust to pay expenses, &c., and "to apply the balance in or towards payment of the debts of the assignor in proportion to their respective amounts without preference or priority:—Held, that the plaintiff was entitled to sue for the whole debt, and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only. *Beaty* v. *Samuel*, 29 Gr. 105.

Chattel Mortgage—*Collocation—Joint and Several Liability.*]—A creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes indorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods. *Benning* v. *Thibeaudeau*, 20 S. C. R. 110.

Distinct Securities for Distinct Debts.]—W. made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, H. filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by W.; (3) upon certain notes made by T. in favour and for the accommodation to W., and indorsed and delivered by W. to H. as a general collateral security for W.'s indebtedness to H. After filing the claim the mortgage debts were paid to H. who had thereupon assigned the mortgages, and the T. notes were also paid by T. to H., and T. had thereupon filed a claim in respect to them against W.'s estate, and received a dividend thereon. The mortgages had been given to secure payment of entirely separate and isolated debts from W. to H. H. afterwards made an assignment to trustees for his creditors, and these latter brought this action, claiming that notwithstanding all the above circumstances, they were still entitled to rank on, and receive a dividend from, the W. estate on the whole of the above indebtedness, and on H.'s claim as originally filed:—Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the other indebtedness, they were still entitled to rank for the full amount, notwithstanding the payment in full of the T. notes, on the authority of Eastman v. Bank of Montreal, 10 O. R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent T. also ranking in respect to the sum he had paid as accommodation maker. *Young* v. *Spiers*, 16 O. R. 672.

Where a mortgagee is also a creditor in respect to a simple contract debt, he cannot tack the simple contract debt to the mortgage debt, and the creditor does not by reason of his debtor having made an assignment for the benefit of his creditors, acquire any higher position in this respect than he occupied at the time of or immediately prior to the assignment. *Ib.*

Dividend from Another Estate.]—The plaintiffs supplied the debtor with goods on a guarantee. The guarantor made an assignment for the benefit of creditors under 48 Vict. c. 26 (O.). The debtor assigned in like manner a few days after. The plaintiffs proved their claim for the full amount on the guarantor's estate, and stated that they held as security their claim against the debtor's estate, but did not value it. The debtor effected a composition with her creditors, and gave composition notes therefor. The guarantor's assignee refused to pay a dividend to plaintiffs until they had valued their security on the debtor's estate. Upon a special case being stated for the opinion of the court, it was held, that by the debtor's assignment his estate was placed in custodiâ legis, protected from judgments and executions, and made available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmitted

into a claim in rem, and so could fairly be regarded as in the nature of a security, which the plaintiffs were bound to value under s. 18, s.-s. 4 (*b*). *Wyld* v. *Clarkson*, 12 O. R. 589.

Guarantee.]—A deceased person, of whom the plaintiff was executor, gave the defendants a guarantee in respect of goods sold and to be sold to another in the following terms:—"I hereby undertake to guarantee you against all loss in respect of such goods sold or to be sold, provided I shall not be called on in any event to pay a greater sum than $2,500." The principal debtor being indebted to the defendants in $5,500, made an assignment under R. S. O. 1887 c. 124, and the defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the $2,500 and filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of the defendants' claim:—Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid:—Held, also, that this was a guaranty, not of part, but of the whole of the debt, limited in amount to $2,500, that is a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the $2,500, nor to recover any part of any dividend which the defendants had received. Hobson v. Bass, L. R. 6 Ch. 792, distinguished; and Ellis v. Emanuel, 1 Ex. D. 157, followed. *Martin* v. *McMullen*, 19 O. R. 230.

Reversed 20 O. R. 257; restored 18 A. R. 559.

Party Primarily Liable.]—The provision of s. 20 of the Assignments Act, R. S. O. 1897 c. 147, that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon," means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security. The substance not the form of the transaction is to be looked at, to ascertain whether the third party is primarily liable; and if it be found that he is, the debtor is then only secondarily liable. *Glanville* v. *Strachan*, 29 O. R. 373.

Right of Retainer.] — Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death. About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. 1887 c. 124:—Held, (1) that the effect of the assignment was by virtue of s. 20, s.-s. 4, of that Act, to accelerate payment of the debt due to the estate. (2) That the executors, being also trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. 1887 c. 124. *Tillie* v. *Springer*, 21 O. R. 585.

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4. *Execution and Requisites of Assignments.*

Affidavit of Bona Fides.]—It is no objection to the affidavit of bona fides of an assignment of goods that the commissioner prepared the assignment. *Noell* v. *Pell*, 7 L. J. 322.

Affidavit of Bona Fides—*Preferences—Distribution of Assets—Arbitration — Conditions of Deed—Statute of Elizabeth*—13 *Eliz.* c. 5.]—*Maguire* v. *Hart*, 28 S. C. R. 272.

Assent of Creditors.]—A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shewn:—Held, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—semble, that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper* v. *Dixon*, 10 A. R. 50.

See Andrew v. *Stuart*, 6 A. R. 495.

Assent of Creditors.]—A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when in its inception it is not so, subsequent dealings or communications between the debtor or his trustees and the creditors may render the trusts irrevocable. *Goodeve v. Manners*, 5 Gr. 114.

Assent of Creditors.]—If the assignee be not a creditor, the assignment is void against an execution coming in before any creditor has executed. *Maulson* v. *Topping*, 17 U. C. R. 183.

Assent of Creditors.]—The mere fact that certain creditors had notice of an assignment does not make the deed irrevocable. *Spooner* v. *Jones*, 3 Ch. Ch. 481.

Where the assignee afterwards re-conveyed to the grantor, some of whose creditors had been informed of such assignment, but had done no act to alter their position, and the land was afterwards sold for taxes:—Held, that the assignment was revoked, and did not affect the title. *Ib.*

Assent of Creditors.]—The meaning of R. S. O. 1887 c. 124, s. 3, s.-s. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction:—Held, therefore, that a sheriff who had seized goods of insolvent

debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R. S. O. 1887 c. 124, s. 3; but held, also, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution. The assignee having failed in the action, because the mortgagee's rights disentitled him to succeed, and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable, no costs were given to either party. *Anderson* v. *Glass*, 16 O. R. 592.

Assent of Creditors.]—It is sufficient under R. S. O. 1887 c. 124, s. 3, s.-s. 5, if the consent of creditors to an assignment is given subsequently to the assignment being made, provided that it is given before any assignment is made to the sheriff of the county. *Hall* v. *Fortye*, 17 O. R. 435.

Assent of Creditors.]—Where such an assignment has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it. Cooper v. Dixon, 10 A. R. 50, distinguished. *Ball* v. *Tennant*, 25 O. R. 59. Reversed in appeal on another ground, 21 A. R. 662.

Assent of Creditors.]—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it. Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner. *Rennie* v. *Block*, 26 S. C. R. 356.

Bills of Sale Act.]—Held, overruling Robertson v. Thomas, 8 O. R. 20, that assignments for the benefit of creditors were until 48 Vict. c. 26 (O.), within the Act relating to Chattel Mortgages and Bills of Sale, R. S. O. 1877 c. 119. *Whiting* v. *Horey*, 13 A. R. 7. See also *S. C., sub nom. Horey* v. *Whiting*, 14 S. C. R. 515.

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

Company.]—The directors of a joint stock company formed under 32 & 33 Vict. c. 13 (D.), cannot, without being authorized by their shareholders, make a voluntary assignment in insolvency. *Donly* v. *Holmwood*, 30 C. P. 240; 4 A. R. 455.

Company.]—The directors of an incorporated trading company have power to authorize the execution of an assignment for the benefit of creditors of the company, and the defendants, execution creditors, as strangers to the company, cannot object that the authority of the shareholders was not given, or that they had not ratified the deed. Donly v. Holmwood, 4 A. R. 555, distinguished. *Whiting* v. *Horey*, 13 A. R. 8. Affirmed by supreme court, *sub nom. Horey* v. *Whiting*, 14 S. C. R. 575.

Declaration of Trust Not Registered.]—An assignment registered, with a separate declaration of trust not registered:—Held, invalid. Arnold v. Robertson, 8 C. P. 147, approved. *Fraser* v. *Gladstone*, 11 C. P. 125.

Description of Property.]—See *Nolan* v. *Donnelly*, 4 O. R. 440; *Whiting* v. *Horey*, 13 A. R. 7.

Execution by Trustees.]—Execution by all the trustees is not absolutely necessary for the validity of an assignment. *Haight* v. *Munro*, 9 C. P. 462.

Filing Copy.]—Under 20 Vict. c. 3, a copy of an absolute assignment or bill of sale may be filed, as well as of a mortgage. See *Carscallen v. Moodie*, 15 U. C. R. 92; *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Form of Affidavit.]—The affidavit stated that the assignment was not made for the purpose of enabling the assignor (instead of the assignee) to hold the goods against creditors:—Held, bad. Semble, that assignees in trust for creditors cannot properly take the affidavit required by 13 & 14 Vict. c. 62. *Olmstead* v. *Smith*, 15 U. C. R. 421.

Form of Affidavit.]—An affidavit that the assignment was made bonâ fide, omitting the words "for good consideration:"—Held, bad. *Mason* v. *Thomas*, 23 U. C. R. 305.

That it was made "for the purposes and trusts therein set forth," and not for the purpose of holding &c., "the estate and effects," mentioned therein, instead of "the goods," as in the statute:—Held, sufficient. *Ib.*

Goods in Bond—*Household Furniture—Change of Possession.*]—See *Carscallen* v. *Moodie*, 15 U. C. R. 92; *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Partner.]—Held, that one co-partner in trade cannot, without the express consent of his co-partner, execute a deed disposing of all the stock-in-trade, effects, and assets of the firm to a trustee to dispose of the same for the general benefit of the creditors of the partnership. *Cameron* v. *Stevenson*, 12 C. P. 389.

Partner.]—A partner of a mercantile firm has no power, either during the existence or after the dissolution of a partnership, to make an assignment of the property and effects of the firm to a trustee for the benefit of creditors. *Stevenson* v. *Brown*, 9 L. J. 110.

Partner.]—The assignment in this case was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors:—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan* v. *Donnelly*, 4 O. R. 440.

Partner.]—The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him, if an assignment became necessary; and also under a cablegram received from him while in England, to the same intent:—Held, that though authority to execute a deed must be by deed, this would not affect goods of which the assig-

nee took actual possession, namely the stock-in-trade in the assignors' store; nor goods warehoused for and held by a bank, where the bank was notified and agreed to hold the surplus, after paying the bank's claim, for the assignee, which was equivalent to taking possession, and which were the only goods in question here. *Nelles* v. *Maltby*, 5 O. R. 263.

Registration.]—Registry Act, 35 Geo. III. c. 5. See *Acason* v. *Eastwood*, 4 U. C. R. 271.

Registration.]—An assignment or sale of personal property upon trust to pay creditors (or upon other trusts) is within the statutes requiring registration. *Howard* v. *Mitchell*, 11 U. C. R. 625.

Held, that the assignment in this case (the particulars of which are set out in the report) must be considered as an absolute sale, not a mortgage, and therefore did not require to be refiled under 12 Vict. c. 74. *Ib.*

Relating Back.]—Where an assignment for the benefit of creditors is filed within the five days allowed by law, it relates back to its date, so as to prevent the effect of an execution placed in the sheriff's hands within the five days. *McInnes* v. *Benedict*, 8 L. J. 22.

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5. *Inspectors.*

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

Payment for Consent.]—An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe, which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent, and void. *Brigham* v. *Banque Jacques Cartier*, 30 S. C. R. 429.

Purchase by Inspector—*Trust.*] — An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto, and he cannot be allowed to become purchaser, on his own account, of any part of the estate of the insolvent. Davis v. Kerr, 17 S. C. R. 235, followed. *Gastonguay* v. *Savoie*, 29 S. C. R. 613.

Purchase of Estate.]—An inspector of an insolvent estate, appointed by the creditors under R. S. O. 1887 c. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof. *Thompson* v. *Clarkson*, 21 O. R. 421.

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

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6. *Liens, Executions, and Privileged Claims.*

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

Attachment of Debt.]—An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him. Wood v. Joselin, 18 A. R. 59, followed. *Re Thompson*, 17 P. R. 257.

Costs of Pending Proceedings.]—A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessaries which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrill*, 10 P. R. 216.

Company—*President and Vice-President*—*Wages*—*Priority.*]—Claims for arrears of salary, made by persons occupying the position of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. *Fayne* v. *Langley*, 31 O. R. 254.

Crown.]—On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by him and sold. The Crown claimed payment from the plaintiff, as assignee of B., of the amount due for duties in priority to the payment of the claims of the general creditors of the estate. Held, that the Crown was not entitled to such priority and that if it elected to come in under the assignment it was bound by the terms thereof and could take only ratably and proportionately with the other creditors. *Clarkson* v. *Attorney-General of Canada*, 15 O. R. 632, 16 A. R. 202.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued against B. on the 19th February, 1887, for the recovery of the duty payable by B.:—Held, that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned. *Ib.*

Execution.]—A writ of fi. fa. against the lands of one H. had been in the sheriff's hands since 1880. In 1887 the sheriff sold under it and received the purchase money. Afterwards, and before payment over by the sheriff to the execution creditors, H. assigned for

the benefit of his creditors under R. S. O. 1887 c. 124. The assignee then claimed the money in the sheriff's hands:—Held, that the assignee was not entitled to the money. Per Boyd, C., R. S. O. 1887 c. 124, s. 9, applies to executions to which the Creditors' Relief Act applies, and where distribution has to be made under that Act, and did not apply to the writ in this case; and the writ in this case was executed by the sale of the lands and receipt of the money, which then became the property of the execution creditors:—Semble, that if R. S. O. 1887 c. 124, s. 9, is to receive such a construction as would pass the money in a case such as this to the assignee, thus giving him a higher right than the execution debtor had, then the enactment is ultra vires as a bankruptcy provision. Per Ferguson, J., the authorities clearly shew that after receipt of the money by the sheriff, the writ was executed; and semble, that "completely executed by payment" in R. S. O. 1887 c. 124, s. 9, means voluntary or involuntary payment to the sheriff. Sinclair v. McDougall, 29 U. C. R. 388, specially referred to. *Clarkson* v. *Sevens*, 17 O. R. 592.

Execution.]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. 1887 c. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage:—Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

Execution.]—Under R. S. O. 1887 c. 124, s. 9, the costs for which the execution creditor has a lien are the costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution. *Ryan* v. *Clarkson*, 16 A. R. 311, 17 S. C. R. 251.

Execution.]—The lien of a plaintiff for costs by virtue of s. 9 of R. S. O. 1887 c. 124, under an execution in the sheriff's hands, against an insolvent, at the time of an assignment by him for the benefit of creditors under that statute, is not superseded by such assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien:—Held, per Armour, C.J., that he is not entitled to rank on the insolvent's estate as a preferential creditor. Per Street, J.—That even if so entitled, it could only be on the net funds available after payment of the proper charges incurred in the management of the estate. *Gillard* v. *Milligan*, 28 O. R. 645.

Judgment.]—The precedence given to an assignment for the general benefit of creditors by R. S. O. 1887 c. 124, s. 9, over "all judgments and all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. 1887 c. 44, s. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant. *Abraham* v. *Abraham*, 19 O. R. 256; 18 A. R. 436.

Lien.] — The plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard, who, immediately after such seizure, made an assignment for the benefit of creditors:—Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance. *Roberts* v. *Bank of Toronto*, 25 O. R. 194; 21 A. R. 629.

Rent.]—The defendant made a lease under seal to R., dated the 8th November, 1884, for five years from the 12th November, at the rent of $400, payable half-yearly in advance on the 12th November, and May, in each year. The lease contained a covenant that, "if the lessee shall make any assignment for the benefit of creditors, * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half-year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May, the defendant, claiming to do so under the above covenant, distrained for the half-year's rent, which, in the regular course of time, would have been payable in advance on the 12th May:—Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed for rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant, which was binding on the tenant, was equally binding on the plaintiff as his assignee. *Graham* v. *Lang*, 10 O. R. 248.

Rent.]—Defendants, in 1881, by indenture under the Short Forms Act, leased certain premises to O., for ten years, at a yearly rent, payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make an assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on non-payment of rent, or seizure or forfeiture of the term for any of the causes aforesaid. In August, 1883, O. assigned to B., as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors:—Held, that the distress was illegal, for the statute 8 Anne c. 14, s. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture; and that the plaintiff B. was entitled to recover the amount received by defendants. Graham v. Lang, 10 O. R. 248, not followed. Per Armour, J.—The year's rent became due only by virtue of the forfeiture, the distress was an unequivocal act indicat-

ing the intention to forfeit, and evidence of such an intention previously formed; so that before the distress defendants had elected to treat the term as forfeited, and having done so their right to distrain was at an end. Moreover they had not distrained during the possession of the tenants from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors:—Quære, per Wilson, C.J., as to this latter point. Per Armour, J.—The execution creditors for whom the money was paid, in order to enable the sheriff to seize under their executions, might also recover; Wilson, C.J., doubting. But held by the court of appeal that the money so paid could not be recovered back, either by the execution creditors, on whose behalf it was paid, or by B. as assignee. *Baker* v. *Atkinson*, 11 O. R. 725; 14 A. R. 409.

Rent.] — The tenant of certain freehold premises executed an assignment under 48 Vict. c. 26 (O.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment:—Held, that the landlord's right of distress was not affected by the assignment:—Held, also, that goods so assigned were not to be therefore deemed in custodiâ legis. *Eacrett* v. *Kent*, 15 O. R. 9.

Rent.]—B., by lease dated the 28th November, 1887, was lessee for five years from the 1st February, 1888, of certain premises at a yearly rental of $370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act, 50 Vict. c. 23 (O.), should not apply to the lease. B. paid $100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises, and remained in possession until the 1st September, 1888. On the 24th July, 1888, the defendants distrained for, and were paid by the plaintiff as assignee, $270, the balance of the current year's rent:—Held, that the lease did not become void because of the assignment, but only voidable; that the right to claim the accelerated rent depended, not upon the lessors' election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of his creditors; that the clause was divisible; and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being an election to forfeit:—Held, also, that the goods in the possession of the assignee were not in custodiâ legis so as to protect them from distress. The position and liability of such an assignee on becoming assignee of the term, considered. Wyld v. Clarkson, 12 O. R. 589, explained; Atkinson v. Baker, 14 A. R. 409, and Griffith v. Brown, 21 C. P. 32, considered. *Linton* v. *Imperial Hotel Co.*, 16 A. R. 337.

Rent.]—Under 58 Vict. c. 26, s. 3, s.-ss. 4 and 5 (O.), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but also to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the lien extends for such further period, over the three months, as the possession lasts. *Clarke* v. *Reid*, 27 O. R. 618.

Rent — *Acceleration Clause* — "*Current Quarter.*"]—By a lease made on the 31st October, 1895, certain premises were demised for a term of three years from the 1st November, 1895, at a yearly rent of $480, payable, in advance, in even portions monthly on the first day of each month, the first payment to be made on the 1st November, 1895. The lease contained the usual statutory covenants and provisoes, and an express power of entry and distress for rent in arrear, and also the following provision:—"If the lessee shall make any assignment for the benefit of creditors * * * the then current quarter's rent shall immediately become due and payable." On the 31st January, 1896, the lessor, who also held a chattel mortgage on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessees, took possession both as mortgagee and by way of distress for rent in arrear, only $40 having up to that time been paid to her on account of rent. On the same day the lessees made an assignment for the benefit of creditors and by consent the goods on the demised premises, which were of far more value than $200, were sold by the lessor and were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods $200, rent for December, 1895, and January, February, March and April, 1896:—Held, per Burton, C.J.O., and Maclennan, J.A.—That s.-s. 1 of s. 3 of 58 Vict. c. 26 (O.), now R. S. O. 1897 c. 170, s. 34, s.-s. 1, is a restrictive provision, and limits the landlord's lien even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made. Clarke v. Reid, 27 O. R. 618, disapproved. Per Burton, C.J.O.—That the acceleration clause in the lease in question had no application, though even if the words "current quarter" could be read "current three months" the clause would not help the lessor, as the current three months ended on the 31st January, 1896; but that a lessor apart from an acceleration clause is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1896. Per Osler, J.A.—That the acceleration clause in the lease had no application, but that if it had, then a quarter's rent became in arrear under it within three months after the assignment for the benefit of creditors and while the assignee was in possession and there were sufficient goods upon the demised premises subject to distress, so that the lessor would be entitled to the amount claimed; but that apart from an acceleration clause a lessor is entitled to the rent which becomes in arrear subsequent to the assignment and for three months thereafter, whether there are goods subject to distress or not, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1st March, and 1st April, 1896. Per Maclennan, J.A.—That "current

quarter" in the acceleration clause meant a quarter of a year, or three months, but that the clause did not avail in this case because the current three months ended on the 1st February, 1896; but that a lessor, apart from an acceleration clause, is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1896. In the result the judgment below allowing the lessor rent for the months of February, March, and April, was varied by disallowing rent for March and April. *Langley* v. *Meir*, 25 A. R. 372.

Rent—*No Distrainable Effects.*]—A landlord has no preferential claim for rent against an estate in the hands of an assignee for creditors if there were no distrainable goods on the premises at the time of the assignment. *Magann* v. *Ferguson*, 29 O. R. 235.

Rent—*Distress.*]—By the terms of a lease of shop premises, the rent was payable quarterly in advance. There was also a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors. Held, that the expression "arrears of rent due * * * for three months following the execution of such assignment" in s. 34 of the Landlord and Tenant's Act, R. S. O. 1897 c. 170, means "arrears of rent becoming due during the three months following the execution of such assignment;" and the landlord was therefore apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment. Held, also, that the expression "the preferential lien of the landlord for rent" in s. 34 has the same meaning that it had under the Insolvent Acts; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress. *Lazier* v. *Henderson*, 29 O. R. 673.

Rent—*Acceleration Clause.*]—A lease, under which the rent was payable quarterly in advance, contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the current year's taxes should immediately become due and payable as rent in arrear, and recoverable as such:—Held, on the lessee making such an assignment, that the lessor was entitled to recover by distress and had a preferential lien for—in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment—the rent of the current quarter in which the assignment was made, which was also due and in arrear, as well as a further quarter's rent, together with the taxes for the current year. Langley v. Meir, 25 A. R. 372, commented on; Lazier v. Henderson, 29 O. R. 673, followed. *Tew* v. *Toronto Savings and Loan Company*, 30 O. R. 76.

Rent—*Acceleration Clause—Forfeiture.*]—A lease of a store was made for five years, at the yearly rental of $700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise. During the term, on the 24th January, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on the 1st October, 1897, $175 rent due on the 1st January, 1898, $175 for "the next quarter's rent," by virtue of the proviso in the lease, and $119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back $319.32 of it, which action was dismissed on the 14th December, 1898. On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898. In this action the plaintiff alleged that he was entitled to be paid by the defendants $322, being the proportion of the rent from the 14th February to the 1st July, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R. S. O. 1897 c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it:—Held, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it. Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which

by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged. *Tew* v. *Routley*, 31 O. R. 578.

Stock Exchange.] — Power of Toronto Stock Exchange to pass by-laws giving preference to the claims of the exchange, and of members of the exchange for debts arising out of the stock exchange transactions, on moneys realized from the sale of insolvents' seats at the board. See *Clarkson* v. *Toronto Stock Exchange*, 13 O. R. 213.

Trust.]—Where C., an insolvent, had assigned all his assets and stock-in-trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C's hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock-in-trade assigned to S.:—Held, that the plaintiff as against S. was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of the assignment. *Calhane* v. *Stuart*, 6 O. R. 97.

Trust.]—When an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable against the agent's assignee for the benefit of creditors, even though the agent has, while purchasing for the principal, also purchased goods of the same kind for himself and has not set aside specific portions of the goods to answer the principal's claim. Harris v. Truman, 9 Q. B. D. 264, applied. *Long* v. *Carter*, 23 A. R. 121; 26 S. C. R. 430.

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7. *Partnership and Separate Estate.*

Attempt to Give Separate Assets to Partnership Creditors.] — Two partners dissolved and divided their assets. Subsequently one of them being sued by an individual creditor, made an assignment of all his estate, real and personal, for the benefit of his creditors, and by the terms of the assignment, placed his partnership and individual creditors on the same footing. In an action by the individual creditor (after he had obtained judgment) to set aside the assignment, it was:—Held, that after the dissolution and division of assets, the share of the partner who was sued became his separate property, and could not be assigned for the benefit of his partnership creditors until his individual debts were first paid, and that the assignment as to personalty was bad and must be set aside, but that a debtor may give a preference to one creditor over another under the Statute of Elizabeth, and that the assignment as to realty was good. *Martin* v. *Evans*, 6 O. R. 278.

Direction to Pay Partnership and Separate Creditors.] — Under an assignment by a firm in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "ratably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership and private creditors, and distributing the same as between them according to law:"—Held that the assignment was valid, for it provided for the payment, both of the partnership and separate creditors, out of the respective estates appointed for that purpose according to law, the meaning of which is well known. *Nelles* v. *Maltby*, 5 O. R. 263.

Dissolution of Firm.]—On the dissolution of a partnership between L. and W., the latter transferred all his interest in the partnership to L., who subsequently became insolvent and assigned all his estate, including that part of it which had formerly been assets of the partnership, to the defendant, in trust to pay "the claims of his creditors ratably and proportionately, and without preference or priority, recognizing such liens, claims, charges, and priorities as the law directs:"—Held, that under the terms of the deed there was no priority between the separate creditors of L. and the joint creditors of L. and W., all being creditors of L., and that both classes of creditors were entitled to be paid pari passu. *Moorehouse* v. *Bostwick*, 11 A. R. 76; reversing 5 O. R. 104.

Dissolution of Firm.] — Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone. Section 5 of R. S. O. 1887 c. 124, does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate. *Macdonald* v. *Balfour*, 20 A. R. 404.

Fusion of Estates.]—Two partners, before the Insolvency Act, assigned their joint and separate estates together, for the benefit of their joint and separate creditors, pari passu. An assignee under the Act, afterwards appointed, filed a bill to set aside these assignments on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing by evidence that both the separate estates were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs. *McDonald* v. *McCallum*, 11 Gr. 469.

Property Passing.] — A deed was executed by John N. Kline & Son, of the first part, whereby, after reciting that they had proposed and agreed to assign all their personal estate and effects to certain parties of the second part, they conveyed and assigned to the said parties "all and singular the stock-in-trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account of what nature or kind soever, belonging to or due or owing to the said parties of the first part, and which are set forth in the schedule hereto annexed, marked with the letter A., and subscribed by the parties hereto of the first and second parts; and all the personal estate whatsoever, of the said parties of the first part, and all their estate and interest therein." No schedule was attached to the deed at the time of execution, but sche-

dules were afterwards annexed, signed John N. Kline & Son, John N. Kline, jr., Anthony Kline:—Held, that, independently of the schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline. *Heward v. Mitchell*, 10 U. C. R. 535.

Property Passing.]—A testator gave all his estate, real and personal, to his executors in trust, empowering them to continue his business, which they accordingly did for several years, and in doing so had acquired a large amount of property, and subsequently assigned the same, as well that portion remaining left by the testator (about one-ninth) as that acquired since his death, to certain trustees for all creditors of the estate, and each executor severally assigned for the benefit of individual creditors. The trustees took and continued in the possession of the chattels assigned under the several conveyances. The trusts declared were for the benefit pari passu of creditors coming in, and who were not bound to release their claims. A judgment having been recovered against the executors individually, upon a note made by them as executors, the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwithstanding the assignments thereof. In an interpleader suit brought to try the question, the court below determined that the assignments were sufficient to pass and did pass the property to the trustees, who were therefore entitled as plaintiffs to a verdict; and that the judgment creditors were entitled, if their judgment and execution were against the executors, to claim as creditors upon the estate assigned by them as such, and if necessary on the separate estate of each, the joint estate being exhausted. *Kerr v. Haldan*, 2 E. & A. 382; affirming *Haldan v. Kerr*, 12 C. P. 620.

Property Passing.] — An assignment under R. S. O. 1887 c. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in s. 4, vests in the assignee all the properties of each of the partners, several as well as joint. *Ball v. Tenant*, 25 O. R. 50; 21 A. R. 602.

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8. *Preferential Transactions under R. S. O. 1877 c. 118, and Amending Acts.*

Absence of Fraud—*Payment.*]—In an action by a creditor for an amount due on a mortgage, and to set aside a conveyance of personal property, in which the Judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved, it was:—Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and that although under 48 Vict. c. 26, s. 2 (O.), it might possibly be that the transaction should be held to be void as against creditors as having the effect of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham, or a colourable one, but was a real transaction and bonâ fide, that the plaintiffs failed on that branch of the case. Part of the purchase money of the goods was arranged by the substitution of a note of the defendants for the notes of the defendant J. P., which had been transferred to a banker, and which note was, on the subsequent sale to the defendant F., paid by him:—Held, that the transaction was a bonâ fide payment under 48 Vict. c. 26, s. 3 (O.). *Building and Loan Association v. Palmer*, 12 O. R. 1.

Advances—*Contemporaneous Agreement.*]—On April 26th, 1886, M. A. V., in pursuance of a written agreement of the same date, gave a mortgage to the plaintiffs on her furniture and stock-in-trade, present and future, to secure advances of goods to be made by the plaintiffs within seven months, to the extent of $1,000 in value; and at the same time she executed a mortgage on the same goods to secure a past indebtedness to the plaintiffs. The advances were made, pursuant to the mortgage, to the extent of about $600. M. A. V. was insolvent at the time, but not to the knowledge of the plaintiffs, and the transaction was an honest one throughout. Over a year after, the goods were seized in execution by the defendant. At that time the past indebtedness secured by the mortgage relating thereto had all been paid off. It did not appear that the payments were made out of the new goods:—Held, by a divisional court, upon the evidence, that there were two agreements—one to secure a past indebtedness, and the other to secure the future advances; and that the mortgage to secure future advances was a valid security within s. 6 of R. S. O. 1877 c. 119. Coyne v. Lee, 14 A. R. 503, cited and followed:—Held, also, that the transaction had not the effect of giving a preference under 48 Vict. c. 26, s. 2. The mortgage was not void under 48 Vict. c. 26, s. 2, for substantially it was given by way of security for a present actual bonâ fide sale and delivery of goods, within the exception to that section; and it was not a preference of the plaintiffs over other creditors, as but for it the plaintiffs would never have become creditors at all; and there was no question under s. 3 (1), as to the goods bearing a fair and relative value to the consideration therefor, inasmuch as it was not an absolute conveyance or transfer, but a mortgage, and would attach only to the exact extent to which value was given therefor, by the delivery of goods. *Goulding v. Deeming*, 15 O. R. 201.

Per Proudfoot, J. The "advances" referred to in R. S. O. 1877 c. 119, s. 6, need not be pecuniary. *Ib.*

Advance to Pay Creditor.]—W., being in insolvent circumstances, and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him, and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received:—Held, that the chattel mortgage was void as against W.'s creditors under R. S. O. 1887 c. 124, and that it did not come within any of the exceptions in s. 3, the necessary preference of a particular creditor placing the transaction outside of the class which it was the intention of the Legislature to protect. *Stoddart v. Wilson*, 16 O. R. 17.

Advance to Pay Creditor.]—A solicitor, acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan from another client who was ignorant

of the purpose for which the loan was required. The solicitor, by direction of the debtor, out of the moneys advanced paid off the creditor in full, and shortly afterwards the debtor assigned:—Held, that the mortgage was one to secure a present actual bonâ fide advance, and could not be impeached. Stoddart v. Wilson, 16 O. R. 17, questioned. The question of notice to the solicitor as affecting the client discussed. *Gibbons* v. *Wilson*, 17 O. R. 290, 17 A. R. 1.

Agreement to Give Security.]—G. & L., bakers, on the 18th May, 1880, agreed with the defendants that if the latter would supply them with flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & L. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & L. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & L. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so in case the mortgagors "should attempt to sell, dispose of, or in any way part with the possession of said goods," and removed them to their own warehouse. The mortgage also contained a redemise clause. The jurat of the affidavit of bona fides was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 11th June, and the sheriff seized the goods under it on the 30th June:—Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, to enable defendants to carry on their business; and therefore there was under R. S. O. 1877 c. 118, no preference of defendants, who became creditors only by this contract:—Held, also, the property having passed by the bill of sale, and the defendants being in actual possession when the plaintiff's attachment issued, that they had a right to retain the goods as against the plaintiff, subject to the mortgagors right of action, if any, for taking possession before default:—Semble, however, that under the clause in the mortgage above mentioned, defendants were justified in taking possession when the mortgagors absconded, leaving no one in charge of the goods. *Robins* v. *Clark*, 45 U. C. R. 592.

Bona Fide Belief in Ability to Carry on Business.]—A company being indebted to L. & B. in a large amount, and believing that their charter did not allow a mortgage on their property to secure an overdue debt, made an agreement to give such mortgage for an advance of a larger sum, agreeing to return the amount of the debt to the mortgagees. At the time of this transaction the company believed that by getting time from this creditor they would be able to carry on their business and avoid failure. This hope was not realized, however, as the company were subsequently compelled to stop payment, and the respondents, who were also creditors, obtained judgments and issued executions against the goods secured by the mortgage:—Held, reversing 7 O. R. 154, and 12 A. R. 137, that inasmuch as the company bonâ fide believed that by giving this mortgage and getting an extension of time for payment of plaintiffs' debt they would be able to carry on their business, the mortgage was not a preference of this debt over those of other creditors, and not a fraudulent preference under R. S. O. 1877 c. 118. *Long* v. *Hancock*, 12 S. C. R. 532.

Book Debts—*Insolvency.*]—One N. owed defendants a sum of money which he was unable to pay in full, and he assigned to defendants all his book debts and accounts, the assignment providing that the book debts should be placed in the hands of a firm of financial agents for collection, who should account to the defendants for the proceeds, less the commission, and whatever amount remained in defendants' hands after their debts were paid should be paid over to N. Plaintiffs, judgment creditors of N., brought an action to set aside this assignment as having the effect of hindering, delaying, and defeating them in the recovery of their claim and giving defendants a preference over other creditors, and so being void under R. S. O. 1877 c. 118, as amended by 48 Vict. c. 26, s. 2 (O.):—Held, affirming 15 A. R. 324, and 14 O. R. 288, that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said Act; that book debts are a species of property included in the provisions of 48 Vict. c. 26, s. 2 (O.), and that the assignment by N. to the defendants was void under that section. *Kloepfer* v. *Warnock*, 18 S. C. R. 701.

Book Debts—*Account.*]—When an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected by him under the preferential security before the attack upon it. *Meharg* v. *Lumbers*, 23 A. R. 51.

Breach of Trust—*Revocation of Transfer—Post Office Act.*]—The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality cannot be impeached under the Assignments and Preferences Act, the duty to make good his wrong being sufficient to protect the transaction. The cheque was sent by the treasurer by post in a letter to the bankers and this letter was received by the bankers in the afternoon, but the amount was not credited in the bank books to the municipality till next morning, and before this was done an assignment for the benefit of creditors had been made by the treasurer:—Held, that the property passed as soon as the cheque reached the bankers and that the assignment was not a revocation of the transfer. Per Ferguson, J.—The property in the cheque passed irrevocably by virtue of the provisions of the Post Office Act, R. S. C. c. 35, s. 43, as soon as the letter was posted. *Halwell* v. *Township of Wilmot*, 24 A. R. 628.

Chattel Mortgage—*Advances of Money—Solicitor's Knowledge of Circumstances.*]—In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock-in-trade in favour of a money lender by whom money was advanced. The money,

which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor, who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Act respecting assignments and preferences and to bring the case within the ruling in Gibbons v. Wilson, 17 A. R. 1:—Held, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a bonâ fide payment of money within the meaning of the statutory exceptions. *Burns* v. *Wilson*, 28 S. C. R. 207.

Compulsory Release.] — An insolvent debtor informed his creditors of his difficulties, and on the 19th March, 1885, all but two of the creditors signed a memorandum to the effect that the best thing he could do was to sell out his stock and effects for a sum named and agreed to be paid by one of the creditors, and which would pay all his creditors fifty cents in the dollar on certain terms, and those who signed agreed to accept fifty cents in full of their claims. The debtor afterwards accordingly, by bill of sale dated the 9th April following, sold and conveyed his assets to one of the creditors, who had signed the memorandum, for the sum and on the terms named therein, which were that the money was to be paid in four and eight months, and the purchaser was to indorse the vendor's notes, so that he could transfer them to the creditors. The bill of sale referred to the previous agreement, and recited that "the creditors" had agreed to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor, and also provided that the balance, if any, "after deducting the debt of the purchasers," (who were among those agreeing to accept the fifty cent composition), should be paid to the debtor:—Held, that this amounted in effect to a condition that any creditor receiving the fifty cents in the dollar of his claim, should release the debtor, and that the sale was therefore void as against the two non-assenting creditors under R. S. O. 1877 c. 118, s. 2. *Jennings* v. *Hyman*, 11 O. R. 65.

Concurrence of Intent.]—In order to create a fraudulent preference under the statute of Elizabeth as interpreted by R. S. O. 1877 c. 95, s. 15, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee. In this case, which was that of a mortgage of goods:—Held, that no such intent was shewn on the part of the mortgagee; nor semble, on the part of the mortgagor. *Hepburn* v. *Park*, 6 O. R. 472.

Concurrence of Intent.]—The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor, under R. S. O. 1877 c. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor; and the rule of the court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion. Lancey v. Merchants' Bank, 10 O. R. 169, (note), followed in preference to Ivey v. Knox, 8 O. R. 635, 648. *Burns* v. *Mackay*, 10 O. R. 167.

Concurrence of Intent.] — A chattel mortgage given as security for a bonâ fide debt cannot be avoided under R. S. O. 1877 c. 118, by simply shewing that the debtor was insolvent, and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgage so as to constitute a concurrence of intent on the part of the debtor and creditor; and the amendment made by 47 Vict. c. 19, s. 3 (O.) does not affect the matter. Burns v. McKay, 10 O. R. 167, followed. In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency; and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld:—Quære, whether, where the statute may be defeated by shewing an antecedent promise to give security, it must be such as the promise indicated. *McRoberts* v. *Steinoff*, 11 O. R. 369.

Confession of Judgment.]—A withdrawal of defence under s. 113 of the Division Courts Act, R. S. O. 1887 c. 51, is not a confession of judgment or cognovit actionem within the meaning of s. 1 of the Assignments and Preferences Act, R. S. O. 1887 c. 124. *Bailey* v. *Bank of Hamilton*, 21 A. R. 156.

Consent Judgment.]—Under C. S. B. C. c. 51, s. 1, a consent judgment obtained by a bank against an insolvent tramway company, with intent to defeat or delay the creditors of the latter, was held to be null and void against them. So long as the intent is proved, it is immaterial whether consent was given under pressure. *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company*, [1897] A. C. 193.

Consent to Order Striking out Defence.]—The defendant, a creditor of O., who was in insolvent circumstances, commenced an action on the 25th May, 1882. By arrangement with O., who appeared, pleaded to the plaintiff's statement of claim, and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and in due course obtained judgment against O., and the validity of the defendant's judgment came in question on interpleader:—Held, following the decisions under R. S. O. 1877 c. 118, that the defendant's judgment was valid. If the matter were res integra, O., by actively interfering to enable the defendant to recover a judgment against him sooner than by due course of law he otherwise would have done, was giving a confession of judgment within the words of the Act, and certainly within its spirit. *Turner* v. *Lucas*, 1 O. R. 623.

Defending One Action—*Book Debts.*]—A man in insolvent circumstances was sued about the same time by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other, that brought by his son, he made no defence, by

reason of which judgment was obtained therein and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. In order to make up sufficient to satisfy the balance of his son's claim, the defendant in the action was urged to make an assignment to his son of all his book debts, which he did, thereby denuding himself of all property:—Held, that as the book debts could be seized under an execution, the assignment thereof was a fraudulent preference within the Act; and the assignment being declared void, the son was ordered to account for the moneys received thereunder. Under the circumstances no costs were allowed to either party. *Labatt* v. *Bixel*, 28 Gr. 503.

Defending One Action.]—The defendant C. defended an action brought against him by the plaintiffs, white in an action brought against him by defendant S., he entered an appearance and filed a plea some days before the plea was due, and on the same day filed a relicta verificatione, whereupon judgment was signed and execution issued:—Held, that these proceedings did not offend against the provisions of the Act R. S. O. 1877 c. 118, s. 1; following in this the decision in Young v. Christie, 7 Gr. 312; McKenna v. Smith, 10 Gr. 40; Labatt v. Bixell, 28 Gr. 503; and Mackedie v. Watt, decided in appeal 28th November, 1881. *Heaman* v. *Seale*, 29 Gr. 278.

Delivery of Horse in Satisfaction of Claim.]—One Chamberlain being in insolvent circumstances, and indebted to K. in $120, was pressed by him for payment, when he agreed to sell K. a horse for $110, in part payment; and about the 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st October, Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 Vict. c. 26 (O.) respecting assignments for the benefit of creditors, which came into force on the 1st September, 1885. In an action against K. to recover the horse, on the ground of fraudulent preference:—Held, that the sale having been made before the Act came into force, the provisions thereof did not apply. Ings v. Bank of Prince Edward Island, 11 S. C. R. 265, followed:—Held, also, that the sale was not void, either as a fraudulent preference under R. S. O. 1877 c. 118, or for non-compliance with the Bills of Sale Act. *Coats* v. *Kelly*, 15 A. R. 81.

Effect of Transaction the Test.]—A company, incorporated in the state of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that under 48 Vict. c. 26 (O.) without regard at all to any question of bona fides, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it:—Held, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld, because it was not shewn to have been given in consideration of a money advance made in the bonâ fide belief that such advance would enable the debtors to continue business and pay their debts in full. *River Stave Company* v. *Sill*, 12 O. R. 557.

Effect of Transaction the Test.]—Per Burton, J.A., s. 2 of 48 Vict. c. 26 (now R. S. O. 1887 c. 124, s. 2), should be read as intended to invalidate any act fraudulent in the sense of being a violation of the statute if it has the effect of defeating or delaying creditors or giving one or more of them a preference over others. *Kennedy* v. *Freeman*, 15 A. R. 166.

Semble, per Osler, J.A., the meaning of s. 2 is, that when a person is in insolvent circumstances, if either the intent or the effect of the transaction is to prefer the creditor, that is all that is necessary to avoid it. *Ib.*

Following Proceeds.]—Semble, where one creditor, having obtained property from his debtor in fraud of other creditors, has realized the property, and received the proceeds in a shape that cannot be earmarked, another creditor who has thereby been defrauded, cannot make the preferred creditor account for the said proceeds, and has no other remedy than that prescribed by 13 Eliz. c. 5, s. 2. *Davis* v. *Wickson*, 1 O. R. 369.

Following Proceeds.]—A favoured creditor, with the connivance of an insolvent debtor, procured a third person to purchase the debtor's entire stock-in-trade, for which the purchaser gave his note to the debtor, who immediately indorsed it to the favoured creditor, who discounted it with a bank. The debtor did not execute any assignment for the benefit of creditors. In an action by the other creditors to compel the preferred creditor to share ratably with them:—Held, that as the preferred creditor had disposed of the note to a bonâ fide holder for value no relief could be given. *Robertson* v. *Holland*, 16 O. R. 532.

Fraudulent Scheme—*Colourable Security.*]—Land stood in the name of a son who was in embarrassed circumstances, and the same was conveyed by him to his father, who asserted that he had advanced the money wherewith to pay the consideration, and he created mortgages thereon to secure his own liabilities in favour of bonâ fide creditors, with the sanction of the son. The court being satisfied that this was a scheme adopted for the purpose of defeating and delaying the creditors of the son, declared the conveyance to the father fraudulent as against creditors. *Knox* v. *Tracer*, 24 Gr. 477.

Although a debtor may be at liberty under the statute of Elizabeth to prefer a creditor by creating a mortgage in his favour, still, if the preference given is only colourable to secure that creditor, and in reality for the fraudulent purpose of defeating other creditors, and such purpose is known to the preferred creditor, who lends himself to it, not for the purpose of obtaining security for his debt, but of aiding the fraudulent purpose of his debtor, the element of bona fides is wanting, which is necessary for the protection of the transaction under the Act. *Ib.*

Further Advances—*Creditor's Notes under Discount.*]—C., a retail trader, being in-

debted to H. & Co., wholesale merchants, gave them a chattel mortgage to secure such indebtedness, and also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mortgage, which C. represented was sufficient to pay off in full all his other creditors. C.'s indebtedness to H. & Co., was covered by his promissory notes, which, at the time of the execution of the mortgage, were on discount with H. & Co.'s bankers. During the currency of the mortgage, C. having allowed his property to be seized for rent, H. & Co. took possession under their mortgage. C. being unable to pay his creditors, the plaintiffs, who were creditors, but had not recovered judgment or execution, took action to set aside the chattel mortgage:—Held, that under the evidence set out in the report there was no fraud, and following Hepburn v. Park, 6 O. R. 472, that the fact that the notes in question were held by the mortgagees' bankers on discount did not invalidate the mortgage. *Hyman* v. *Cuthbertson*, 10 O. R. 443

Future Acquired Chattels.]—A mortgage by an insolvent person on future acquired chattels to secure the repayment of the price of such chattels to the vendor thereof is binding, notwithstanding 48 Vict. c. 26, s. 2 (O.) *Goulding* v. *Deeming*, 15 O. R. 201.

Hindering and Delaying Creditors— *Statute of Elizabeth.*]—In an assignment for the benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment:—Held, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor, who had parted with all his property, they would be hindered and delayed in the recovery of their debts, and the deed was, therefore, void under the statute of Elizabeth. *McDonald* v. *Cummings*, 24 S. C. R. 321.

Husband and Wife — *Advances—Pressure.*] — The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about $1,500 derived from the estate of a former husband, which she lent at different times to her husband, directly or in paying his debts, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of $200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements, and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale of other goods, for the expressed consideration of $300. The plaintiff and her husband continued to reside together, and apparently had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as pleased himself. The evidence established the bona fides of the claims set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on the goods:—Held, that the bill of sale and chattel mortgage were not open to objection as being given direct to the wife by the husband; and that even if her title under the chattel mortgage could not be supported for want of a sufficient change of possession, she could claim under the bill of sale, which, being obtained by pressure, was not a fraudulent preference under R. S. O. 1877 c. 118. *Totten* v. *Bowen*, 8 A. R. 602.

Insolvent — *Computation of Assets and Liabilities.*]—The meaning of R. S. O. 1877 c. 118, as amended by 48 Vict. c. 26, s. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying, or prejudicing his creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency. *Rae* v. *McDonald*, 13 O. R. 352.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant M.:—Held on the evidence, the debtor was insolvent when he made the mortgage, whereby the defendant obtained a preference over the other creditors, including the plaintiff, and that the mortgage must be set aside. *Ib.*

Per Rose, J.—A debtor is legally insolvent when he has not sufficient property to pay all his debts if sold under legal process; and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business. *Ib.*

Per Cameron, C.J. In determining whether a debtor is insolvent, &c., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale. *Ib.*

Per Rose, J.—Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities. *Ib.*

Two of the debts were to relatives of the debtor, secured by mortgage and promissory notes. The Judge at the trial charged that because the debts were under the control of the debtor they should not be included in estimating his liabilities. Per Rose, J. This was misdirection. *Ib.*

Insolvent.]—A man may be deemed in "insolvent circumstances," within the meaning of 48 Vict. c. 26, s. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent. Rae v. McDonald, 13 O. R. 352, discussed. *Warnock* v. *Kloepfer*, 14 O. R. 288, 15 A. R. 324.

Insolvent.]—On 19th December, 1885, a transfer of certain book debts was made by the firm of B. M. & Co., to defendant, under a contract therefor, made on the 16th August, 1884, whereby defendant lent the firm $15,000, which was to be repaid on six months' notice, and defendant to be employed as a clerk at $2,000 a year. The firm subsequently made an assignment under 48 Vict. c. 26 (O.), to the plaintiff, for the benefit of their creditors. The plaintiff alleged that at the time of the transfer the firm was insolvent, and therefore the transfer was invalid as giving, or having the effect of giving, the defendant a preference. At the time of the transfer the value of the firm's stock of goods at the ordinary selling value was nearly double the amount of the firm's liabilities; but when they were sold by the plaintiff, some two

months afterwards, they only realized a third of the ordinary selling price, and much less than the liabilities:—Held, that the firm were not insolvent at the time of the transfer; and the transfer was therefore valid. *Clarkson* v. *Sterling*, 14 O. R. 469.

Insolvent.]—Under a judgment recovered and execution issued thereon in February, 1887, certain goods and chattels of C. were seized. These goods were covered by a chattel mortgage made on 18th December, 1886, in favour of the defendant. The evidence shewed that at the time of the mortgage there was a surplus of about $13,000 of assets over liabilities. All the assets were either mortgaged or under warehouse receipts:—Held, that C. could not be deemed to be insolvent at the time of the making of the mortgage within 48 Vict. c. 26 (O.) *Dominion Bank* v. *Corran*, 14 O. R. 465.

There is no wider meaning to be given to the words "unable to pay his debts in full" than to "insolvent circumstances;" but both expressions refer to the same financial condition, that is, to a condition in which a debtor is placed when he has not sufficient property, subject to execution, to pay all his debts if sold under legal process at a sale fairly and reasonably conducted. *Ib.*

The fact that all the assets were either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent. *Ib.*

Knowledge of Insolvency—*Advances.*]—A transaction entered into by a person in insolvent circumstances is not impeachable, unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith. *Johnson* v. *Hope*, 17 A. R. 10. And see *Ashley* v. *Brown*, 17 A. R. 500.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency, and in good faith, is not impeachable, because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference. Stoddart v. Wilson, 16 O. R. 17, disapproved. *Ib.*

Knowledge of Insolvency.]—A farmer mortgaged his farm to secure a debt due by him to the mortgagee and a small sum advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances:—Held, following Johnson v. Hope, 17 A. R. 10, that the mortgage was not void against creditors, under s. 2 of R. S. O. 1887 c. 124. *Gibbons* v. *McDonald*, 19 O. R. 290, 18 A. R. 159.

Knowledge of Insolvency.] — Held, following Johnson v. Hope, 17 A. R. 10, that an assignee for the benefit of creditors under R. S. O. 1887 c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full. *Lamb* v. *Young*, 19 O. R. 104.

Knowledge of Insolvency.]—The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. 1887 c. 124 (following Molsons Bank v. Halter, 18 S. C. R. 88), and where valuable consideration has been given clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute of 13 Elizabeth, c. 5. *Hickerson* v. *Parrington*, 18 A. R. 635.

Loan—*Payment to Creditor.*]—If a person borrow money from an innocent lender and employs it in preferring a creditor, the lender is not debarred from suing for repayment. *Court* v. *Holland*, 4 O. R. 688.

Nominee of Creditor—*Infant Partner.*]—S. & W., a firm, of whom W. was a minor, becoming embarrassed, arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of this indebtedness maturing at short dates were made by S. & W., payable to P., and indorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and $50 was paid him by J. G. & Co. for indorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands, received subsequent to the making of the mortgage. In an interpleader action between P., claiming under the chattel mortgage, and C. claiming under his execution:—Held, that the mortgage must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, and that upon the evidence set out in the report it must be held void as against creditors:—Semble, that the share of the infant W. did not pass by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made. *Powell* v. *Calder*, 8 O. R. 505.

Partial Avoidance.]—Section 2 of R. S. O. 1887 c. 124, which makes void a transfer of goods, &c., by an insolvent with intent to, or having the effect of, hindering, delaying, or defeating creditors or giving one or more creditors a preference over the others, does not apply to a chattel mortgage given in consideration of an actual bonâ fide advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay, or hinder his creditors. If part of the consideration for a chattel mortgage is a bonâ fide advance and part such as would make the conveyance void as against creditors, the mortgage is not void as a whole, but may be upheld to the extent of the bonâ fide consideration. Commercial Bank v. Wilson, 3 E. & A. 257, decided under the statute of Elizabeth, is not law under the Ontario statute. Decision of the court of appeal, 18 A. R. 646, sub nom. Campbell v. Roche, McKinnon v. Roche, following that case, overruled, but the judgment sustained on the ground that it was proved that no part of the consideration was bonâ fide. *Campbell* v. *Patterson, Mader* v. *McKinnon*, 21 S. C. R. 645.

Parties.]—The debtor is not a proper party to an action by his assignee against a creditor to set aside a preferential transfer. *Beattie* v. *Wenger*, 24 A. R. 72.

Payment of Money.]—Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under 48 Vict. c. 26 (O.), but before it came into force:—Held, on demurrer, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by s. 3, s.-s. 3, of the statute. *Clarkson* v. *Ontario Bank*, 13 O. R. 666.

Payment of Money.]—Per Burton and Patterson, JJ.A. Chapter 3 of s. 4 of 48 Vict. c. 26 (now repealed) did not vest in an assignee the right to maintain an action to recover back moneys paid by a person in insolvent circumstances within one month of an assignment by him under the Act. *Clarkson* v. *Ontario Bank*, 15 A. R. 196.

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

Payment of Money.] — Indorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of s. 3 of R. S. O. 1887 c. 124. Armstrong v. Hemstreet, 22 O. R. 336, overruled. *Davidson* v. *Fraser*, 23 A. R. 439, 28 S. C. R. 272.

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

Payment — *Secret Agreement — Onus — Assignee for Creditors—Privity.*] — In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment, under the terms of an alleged secret agreement:—Held, that the onus of proof was on the plaintiffs. Held, also, that the payments not being procured by unjust oppression or extortion on the part of the defendants, but being voluntary, the assignee could not recover. Review of English cases on this point. Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff by virtue of an order under R. S. O. 1897 c. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, before the alleged secret agreement. *Langley* v. *Van Allen*, 32 O. R. 216.

Pledge — *Warehouse Receipt — Quebec Law—Arts.* 1035, 1036, 1169, *Civil Code.*]—See *Stevenson* v. *Canadian Bank of Commerce*, 25 S. C. R. 530.

Pressure—*Collusion.*]—The plaintiff was suing the defendant F., who was in insolvent circumstances, when the defendant M. applied to him, and by threats of action to enforce his claim, and a promise to give time to F. if he acceded to his request, induced F. to execute a cognovit whereby M. obtained priority over the plaintiff. Both parties placed writs of execution in the sheriff's hands. Under that at the suit of M., the goods of F. were sold, M. buying part thereof, the price of which he retained on account of his judgment and received the balance from the sheriff:—Held, reversing 3 O. R. 499, that the cognovit was collusive and void under R. S. O. 1877 c. 118, s. 1, and the amount realized at the sale by the sheriff was properly applicable to the plaintiff's writ:—Held, also, that a judgment for payment by M. to the plaintiff of the proceeds of the sale could properly be made in this action. *Martin* v. *McAlpine*, 8 A. R. 675.

Pressure.]—In March, 1879, the defendant E., a milliner, removed her business to the village of Tara, and in the November following changed her then residence and place of business to a shop owned by her co-defendant, adjoining to and under the same roof as his own. In the spring of 1880 the defendants commenced other business transactions, when her co-defendant lent E. $120 to enable her to purchase stock for her business, she promising to give him security for its repayment by executing in his favour a mortgage on everything she had. The parties continued their business relations, T. advancing E. moneys from time to time, till in November, 1880, she was indebted to him in the sum of $463.73, including one year's rent of her shop, a bill of E.'s for medical attendance, and a sum for interest accrued due, and for which she executed a chattel mortgage, covering all her stock-in-trade and household effects. Both defendants swore that E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a letter from T.'s solicitors demanding payment, or in default an action would be brought. The security was upheld at the trial and this judgment was affirmed by an equal division. *Brayley* v. *Ellis*, 1 O. R. 119; 9 A. R. 565.

Pressure.] — Where certain persons who were liable as indorsers of certain promissory notes not yet due, knowing the maker's insolvent circumstances, under threat of suit, induced him to give a cognovit actionem, whereon they entered judgment and issued execution:—Held, not such pressure as exempted the cognovit and subsequent proceedings from being collusive, fraudulent and void within R. S. O. 1877 c. 118. *Meriden Silver Co.* v. *Lee*, 2 O. R. 451.

A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness, which notes they indorsed to

third parties; before the notes were due and while they were still outstanding in the hands of third parties they applied to the debtor to give a cognovit actionem, knowing at the time that he had recently given a chattel mortgage on his stock-in-trade and was hopelessly insolvent—and under threat of suit the debtor gave the cognovit, upon which judgment was entered and execution issued:—Held, a fraudulent preference, and that the judgment and execution were fraudulent and void under R. S. O. 1877 c. 118:—Held, also, that the transaction could not be supported on the ground of pressure. Ex parte Hall, 19 Ch. D. 580, followed. *Ib.*

Pressure—*Following Proceeds.*] — Where T., being then insolvent, transferred to A., one of his creditors, all his estate and effects, and it appeared that the impelling cause of the transfer was the application of A. to be paid or protected, and the present plaintiff, also a creditor, sought to set aside the said transfer as a fraudulent preference:—Semble, the transfer was not "voluntary" within R. S. O. 1877 c. 118, and could not be set aside. Before the present proceedings A. had transferred the said effects for value to a bonâ fide purchaser:—Held, that A. could not, in any event, be called on to make good the value of the goods, as if he were a debtor of the plaintiff. *Stuart* v. *Tremain*, 3 O. R. 190.

Pressure — *Knowledge of Insolvency.*]—R. being a creditor of A., applied to him to give security for his debt, and, under threat of suit, procured from him a chattel mortgage on his stock-in-trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that A. was insolvent when he obtained the mortgage; while the mortgagor sought to gain time and to go on with his business:—Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. 1877 c. 118. *Seagsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

Pressure.]—Held, in this case, that inasmuch as the mortgagor was coerced into making the second mortgage, the making of such mortgage could not be regarded as a fraudulent preference. *Tidey* v. *Craib*, 4 O. R. 626.

Pressure.]—L. being in insolvent circumstances went to A. and asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, and apply it to the indebtedness of L. to him, and to several other creditors whom he, A., represented. This was agreed to and acted on, and certain securities were thus transferred to A. by L. L. also at the same time, requested A. to sell some leather for him, which A. agreed to do on similar terms as to the application of the proceeds, and the leather was duly transferred to A. who was aware of L.'s circumstances. On an action being brought impeaching the transfer of the securities as a fraudulent preference:—Held, that inasmuch as the idea of the transfer as made was proposed by A., and he and not L., was the originator of the scheme, whereby he and the creditors represented by him were preferred, the transfers were not made "voluntarily," and "with intent" to give such creditors a preference over the other creditors within the meaning of the statute, and could not be set aside. *Whitney* v. *Toby*, 6 O. R. 54.

Pressure.]—Where it was sought to set aside a bill of sale of personal property as fraudulent and void, as against the creditors of the grantor, and the evidence shewed that it was reluctantly given by the debtor, who only yielded after some delay, and to a continuous insistence on the part of his creditors, his intent being to escape his creditor's importunity, and that the demand of the creditor was made bonâ fide, with no intent but to obtain the security, which she was advised she ought to have:—Held, that the bill of sale was not void under R. S. O 1877 c. 118, s. 2. *Slater* v. *Oliver*, 7 O. R. 158.

Pressure.]—Pressure will not validate a security unless it be bonâ fide pressure to secure a debt, and without a view of obtaining a preference over the other creditors. *Powell* v. *Calder*, 8 O. R. 505.

Pressure.]—V., who was a practising attorney, and also clerk of the peace and county attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an assignment of his emoluments as county attorney to H. W. and J., to secure the amount which he had been ordered to pay their client, at the same time telling H. W. and J., that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the county and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client, on which costs were taxed in his favour at $164, which he also assigned to secure the same claim. About a month afterwards the plaintiff G., an execution creditor, obtained an attaching order:—Held, that the existence of the order held by H. W. and J., was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the meaning of the Act R. S. O. 1877 c. 118. *Grant* v. *VanNorman*, 7 A. R. 526.

Pressure — *Collusion.*] — The jury having found that T. was, to his own knowledge and that of the preferred creditors, unable to pay his debts in full, and that assignments to certain creditors of two policies of insurance and moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated pressure with the intent on the part of T. to give, and on the part of the preferred creditors to obtain, a preference over the other creditors of T.:—Held, that the assignments were null and void under R. S. O. 1877 c. 118, s. 2, as against the other creditors of T. *Ivey* v. *Knox*, 8 O. R. 635.

Pressure.]—An assignment obtained by pressure, of all the trader's goods, in trust to secure the plaintiff in preference over other creditors, and to pay the residue to such trader, is not fraudulent, possession having been changed consistently with the deed. *McPherson* v. *Reynolds*, 6 C. P. 491.

Pressure.] — The doctrine of pressure which obtained before the insolvency laws now occupies the same position since their repeal. *Brayley* v. *Ellis*, 1 O. R. 119, 9 A. R. 565.

Pressure — *Criminal Liability—Trustee.*] —R. S. O. 1887 c. 124, s. 2, makes void any

conveyance of property by a person in insolvent circumstances made "with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect;"—Held, affirming 16 A. R. 323, that the words "or which has such effect" in this section apply only to the case of "giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them;"—Held, further, that the preference provided against in the statute is a voluntary preference, and a conveyance obtained by pressure from the grantee would not be within its terms. W. having become insolvent, and wishing to secure to an estate of which he was an executor moneys which he had used for his own purposes, gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section:—Held, that the mortgage was not void under the statute, for there was no preference, as the persons for whose benefit the security was given were not creditors of the grantor, but stood in the relation of trustee and cestui que trust:—Held, also, that the grantor, being criminally responsible for misappropriating the money of the estate of which he was executor, the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference. *Molsons Bank* v. *Halter*, 18 S. C. R. 88.

Pressure — *Voluntary Conveyance—Consideration—Untrue Statement of Consideration.*]—Where there was evidence of a request made to a person in embarrassed circumstances by one who had indorsed notes for him, for a conveyance of an equity of redemption in land, to secure the indorser against his liability, and the first proceeding taken to impeach the conveyance was a seizure of crops upon the land under an execution against the grantor, more than sixty days after the transfer was made:—Held, that, there having been pressure, the conveyance could not be impeached as a preference. But, the statement of the consideration in the conveyance being untrue, the onus was upon the grantee to prove beyond reasonable doubt that there was some other good consideration, and his own unsupported statement that such existed was insufficient, and the conveyance must be treated as voluntary, and therefore void under the statute of Elizabeth. *Gignac* v. *Iler*, 29 O. R. 147; 25 A. R. 393.

Pressure — *Agreement to Give Security.*]—Where a preferential security, given while R. S. O. 1887 c. 124, as amended by 54 Vict. c. 20, was in force, is attacked within sixty days, evidence of pressure is not admissible to rebut the presumption of intent to give a preference. An agreement to give security, made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer, but where the giving of security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail. *Webster* v. *Crickmore*, 25 A. R. 97.

Pressure — *Intent.*]—By the Manitoba Act, 49 Vict. c. 45, s. 2, "Every gift, conveyance, &c., of goods, chattels or effects * * made by a person at a time when he is in insolvent circumstances * * with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void":—Held, that the word "preference" in this Act imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor:—Held, further, that a mere demand by the creditor, without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference. The words "or which has such effect" in the Act apply only to a case where that has been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. Molsons Bank v. Halter, 18 S. C. R. 88, approved and followed. *Stephens* v. *McArthur*, 19 S. C. R. 446.

Pressure — *Knowledge of Insolvency.*]—A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as a result of pressure and for a bonâ fide debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. Molsons Bank v. Halter, 18 S. C. R. 88, and Stephens v. McArthur, 19 S. C. R. 446, followed. *Gibbons* v. *McDonald*, 20 S. C. R. 587, affirming 18 A. R. 159.

Pressure — *Collusion.*]—In an action to have a chattel mortgage made by a debtor to certain creditors declared fraudulent and void as against other creditors, it was found at the trial that at and before the time of the execution of the mortgage, the debtor was in insolvent circumstances and unable to pay his debts in full, as he well knew; that the mortgagees were well aware of the fact and took the mortgage with full knowledge of it; that their object in taking the mortgage was to obtain security for their debt; that the necessary effect was to defeat, delay, and prejudice the creditors of the mortgagor, and to give the mortgagees a preference over the other creditors; and that the mortgagees at and before the execution of the mortgage knew that it would have such effect. It also appeared that the property covered by the chattel mortgage was all that the debtor had, and that he knew that he had many creditors who could not be paid:—Held, following Molsons Bank v. Halter, 18 S. C. R. 88, that the mortgage was not assailable under R. S. O. c. 124, s. 2, notwithstanding the findings of fact, because the mortgagees had requested the debtor to give them the security. *Davies* v. *Gillard*, 19 A. R. 432, reversing 21 O. R. 431.

Pressure.]—The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time. *Beattie* v. *Wenger*, 24 A. R. 72.

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

Presumption.]—Held, per Hagarty, C.J. O., (hesitante), and Burton, J.A.—The presumption spoken of in s.-ss. 2 (a) and 2 (b) of s. 2 of R. S. O. 1887 c. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vict. c. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections. Per Maclennan, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable. Per Osler, J.A.—The presumption is general and is irrebuttable; but the security in question is supportable under the previous promise. Cole v. Porteous, 19 A. R. 111, distinguished. Judgment below, 22 O. R. 474, affirmed. *Lawson* v. *McGeoch*, 20 A. R. 464.

Previous Agreement.]—A chattel mortgage given in pursuance of a previous agreement therefor to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and mortgagee believing the former to be solvent when the mortgage was actually made, was impeached within the sixty days provided for by s. 2, s.-s (a), of 54 Vict. c. 20 (O.), amending R. S. O. 1887 c. 124:—Held, that the mortgage was valid. *Lawson* v. *McGeoch*, 22 O. R. 474; 20 A. R. 464.

Previous Agreement.]—Certain creditors, believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors:—Held, that notwithstanding the agreement, the Act 54 Vict. c. 20 (O.), amending the Act relating to fraudulent preferences by insolvent persons, applied, that the doctrine of pressure was not applicable, and that the fraudulent intent must be presumed. *Bresse* v. *Knox*, 24 A. R. 203.

Previous Agreement—*Threatened Action for Tort.*]—One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into several years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action and obtained judgment for damages and costs and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made:—Held, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud. *Montgomery* v. *Corbit*, 24 A. R. 311.

Promise to Give Security — *Presumption—Rebuttal—Payment — Transfer of Security—Cheque—Promissory Notes—Discount by Third Person.*]—In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about $8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the partners; they promising him to retire the notes out of the proceeds of the sale of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly $11,000, their liabilities being about $19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted for him by a stranger, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred:—Held, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference. The payment of $1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of $5,200 paid to retire two of the notes. The $5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, &c., of the firm. The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself. *Armstrong* v. *Johnston*, 32 O. R. 15.

Purchase of Debt Before Assignment—*Set-off.*]—Before an assignment for the benefit of creditors, a person indebted to the assignor, and who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter, which the purchaser claimed to set off against his debt to the insolvent:—Held, that under R. S. O. 1887 c. 124, s. 23, in connection with the general law of set-off, he was entitled to do so. *Thibaudeau* v. *Garland*, 27 O. R. 391.

Purchase of Goods—*Set-off of Debt.*]—A trader who was in insolvent circumstances and for whom the plaintiff D. was liable as indorser on notes discounted at a bank and then current, was urged by him for a settlement and security, which, however, he refused to give, but offered to sell E. the whole of his stock-in-trade, household furniture, &c. E. accordingly bought it, paying the vendor $1,400, the excess in value of the goods over and above the notes, which he retired the same day. Next day the vendor absconded, but the evidence failed to satisfy the court that E. intended to commit any fraud in the arrangement so carried out:—Held, that although E. was aware that the debtor was in pecuniary embarrassment, the transaction, in the absence of proof of mala fides, was not

liable to be impeached as a fraudulent preference. *Lewis* v. *Brown*, *Elliott* v. *Brown*, 10 A. R. 639.

Sale at Indorser's Instance.]—J. M., who was in insolvent circumstances, with the concurrence if not at the instance of his brother, who was liable as indorser on some of the insolvent's paper held by the defendants S. & M., effected a sale of all his (J. M.'s) stock-in-trade, book debts, &c., to a bonâ fide purchaser at 60c. in the dollar; the proceeds of the sale he paid to S. & M., and they credited a portion thereof on the notes indorsed by the brother:—Held, that this was not liable to be impeached as a fraudulent preference of S. & M. *Harvey* v. *McNaughton*, 10 A. R. 616.

Security to Creditor Assuming Other Claims.]—One S., a trader who was in embarrassed circumstances, on consultation with W., one of his creditors, was advised by him to make an assignment of all his stock-in-trade and effects, which he did to his wife, in whose name the business was afterwards carried on, she obtaining from the plaintiffs goods on her own credit; and on the plaintiffs agreeing to settle the claims of two other creditors, which they did, she executed to them a chattel mortgage on all the effects in her shop. The sheriff having seized the goods under an execution at the suit of another creditor, the plaintiffs instituted interpleader proceedings:—Held, that the mortgage to them was a fraudulent preference, and as such void against creditors. *Boyd* v. *Glass*, 8 A. R. 632.

Security Given Up.]—The liability of the indorser of a promissory note made by the debtor, held by the creditor for part of his debt, is not a "valuable security" within the meaning of s.-s. 3 of s. 3 of R. S. O. 1887 c. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference the liability cannot be "restored" or its value "made good" to the creditor, or the indorser compelled to again indorse. What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under s.-s. 4 of s. 19 of R. S. O. 1887 c. 124. *Beattie* v. *Wenger*, 24 A. R. 72.

Service Out of Jurisdiction—*Preferential Transfer of Goods.*]—An action by an assignee under R. S. O. 1887 c. 124 against persons residing in the Province of Quebec to set aside a transfer of goods effected in this Province, as a fraudulent preference, which goods have afterwards been removed to Quebec, is founded on a "tort committed within the jurisdiction," within the meaning of Rule 271 (e), as amended by Rule 1309. *Clarkson* v. *Dupré*, 16 P. R. 521.

Subsequent Dealings by Voluntary Grantee.]—On 4th April, 1863, M. and his wife (to bar dower) mortgaged the lands in question to C. On 21st May, 1867, M. being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1868 and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On 20th December, 1874, M. and his wife (to bar dower) mortgaged the said lands to C. All the above deeds were registered about the time of their respective executions. On 6th March, 1876, G. assigned to the plaintiff, but the deed was not registered. On 7th June, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered 15th July, 1876. On 21st May, 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till 4th August, 1881. The plaintiff had no notice that the conveyance from M. of 21st May, 1867, was invalid, nor of the conveyance of 21st May, 1874, but he had notice of the three mortgages to C., and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages:—Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in title arising from M. executing the latter two mortgages to C., although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three mortgages, and took his mortgage, subject to such claim by C.:—Held, also, the deed from M. of 21st May, 1867, was either voluntary or a fraudulent preference, and in either case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered. *Edwards* v. *Morrison*, 3 O. R. 428.

Supplemental Conveyance.]—A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands; but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. 1877 c. 118, would not suffice to cure the defects. The intent to prefer is a question of fact for the jury; and therefore where the jury found that there was such intent, and where there was evidence to support the finding, the judgment of the county Judge setting aside the jury's verdict in favour of the execution creditor was reversed, but a new trial was directed in order that evidence might be given to shew that the bill of sale was made in order to carry out honestly the original mortgage contract. *Smith* v. *Fair*, 11 A. R. 755.

Surety.]—To avoid a transfer as a fraudulent preference under R. S. O. 1887 c. 124, s. 2, the person to whom it is made must be a creditor in respect of the transaction attacked; and a surety for an insolvent who has not paid the debt for which he is surety is not a creditor within the meaning of the Act. *Hope* v. *Grant*, 20 O. R. 623.

Surplus Proceeds of Mortgaged Goods.]—A trader carrying on business in two establishments mortgaged both stocks-in-trade to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B. who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances, and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the pur-

chaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for the benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods, under an order of the court, the balance remaining due on his mortgage. (Horsfall v. Boisseau, 21 A. R. 663.) The assignee of the mortgagor then brought an action against C. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors: —Held, that there was no preference to B. within R. S. O. 1887 c. 124, s. 2; that his position was the same as if his whole debt, secured and unsecured, had been overdue and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 23 A. R. 230; 26 S. C. R. 437.

Title Not to Pass.]—It appeared on the trial of an interpleader issue, that the claimant had agreed in writing with the execution debtor, an insolvent, to furnish material to the latter for the manufacture of carriages, from time to time, for one year, it being provided that no property in such goods should pass, but that notwithstanding any improvement or work upon the same, or change of form or addition thereto or use thereof, the same and every part thereof should be and remain the goods and property of the claimant. The material was supplied and manufactured into carriages by the execution debtor, which were seized by the defendants, execution creditors of his, and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized:—Held, that the above agreement was not one which could be said necessarily to have the effect of defeating or delaying creditors, and in the absence of fraud the claimant was entitled to succeed on the issue:—Held, also, that the fact that the claimant, thinking that the above agreement was lost, from time to time took mortgages from the execution debtor upon the carriages manufactured by him, made no difference; for even if this had the effect of vesting the property therein in him that could only be subject to the lien of the claimant to be paid out of them. Moreover the mortgages having been taken, not to supersede the original writing, but under the error that that being lost (as supposed) would be no longer available, the rights of the parties were still subject to the original agreement. *Wellbanks* v. *Heney*, 19 O. R. 549.

Transfer of Goods in Trust—*Distribution Amongst Creditors—Action by Assignee to Recover Creditor's Share.*]—Within sixty days of the making of an assignment for the benefit of creditors, the insolvent transferred to a person in trust for certain of his creditors a quantity of butter, which was sold, realizing $1,800, and the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee then sued one of the creditors to recover back the moneys paid him as his share, the amount so sought to be recovered being within the jurisdiction of the division court:—Held, that the transfer was divisible into as many parts as there were shares, and the division court had jurisdiction to entertain the action. *Beattie* v. *Holmes*, 29 O. R. 264.

Unearned Profits.]—An assignment by way of security of the profit expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences, and cannot be set aside under that Act. *Blakely* v. *Gould*, 24 A. R. 153; 27 S. C. R. 687.

Waiving Period of Credit—*Premature Issue of Execution*]—On the 28th March, 1882, a writ was issued by C. et al., respondents, against one M., for the recovery of the sum of $32,155.33, and said writ was duly indorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of $32,155.33 on an account previously stated and settled between C. et al. and M., such amount being arrived at by allowing to M. a discount of five per cent, for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. et al., appellants, creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued. The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders:—Held, affirming 2 O. R. 243, and 10 A. R. 92, that what the debtor did did not constitute a fraudulent preference prohibited by R. S. O. 1877 c. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity. *Macdonald* v. *Crombie*, 11 S. C. R. 107.

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9. Validity of Assignments.

Absolute or Conditional Release.]—R. being indebted to B. and V., the plaintiffs, in $979.76, gives his note in September, 1859, at six months, payable at the Bank of Montreal, in Guelph, with current rate of exchange, on New York. In June, 1860, R. made an assignment, to which the plaintiffs were executing parties, which—after reciting an agreement by R.'s creditors to accept 5s. in the £, payable in six and twelve months, to be secured by notes satisfactorily indorsed, and a covenant by R. to pay that sum—contained an absolute release of R. from all those executing it. The plaintiffs before executing this instrument claimed the promised indorsed notes, or to hold the original note till the compromise was paid. On the 6th August, 1860, another assignment was made by R., in trust till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted, "the party that promised to become a partner drew back." This assignment the plaintiffs did not

sign, because when the first offer fell through they sold the original note, and claimed to have nothing more to do with the matter:—Held, that the giving of the notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt. 2. That the deed of the 6th August did not annul the former assignment. 3. That this action for goods sold, the consideration for the original note, being brought prior to the 1st January, 1861, (when the first instalment became due on the assignment) and the release in the instrument being absolute, the non-payment of that instalment did not remit the parties back to their original position, and the validity of the original assignment was not in question. *Benedict* v. *Rutherford*, 11 C. P. 213.

Assent of Creditors — *Preferences.*]—B., an insolvent debtor, made a deed of his stock-in-trade and lands to the plaintiff, in trust to convert the same into money, pay the expenses of the trust, retain ten per cent. of moneys received by way of compensation, and pay the present execution and other privileged creditors, if any, according to priority, next to divide the balance pari passu amongst all other creditors, and to pay the surplus, if any, to B. The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by, or communication of it to, any of the creditors. The defendants seized under an execution a few days after the deed:—Held, that the deed was a revocable, voluntary instrument, the relation of trustee and cestui que trust not having been established between the plaintiff and the creditors, and therefore void as against the defendants:—Held, also, that it was void under R. S. O. 1877 c. 118, s. 2, as it did not provide for paying ratably and proportionably, and without preference or priority, all the creditors, but gave a preference to others besides execution creditors. *Andrew* v. *Stuart*, 6 A. R. 495.

Benefit Restricted to Certain Creditors.]—When property is conveyed in trust to pay debts, it cannot be considered as a fraudulent conveyance against creditors not included with the creditors for whom the trust is declared. *Doe d. Laurason* v. *Canada Company*, 6 O. S. 428.

Benefit Restricted to Certain Creditors.]—Under what circumstances an assignment to one or more creditors for themselves and others, may be upheld against another creditor, who has seized the same goods in execution upon a judgment confessed to him before the assignment: *See Farish* v. *McKay*, 5 U. C. R. 461.

Benefit Retained.]—On an interpleader issue to try the validity of an assignment in trust for creditors, the court being left to draw the same inferences as a jury:—Held, that it was fraudulent for the assignor to assign on the understanding that he should keep possession of his household furniture. *Wilson* v. *Kerr*, 17 U. C. R. 168; 18 U. C. R. 70.

Considerations not Expressed.] — A. on the 4th January, 1858, conveyed his real estate absolutely to defendants in consideration of 5s.; this deed was not executed by defendants, and was registered on the 6th. On the 5th A. made an assignment for creditors generally, which deed was executed by the defendants and other creditors of the assignor, but was not registered, and in the latter deed the trusts, on which the real estate was conveyed by the former one, were fully declared:—Held, the conveyance being impeached on the ground of fraud, that it was competent to those upholding it to shew the existence of considerations other than the 5s. expressed, although the common words, "and for other considerations," were omitted. *Bank of Toronto* v. *Leeles*, 10 C. P. 282.

Fraudulent Assignment of Lease.]—The assignment of a lease by the lessee to a trustee, for a bonâ fide creditor of the assignor, with the intention of thereby evading the claims of the creditors of the cestui que trust, is not a fraudulent assignment within 5 Will. IV. c. 3, s. 8. *Doe d. Biggard* v. *Millard*, E. T. 3 Vict.

Illegal Mode of Disposition.]—A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, and failing in that plan of disposition, then in trust to sell as the trustees should deem most advantageous:—Held, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared. *Goodeve* v. *Manners*, 5 Gr. 114.

Lands.]—Held, that a deed of assignment of lands in trust for creditors, under the circumstances of this case, was not void under 13 Eliz. c. 5; and that s. 18 of the Indigent Debtors' Act, R. S. O. 1877 c. 118, s. 2, does not refer to real property. *McNab* v. *Peer*, 32 C. P. 545.

Limited to Creditors Executing.]—Under 22 Vict. c. 96, an assignment is invalid if made only for the benefit of creditors who execute it. *Burritt* v. *Robertson*, 18 U. C. R. 555.

Limited to Creditors Executing.]—A provision appointing a time within which creditors must come in and execute, in order to receive the benefit of the trusts, does not render the deed void under 22 Vict. c. 26. *Metcalf* v. *Keefer*, 8 Gr. 392.

Semble, 22 Vict. c. 26 has not altered the law except as to preferential assignments. *Ib.*

Money Consideration not Necessary —*Acceptance of Trust Sufficient.*]—C. S. U. C. c. 45 does not require a money consideration. *Noell* v. *Pell*, 7 L. J. 322.

An assignment for the general benefit of creditors, as far as the effects will go, together with the acceptance of the trust by the assignees, who swear they are creditors, is a sufficient consideration to support the assignment. *Ib.*

Named Creditor.]—An assignment of all the assignor's property, including book debts, &c., in trust to pay, first, all executions in the hands of the sheriff or of any bailiff of any division court in the county, and, secondly, all debts due to the persons named in the schedule annexed, and all other creditors omitted there, but who should in due time come into the assignment; but in case (after satisfying the executions) there should not be enough to pay the same in full, then to distribute pro ratâ among the persons named in the schedule, and return the surplus, if any, to the assignor:—Held, void, under C. S. U. C. c. 26, s. 18, as not being for the purpose of paying all creditors without preference. *Watts* v. *Howell*, 21 U. C. R. 255.

No Schedule of Goods and Debts.]—W. being indebted to B. and to the plaintiff, absconded, and B. attached his goods; but he afterwards returned, and made an arrangement, on which the attachment was withdrawn. W. then executed an assignment to the plaintiff, which recited that he was indebted to him "in a large sum of money," and assigned "all and singular his stock-in-trade, chattels, debts," &c., and "all his personal estate and effects whatsoever and wheresoever," upon trust to sell and pay the plaintiff (the assignee) all indebtedness and moneys due and owing by W. to him, and to pay the surplus, if any, to W. He left the Province again next day; the plaintiff took possession of the goods, and the defendant some weeks after sued out an attachment for a debt due to him by W. On an interpleader issue the jury found that the assignment was made in good faith to secure a debt due:—Held, that the assignment could not be upheld, for it neither specified the amount secured, nor gave any schedule of the goods and debts; and a new trial was granted. *Howell* v. *McFarlane*, 16 U. C. R. 463.

Semble, that the second attachment could not prevent the assignment. *Ib.*

Omission of Claim from Schedule.]—For the expressed purpose of making a fair and equitable distribution of his property and effects amongst all his creditors, a trader in insolvent circumstances executed a deed of assignment of all his property, real and personal, in trust to sell the same, and out of the proceeds: (1) to pay in full the several debts due or to become due by the assignor to the assignee, and the several other persons and firms designated in a schedule annexed thereto, and if insufficient for that purpose, to distribute the proceeds ratably amongst the several persons and firms named in the said schedule; and (2) to return any surplus to the assignor. A claim for $26.86, which the court below held to be established, was in ignorance or by inadvertence omitted from such schedule, and the defendant, a scheduled creditor, obtained judgment for $1,780.75; and under his execution the sheriff seized the goods. The common pleas division held (32 C. P. 524) the deed to be invalid in consequence of the omission of such claim for $26.86. On appeal, the court of appeal being equally divided, the appeal was dismissed, with costs (10 A. R. 405.) In the supreme court it was held, reversing the judgment of the court below, that the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the creditors named in the schedule. Per Strong, J.—That the assignee was confined to the schedule, but effect must be given to the word "intent" in the statute, and as the evidence shewed that a bonâ fide effort was made to ascertain the names of all the creditors before the execution of the deed, it did not appear that the insolvent intended to prefer the schedule creditors, and the deed, therefore, was not void under R. S. O. 1877 c. 118, s. 2. *McLean* v. *Garland*, 13 S. C. R. 366.

Omission of Part of Estate.] — Held, that the omission of some part of the assignor's estate from the assignment or the postponing the making of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate it. *Nelles* v. *Maitby*, 5 O. R. 263.

Parol Assignment.] — A composition where lands are not concerned, or an assignment of goods which would not fall within the Statute of Frauds, is valid by parol. *Brunskill* v. *Metcalf*, 2 C. P. 431.

Partnership and Separate Creditors.]—Two persons carried on business under the name of "G. & W." Having become unable to pay their liabilities, they made an assignment to the plaintiffs of all their partnership effects and of all the personal effects of G., "other than wearing apparel," in and about the dwelling-house of G., in trust to pay all the creditors of "G. & W.:"—Held, affirming 32 C. P. 68, that the deed was void, in consequence of providing for the payment of partnership creditors only; and parol evidence was not admissible to prove that the object of the parties, in making the assignment, was to provide for the payment of separate as well as partnership creditors. *Mills* v. *Kerr*, 7 A. R. 769.

Partnership and Separate Creditors.]—W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff, in trust to realize and pay "all the just debts of the said creditors of the said debtors ratably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property, and owed but $110; that the other had some household furniture which was seized for rent, which it satisfied; that he owed less than $100 otherwise; and that all these separate debts had been satisfied:—Held, that the assignment was not void in providing for payment of partnership creditors only:—Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment:—Held, also, that there was, under the facts stated in the report of the case, an actual and continued change of possession. *Kerr* v. *Canadian Bank of Commerce*, 4 O. R. 652.

Partnership and Separate Creditors —*Interest.*]—McP. Bros., a firm composed of two partners, by deed assigned to the plaintiff the partnership property and assets only, upon trust to pay the joint creditors only. The deed authorized the plaintiff to pay creditors' claims either with or without interest. On the day before the assignment the sheriff had seized the partnership property under two writs of execution (one of which he swore at the trial he thought was against one of the partners only, but there was no further proof of this), and put the plaintiff in possession as his bailiff. McP. Bros. then determined to assign to the plaintiff, and it was arranged between the sheriff and the plaintiff that on the execution of the assignment the plaintiff should retain possession subject only to these executions:—Held, that the deed was not void under R. S. O. 1877 c. 118, for intent to prefer the partnership creditors; nor for intent to prefer particular creditors; even if such intent were shewn by the arrangement between the plaintiff and the sheriff, inasmuch as the assignors were not parties to such arrangement; nor by reason of the provision for payment of creditors' claims with or without interest. *Ewart* v. *Stuart*, 12 A. R. 99.

Power to Carry on Business.]—An assignment in trust for creditors of a small stock of goods valued at about $230, and some land, made to a person not a creditor, contained a provision empowering the assignee,

without consulting the creditors, to carry on the business, and wind it up, no time being stated therefor: to pay all salaries, wages, &c., and all advances made in goods and money for conducting said business in the winding up thereof, to the best advantage, which advances he was authorized to make, and also to sell the said land as to him should seem meet, and to retain a reasonable compensation for the execution of the said trusts: —Held, that the assignment was void, as containing provisions hindering and delaying creditors, and such as they could not reasonably be required to agree to. *Gallagher* v. *Glass*, 32 C. P. 641.

Power to Carry on Business.]—Where an assignment provides for the carrying on of the business of the insolvent debtor by the assignee, but only as subsidiary to the winding up of the same, this is not unreasonable, and does not invalidate the assignment. *Ontario Bank* v. *Lamont*, 6 O. R. 147.

Power to Carry on Business].—A deed of assignment for the benefit of creditors gave power "until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deemed it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods or merchandise as may be requisite for such purpose," and the trustee was not to become liable for the debts or losses of the said business in any way except for the distribution of the moneys come to his hands under the deed. There was no evidence of any intentional dishonesty on the part of the assignor:—Held, that this provision did not invalidate the deed under R. S. O 1877 c. 118. *Alexander* v. *Wavell*, 10 A. R. 135.

Power to Carry on Business—*Power to Employ Assignor.*]—By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business * * * and to stand possessed of the said moneys, &c., and all profits and increase arising therefrom, in trust to pay," &c., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part (the insolvent) or any other person in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade:"—Held, that the provisions above set forth did not invalidate the deed. *Jennings* v. *Moss*, 10 A. R. 686.

Power to Carry on Business—*Power to Employ Assignor.*]—The plaintiffs claimed under an assignment by M., the execution debtor, to them of all his real and personal property upon certain trusts. This deed provided for payment—first, to certain privileged creditors of the sums mentioned; and next, to pay a ratable proportion to the same creditors of the residue of their demands, and also a ratable proportion to all creditors executing within two months. There were also provisions, that if the trustees should think it advisable, and a majority in value of the creditors signing the deed should consent, they might carry on the business for the benefit of such creditors, employing M. for this purpose, and making him an allowance; that from time to time out of the proceeds realized they might purchase new stock, but the business to be wound up, at all events, within two years; and that the trustees might permit M. to use such portions of his household furniture for such time and on such terms as they should think proper. The furniture was left in M.'s possession, being used in rooms over the shop, where he continued to live. The deed was registered with the clerk of the county court, but there was no affidavit verifying any debt:—Held, first, that it was properly left to the jury to say whether they believed that the assignment was in truth made for the benefit of the creditors, and that the plaintiffs had taken possession, and were acting bonâ fide under it. Secondly, that none of the provisions above mentioned could be considered as illegal or affording evidence of fraud. *Taylor* v. *Whittemore*, 10 U. C. R. 440.

Power to Carry on Business—*Power to Employ Assignor.*]—The assignment, made before 22 Vict. c. 96, provided that the assignee might carry on the business for the benefit of the creditors executing, and employ the debtor to manage it, at such salary as might be agreed on, and supply goods to keep up the stock and for the more beneficial management of the business in the interest of the creditors, and pay for such goods out of the trust estate. Quære, whether this would make the executing creditors partners in the business. *Crapper* v. *Patterson*, 19 U. C. R. 160.

Power to Carry on Business—*Power to Employ Assignor.*]—Held, that an assignment after 22 Vict. c. 96, purporting to be for the general benefit of creditors, with power to the assignees to make advances for conducting and winding up the business, no time being limited within which it was to be wound up; such advances to be the first charge upon the assets, with ten per cent. profit upon all moneys received as compensation for the advances and for the trouble in winding up, with power to employ the assignor at a salary in their discretion, was void as against subsequent judgment creditors. *Hendry* v. *Harty*, 9 C. P. 520.

Power to Carry on Business—*Delay.*] —A provision for carrying on the business so as to render the creditors partners with the trustees quoad third persons, or one which may cause unreasonable or prejudicial delay to the creditors, renders the deed void. *Metcalf* v. *Keefer*, 8 Gr. 392.

Power to Employ Assignor—*Remuneration to Trustees.*]—Neither an allowance of a reasonable remuneration to the trustees, though they may be creditors, under 13 Elizabeth, nor a provision for the employment of the assignor at a reasonable remuneration, renders the deed void under 22 Vict. c. 26. *Metcalf* v. *Keefer*, 8 Gr. 392.

Power to Employ Assignor—*Release Clause.*]—An assignment (duly filed) for the general benefit of creditors, containing a power to employ the assignor in winding up the business, giving those a share who should execute, and containing a release clause, except where those executing should add the words, "without release," amounts to a pro-

vision for the ratable payment of all the assignor's debts, and is valid. *Feehan* v. *Lee*, 10 C. P. 385.

Power to Employ Assignor—*Power to Defer Realization.*]—A retail merchant assigned all his property real and personal to a trustee, then his clerk on a salary of £175 a year. The assignment provided that the assignee, as soon as conveniently might be, should collect the debts, and sell so much of the goods, as should not be required to wind up the business, and afterwards should sell the lands on such terms as he might think best. He was authorized to employ the assignor at not exceeding £250 a year, and to allow him to use the household furniture until the other property should be exhausted. With the money he was directed, after paying expenses of the assignment, salaries, &c., and retaining ten per cent. for his own trouble, to pay the creditors ratably. The assignment was executed only by the assignor and the assignee, who was a creditor, but some other creditors had signified their assent. The debts to be collected amounted to $2,877, and were due by about 160 debtors, and the lands formed the most valuable portion of the assets:—Held, that the assignment was fraudulent and void as against creditors, the chief objection being that the sale of the land was postponed till after collection of the debts. *Cornwall* v. *Gault*, 23 U. C. R. 46.

Power to Make Purchases.]—An assignment gave the trustees power from time to time, as they should deem expedient, "to purchase stock for the purpose of enabling them to assort and sell off the present stock to the best advantage, for the benefit of the estate:"—Held, that creditors executing would not by this become partners in the business, and that the clause was not objectionable. *Maulson* v. *Peck*, 18 U. C. R. 113.

Power to Sell on Credit—*Liens.*]—An assignment in trust for creditors, amongst other things, authorized the trustees to sell for cash or on credit, and if on credit, with or without security for the balance of purchase money remaining unpaid, and also to pay in full any debts which constituted a lien on the assets where deemed advisable in the interests of the trust:—Held, affirming 2 O. R. 525, that the introduction into the trust deed of power to sell on credit, which was so given in good faith, did not invalidate the assignment:—Held, also, that the discretion vested in the trustee to pay such liens in full did not invalidate the deed. *O'Brien* v. *Clarkson*, 10 A. R. 603.

Power to Sell on Credit.]—In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shewn:—Held, affirming the judgment of the court below—Badenach v. Slater, 8 A. R. 402—that the fact of the deed authorizing a sale upon credit did not, per se, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. 1877 c. 118, s. 2. *Slater* v. *Badenach*, 10 S. C. R. 296.

Preference—*Release Exacted—Resulting Trust.*]—A deed of assignment of property in trust for the benefit of creditors provided for the distribution of the assets by the assignee as follows: first, to pay certain named creditors in full; secondly, if sufficient assets remained after such payment to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same pro ratâ among such second preferred creditors; thirdly, to divide the remaining assets among all the creditors not preferred in equal proportions according to their respective claims; and, fourthly, to pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect:—Held, that the deed was one to which it was unreasonable to expect unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favour of the debtor, it was void under the statute, 13 Eliz. c. 5. *Whitman* v. *Union Bank of Halifax*, 16 S. C. R. 410.

Preference—*Hindering and Delaying Creditors.*]—In an assignment for the benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment:—Held, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts and the deed was, therefore, void under the statute of Elizabeth. *McDonald* v. *Cummings*, 24 S. C. R. 321.

Prior Transfer of Part of Assets—*Release.*]—Where it was sought to set aside an assignment of real and personal property made by an insolvent debtor to a trustee for creditors, on the ground that the assignor had, before the execution of it, satisfied some of his creditors in full by transferring goods of his to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a release of the debtor in any manner:—Held, that the instrument was valid, and could not be set aside, and the case was distinguishable from those American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge:—Semble, that where in such an instrument the goods are transferred, subject to the payment of rent, to a prior mortgagee, this does not invalidate the instrument. *Ontario Bank* v. *Lamont*, 6 O. R. 147.

Registration—*Right to Prefer.*]—An assignment or sale of personal property upon trust to pay creditors (or upon other trusts) is within the statutes requiring registration. The consideration for such assignment is "bonâ fide" within those Acts, though some creditors may thereby lose their debts; for a debtor may pay his creditors in such order as he may think proper. *Heward* v. *Mitchell*, 11 U. C. R. 625.

Release Exacted.] — Debtors having obtained from their creditors an extension of time, covenanted to pay all the debts in full, and not to part with their effects except for the benefit of their creditors generally. Subsequently they made an assignment to one creditor for the benefit of all, the deed containing a release from all further indebtedness by the creditors executing. The court declared such assignment to be in contravention of the agreement, and that the creditors were entitled to participate ratably in the proceeds of the trust effects without releasing the balance of their claims. *Taylor* v. *Mabley*, 6 Gr. 570.

Release Exacted.] — Assignments held fraudulent before 22 Vict. c. 96, s. 19, C. S. U. C. c. 26, s. 18, for exacting a release in full from those executing. *Wilson* v. *Kerr*, 17 U. C. R. 168, 18 U. C. R. 470; *Maulson* v. *Topping*, 17 U. C. R. 183; *McDonald* v. *Putnam*, 7 Gr. 395.

Release Exacted—*Subsequent Waiver.*] —B. on the 31st March, 1859 (after 22 Vict. c. 96), assigned all his personal estate to trustees in trust for all his creditors; but the assignment contained a release to him from all further liability, and it was declared that any creditor refusing or neglecting within six months after notice to execute the deed or otherwise to discharge the assignor, should lose all benefit therefrom; and that the trustees might pay the amount of his claim to the assignor. This deed was executed by B. and the trustees, both of whom were creditors. Afterwards, and before the defendants' execution was placed in the sheriff's hands, B. executed a deed-poll, authorizing the trustees to pay all creditors unconditionally, without requiring them to execute the assignment or discharge him:—Held, that the assignment was void as against defendants, execution creditors, and that its validity was not restored by the second deed. Remarks as to the effect of a release in assignments before 22 Vict. c. 96. *Burritt* v. *Robertson*, 18 U. C. R. 555.

Release Exacted.]—Where a debtor, before 22 Vict. c. 96, assigned his estate and effects to trustees for the satisfaction of his debts, without reserve:—Held, affirming 10 C. P. 282, that he might, under the then state of the law, stipulate for a release to himself from all further liability:—Held, also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate. *Bank of Toronto* v. *Eccles*, 2 E. & A. 53.

Release Exacted.]—An assignment for such creditors as should execute it within thirty days, and agree to release the assignor:—Held, void under 22 Vict. c. 96, s. 19. *Darling* v. *McIntyre*, 19 U. C. R. 154; *Crapper* v. *Patterson*, 19 U. C. R. 169.

Release Exacted — *Reservation in Assignor's Favour.*]—The debtor, by deed, executed by two of his creditors, conveyed all his real and personal estate, except his household furniture to trustees for payment of his debts, stipulating that after paying all expenses, and until the trusts should be carried out or the property exhausted, the trustees should, before payment of any of the debts, pay to him, out of the moneys realized from the estate, the sum of £375 a year for the support of his wife and family; that creditors, to have the benefit of the deed, must execute it within a limited time; that no dividend should be paid to the creditors till a sum had been realized sufficient to pay them 2s. 6d. in the £, and that the creditors should release the debtor from all future liability. Two creditors only executed, and subsequently the debtor made another deed to the same trustees, containing a similar release from his creditors who should become parties to it, and upon similar trusts, with the exception of the reservation in his own favour, which was considered questionable. The trustees acted under the second deed, and though both were inoperative to pass real estate, they proceeded to sell the lands, and the plaintiffs, the City Bank, became the purchasers, but the purchase was afterwards abandoned because of this defect in the deed of assignment. Afterwards a creditor, who had lodged an execution in the sheriff's hands subsequently to the deed of assignment, filed a bill praying to have the first deed set aside, or, in the alternative, that he might be allowed to share in the proceeds of the estate without complying with the stipulation for a release:—Held, (in accordance with Bank of Toronto v. Eccles, 2 E. & A. 53), 1. that the stipulation for release did not invalidate the deed. 2. That the provision for the payment of a dividend might, under certain circumstances, be considered unreasonable and fraudulent: and 3. that the second deed was not objectionable by reason of anything appearing on its face: although the validity of the first deed might be open to question. Under these circumstances the plaintiff was allowed to share under the deed in such portions of the property as had not already been divided among the creditors assenting thereto, upon his executing the deed; all other creditors who had not deprived themselves of the right to come in to be admitted on same terms. *Mulholland* v. *Hamilton*, 10 Gr. 45.

Right to Prefer.]—Where a debtor, before 22 Vict. c. 96, assigned his estate and effects to trustees for the satisfaction of his debts without reserve:—Held, affirming 10 C. P. 82, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full and a ratable distribution as to the rest. *Bank of Toronto* v. *Eccles*, 2 E. & A. 53.

Right to Prefer.]—In 1857 A. made an assignment for the benefit of his creditors, and thereby provided for the preferential payment of all sums which other persons were liable for as sureties or indorsers for him:—Held, that the creditors to whom these secured sums were due were entitled to the benefit of this provision, and would not lose it by executing the deed of assignment, though it contained a clause releasing the debtor. *Mulholland* v. *Hamilton*, 15 Gr. 53; *Thorne* v. *Torrance*, 16 C. P. 445, 18 C. P. 29; *Squire* v. *Watt*, 29 U. C. R. 328.

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

Ulterior Motive.]—A debtor, by deed, reciting that he had become embarrassed by indorsing and as security for others, assigned all his property, both real and personal, including land worth about £1,500, in trust to pay—first, the parties named in a schedule annexed, being those to whom he had become indebted on his own account, whose claims did not exceed £110; and, secondly, the other creditors who should execute the assignment. There was no evidence of more than a few trifling debts, amounting to about £150:—Held, that there was nothing in the nature of the trusts created for which the deed could be held void in law; but the jury having found in favour of it the court granted a new trial, considering that there was much ground for suspecting that the few direct claims had been made a pretence for tying up all the debtor's property, and defeating other creditors. *Balkwell* v. *Beddome*, 16 U. C. R. 203.

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10. *Miscellaneous Cases.*

Act of Bankruptcy.]—As a general rule, an assignment for the benefit of creditors will be taken as a declaration of insolvency and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging maladministration, and alleging that the executor, subsequently to the death of the testator, had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and receiver before answer, under the circumstances granted an interim injunction and receiver, notwithstanding the executor denied any maladministration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Gr. 443.

Amendment.]—Held, that all reference to the real estate having been struck out from the form used for making the assignment, the omission was not a "mistake, defect, or imperfection" within s. 10 of R. S. O. 1887 c. 124, and capable of amendment under that section. *Blain* v. *Peaker*, 18 O. R. 309.

Application of Act.] — The defendant, who was employed as financial manager of a firm, advanced to them a large sum of money, to be repaid on his giving six months' notice demanding payment, on default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but although repeated demands for payment were made by defendant, nothing was done until 19th December, 1885, when a transfer to him of certain securities was made by the firm, who within two months made an assignment under 48 V. c. 26 (O.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realized from the securities, it was:—Held, that whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law. Quære, whether the effect of the statute is to alter the law in this respect. *Clarkson* v. *Sterling*, 15 A. R. 234.

Application of Act.]—54 Vict. c. 20, the "Act to amend the Act respecting Assignments and Preferences by Insolvent Persons," R. S. O. 1887 c. 124, is not retrospective, and does not apply to any gift, transfer, &c., made before the passing thereof, and no inference that the Legislature intended it to be retrospective is to be drawn from the language of s. 3, providing that nothing therein should affect any action pending, &c. *Ormsby* v. *Jarvis*, *Chapman* v. *Jarvis*, 22 O. R. 11.

Bank of Upper Canada—*Payment in Notes of Bank.*]—K. was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the bank, before becoming insolvent, assented to the sale and received the first instalment of the purchase money. The purchaser went into possession, but was in default in paying purchase money; the defendants were his assigns. By the trust deed, which the bank executed on becoming insolvent, (which deed was afterwards confirmed by statute), it was made the duty of the bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the bank. On a bill by the bank trustees for payment, it was held that as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par. *Trustees of the Bank of Upper Canada* v. *Canadian Navigation Co.*, 16 Gr. 479.

Company—*Voluntary Assignment*—*Winding-up.*]—Section 9 of the Dominion Winding-up Act gives a wide discretionary power to the court to grant or refuse a winding-up order; and where upon an application for such an order, it appeared that the company had previously made an assignment for the

benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused. *Wakefield Rattan Co. v. Hamilton Whip Co.*, 24 O. R. 107.

Company—*Voluntary Assignment—Winding-up.*]—Where the insolvency of the company is admitted, the court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107, not followed. *Re William Lamb Manufacturing Co. of Ottawa*, 32 O. R. 243.

Constitutional Law.]—Held, following Brodly v. Stuart, 7 C. L. T. Occ. N. 6, that 48 Vict. c. 26 (O.), is intra vires the Provincial Legislature. *Clarkson v. Ontario Bank*, 13 O. R. 666; and see *S. C.*, 15 A. R. 166.

Duress.]—Assignment obtained by duress and improper use of the criminal process. See *Shorey v. Jones*, 15 S. C. R. 398.

Evidence.]—A bill was filed by A. and B. to enforce certain registered judgments. B.'s interest was as assignee of A. The assignment was for the benefit of creditors, but it did not appear that any creditor was party or privy to the assignment; and the assignee had sworn, in one of the affidavits filed, that his only interest was as trustee for A.:—Held, that any evidence admissible against A. was admissible against both plaintiffs. *McDonald v. Wright*, 12 Gr. 552.

Examination.] — "Transfer" used in Con. Rule 928 is not intended to cover an assignment for the general benefit of creditors, valid and sufficient under R. S. O. 1887 c. 124, and an assignee under that Act is not one of the persons to be subjected to examination under that Rule. *British Canadian Loan and Investment Company v. Britnell*, 13 P. R. 310.

Examination—*Separate Estate of Partner—Right to Examine Former Employee of Firm.*]—When a partnership has been dissolved a former employee or servant of the firm may be examined, under the Assignments and Preferences Act, R. S. O. 1897 c. 147, s. 34, by the assignee of the separate estate of one of the partners, as to the affairs of such estate. *Re Guinane*, 18 P. R. 208.

Examination of Insolvent Debtors—*County Court Judge—Power to Commit.*]—A county court Judge has no jurisdiction to commit an insolvent debtor for unsatisfactory answers on his examination under the Assignments and Preferences Act, R. S. O 1897 c. 147, ss. 34, 36. *In re Rochon*, 31 O. R. 122.

Examination of Assignor—*Unsatisfactory Answers — Concealment—Committal.*]—The provisions of s. 36 of R. S. O. 1897 c. 147, which provide for the punishment of an assignor who has concealed or made away with his property in order to defeat or defraud his creditors, do not apply to his acts disclosed on examination as having been done before the date of the passing of the original Act, 58 Vict. c. 23 (O.) *Re Lucas, Tanner & Co.*, 32 O. R. 1.

Firm Cheque—*Overpayment.*]—Defendant having a judgment against M. and others, obtained an order on C. and others, garnishees, to pay over after deducting any contra claim they might have. Defendant received on this order $171, by cheque of the plaintiff's firm, the plaintiff alone being the assignee of C.'s estate. It was afterwards discovered that the order was for too much, and it was therefore rescinded, except as to the proper sum, which the garnishees admitted set-off more than covered, so that nothing in fact should have been paid:—Held, that the plaintiff might recover the $171 from defendant as money had and received:—Held, also, that the fact of the payment having been made by the cheque of plaintiff's firm, could not prevent the plaintiff alone from recovering, as the money was proved to have been the money of C.'s estate, in which the plaintiff's partners had no interest. *Sessions v. Strachan*, 23 U. C. R. 492.

Indorsement to Secure Payment of Composition.]—Right of Indorsers to take Possession of Stock-in-Trade if Debtor in their Opinion Incapable of Carrying on Business — Facts Justifying Formation of such Opinion—Assignment by Debtor after Possession Taken. See *Francis v. Turner*, 25 S. C. R. 110.

Interest]—The rule in bankruptcy that interest should not be allowed after the date of the commission does not apply in the case of voluntary assignments for the benefit of creditors. *Stewart v. Gage*, 13 O. R. 458.

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

Moneys Paid under Voidable Assignment.]—In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. Cox v. Worrall, 26 N. S. Rep. 366, questioned. *Taylor v. Cummings*, 27 S. C. R. 589.

Purchase of Insolvent Estate—*Completion of Purchase after Judgment—Special Damages—Res Judicata.*]—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the superior court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery:—Held, that under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a

prudent administrator, he was obliged to make for the safe-keeping of the property. Held, also, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts, and the right to recover them was not res judicata by the judgment in that action. *Hyde* v. *Lindsay*, 29 S. C. R. 595.

Quebec Law—*Promissory Note—Illegal Consideration.*]—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business.—A promissory note given to secure the amount of the preferences payable under such an arrangement is wholly void. *Brigham* v. *Banque Jacques Cartier*, 30 S. C. R. 429.

Quebec Law—*Retrait Successoral—Sale by Curator before Partition.*]—See *Baxter* v. *Phillips*, 23 S. C. R. 317.

Sale of Assets — *Extinguishment of Debt.*]—An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom:—Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets. *Dueber Watch Case Manufacturing Co.* v. *Taggart*, 26 A. R. 295, 30 S. C. R. 373.

Scheme of Distribution — *Appeal — County Court Judge—Persona Designata.*]—By s. 30 of the Assignments Act, R. S. O. 1897 c. 147, an assignee for the benefit of creditors is enabled to take the proceedings authorized by s. 32 of the Creditors' Relief Act, R. S. O. 1897 c. 78, and, if he does so, the provisions of ss. 32 and 33 of that Act are to apply, mutatis mutandis, to proceedings for the distribution of moneys and determination of claims arising under an assignment:—Held, that an order of a county court Judge dismissing an application by a claimant, under s. 30, to vary the scheme of distribution made by the assignee of a debtor, was made by him as persona designata, and there was no appeal therefrom either by virtue of s. 38 of the Creditors' Relief Act, or of s. 52 of the county courts Act, R. S. O. 1897 c. 55, or otherwise. In re Pacquette, 11 P. R. 463, and In re Young, 14 P. R. 303, approved and followed. In re Waldie and Village of Burlington, 13 A. R. 104, distinguished. *Re Simpson and Clafferty*, 18 P. R. 402.

Set-off—*Judgments.*]—After recovery of judgment by the defendants against the plaintiff for a debt and costs, the plaintiff recovered judgment against the defendants in a separate action for damages for malicious prosecution and costs. Before the verdict for damages was actually given, the plaintiff executed an assignment to a trustee for the benefit of his creditors of the amount of any verdict which he might recover, but this assignment was not delivered until after the verdict had been rendered and an order for the entry of judgment upon it made by the trial Judge:—Held, that at the time the assignment was delivered the claim to damages had become a judgment debt, and, as such, a debt which should be set off under the principle of s. 23 of R. S. O. 1887 c. 124; and, upon the application of the defendants, an order directing a set-off was made. *Moody* v. *Canadian Bank of Commerce*, 14 P. R. 258.

Set-off—*Sale of Debts.*]—R. S. O. 1887 c. 124, s. 20, s.-s. 5, which provides that where a claim against the estate is contested by the assignee the same shall be for ever barred of any right to rank thereon if an action is not brought against the assignee to establish the claim within a limited time, only applies to the right to rank on the estate, and does not affect the right to set-off the claim so barred in an action against the claimant by the assignee of the estate, or any one claiming through him. *Johnston* v. *Burns*, 23 O. R. 179, 582.

II. Composition Agreements.

Acceptance of Composition.]—The defendant, a trader, being in insolvent circumstances, wrote to the plaintiff, a creditor in Scotland, giving him a statement of his account and informing him of his intention to make some arrangement with his creditors, and that plaintiff must rank with the others on his estate, which he stated would not pay more than fifty cents in the dollar, to which the plaintiff replied expressing no dissent; and, again, that he was satisfied if there was no preference given. In the meantime defendant had effected an arrangement with his creditors for a composition of thirty cents in the dollar, on his representation that the plaintiff would accept it, without which the whole arrangement would have fallen through, and the defendant must have gone into insolvency. Defendant on the same day, by letter, informed the plaintiff of the arrangement; to which the plaintiff replied without expressing dissatisfaction. Afterwards, without dissent, he received the instalments of the composition sent to him, and on the receipt of the last instalment he acknowledged it as a payment of "the last instalment of your indebtedness to me:"—Held, that the plaintiff must be deemed to have accepted the composition with the other creditors, and therefore that he could not sue defendant for the balance. Remarks as to the form of plea in such a case. *Mitchell* v. *Mitchell*, 27 C. P. 160.

Acquiescence—*Waiver of Time Clause.*]—Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented:—Held, that a creditor who had benefited by the realization of the assets, and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. The debtor's assent to such repudiation and the grant of better

terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect. *Howland* v. *Grant*, 26 S. C. R. 372.

Composition Arrangement—*Penalty.*]—An instrument in writing whereby a debtor transfers all his assets to an assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition, and not an absolute assignment under R. S. O. 1887 c. 124, although stated in the instrument to be under that Act; and an action for penalties against the assignee for not advertising and registering such an instrument, pursuant to that Act, will not lie. *Gundry* v. *Johnston*, 28 O. R. 147.

Conditional Release.]—The creditors of an insolvent debtor, by deed, absolutely released him; but it appeared by a memorandum on the instrument that such release was intended to be in consideration of the debtor delivering to them certain indorsed notes, which, however, he stated he was unable to procure, and in fact they were not delivered as agreed upon:—Held, that the creditors were entitled in this court to enforce payment of their original claim, notwithstanding that the debtor offered to pay the sum for which it was stipulated by the deed of composition that the notes should be given, or to give the notes agreed upon; and although the court of common law had held the right of the creditors to recover was gone. *Hill* v. *Rutherford*, 9 Gr. 207.

Creditor Understating Claim.] — A creditor under a composition deed, either under the Insolvent Act or otherwise, cannot give a general release and subscribe for a particular sum, as being apparently his whole claim, and afterwards advance other demands as not included in this discharge, for this would be a fraud on the other creditors. *Fowler* v. *Perrin*, 16 C. P. 358.

Demand Upon Surety.] — Declaration that the defendants undertook to give their promissory notes payable at certain periods, for 10s. in the pound of the debts due by one F. to such of his creditors as should within two months after the date of the deed express their consent to accept such composition. The 5th plea alleged that the plaintiffs did not demand of defendants to execute and deliver the said note:—Held, that defendants not being bound to anybody by name, and it not being averred that defendants had notice that these plaintiffs were creditors, or that as such they had consented to accept the composition, or what the debts of F. were, a demand was necessary; and the plea was therefore held good. *Matthewson* v. *Henderson*, 13 C. P. 96.

Informal Authority.]—To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for the benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800." In April, 1885, A. wrote a letter to L., in which he said: "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated:—Held, that the execution of the deed on his behalf being made without sufficient authority L. was not bound by the release contained therein and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it. *Lawrence* v. *Anderson*, 17 S. C. R. 349.

Liability of Trustees.]—A trader in insolvent circumstances made an assignment of his property to several of his principal creditors, in trust for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept twenty per cent. of their demands, and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees re-assigned the property to the debtor on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs:—Held, that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to realize the amount of the composition agreed on; and as to this, if desired by the trustees, an inquiry by the master was directed. *National Bank of Albany* v. *Moore*, 21 Gr. 269.

Loan to Effect Payment—*Secret Agreement.*]—On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $14,000. B. et al., the appellants, were at that time accommodation indorsers for $7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for its claim, B. et al., on the 8th January, 1884, advanced $3,000 to L. and took his promissory notes and a new mortgage, registered on the 13th January, for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. et al., the respondents, who, on the 14th January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. et al., who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors:—Held, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. *Brossard v. Dupras*, 19 S. C. R. 531.

Parol Composition.]—Action on three notes. Plea to the further maintenance of the action, a composition with the plaintiff and creditors, whereby it was agreed by the defendants with the plaintiff and their other creditors, that after assigning a certain build-

ing contract to the Bank of Upper Canada, in discharge of the bank's claim against them, defendants were to convey all their other estate, effects and contracts, to two persons in trust for the plaintiff and the other creditors, &c. The assignment, as completed after the action, was executed by many creditors, but not by the plaintiff. The subject matter assigned appeared to have been goods, chattels, and choses in action, far exceeding £10 in value, and yet at the time of the composition pleaded no part was delivered or accepted, no earnest paid, nor part payment made; nor was the agreement or composition pleaded in writing; and moreover the Bank of Upper Canada, a corporation, one of the alleged parties to the agreement, did not appear to have contracted under their seal:—Held, upon these grounds, that the plea was not supported. *Brunskill* v. *Metcalfe*, 3 C. P. 143.

Partial Failure of Consideration.]—Where J. H., R. M., and F. H. had agreed to give their promissory notes to the creditors of E. F. (who had already made an assignment for their benefit) in composition for the debts of E. F., at 10s. in the £, and for the benefit of the creditors had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one-half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods; and the goods were afterwards all delivered to C. with the knowledge and assent of E. F.:—Held, that the deed of J. H., R. M., and F. H. could not be avoided on the ground of fraud because there was subsequently a partial failure in the arrangement on the faith of which they had made the deed. *Matthewson* v. *Henderson*, 15 C. P. 90.

If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected. *Ib.*

Partnership — *Judicial Abandonment—Dissolution.*] — A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership:—Held, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estates of each partner as well as the partners' individual rights as between themselves:—Held, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *MacLean* v. *Stewart*, 25 S. C. R. 295.

Reversed by the Judicial Committee of the Privy Council, 28th July, 1896 (unreported.)

Payment not Made at Time Fixed—*Double Payment.*]—B. & Co. discounted with defendants a draft drawn by the former on the plaintiff for the amount of his indebtedness, which plaintiff accepted, but did not pay at maturity. Subsequently B. & Co. made an assignment for the benefit of their creditors, and afterwards plaintiff also becoming embarrassed, procured his creditors, including B. & Co.'s estate, to execute a deed of composition and discharge whereby plaintiff's creditors agreed to accept fifty cents on the dollar on their respective debts, payable thirty days from the date of the deed, one D. being surety for the said payment within the time limited. There was a covenant by plaintiff and his surety to pay the composition to the several creditors on or before a fixed date, and by the creditors with plaintiff not to sue for their several debts, and if plaintiff and his surety should observe and perform the covenants, &c., on their part, the creditors would release and deliver up the bills and notes, &c., held by them; and if any of the creditors should sue for their debts the deed might be pleaded in bar. The defendants refused to execute the deed of composition. They proved for the amount of the draft with other indebtedness against B. & Co.'s estate and received a dividend of fifty cents and threatened to sue plaintiff, and he not knowing that they had received the dividend, paid them the amount of the draft which they applied on B. & Co.'s general indebtedness and were thus paid in full, but on discovering the facts he brought this action to recover the amount received by them. The plaintiff had not paid B. & Co. the fifty cents or any part thereof:—Held, that the covenant not to sue in the deed of composition and discharge was not absolute, but merely conditional on payment being made within thirty days; and as plaintiff had not paid B. & Co. within the time limited he could not have claimed a release and set up the covenant as a bar to the action; that the defendants were trustees for B. & Co. to the extent of fifty cents in the dollar of the amount received from plaintiff, and that B. & Co.'s estate could compel the defendants to refund such amount to them, and therefore plaintiff had no right of action against the defendants. *Andrews* v. *Bank of Toronto*, 15 O. R. 648.

Payments not Ratable.] — A general agreement of the defendant's creditors to accept a composition of 10s. as pleaded:—Held, not proved by evidence that the defendant, having become insolvent, had paid to some of his creditors one rate in the pound, and to other creditors another rate. *Forster* v. *Bettes*, 5 U. C. R. 599.

Release of Debt—*Promise to Pay.*]—An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt. A consideration is necessary to support a subsequent promise to pay a debt or the balance of a debt which has been released by the creditor or discharged by a deed of composition or discharge. Austin v. Gordon, 32 U. C. R. 621, observed upon. Judgment below, 24 O. R. 486, reversed. *Samuel* v. *Fairgrieve*, 21 A. R. 418. Reversed in the supreme court on another point, *sub nom. Craig* v. *Samuel*, 24 S. C. R. 278.

Representation as to Ownership of Property.] — Where a debtor, in order to effect a compromise with his creditors, offered a mortgage on certain property, which pro-

perty he represented as belonging to another person who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that before it was executed the debtor had obtained a conveyance of the property to himself:—Held, that such conveyance was, under the circumstances, subject to the mortgage. *Fraser* v. *Sutherland*, 2 Gr. 442.

Resolution of Creditors—*Fraud.*]—A resolution passed and signed by creditors at a meeting called to consider the debtor's position, that the debtor "be allowed a settlement at six, nine, and twelve months, at the rate of twenty-five cents in the dollar in equal payments without interest" does not, in itself, operate as satisfaction of their claims. Payment in accordance with its terms is essential. A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full, is not debarred from suing the debtor for the original indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being in fact released or otherwise discharged. *Weese* v. *Banfield*, 22 A. R. 489.

Secret Advantage.]—A. guaranteed to The rule in respect of compositions between notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on this guarantee. *Clarke* v. *Ritchey*, 11 Gr. 499.

Secret Advantage—*Secured Creditor.*]—The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any mortgage, hypothec, lien, or collateral security held by any such creditor as security for any of said debts:"—Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at the time of, or before, executing the deed of extension. *Henderson* v. *Macdonald*, 20 Gr. 334.

Security to Take Effect if all Creditors Consent.]—Various proposals having been made for a composition by all the creditors of an insolvent person, A. executed a deed to a trustee, reciting that an agreement to that effect had been come to, and conveying certain property to the trustee to secure any person or persons who might indorse the composition notes which the debtors were to receive. B., a creditor, indorsed the notes of the other creditors, but was to receive payment in full of his own demand:—Held, that the trust deed was not a security for the notes he indorsed, the deed being available only if the composition was accepted by all the creditors. *Clarke* v. *Ritchey*, 11 Gr. 499.

Signature by Bank Manager.]—At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an arrangement was made to accept forty cents on the $, on the amount of the claims. A deed of composition with a covenant to accept the forty cents was prepared, and was executed by C. N., the manager of the plaintiffs' branch at L. The execution was "for Bank of Commerce, C. Nicholson," opposite to which was an ordinary seal. At the time the manager executed the deed, there were two creditors mentioned in the schedule who had not executed. Before either of these creditors had executed, and before the composition notes had been tendered to the manager, he wrote defendant's solicitor withdrawing from the arrangement. It did not appear that the head office had repudiated the manager's authority. The composition notes were subsequently tendered to the manager, but he refused to accept them. By the plaintiffs' Act of incorporation the management of the bank's affairs was to be by the directors, who had authority to open branches and to appoint the officers. The chief place of business was to be at T., where the corporate seal was kept:—Held, that the deed was not binding on plaintiff corporation, not being under the corporate seal, nor under a signature or sign manual whereby it executed documents:—Held, however, on the evidence, that the manager had authority to agree to accept less than the whole of the claim, and did so agree, and that the debtor performed his part by tendering the notes: and that under R. S. O. 1887 c. 44, s. 53, s.-s. 7, the agreement was irrevocable. *Bank of Commerce* v. *Jenkins*, 16 O. R. 215.

Strict Compliance.]—The rule that the terms of a deed of composition must be strictly complied with, considered and acted on. *Hill* v. *Rutherford*, 9 Gr. 207.

Surplus.]—A trust was created for the benefit of creditors pro rata, in consideration of their discharging the debtor; all the creditors, except the plaintiffs, accepted from two creditors who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands in full. The estate yielded more:—Held, that the plaintiffs had no right to the whole of the difference. *Baldwin* v. *Thomas*, 15 Gr. 119.

Voluntary Composition.]—A deed of composition and discharge made without any proceedings in insolvency (before or after), without any assignee being appointed, and apparently wholly outside the insolvent court, is not a bar to non-assenting creditors. *Green* v. *Swan*, 22 C. P. 307.

III. Imperial and Foreign Bankruptcy Proceedings.

Effect of English Bankruptcy.]—An English bankruptcy carries all the real and personal property of the bankrupt in any part of the British dominions; the theory of the English Bankrupt Acts being that when once a forum had been established for the winding-up of an estate it is expedient that the whole property of the bankrupt should be brought there in order that it may be ratably divided amongst all his creditors; and the assets of the bankrupt having been thus taken away from him, creditors will not be allowed to harass him with unnecessary litigation. The defendants in these actions carried on business in England and Canada, and had creditors in both countries, the plaintiffs being Canadian creditors. The defendants became

subject to the English bankruptcy laws, and a trustee in bankruptcy was appointed, to whom the plaintiffs presented their claim against the estate of the defendants, which claim included the amount claimed in these actions, which were begun in Ontario. The English court made an order on the application of the trustee restraining the plaintiffs from further prosecuting these actions; and upon the application of the defendants an order was made in chambers here staying proceedings in them:—Held, affirming 13 P. R. 86, specially referring to Howell v. Dominion of Canada Oils Refinery Co., 37 U. C. R. 484; Regina v. College of Physicians and Surgeons of Ontario, 44 U. C. R. 564; Ellis v. McHenry, L. R. 6 C. P. 228, that it was the duty of the court here to aid the English court; and that the plaintiffs by putting in their claim before the trustee had precluded themselves from objecting to the authority of the English court; and therefore that the order made in chambers here was a proper order under the circumstances. Liberty was reserved to the plaintiffs to apply for leave to proceed here after obtaining leave in England. *Maritime Bank* v. *Stewart*, 13 P. R. 262, 491.

Effect of Scotch Bankruptcy.]—To an action on notes against the makers, who were members of a firm carrying on business here and in Glasgow, one defendant pleaded, on equitable grounds, in substance, that proceedings in bankruptcy had been commenced against them in Scotland, in the proper court there, and sequestration of their estates awarded, and a warrant of protection granted to them: and that in such proceedings, which were still pending, the plaintiff duly proved his claim against them, including these notes. Another defendant set up a similar defence, but averring only that the plaintiff, who had notice of the proceedings, could and ought to have proved and still might prove therein for the notes declared on:—Held, on demurrer, both pleas bad, for that a sequestration and warrant of protection, under the Bankrupt (Scotland) Act, 1856, before a final discharge, form no bar to this suit. *Robinson* v. *McKeand*, 23 U. C. R. 359.

Foreign Bankruptcy — *Real Estate.*] —Bankruptcy proceedings in a foreign country will not affect real estate in Canada. The insolvent, who owned lands in Canada, residing and carrying on business in the State of New York, was, with his co-partners, adjudicated a bankrupt by the court of that State on the 15th November, 1873, and, in accordance with a resolution passed by the creditors under a provision of the bankrupt law of the United States, the bankrupts on the 14th February, 1874, conveyed their estates to a trustee appointed by the creditors, for the purpose of winding up the estate. The deed was styled "In bankruptcy," and purported to "convey, transfer, and deliver all their and each of their estate and effects" to the trustee, to be applied for the benefit of the creditors in like manner as if the bankrupts had, at its date, being duly adjudged bankrupts, and the trustee appointed assignee in bankruptcy under the Bankruptcy Act of the United States. On the 26th August, 1874, a writ of execution against the insolvent's lands in Canada was placed in the sheriff's hands by the defendants, who had, in the meantime recovered a judgment against him. Subsequently, the insolvent, by way of further assurance, executed a conveyance of all his lands in Canada to the same trustee for the said creditors. The plaintiff, the substituted trustee, filed a bill to compel the removal of the writ of execution, on the ground that it formed a cloud on his title to these lands:—Held, reversing 24 Gr. 356, that the plaintiff was not entitled to relief, for that the deed of the 14th February, merely vested in the trustee the estate which would have passed to an assignee by operation of the bankruptcy law; and there was no evidence of any intention to pass more. *Macdonald* v. *Georgian Bay Lumber Co.*, 2 A. R. 36.

On appeal to the supreme court this judgment was affirmed, and:—Held, that a bankrupt assignment made under the provisions of an Act of the Congress of the United States of America will not transfer immovable property in Canada. Also, that the deed of the 14th February, 1874, was not effectual either as a deed of bargain and sale, or a deed of grant, to pass any legal title or interest in the lands of D. in Canada. *S. C.*, 2 S. C. R. 364.

Foreign Discharge.] — A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default, and is in execution. *Brown* v. *Hudson*, Tay. 346.

Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries. *Ib.* 390.

Foreign Discharge.]—To an action on a promissory note made in the United States, defendant pleaded his discharge under the bankrupt laws there; to which the plaintiff replied, that by such law the discharge was fraudulent and void, because the defendant, in the schedule attached to his petition, had fraudulently, and with intent to prevent the plaintiff from sharing in his estate or opposing his discharge, omitted any mention of the plaintiff or his claim. The omission was proved, and the law of the United States was stated to be, that such omission, unless fraudulent and wilful, would not avoid the discharge; but it was not shewn whether the assent of a certain number of creditors or the payment of a certain dividend was requisite, or whether there was any provision which would shew a motive for the omission. The defendant swore that his reason for the omission was, because he thought the claim was paid; that in 1865 he had left property with one C. to sell and pay it, among other debts, and told plaintiff's brother, who then held the note, that he had done so; and that as late as 1868 he had seen him, and he never mentioned the subject, nor had he at any time been asked for the money. The brother, in answer, said he had asked for payment, but did not state the time:—Held, leave having been reserved to move for a nonsuit upon the whole case, that the rule should be absolute; for though upon the plaintiff's evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by defendant. *Foster* v. *Taylor*, 31 U. C. R. 24.

Foreign Discharge.]—Plaintiff sued on a foreign judgment recovered against defendant, who pleaded never indebted, and that he had never been served with proceedings in the foreign court. During the progress of the suit defendant obtained a discharge in bankruptcy in the district court of the northern

district of Ohio, and at the trial obtained leave to plead this discharge as a plea puis darrein continuance, on which issue was taken. Defendant proved that such a discharge would release defendant from all his debts provable against his estate in the United States, including the debt to the plaintiff. Plaintiff's only evidence in reply was, that defendant resided in Canada for two years previous to the discharge, and that he (plaintiff) had no notice of defendant's bankruptcy in the United States; and he contended that, as the Bankruptcy Acts required the bankrupt to reside or carry on business in the state where he filed his petition, and the defendant resided in Canada, the court in Ohio had no jurisdiction to grant a discharge, and that the one produced was therefore bad:—Held, that the discharge was a bar to plaintiff's suit:—Held, also, that it was not necessary for defendant to prove that all proper steps had been taken to obtain the discharge, but that the discharge itself was prima facie evidence of this. *Ohelmacher* v. *Brown*, 44 U. C. R. 366.

Foreign Principal's Bankruptcy.]—An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals living in England, before the bankruptcy there of the latter, on which, however, he had paid nothing; and he disputed any liability to the holders in respect thereof:—Held, that the assignee in bankruptcy was entitled to a receiver. *Kemp* v. *Jones*, 12 Gr. 260.

Foreign Winding Up.]—An insurance company incorporated in the State of New York, and carrying on business in this Province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile, with a view of winding up the affairs of the company; and that irrespective of what the result of the proceedings may be as to solvency or insolvency of the company. *Douglas* v. *Atlantic Mutual Life Insurance Co.*, 25 Gr. 379.

Registration of Foreign Bankruptcy Proceedings.]—An "act and warrant" under 19 & 20 Vict. c. 79 Imp. (Scotch Bankrupt Act,) though containing no attestation clause, without a witness to its execution, and specifying no lands in Upper Canada, is capable of registration. *Robson* v. *Carpenter*, 11 Gr. 293.

IV. Indigent Debtors' Relief.

1. *Allowance.*

The prisoner is sufficiently described in the affidavit as a prisoner in execution of the Midland district, at the suit of the plaintiff. *Shuck* v. *Cranston*, Tay. 370.

An affidavit that defendant is not worth £5, besides necessary wearing apparel, is sufficient. *Malone* v. *Handy*, 5 O. S. 75.

The court will not grant an order for arrears which accrued pending an unsuccessful application for discharge. *Moran* v. *Maloy*, Tay. 408.

Service of an order for allowance, under 2 Geo. IV. c. 8, s. 3, was not considered a service under 8 Geo. IV. c. 8. *Shuck* v. *Cranston*, Tay. 437.

Payment to a person acting as turnkey is good. *Hyde* v. *Barnhart*, Dra. 53.

After a rule for allowance, plaintiff cannot file fresh interrogatories and suspend the payment, although he hear of property supposed to have been made away, of which when filing the first interrogatories he had no knowledge. *Ib.* 54.

Where a defendant after obtaining his allowance goes on the limits, he must give notice of his return to custody before he is entitled to further payment.—*S. C.*, Dra. 201.

A defendant rendered by his bail after the return of non est inventus to a ca. sa. is not in custody on mesne process, nor is he charged in execution, so as to obtain the weekly allowance. *Lyman* v. *Vandecar*, M. T. 2 Vict.

A debtor in custody on a criminal charge cannot obtain a rule for the weekly allowance in a civil suit. *Thompson* v. *Hughson*, M. T. 6 Vict.

The court will order the weekly allowance to a party imprisoned for non-payment of costs. *Doe d. Vancott* v. *Reid*, 4 U. C. R. 125.

A Judge in chambers cannot order the allowance for prisoners charged in execution on final process. *Low* v. *Melvin*, 1 C. L. Ch. 25.

Weekly allowance—How to be paid—Suggested fraud. *Spence* v. *Drake*, 2 L. J. 91.

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2. *Discharge.*

The court will not grant a rule absolute in the first instance for discharge for non-payment, unless the affidavit state that no interrogatories have been filed by the plaintiff. *Williams* v. *Crosby*, Tay. 10.

To obtain a prisoner who has applied for his discharge, the affidavit must not only state his possession of property obtained since his imprisonment, (or his obtaining his allowance), but also that he has secreted or fraudulently parted with it. *Williams* v. *Crosby*, Tay. 18.

The court refused to discharge a defendant where the plaintiff died, and the allowance was tendered by a person who had usually paid it, although no administration had been granted. *Beard* v. *Orr*, Dra. 241.

Affidavits may be received contradicting the answers of a prisoner to interrogatories filed to deprive him of the allowance, and in answer to an application for his discharge; and the court will not discharge the prisoner unless they are satisfied that he has no means of support, and has not fraudulently secreted or conveyed, &c. *Montgomery* v. *Robinet*, 2 O. S. 506.

Payment of the allowance after answers filed to the plaintiff's interrogatories is a waiver of any objections to the answers, and the plaintiff cannot file further interrogatories without leave. *Malone* v. *Handy*, 5 O. S. 310.

The answers of a defendant in custody to interrogatories by the plaintiff after an order for the allowance, must not only be full, but satisfactory. *Sanderson* v. *Cameron*, E. T. 2 Vict.

The plaintiff may file interrogatories after his default in payment of the allowance, and

before defendant has applied for his discharge. *Elwood* v. *Monk, Butler* v. *Thomas,* M. T. 3 Vict.

It is no excuse for not paying the allowance, that the defendant had it paid at the suit of another plaintiff, or that a co-defendant is not in custody, and has put in bail after the order granted. *Truscott* v. *Walsh,* 5 O. S. 79.

Where a defendant is arrested and has the allowance ordered in several causes, he is, under s. 4 of C. S. U. C. c. 26, entitled to one sum of 10s. a week, but in default of payment he can properly claim to be discharged in all the causes. The fact of non-payment of the costs of a former application dismissed with costs, is no reason for refusing a second application made upon sufficient materials. *McInnes* v. *Webster,* 8 L. J. 21.

Answers to interrogatories were filed and served in Toronto on Friday, 20th August; the allowance was not paid in Barrie on Monday 23rd:—Held, upon a summons to discharge the prisoner for non-payment, that a reasonable time had not elapsed between the filing of the answers and the non-payment. *Regina* v. *Heathers,* 1 C. L. Ch. 52.

An application for discharge must be supported by an affidavit of the turnkey that the money has not been paid, if the sheriff employ one; if not his affidavit should shew it. *Carpenter* v. *Tout,* 3 L. J. 151.

A prisoner in execution for seduction is not entitled to weekly allowance, or at all events not to be discharged for non-payment of it. *Upthegrove* v. *Winters,* 6 L. J. 88; *Parcell* v. *McKeown, ib.* 58.

Held, that upon the affidavits and facts in this case, it sufficiently appeared that an order for the allowance had been served, and default made in payment, so that defendant was entitled to his discharge. *Hutchinson* v. *Jackson,* 2 P. R. 276.

An insolvent debtor charged in execution for seduction:—Held, entitled to relief. *Perkins* v. *O'Connelly,* 5 O. S. 80.

A defendant in custody under a ca. sa. for not answering satisfactorily interrogatories on a judgment in an action of seduction:—Held, a debtor, entitled to his discharge under C. S. U. C. cc. 24, 26. *Boyd* v. *Bartram,* 3 P. R. 28.

A defendant in custody in execution for a sum not exceeding £100 is not entitled to his discharge unless he has been six months in confinement in gaol. *Denham* v. *Talbot,* 5 O. S. 79.

If not exceeding £20 he is entitled to his discharge on satisfying the court that he has been imprisoned more than three months, but the rule is not absolute in the first instance. *King* v. *Keogh,* 5 O. S. 326.

The notice required of intention to apply for discharge may be given before the full period of imprisonment has expired. *McPherson* v. *Campbell,* T. T. 4 & 5 Vict.

The debtor must shew that he has given the notice. *Averill* v. *Baker,* M. T. 5 Vict.

A prisoner in execution for debt cannot, by assigning his effects in trust for such creditors as choose to come in and on receiving a dividend discharge him, make himself an insolvent debtor within 10 & 11 Vict. c. 15. *Gillespie* v. *Nickerson,* 6 U. C. R. 628.

A debtor applying for his discharge must shew that he has not since judgment so disposed of his effects as to defeat the creditors' remedy. An assignment, after judgment, for the benefit of creditors generally, will therefore prevent his discharge. Quære, whether it would affect his claim to the privilege of gaol limits. *Aitkin* v. *Bullock,* 11 U. C. R. 19.

On Saturday, the 14th August, a debtor applied for his discharge, under 10 & 11 Vict. c. 15, s. 3; on the 30th the plaintiff filed interrogatories:—Held, that the plaintiff had all Monday, the 30th, to file his interrogatories. Semble, also, that they must be filed before the expiration of the fifteen days limited by the Act. *Bulkley* v. *Griggc,* 1 C. L. Ch. 50.

A prisoner applying to be discharged from custody under s. 300 of the C. L. P. Act, 1856, should shew, in addition to the other requirements of that section, that he has been in close custody for three successive calendar months. *McLeod* v. *Buchanan,* 2 L. J. 229.

A debtor in custody on mesne process will not be discharged under s. 295 of the C. L. P. Act, 1856, for default in payment of weekly allowance, until he has answered the interrogatories filed under s. 296, even after such default made. *Corcoran* v. *Taylor,* 2 L. J. 233.

Since the repeal of 10 & 11 Vict. c. 15, no insolvent debtor can apply to be discharged upon the mere affidavit of his not being worth £5, exclusive of wearing apparel. Proceedings must for that purpose be had under s. 300 of C. L. P. Act, 1856. *Travis* v. *Wanless,* 3 L. J. 89.

Prisoner in custody on mesne process cannot obtain his discharge by applying under s. 300, C. L. P. Act, 1856. *Wright* v. *Hull,* 3 L. J. 108.

Held, 1. Upon the answers of defendant to interrogatories and his oral examination, that, notwithstanding the statements of the debtor to the contrary, it sufficiently appeared he had wilfully contracted the debts for which the judgments were recovered, without having had at the time a reasonable assurance of being able to pay or discharge the same. 2. That it was the duty of the Judge to whom application was made for discharge of the debtor, on the ground that he was not worth $20, under C. S. U. C. c. 26, s. 11, to recommit him, which was done, until 1st June next—defendant having been in custody since 28th May, 1864, and having made his application for discharge before Michaelmas term last. 3. That if plaintiff so desired, it should be a condition of the discharge that the debtor should assign his interest in the assets and effects of the firm of which he was a member. *Winks* v. *Holden, Ogilvy* v. *Holden,* 1 C. L. J. 100.

An affidavit for discharge from close custody must, under s. 8 of C. S. U. C. c. 26, be

positive to the effect that the debtor is not worth $20, exclusive of his necessary wearing apparel, &c. *Dougall* v. *Yager*, 1 C. L. J. 133.

Before a debtor can be discharged on interrogatories, he must disclose what he has done with his property by answers which are in the opinion of the Judge sufficient, that is, full, complete and true. A disposition of property, though not necessarily a moral fraud, may be fraudulent as against, and calculated to injure, his creditors, and therefore militate against the discharge. *Dougall* v. *Yager*, 2 C. L. J. 161.

Further explanations and a transfer of certain claims to the creditor were required. *Ib.*

Where a defendant in close custody under a ca. sa. in an action of crim. con. has not answered interrogatories, and appears to have the means of satisfying a large portion of the judgment, he is neither entitled to be discharged under C. S. U. C. c. 26, s. 8, nor to be re-committed under s. 11 for twelve months, and then discharged. *Glennie* v. *Ross*, 15 C. P. 536.

Where a defendant applies for his discharge under 10 & 11 Vict. c. 15, affidavits may be received from the plaintiff contradicting the answers to interrogatories, or shewing that they cannot be true. *Clarkson* v. *Hart*, 9 U. C. R. 348.

It was held otherwise in *Campbell* v. *Anderson*, 1 C. L. Ch. 91.

The expression in s. 9 of the Indigent Debtors' Act, R. S. O. 1897 c. 81, "if the matter thereof is deemed satisfactory"—referring to the examination of the debtor—means, "if he fully and credibly gives the information called for by viva voce questions." The object of the statute and the examination is to test the verity of the statement that the debtor has not wherewith to pay—that he is in fact an indigent debtor—and if he fully and fairly discloses his dealings with his property so as to make it appear that his affidavit is correct, and that he has in truth no means in his possession or under his control to pay any part of the claim, then he should be discharged from custody, even though he may have fraudulently disposed of his property, and although his manner of dealing therewith may have been unsatisfactory for that reason:—Held, also, that affidavits could be looked at upon a motion for discharge of the defendant, to supplement the examination, but only as an indulgence where filed after the appeal was launched. *People's Loan and Deposit Company* v. *Dale*, 18 P. R. 338.

The answers of a prisoner being styled in the cause, and intituled in the proper court, were headed "The answers upon oath of," &c., and proceeded thus: "To the first interrogatory, he saith," &c. 2. To the second interrogatory, &c., not adding "he saith." To the fifteenth interrogatory only the figures "15" were prefixed. The jurat stated that the deponent was sworn, &c., "and made oath that the foregoing answers were true, on this 8th day of March, 1854."—Held, that the forms of the answers and the jurat were defective. *Addy* v. *Brouse*, 1 P. R. 234.

The provisions of 5 Will. IV. c. 3, s. 6, not having been re-enacted in the Consolidated Statutes, the law has been changed, and the debtor is now entitled to his discharge if he give the information called for by interrogatories or examination vivâ voce, and it appears that he is not worth $20 exclusive of his articles exempted, unless his case is brought within the provisions of C. S. U. C. c. 26, s. 11. *Wallis* v. *Harper and Gibson*, 3 P. R. 50.

This case, upon the result of the interrogatories and examination vivâ voce as stated in the report, was held not within any of the provisions in that section, and the debtor was discharged; but it was made a condition that he should assign to the plaintiff certain claims. *Ib.*

The provisions of the C. S. U. C. c. 26, apply to the court of chancery, and a debtor confined under a writ of arrest may apply for his discharge under s. 7. *Lawson* v. *Crookshank*, 2 Ch. Ch. 413.

Under 7 Vict. c. 31, s. 6, the court would not punish defendant by commitment unless upon his examination the cause of action and the circumstances would clearly warrant such a course, and in this case it was refused. *McCue* v. *Todd*, 1 U. C. R. 278.

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3. *Miscellaneous Cases.*

Attacking Judgment.]—A defendant, after having been discharged from custody as an insolvent debtor by the order of a Judge in chambers, will not be allowed to take exceptions to the judgment previously obtained in the same cause, though if the discharge be made on the consent of the plaintiff only, it may be different. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.

Recommittal.]—Debtor on limits—Application for recommittal on interrogatories—Means of debtor—What may be considered available. *Brown* v. *Stevens*, 2 L. J. 68.

V. Insolvent Acts Before 1864.

1. *In General.*

Act of Bankruptcy.]—Deed of assignment by bankrupt to one of his creditors, with a right of preference—Annexing of schedule to deed—Assignment on the face of the instrument of all bankrupt's estate to one creditor, an act of bankruptcy per se. Quære, anything short of this such an act. *Kerr* v. *Coleman*, 6 U. C. R. 218.

Construction of Bankruptcy Act, 7 Vict. c. 10, clauses 2 and 19, also of proviso to clause 19, and also of clauses 37 and 38, as to the necessity the Act imposes upon the assignee of a bankrupt seeking to invalidate an assignment to a particular creditor, to prove that the assignment was voluntary, besides being made in contemplation of bankruptcy, with the knowledge of the creditor, and for the purpose of a preference. *Ib.*

Semble, that a jury finding "that the assignment was executed in contemplation of bankruptcy, and that defendant knew when he took it that the other creditors would not

be paid their debts," is sufficient to satisfy the Act, and avoids the assignment, without any direction or finding upon the assignment being voluntary. *Ib.*

Application of English Act.] — See *Maulson* v. *Commercial Bank*, 2 U. C. R. 338.

Costs of Proving Claim.]—See *In re Wallace*, 2 O. S. 233.

Creditor's Refusal to Redeem—*Action Against Insolvent*]—A debtor made an assignment of certain real estate to B., a creditor, the deed being absolute in form, but intended as a security for the debt, and the debtor afterwards became bankrupt under 7 Vict. c. 10. Many years subsequently he filed a bill against the mortgagee's administrator for an account. The administrator, being ignorant of the bankruptcy, consented to a decree referring it to the master to take the necessary accounts on the footing of the assignment being a security; but on afterwards discovering the fact of the bankruptcy, he filed a petition setting up the bankruptcy and claiming relief against the decree:—Held, that the consent to the decree was no bar to relief, and that the decree should be set aside, and the bill dismissed with costs, unless the assignee in bankruptcy was willing to adopt the suit and to become bound by it. The plaintiff swore that at the meeting of the creditors B. refused to give up the property without receiving from the creditors payment in full of his debt; and that they refused to pay:—Held, that this did not put an end to their right to the property, or authorize the bankrupt to sue for it to his own use. *Hatch* v. *Ross*, 15 Gr. 96.

Defendant Becoming Bankrupt.]—A plea, "that after the making of the promise, and after the action had accrued, defendant became a bankrupt:"—Held, good on special demurrer. *Short* v. *McMullen*, 6 U. C. R. 407.

Ejectment for Property Sold.]—Where a bankrupt whose property had been sold under a commission of the court in Montreal, brought ejectment for the same land:—Held, that he was barred by 7 Vict. c. 10, and 9 Vict. c. 30. *Bradbury* v. *Wasley*, 9 C. P. 420.

Interest.]—Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt, by express contract or by statute, bears interest, or where a contract to pay it is implied, but on no other debts will interest be allowed. *Re Langstaff*, 2 Gr. 165.

Payment Before Bankruptcy.] — See *Moore* v. *Cook*, 9 U. C. R. 261.

Plaintiff Becoming Bankrupt.] — Where a plaintiff commences an action, and pending the proceedings becomes a bankrupt, he may, under 7 Vict. c. 10, ss. 31 and 32, continue the suit in his own name, unless the assignees intervene. *Ireland* v. *Wagstaff*, 4 U. C. R. 231.

Preferential Assignments.] — Semble, 22 Vict. c. 26 has not altered the law except as to preferential assignments. *Metcalf* v. *Keefer*, 8 Gr. 392; 7 L. J. 270.

Prior Assignment.] — The effect of a legal assignment to trustees for creditors is, that it diverts the beneficial interest of the property assigned from the assignor, and subsequent assignees of his estate under the bankrupt laws do not take it as his assignees, for they acquire a legal interest in such property only as can be applied to the payment of his creditors generally under the bankrupt laws. *Anderson* v. *Gamble*, 8 U. C. R. 437.

Promissory Note Not Due.]—A note indorsed by the bankrupt before commission issued though not due until after, may be proved as a debt, and the plea of bankruptcy is a defence to it. *Wood* v. *Hutt*, 9 U. C. R. 344.

Proving Act of Bankruptcy.]—Act of bankruptcy must be stated in affidavits filed with Judge. *In re Gillespie*, 2 O. S. 2.

Proving Act of Bankruptcy.] — A party suing out a commission of bankruptcy, under 7 Vict. c. 10, must prove before the Judge or commissioner, not only the act of bankruptcy, but also the trading. Such evidence cannot be afterwards received to uphold a commission issued without the proof having been given. *In re Rose*, 2 O. S. 14.

Right of Action for Negligence.]—Under 8 Vict. c. 48, the right to sue an attorney for negligence, vests in the assignee of an insolvent. *Alexander* v. *A. B. & C. D.*, 5 U. C. R. 329.

Right of Action.]—Where a bankrupt, thirty days before the commission, bonâ fide assigned part of his interest in a bond to A. B. (viz., to £400 out of £500):—Held, that the bankrupt, and not his assignee, should sue for the interest A. B. had in the bond. *Hughes* v. *Newcastle District Mutual Fire Ins. Co.*, 8 U. C. R. 315.

Setting Aside Commission.]—Commission of bankruptcy superseded on application to the vice-chancellor in the first instance, and not by way of appeal. *In re Merritt*, 1 O. S. 283.

Trader.]—Defendant was a trader, within 7 Vict. c. 10, but first became so after the expiration of that Act, and became insolvent before 19 & 20 Vict. c. 93:—Held, that he was clearly within the latter Act. *Boulton* v. *Nourse*, 15 U. C. R. 555.

Wife's Interest.]—Where the wife of a bankrupt in Lower Canada had a remainder in lands in Upper Canada, expectant on the death of her mother:—Held, that there was no interest which could vest in the assignee, and that his not disclosing such interest was not fraudulent. *Phillips* v. *Masson*, 9 U. C. R. 20.

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2. *Composition and Discharge.*

Bond.]—Debt on bond made by defendant and one W., as sureties for one S., conditioned that if said S. should not from time

to time, &c., well and truly pay unto the plaintiff each and every of ten promissory notes on the respective days on which the same became due and payable, according to the tenor and effect of the said promissory notes respectively, then, if defendant and said W., or either of them, should well and truly, absolutely and at all events, pay or cause to be paid unto the plaintiff each and every of the said ten promissory notes on the respective days on which the same became payable, then, &c.; otherwise, &c., assigning breaches as to the last six notes. Plea, that S. did not pay the first and second of the said ten notes when the same became due and payable according to the tenor and effect thereof, and that thereupon the bond became forfeited; and that afterwards, and while the said notes remained due and unpaid—to wit, on, &c.—said S. became bankrupt; and that afterwards, and while the said notes remained due and unpaid, and after the said writing obligatory had become forfeited, the defendant became bankrupt, &c., and that said debt accrued due and was payable before the defendant became bankrupt:—Held, on demurrer, that the bond being forfeited before defendant's bankruptcy, therefore the penalty became a debt which the plaintiff might have applied to have retained in the hands of the defendant's assignee till the contingency happened, and then have proved; and that the defendant was discharged, and the plea consequently good. *Perrin* v. *Hamilton*, 5 C. P. 57.

Bond.]—C., one of the obligors in a bond of indemnity to the sheriff under a writ of attachment, obtained a final order for protection from process; judgment was obtained in an action against the sheriff, subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that C. was not discharged by such final order, the claim not being one which could have been proved against his estate either in insolvency or bankruptcy. *Moody* v. *Bull*, 7 C. P. 15.

Bond.]—Action on a bond to the limits against F. and his sureties. Sixth plea, that by an order made according to S Vict. c. 48, and 19 & 20 Vict. c. 93, the defendant F. was duly discharged from the cause of action for which the arrest took place. Seventh plea, that before the said F. departed from the limits, and after his arrest and bail given, an interim order for protection was given to him, which was in full force at the time of his departure as alleged. Eighth plea, that before his suit, a petition for protection of said F. was presented to W. S., county Judge, and filed in the insolvent court, and thereupon a final order for protection and distribution was made by said W. S., duly authorized; and that the debt for which the attachment issued, on which F. was arrested, was contracted before the filing of said petition:—Held, on demurrer, pleas bad. *Meyers* v. *Francis*, 15 U. C. R. 565.

Composition—*Advantage to One Creditor.*]—A commission of bankruptcy issued against J. V., one of two joint makers of a promissory note to plaintiff. J. V. desired to compromise with his creditors, and the plaintiff agreed to this, provided the residue of the note was secured to him. Defendant gave plaintiff a bond to secure it on real estate:—Held, that the bond was void. *Smith* v. *Dittrich*, 8 U. C. R. 589.

Covenant to Indemnify.]—Covenant to indemnify "generally and without exception" against a charterparty which defendants had assumed:—Held, under the circumstances of this case, not to be discharged by defendants' bankruptcy and certificate. *Jarvis* v. *Walker*, 9 U. C. R. 136.

Defending One Action and Allowing Judgment by Default of Another.]—The fact that a debtor defends one action brought against him by a creditor, and allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under 22 Vict. c. 96, ss. 18 and 19. *Young* v. *Christie*, 7 Gr. 312.

Discharge.]—The final order under 8 Vict. c. 48, must be as well for the distribution of the effects of the bankrupt, as for protecting his person and goods from process. *Ferrie* v. *Lockhart*, 4 U. C. R. 477.

The Judge's order under the insolvent law need not be confirmed by the court of review, to operate as a discharge from actions. *Ib.*

Discharge.]—To an action on a note defendant pleaded that after contracting the debt, and before this suit, a petition for protection from process was duly, and according to the statute, presented by him to a county Judge, and filed in the insolvent court; and that thereupon, before action, a final order for protection and distribution was made by, &c.; and that the said debt was contracted before the date of filing said petition. The plaintiff replied that the promise was made, and the cause of action accrued, after the petition was presented—concluding to the country:—Held, on demurrer, replication bad; plea good. *March* v. *Alexander*, 10 U. C. R. 435.

Discharge.]—Quære, whether a person having failed before the Bankruptcy Act, 7 Vict. c. 10, but continuing a trader, and unable to meet his engagements, and so being able to avail himself of its provisions, could still take advantage of the Insolvent Debtors' Act, 8 Vict. c. 48. But held, that a final order obtained under the above circumstances was conclusive, and not to be questioned in an action brought for a debt barred by it. *Stevenson* v. *Green*, 11 U. C. R. 452, 12 U. C. R. 290.

Discharge.]—The order recited the petition, and that the debtor was entitled to protection, and then certified that "this final order" was granted under 19 & 20 Vict. c. 93; the operative words of the order being omitted:—Held, that the order was insufficient. The effect of the order under 19 & 20 Vict. c. 93, is not confined to debts specified in the schedule. *Commercial Bank* v. *Cuvillier*, 18 U. C. R. 378.

Facilitating Judgment on Specially Indorsed Writ.]—Where the application is really in the interest of a subsequent judgment creditor, the mere fact that the judgment debtor makes an affidavit in support of the application, is not enough to make him the party applying. Where the debt is bonâ fide due, the circumstance that the debtor

facilitates the plaintiff's recovery of a judgment on a specially indorsed writ, even in pursuance of a previous understanding, while he defends suits brought against him by other creditors, is not enough to constitute fraud. The C. S. U. C. c. 26, s. 17, which avoids judgments obtained on cognovits delivered under circumstances therein mentioned, does not extend to judgments obtained under specially indorsed writs. Quære, is the fact that the debtor agrees to expedite the creditor's recovery of a just debt by judgment, under any circumstances, a collusive, a fraudulent, or a wrongful proceeding. White v. Lord, 13 C. P. 289, in this respect doubted. *McKenzie v. Harris*, 10 L. J. 213.

Interlocutory Judgment Before Discharge.] — Though a certificate of bankruptcy be no discharge till confirmed, an interlocutory judgment entered before confirmation will be set aside to allow the bankrupt to plead his certificate, or the court will relieve him by staying the execution of the fi. fa., on a proper application after judgment and execution issued. *Commercial Bank v. Culross*, 3 U. C. R. 176.

Judge in Chambers.]—A Judge in chambers will not in general entertain or enter into a question as to the validity of an order or discharge for insolvency in the nature of a bankrupt's certificate, under 19 & 20 Vict. c. 96, but will rather let the point be determined by way of audita querela. *Schofield v. Ball*, 3 L. J. 204.

Lower Canadian Discharge.]—Under 7 Vict. c. 10, s. 74, a certificate of discharge under the ordinance passed in Lower Canada, is a discharge from debts in Upper Canada which were provable under the Lower Canada commission. *McDonald v. Dickenson*, 1 U. C. R. 15.

Not Entering Defence.] — A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a bonâ fide debt. Subsequently both creditors sued for their respective demands, but to enable one of them to obtain a first judgment no defence was entered to his action, while the other action was defended. The court, following Young v. Christie, 7 Gr. 312, refused to restrain the first judgment creditor from enforcing his execution. *McKenna v. Smith*, 10 Gr. 40.

Order Under 19 Vict. c. 93.]—Declaration on a note, and common counts. Plea, that defendant had been a trader in Upper Canada within the Bankrupt Act 7 Vict. c. 10, and since the expiration thereof became insolvent, &c., but not stating that he was insolvent at the passing of 19 & 20 Vict. c. 96, whereunder he filed his petition, and claimed to be exempt:—Held, not sufficient under 19 & 20 Vict., and that the clause in the order, "and it appearing that the said defendant by virtue of the statutes in that case (19 Vict.), made and provided, is entitled to the protection of his person," &c., could not be constructed as an adjudication by the court that the petitioner was insolvent at the passing of the Act. *Smith v. Dempsey*, 10 C. P. 515.

Pleading Lower Canadian Certificate.]—The certificate obtained by a bankrupt under the ordinance of Lower Canada, 2 Vict. (3) c. 36, prior to 7 Vict. c. 10, might be given in evidence under the general form of plea allowed by s. 64. *Phillips v. Masson*, 9 U. C. R. 20.

So might fraud by the bankrupt in obtaining his certificate. *Ib.*

Refusal of Certificate.]—Where a trader had requested one of his creditors to sue out a commission of bankruptcy against such trader, and upon the promise of being afterwards paid his debt in full the creditor sued out the commission, and the Judge below had refused to grant the bankrupt his certificate, the court of review refused to interfere. *Ex parte Detlor*, 1 O. S. 278.

Scheduled Debt.]—Where such an order is pleaded in bar of a debt, it must be averred that such debt was included in defendant's schedule. *Boulton v. Nourse*, 11 U. C. R. 452.

Scheduled Debt.]—The plaintiff took defendant's note for advances made, for £396, on the 10th March, at three months. On the 19th defendant obtained his final order for discharge under 8 Vict. c. 48, the plaintiff being mentioned in his schedule as a creditor for £150:—Held, that the order was not a bar to the note, even as to the £150, if included in it. *Greenwood v. Farrell*, 17 U. C. R. 490.

Staying Certificate.]—K. having become a bankrupt, and passed the several examinations required by the 7 Vict. c. 10, before the Judge of the Niagara district court, and obtained from the commissioner his certificate, a petition was presented to the vice-chancellor by several of his creditors, praying a stay of the certificate, on grounds of fraud, &c.:—Held, that the commissioner of bankrupts is the only person who can exercise any discretion in granting or refusing the certificate to the bankrupt, under the statute. *In re Kissock*, 1 O. S. 225.

Withdrawing Appearance.] — Defendants being insolvent, the plaintiffs on the 7th January, issued a writ, which was served on the 12th. On the 17th an appearance was entered and a consent given two days after to withdraw the same, which was filed on the 23rd, and judgment entered for want of appearance on the same day. Execution was issued on the 30th. On the 12th January, defendants dissolved partnership, and on the 23rd, L., one of the defendants, absconded from the Province. A creditor of defendants sued out an attachment against the goods of L. under C. S. U. C. c. 25, s. 2, and applied under s. 22, to set aside the judgment and execution of plaintiffs for fraud and collusion in obtaining same between plaintiffs and defendants:—Held, that the withdrawal of the appearance by L. under the circumstances set out above, and in the affidavits filed on the motion, shewed sufficient grounds for setting aside the execution for fraud and collusion. *White v. Lord*, 13 C. P. 289.

Withdrawing Plea.] — An attachment issued against defendant on 6th July. On the same day a summons was served on him abroad at the suit of G. Within six months

the plaintiff sued out another attachment. It did not appear whether the plaintiff in the first attachment had obtained judgment, or whether that writ was issued, or G.'s summons served first, but G. first obtained execution:—Held, that so far as appeared G. was entitled to the benefit of his fi. fa. as against these plaintiffs, and that the mere fact that defendant withdrew his plea and allowed G. to get judgment by default, was no ground for imputing collusion in obtaining such judgment. *Caird* v. *Fitzell*, 2 P. R. 262.

3. *Effect on Executions.*

The seizure and levy in execution under 7 Vict. c. 10, s. 37, to avoid the effect of a commission subsequently issued, mean only the seizure, and not the actual levying of the money. *Hales* v. *Tracy*, 1 U. C. R. 541.

If a seizure be made without notice of a prior act of bankruptcy, the sheriff may proceed and sell, and pay the proceeds to the execution creditor, though the commission be placed in his hands before sale. *Maulson* v. *Commercial Bank*, 2 U. C. R. 338.

Where a party had confessed judgment to a bank before the bankrupt law, with the understanding that it would not be enforced on payment of a certain sum every fortnight; and it was agreed, after several payments, that the confession should stand also as a security for notes to be discounted for the party; and proceedings having been threatened by other creditors, the bank issued execution and sold:—Held, that the assignees of the bankrupt, on a commission issued after the seizure, but before the sale, could not recover the proceeds in an action for money had and received against the bank. *Ib.*

To support an application by an insolvent to set aside an execution, a levy must be shewn upon some property not vested in the assignee, who would otherwise be the proper party to apply. *Mullens* v. *Burke*, 1 P. R. 271.

A fi. fa. placed in the sheriff's hands before the commission was sealed, but on the same day on which it was completed and delivered to the sheriff, has priority over the commission. *Beckman* v. *Jarvis*, 3 U. C. R. 280.

Quære, what course is the sheriff to pursue upon an execution against the goods of one of two partners under the circumstances of one being a bankrupt, and the other not. *O'Neill* v. *Hamilton*, 4 U. C. R. 294.

A notice to the execution creditor in general terms before the sheriff could have levied, without specifying any particular act of bankruptcy, is sufficient to protect the debtor's property for all his creditors. *French* v. *Kingsmill*, 5 U. C. R. 30.

Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall issue upon it within two months, and that the execution creditor or his attorney was aware of the fact before suing out execution. *Ib.*

Where defendant had obtained his certificate of discharge after judgment and before execution, the execution and all subsequent proceedings were set aside with costs. *Harris* v. *Bunnell*, 2 P. R. 103.

4. *Preferential Transactions.*

Advance and Pre-existing Debt.]—A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied:—Held, that this was not such a preference as rendered the chattel mortgage void. *Risk* v. *Sleeman*, 21 Gr. 250.

Assignment of Judgment—*Notice to Debtor—Lien for Costs.*]—G. recovered a judgment against D., and afterwards, though insolvent, assigned it by two assignments to his attorney, one for costs due him by G., and the other for a debt due to R. by G. Afterwards, C. obtained a judgment against G., and attached the debt so due to him by D., and gave notice of the attachment to D. before the assignee of G. had given notice of his assignment. D. paid the moneys due to G. by himself to the sheriff, under an execution issued at the instance of the assignee of G.:—Held 1. That the mere fact of C. having been the first to give notice could not entitle him to priority over the assignee of G., but that by reason of the insolvency of G., the assignments were void under 22 Vict. c. 26. 2. That the solicitor of C. must be restricted to the costs incurred by him in the action brought by G. against D., and that R. must stand as an ordinary creditor. *Davidson* v. *Douglas*, 15 Gr. 347.

Cognovit.]—A cognovit given, payable immediately, for a just debt, is not a voluntary or fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of 7 Vict. c. 10. *Beckman* v. *Workman*, 1 U. C. R. 531.

Cognovit.]—A cognovit given in contemplation of bankruptcy, and to give defendant a preference, is a security within s. 19, and therefore void. *Brent* v. *Perry*, 7 U. C. R. 24.

Cognovit—*Estoppel.*]—Where a cognovit has been given by a bankrupt in fraud of the bankruptcy law, and it is therefore, with all steps taken under it, void, the assignee of the bankrupt, in bringing an action against the sheriff, must be looked upon as contending for the interest of the creditors, and not merely as representing the person or estates of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud. *Ponton* v. *Moodie*, 7 U. C. R. 301.

Confession of Judgment.]—Trover by the assignees of a bankrupt. Plea, justifying under a judgment and execution against the bankrupt before bankruptcy. Replication: that the judgment was recovered on a confession of judgment given "in contemplation of bankruptcy, and for the purpose of giving one of several creditors a preference, and with the intent to delay and defeat other creditors:"—Held, sufficient, without adding that it was given within a month of the commission. *Brent* v. *Perry*, 5 U. C. R. 538.

And see *S. C.*, 7 U. C. R. 24.

Contemporaneous Security.]—One A. sold to B. his interest in certain land, there

being an amount due thereon, to obtain a title, part of which A., and the remainder B., was to pay. B. gave to A. personal property worth £100, and among it the horse in question in this suit, for his interest in the land; but to secure the payment by A. of his share (£42 19s. 4d.,) B. took from A. a mortgage on the horse. An execution having been issued out of the division court against A., the horse was sold under it, and purchased by the plaintiff. B. being present and protesting against the sale. B. subsequently got peaceable possession of the horse, and this action of replevin was brought to obtain possession of it from him, the plaintiff claiming it under the division court sale:—Held, that the mortgage was not void, as being a preferential assignment under s. 18 of C. S. U. C. c. 26, it being a contemporaneous security for the purchase money of property taken at the time of the sale. *Ross* v. *Elliott*, 11 C. P. 221.

Creditor's Knowledge.]—An assignment made bonâ fide by a person about to become a bankrupt to a creditor thirty days before commission issued, is good, if made without the creditor's knowledge of any act of bankruptcy, or that bankruptcy was in contemplation. *Armour* v. *Phillips*, 4 U. C. R. 152.

Insurance Loss.]—Where a fire policy was after a loss verbally assigned to a creditor by an insolvent person, in satisfaction of a debt not yet due, and in consideration of an advance of money at the time, the assignment was held void, as a fraudulent preference within C. S. U. C. c. 26, s. 18. *Bank of Montreal* v. *McTavish*, 13 Gr. 395.

Pre-existing Obligation.]—22 Vict. c. 26, s. 18, against preferences, does not apply to a conveyance of real estate sold by the debtor before his insolvency, but not paid for. *Carradice* v. *Currie*, 19 Gr. 108.

Pressure.]—Held, that a mortgage by an insolvent, or by one on the eve of insolvency, executed under pressure by the creditor, as for instance, a threat of a criminal prosecution, but given to secure a pre-existing debt, was not a fraudulent preference under C. S. U. C. c. 26, s. 18, the pressure used rebutting the presumption of a fraudulent intention on the part of the debtor to prefer the creditor. The intent with which the instrument is given being a question for the jury, the circumstances of pressure attending its execution, ought not to be withdrawn from them. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

Pressure.]—A mortgage of chattels to a creditor by a person in insolvent circumstances, not made with the intent of giving such creditor a preference, but under pressure, and to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full, is not void under 22 Vict. c. 26. *Gordon* v. *Young*, 12 Gr. 318.

VI. Insolvent Acts of 1864, 1865, 1869, and 1875.

1. *Application and General Effect.*

Acceptance of Assignment.]—A voluntary assignment to an official assignee under the Insolvent Act of 1864, s. 2, is not valid unless accepted by the assignee. *Yarrington* v. *Lyon*, 12 Gr. 308.

Acquiring Priority by Registration.]—An assignee in insolvency cannot acquire priority over a prior vendee of the insolvent by prior registration of the instrument appointing such assignee. *Collver* v. *Shaw*, 19 Gr. 599.

Assets in Different Counties or Provinces.]—Where a trader in Ontario becomes insolvent and an attachment in insolvency is issued to the sheriff of the county in which he resides, the county Judge can issue another attachment to the sheriff of any county in Ontario, or of any district in Quebec, in which the insolvent has property. *Re Beard*, 15 Gr. 441.

Assignment.]—A debtor, being in difficulties, assigned all his property to a creditor, who agreed to pay a composition of 40 cents in the $ within a year. This had been paid, except to defendant, who refused to accept, and issued execution. On an interpleader between the assignee and the defendant, to try the title to the goods assigned, the jury having found the transaction bonâ fide:—Held, that such assignment was not avoided by the Insolvent Act, s. 8, for that the statute applies only where proceedings are taken, and as against a person claiming, under it:—Held, also, that the assignment was not invalid under C. S. U. C. c. 26, s. 18. *Squire* v. *Watt*, 29 U. C. R. 328.

Assignment by One Partner.]—One of two partners, a few days before an attachment against both under the Act of 1864 had issued, assigned his estate for the benefit of his creditors:—Held, void as against the official assignee. *Wilson* v. *Stevenson*, 12 Gr. 239.

Assignment Not in Accordance with the Act.]—An assignment for the benefit of creditors, not made in accordance with the Act, is an act of insolvency, and void as against an execution creditor, or the official assignee appointed in compulsory proceedings under that Act, after such proceedings are taken, if finally sustained. Wilson v. Cramp, 11 Gr. 444, approved of. *Thorne* v. *Torrance*, 16 C. P. 445; 18 C. P. 29.

Such proceedings render the assignment absolutely void as against creditors of the insolvent, so as to let in intermediate execution creditors. *S. C.*, 16 C. P. 445.

Assignment.]—Upon the death of one member of a firm, and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. But where the capital of surviving partners having been lost, they, while the estate was supposed to be solvent, conveyed the same to a trustee for creditors upon the request of the executrix of a deceased partner in consideration of a release by her from all liabilities; and the executrix afterwards, upon obtaining probate, conveyed her interest to the trustee; and subsequently through a shrinkage in value the estate became insufficient to meet the liabilities, it was:—Held, that by the assignment to the trustee, at the request of the executrix, for valuable consideration, they had parted with all interest in the estate, and nothing passed to the plaintiff, as assignee, under proceedings in insol-

vency taken on the supposition that the assignment to the trustee was an act of insolvency, and that the assignment to the trustee not being questioned on the ground of fraud, the assignee of the survivors was precluded from any inquiry. *Davidson* v. *Papps*, 28 Gr. 91.

Banker.]—A banker is a trader within s.-s. 2 of s. 3 of the Act of 1864. *Bagwell* v. *Hamilton*, 10 L. J. 305.

Banker and Broker.]—A banker, and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks:—Held, a trader within the Act of 1869. *Duncan* v. *Smart*, 35 U. C. R. 532.

Barber.]—A barber is not a trader within the Act of 1869. *Thomas* v. *Hall*, 6 P. R. 172.

And the sale of perfumery, being merely incidental to his business; and a purchase of tobacco nine months before his assignment, which he sold again immediately, being an isolated transaction; were held, upon the evidence, insufficient to bring him within the Act. *Ib.*

Barrister.]—One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought suit thereon against H., the assignee in insolvency of C. and D. and others, the owners of parts of the mortgaged lands. It was objected by D. that C. should have been made a party:—Held, that C. was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph* v. *Haffner*, 29 Gr. 421.

Debt not Due.]—Under the Insolvent Acts of this Province a creditor, whose debt has not matured, may commence proceedings against his debtor who is insolvent, in like manner as he might have done if his debt had been overdue at the time. *In re Moore*, 18 C. P. 446.

Earnings after Insolvency.]—An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the assignment in insolvency, and before discharge, over and above what is necessary for the reasonable maintenance of the insolvent and his family. Therefore, where an insolvent, pending his discharge, applied part of his earnings in the purchase of land for the benefit of his wife:—Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land. *Clarkson* v. *White*, 4 O. R. 663.

Effect on Action.]—Declaration on a note made by defendant, payable to plaintiff. Plea, on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against defendant, under the Insolvent Act of 1864, for the same cause of action, subsequently to the declaration in this cause:—Held, bad. *Baldwin* v. *Peterman*, 16 C. P. 310.

Execution Creditor also Attaching.]—Two assignments were made by the debtors on the 1st and 5th June, 1865, to the plaintiff, a creditor, for the benefit of creditors. On the 6th June, 1865, defendant, another creditor of the debtors, obtained judgment against them, and placed a fi. fa. in the sheriff's hands, and on the 1st July, 1865, he also caused a writ of attachment, under the Insolvent Act of 1864, to be issued against them. The goods assigned to plaintiff were seized under a fi. fa.—Held, that the defendant, although the attaching creditor, was not put to his election, but might proceed in insolvency as well as upon his fi. fa. *Thorne* v. *Torrance*, 16 C. P. 445.

See S. C., in appeal, 18 C. P. 29.

Foreigner.]—The plaintiff had been engaged in business in Canada, though not permanently resident there. He was arrested by defendant, a constable, who took possession of money found on him, and being discharged, he sued the defendant for the money. A writ of attachment having issued against him, one M. was appointed official assignee, and applied, under s. 4, s.-s. 9, of the Insolvent Act of 1864, to be allowed to intervene and represent the plaintiff in the suit. The plaintiff was not liable to the insolvent laws. The point being one of great practical importance, raised for the first time, the court, with a view to have it properly brought up, left the assignee to sue the defendant for the money, so that the defendant might apply under the Interpleader Act, and the question be presented on the record in a feigned issue. *Mellon* v. *Nicholls*, 27 U. C. R. 167.

Husband and Wife—*Costs.*]—In an action on a foreign judgment, it appeared from the roll that the judgment was on a bill of complaint brought in the State of New York, against S. and his wife, by one Saxton (the now defendant), to set aside a certain conveyance made to the wife as fraudulent, and that such bill was dismissed with costs to be paid by the plaintiff (the now defendant). It appeared also that the suit was substantially against the wife, her property being in dispute, and that her husband was joined for conformity only. An assignment of the judgment was produced from S. and wife to the now plaintiff, and a previous assignment, during the pendency of the foreign suit, of all costs accrued or that might accrue. It was admitted on behalf of the now plaintiff, that at the execution of the assignment S. was an insolvent under the Act of 1869, and that the now plaintiff was the attorney of S. and his wife in the foreign court:—Held, that the plaintiff was entitled to recover, for prima facie the costs for which the judgment was recovered were incurred and recovered by the wife, and did not pass to the assignee of her husband. *Hughitt* v. *Saxton*, 42 U. C. R. 49.

Innkeeper.] — An innkeeper is not a trader within the meaning of the Insolvent Act of 1869. *Harman* v. *Clarkson*, 22 C. P. 291.

Lease—*Forfeiture.*]—The lessees under a lease containing a covenant not to assign without leave, in the statutory form, made a voluntary assignment in insolvency on 17th May, 1869. The assignee sold the stock-in-trade of the insolvents, who were dry goods merchants, and the purchaser took possession of the premises from him on the 27th May,

the assignee also occupying a room there for the management of the estate:—Held, that such assignment was a breach of the covenant, and a forfeiture; for the term passed to the assignee under the provisions of the Insolvent Act, and if any election to accept it were necessary on his part, it was shewn by his conduct. *Magee* v. *Rankin*, 29 U. C. R. 257.

Limitations Act.]—Held, affirming 1 O. R. 167, that an assignment under the Insolvent Act, 1875, by an insolvent mortgagor, does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *Court* v. *Walsh*, 9 A. R. 294.

Married Woman.]—Under the Insolvent Act of 1875 a married woman may make herself liable to be placed in insolvency. At a meeting of the insolvent's creditors a sale of his estate was made to his wife, who was not present at the meeting and took no personal part in its inception or completion. It was arranged that the purchase should be in her name, and that she should give her promissory notes for the price, secured by a mortgage on her separate real estate. It appeared that it was understood by every one engaged in this transaction that its object was to enable the husband to continue the business. After the security had been given the shop was re-opened: the same sign-board remained over the door, and the business appeared to be carried on precisely as before. Purchases of goods were made in her name, for which she signed notes, but the orders were always given by her husband, and the correspondence, although conducted in her name, was written and signed by him without any communication with her. As soon as he obtained his discharge he substituted his own name for his wife's in correspondence and in notes. Upon a writ of attachment issued against her after her husband's discharge:—Held, that even if the stock-in-trade was her separate property, she never employed it in trade separate from her husband, but allowed him to employ it in a business really his own: she was, therefore, not a trader within the Act of 1875. *In re Gearing*, 4 A. R. 173.

Mortgagor's Right of Set-off.]—A mortgagor and mortgagee dealt together for some years without having any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings:—Held, that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court* v. *Holland*, 29 Gr. 19.

Newspaper.]—See *Pinkerton* q. t. v. *Ross*, 33 U. C. R. 508, in which printing and publishing a newspaper was held to constitute the partners employed in it a partnership "for trading purposes," within 33 Vict. c. 29, s. 10, and liable to the penalty for not registering such partnership.

Procuring Goods to be Taken in Execution.]—Refraining from entering an appearance to an action by a creditor on a specially indorsed writ, whereby he obtains judgment and a priority over other creditors, is not in itself a procuring of his goods, &c., to be seized or taken in execution within the meaning of the Act; but it is open to the creditors to satisfy the Judge that the taking in execution was through the procurement of the insolvent. *Worthington* v. *Hamilton*, 10 L. J. 304.

Promissory Note—*Indorsement Abroad.*]—The payee of a promissory note made and payable in Ontario, who had absconded to Michigan, while there, and after a writ of attachment in insolvency had issued against him in Ontario, indorsed the note for good consideration to the plaintiffs, who took it bonâ fide. Evidence was given to prove that by the law of Michigan the indorsement was sufficient to pass the note to the plaintiff:—Held, that the plaintiffs could not recover, as the title to the note had vested in the assignee before the indorsement, and that his rights thereto could not be affected by the law of Michigan. *Jenks* v. *Doran*, 5 A. R. 558.

Purchasing Claim.]—A bonâ fide purchase for value of a claim against an insolvent, made by a creditor for the express purpose of increasing such creditor's demand to an amount sufficient to issue a writ of attachment under s. 9 of the Act of 1875, is valid. *Carrier* v. *Allin*, 2 A. R. 15.

Repeal of Act.]—The repeal of the Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the repeal. *Cooper* v. *Kirkpatrick*, 8 P. R. 248.

Repeal of Act.]—Held, that the repeal of the Insolvent Acts by 43 Vict. c. 1 (D.), before claim made, was no bar thereto, the estate of the insolvent having vested in the assignee before 1st April, 1880, and there having been no reconveyance of the property to the insolvent, who had, however, obtained his discharge before action brought. *Clarkson* v. *White*, 4 O. R. 663.

Representative Capacity.]—Section 27 of the Insolvent Act of 1865, does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character. *In re Sharpe*, 20 C. P. 82.

Retroactive Effect.]—The Act of 1864 has not a retrospective effect, so as to make an act of insolvency committed before 1st September, 1864, sufficient to support an attachment issued after that day. *Worthington* v. *Hamilton*, 10 L. J. 304.

Reversionary Interest.]—An insolvent's reversionary interest in an estate passes to his assignee, and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees, and for an account of the estate; but the court refused to make an order for the sale of such reversionary interest. *Gray* v. *Hatch*, 18 Gr. 72.

Rights of Action—*Personal Wrong.*]—The plaintiff, having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his wife, and for assaulting her. Before recovering judgment he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee:—Held, on demurrer, that the plaintiff was entitled to recover, for the causes of action, being for purely personal

wrongs, did not pass to the assignee. Semble, also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit. *White* v. *Elliott*, 30 U. C. R. 253.

Rights of Action—*Personal Claim.*]—On the 10th February, 1873, defendants obtained an order to stay proceedings until security was given for costs, on the ground that the plaintiff had become insolvent. The declaration contained three counts: 1. On a fire policy. 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers. 3. In trespass to goods, alleging similar special damage. No objection was made in chambers that the causes of action in the second and third counts did not pass to the assignee. On application to the court:—Held, that the causes of action under the first and second counts passed to the assignee, for as to the second, as the conversion, the primary cause of action, passed to the assignee, the special damage dependent upon it could not be sued for by the debtor; but that the cause of action in the third count did not pass, being for a personal claim of the debtor independent of his right of property:—Held, therefore, that as to the third count the order should not have been made: that being made without authority it might be rescinded as to that count; and that the action might be stayed on one count, leaving it to proceed on the others. *Smith* v. *Commercial Union Insurance Co.*, 33 U. C. R. 529.

Rights of Action for Creditors' Benefit.]—The first count was for trespass quare clausum fregit, and carrying away plaintiff's goods and expelling him. The second count alleged that defendants by deed covenanted to sell the plaintiff certain lands and premises with the saw mill and machinery thereon and the rights and appurtenances thereto, for $2,523.79, together with all sums of money which defendants might, after the date of said deed, expend in and upon said lands, with interest at eight per cent. thereon; all such principal moneys and interest to be fully paid up and satisfied, and the agreement completed before the 8th June, 1874, and upon payment at the times specified defendants should convey the premises to the plaintiff, and should suffer for the payment of the purchase money, default in payment; and all conditions were fulfilled, &c., yet after the making of the deed and before the expiration of the time limited for the payment of the purchase money, defendants entered and evicted plaintiff. Fourth count: trover. Plea: that after the accruing of the causes of action plaintiff became insolvent under the Act of 1869, and being such insolvent duly made an assignment to W., in whom, as such assignee, all the plaintiff's estate, debts, assets, and effects, and the causes of action, &c., became vested. To this plaintiff replied that the action was brought for the benefit of plaintiff's creditors, who had given security for defendants' costs herein:—Held, replication good, for the plaintiff having, before the appointment of the assignee, rightly sued in his own name, he might continue to do so so long as the assignee did not intervene and have his name inserted; but that there was a formal defect, which might be amended, in not stating, as the plea was to the further maintenance of the action, that the action was continued since the appointment of the assignee for the benefit of the creditors, instead of that it was so brought. Semble, that the plaintiff, even after the assignee's appointment, might have sued in his own name for the causes of action in the first and second counts, if not for those in the fourth count; but that he might also, if he pleased, give the benefit of such causes of action to his creditors. Quære, as to whether there was any necessity for the replication. *Dunn* v. *Irwin*, 25 C. P. 111.

Sale by Undischarged Insolvent.]—To a declaration on the common counts, defendant pleaded that the plaintiff before action assigned under the Act of 1875 to an official assignee, in whom the alleged cause of action became vested. Replication, that the cause of action was for goods bargained and sold by plaintiff to defendant after the assignment, and that the assignee had not interfered or required the defendant to pay him:—Held, good. *Graham* v. *McKernan*, 42 U. C. R. 368.

Set-off.]—By a lease, made by the defendant to the insolvents, the lessees were "to get pay for improvements at a fair valuation, and to have the right of purchase during the term by paying the lessor, first, all claims by way of notes, or otherwise, he holds, or may hold, against the said lessees, and the sum of $235.15, as purchase money," &c. In January, 1875, an attachment under the Insolvent Act of 1869 was issued; and in March defendant filed his claim, which included a note for $500, most of which sum had been expended in improvements, and had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at $275, in which defendant did not take part, and the assignee sued defendant for that sum on his covenant:—Held, that the note formed an equitable if not a legal set-off against the claim; that the right to such set-off was matter of procedure, and governed therefore by the Act of 1875, not the Act of 1869; and that defendant was not precluded by having proved his claim. Quære, whether under the lease the payment of defendant's claim was not a condition precedent to his paying for improvements. *Mason* v. *Macdonald*, 45 U. C. R. 113.

The difference between our insolvent law, as to set-off, and that in England and the United States, remarked upon. *Ib.*

Subscription for Stock.]—Railway—Subscription for stock—Property in the stock held not to pass to assignee. See *Denison* v. *Smith*, 43 U. C. R. 503.

Trader—*Evidence.*]—The fact of the trading as well as the act of insolvency must be proved by the affidavits of two credible witnesses, in addition to the affidavit of the creditor, to support an attachment issued on the act of insolvency, created by s.ss. 2, 3, and 4 of s. 3. *Bogwell* v. *Hamilton*, 10 L. J. 305.

A trader who had ceased to trade before 1st September, 1864, cannot be proceeded against under s.ss. 2, 3, and 4. But it is not necessary for the plaintiff expressly to state in his affidavits for the attachment that the defendants were traders since the Act came into force. *Ib.*

Trader.]—Upon an application to set aside a writ of attachment, it appeared that the affidavit on which the order for the at-

tachment was granted made no reference to the debtor's occupation or business, except that it described him in the style of cause as a merchant, and afterwards stated that the deponent believed the debtor was insolvent within the meaning of the Act of 1875:—Held, that the heading of an affidavit is merely descriptive, and not an allegation of fact. Held, also, that the affidavit in question was defective in not stating facts sufficient to satisfy the Judge who granted the order that the debtor was a trader within the meaning of the Act. *Re Creen*, 15 C. L. J. 35.

Watch.]—An insolvent has no right to retain a valuable and expensive watch from his assignee on the ground that it is necessary and ordinary wearing apparel. *Re Sanborn*, 14 C. L. J. 241.

Watch.]—But a watch and chain which an insolvent had been in the habit of wearing, and of no great value, were not ordered to be given up to the assignee. *Re Robinson*, 15 C. L. J. 287.

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2. Assignee's Liabilities and Rights.

Acceptance of Assignment.]—A voluntary assignment to an official assignee under the Insolvent Act of 1864, s. 2, is not valid unless accepted by the assignee. *Yarrington* v. *Lyon*, 12 Gr. 308.

Every material allegation in a bill should be positive; and an allegation, that so far as the plaintiffs know, an assignee has not accepted the assignment executed by an insolvent, was held insufficient. *Ib.*

Accounting — *Removed Assignee.*] — J. was appointed official assignee of B. under the Insolvent Acts of 1864 and 1865. After the Insolvent Act of 1869 came into force, the creditors removed him and appointed another assignee in his place. Before his removal, J. rendered an account of his receipts and disbursements, with which the creditors were dissatisfied, and presented a petition to the Judge to examine the account, to settle and adjust it, and to order J. to produce the books, papers, and vouchers of the estate, and to pay over all moneys which might be found to be in his hands. The Judge held that the assignee, having already rendered an account, must be taken to have "fully accounted" within the meaning of the Act of 1864; that he had no jurisdiction over the removed assignee under that Act; and that he could not proceed under the Act of 1869, as the relief sought was not a "matter of procedure merely," and he dismissed the petition:—Held, on appeal, 1. That the summary remedies given by the Act of 1869 are applicable to assignees appointed under the Acts of 1864 and 1865; 2. That the Judge had jurisdiction, even under the Act of 1864, to examine into and decide upon the correctness of the items of an assignee's account, and to adjust such account; 3. That this jurisdiction exists over a removed assignee until he has "fully accounted" for his acts and conduct while he remained assignee; 4. That an assignee has not fully accounted within the meaning of the Act by rendering an account merely, but that the expression necessarily means accounting and paying over; 5. That the duties of an assignee are to conform himself to the law; and the performance of these duties may under either Act be summarily enforced by the Judge, and a removed assignee remains subject to this jurisdiction until he has fully accounted for his acts and conduct while he remained assignee. *In re Botsford*, 22 C. P. 65.

Advertisement.]—By assignees in insolvency for the sale of property. See *O'Reilly* v. *Rose*, 18 Gr. 33.

Advertisement of Sale.]—The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sale by a trustee or quasi trustee acting under a power. The power must be followed, and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, s. 47, who in such cases acts under a statutory power authorizing a sale, "but only after advertisement thereof for a period of two months." *In re Jarvis* v. *Cook*, 29 Gr. 393.

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale "for a period of two months" as prescribed by the Act, no sanction of the creditors thereto having been given:—Held, a good objection to the title by a vendee of the purchaser at such sale. *Ib.*

Appointment — *Board of Trade* — *Resolution.*] — Held, that the London board of trade, which was an organized body in operation before the Insolvent Act of 1864, had power, though not incorporated, to appoint official assignees under that Act; and that such appointment was properly made by resolution. *Churcher* v. *Cousins*, 28 U. C. R. 540.

The transmission of a copy of such resolution to the clerk of the county court, under s. 4, is directory only; and the omission to send it will not invalidate the appointment. *Ib.*

Appointment—*Board of Trade.*] — Official assignees cannot be appointed by unincorporated boards of trade formed after the passing of the Insolvent Act. *Newton* v. *Ontario Bank*, 13 Gr. 652, 15 Gr. 283.

Appointment—*Board of Trade—County Judge.*]—The county Judge of a county, in which no board of trade existed, appointed an official assignee for the county within three months after the Insolvent Act of 1869 came into force:—Held, that such appointment was valid under s. 31 of the Act, although a board of trade existed in an adjoining county but had not appointed an assignee. *Blakely* v. *Hall*, 21 C. P. 138.

Quære, can a board of trade appoint an official assignee under s. 31 after the lapse of three months from the time when the Act came into force. *Ib.*

In pleading to a declaration, charging a sheriff with neglecting to make the money under a fi. fa., an allegation that the execution debtor made an assignment under the Insolvent Act of 1869, to an official assignee for the county, appointed under the Act by the county Judge, and that the sheriff had surrendered the goods to the assignee, is sufficient, without alleging that no board of trade existed in the county, or in an adjacent county, or that no assignee had been appointed by a board of trade; and it would be sufficient to aver that the assignment had been made to an official assignee for the county, without shewing how the assignee was appointed. *Ib.*

Assisting in Fraud.]—Remarks as to the conduct of an official assignee in assisting an insolvent, who had no assets and no expectation of any, in a fraudulent attempt to take advantage of the Act, and as to the liability incurred thereby. *Thomas* v. *Hall*, 6 P. R. 172.

Bond to President of Board of Trade.]—A bond to W. S., of, &c., president of the board of trade of the city of London, to be paid to him as president of the said board, his successors and assigns, and executed by the sureties, but not by the assignee:—Held, sufficient, under s. 4, s.-s. 2. *Churcher* v. *Cousins*, 28 U. C. R. 540.

Quære, whether a defect in such security, or the absence of it altogether, would avoid the assignee's appointment. *Ib.*

Bond — *Official Assignee — Creditors' Assignee.*]—Held, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee under s. 29 of that Act but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee. *Armstrong* v. *Forster*, 6 O. R. 129.

Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them. *Ib.*

Bond — *Official Assignee — Creditors' Assignee.*]—Held, that where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Letourneux* v. *Dansereau*, 12 S. C. R. 397.

Chairman at Meeting.]—It is improper for the official assignee at the first meeting of creditors to act as chairman. *Re Harris*, 12 C. L. J. 251.

Collateral Attack on Status.]—Declaration by plaintiff as assignee in insolvency of McM., on the common counts. Plea, that McM. was not a trader within the meaning of the Insolvent Act of 1869. Replication by way of estoppel, setting out in full the proceedings and adjudication in the insolvent court, shewing that an attachment in insolvency issued against McM., that he petitioned the Judge to set it aside on the ground, among others, that he was not a trader within the Act, that the Judge decided that he was a trader, and that such decision was affirmed on appeal:—Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.:—Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events as against a debtor of McM., but were subject to question in this court. *Groves* v. *McArdle*, 33 U. C. R. 252.

Leave to take issue on the plea, reply specially, and demur, was refused. *S. C.*, 9 C. L. J. 126.

Commission—*Purchase at Percentage.*]—An offer by a creditor to purchase the estate at twenty cents in the dollar, exclusive of the claim of a bank, was accepted. The bank was fully secured by the purchaser's indorsation:—Held, that the assignee was not entitled to a commission on the bank's claim. *Re Smith & Co.*, 1 A. R. 480.

Disagreement Between Majority in Number and Majority in Value—*Official Assignee—Residence Out of County.*]—When the majority of creditors in number vote one way as to the appointment of an assignee, and the majority in value another way, there is not a "default of appointment," and under the circumstances of this case it was properly brought before the Judge, under s. 102 of the Act of 1875, to decide as to who should be assignee. A person properly selected as assignee is not ineligible because he is not an official assignee, or a resident of the county. *Re Harris*, 12 C. L. J. 251.

Dividend.]—An action may be brought against an assignee for a dividend on a duly collocated and advertised claim which has not been objected to. *Simpson* v. *Newton*, 4 C. L. J. 46.

How Far He Represents the Estate.]—The official assignee of an insolvent's estate is appointed for the conservation of the estate, and his powers and duties are only those pointed out in s. 16 of the Act of 1875. Where, therefore, a person claiming to be a purchaser of the assets petitioned the Judge in insolvency to have them restored to him, to which petition the official assignee appeared, and on discussion the Judge ordered a restoration of the estate to the alleged purchaser:—Held, that the insolvent estate was not represented in such proceeding, and that there had not been any valid adjudication upon the questions raised in this suit. *Smith* v. *McMillan*, 26 Gr. 300.

Invalid Appointment—*Right of Creditor to Object.*]—Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the assignment:—Quære, whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment. *Newton* v. *Ontario Bank*, 13 Gr. 652.

Invalid Appointment—*Sale.*]—Sale of goods by assignee not duly appointed.—Warranty of right to sell.—Liability. *Johnston* v. *Barber*, 20 C. P. 228.

Joint and Separate Creditors.]—At a meeting of creditors held to give their advice upon the appointment of an official assignee, it was held that the creditors of the individual partners had the right, as well as the creditors of the firm, to vote in the choice of an assignee. *Luxton* v. *Hamilton*, 10 L. J. 334.

Judge's Control Over Assignee.]—A demand for wages was made as a preferred claim to an assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of the claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county Judge, calling on the assignee to shew cause why he should not pay the claim, and the assignee not appearing, evidence was taken before the Judge, and an order made for payment forthwith, with costs, of a sum less than the original demand. The assignee afterwards paid the claim as reduced, but refused to pay any costs; upon which the Judge's order was made a rule of court, and execution issued thereupon against the goods of the assignee. Upon his application for a writ of prohibition to prohibit further proceedings on the writs or orders, &c.: —Held, 1. that the assignee should not have been ordered, so far as appeared, to pay costs; 2. that the power given to the Judge by s. 4, s-s. 16, of the Act of 1864 to control the assignee, is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the Judge has no power to enforce his orders by judgment and execution, though he might possibly compel an assignee to pay costs incurred by his disobedience, by making it a condition that he should pay them before he could be considered purged of his contempt; and that the only remedy of the assignee was to apply for a prohibition. *In re Cleghorn and Munn*, 2 C. L. J. 133.

List of Creditors.]—A list of creditors need not be appended to an assignment to an official assignee. *Hingston* v. *Campbell*, 2 C. L. J. 269.

Money Deposited by Insolvent—*Non-production of Deposit Receipt.*]—M. deposited a sum with the plaintiffs, and soon afterwards absconded. The plaintiffs had given him a receipt, stating the money was payable on the production of that document. A writ of attachment issued against the depositor's property as an absconding insolvent debtor under the insolvent Acts; and the defendant Little was appointed official assignee. He demanded the money without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of his appointment. He then sued the plaintiffs for the money. The action was restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant Little and another claimant of the money, whose claim accrued after the attachment, to interplead. The court, under the circumstances,—Held, that the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it, with the costs occasioned to the estate by their refusal. *Bank of Montreal* v. *Little*, 17 Gr. 313.

Notice of Action.]—An official assignee in insolvency sued for trespass in taking and selling goods, is not entitled to notice of action. So held in accordance with the cases deciding that a sheriff is not entitled to such notice. *Archibald* v. *Haldan*, 30 U. C. R. 39.

Objecting to Appointment—*Estoppel.*]—The plaintiff having proved his claim before the assignee and having obtained an order in this court to set aside the insolvents' discharge in the insolvent court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed. *Allan* v. *Garratt*, 30 U. C. R. 165.

Proof of Status.] — See *Creighton* v. *Chittick*, 7 S. C. R. 348.

Putting Status in Issue.]—In an action by plaintiff, describing himself as "the official assignee of the estate and effects of M. according to the statute in force concerning insolvents," against defendant, for a wrongful sale of goods seized by him under a distress warrant:—Held, that a plea denying the goods to be the goods of the plaintiff as such assignee, did not put in issue the plaintiff's official character as assignee. *McEdwards* v. *McLean*, 43 U. C. R. 454.

Reconveyance of Estate.] —After a deed of composition and discharge had been agreed upon, but before it was actually executed, the assignee, at the request of the inspectors, surrendered the estate to the insolvent, but never re-conveyed it. The insolvent afterwards refused to pay the assignee's fees in the insolvency proceedings, whereupon the assignee petitioned the Judge for an order on the insolvent to pay, and in default for permission to resume possession of the estate. Section 49 of the Insolvent Act of 1875 provides that in every case a deed of composition shall be on condition, whether the same be expressed or not, that if the same be carried out the insolvent shall pay the costs in the insolvency proceedings, including those for the confirmation of such composition. Section 59 declares that the composition may be either payable in cash or on terms of credit, and the payment secured or not, according to the pleasure of the creditors signing it, and the discharge, either absolute or conditional upon the composition being satisfied; and if the discharge be conditional upon the composition being paid, and the deed of composition and discharge should cease to have effect, the assignee shall immediately resume possession of the estate:—Held, that under s. 59 the assignee has no power to resume possession of the estate, except upon default of payment of the composition, where such payment is a condition precedent to the discharge. Semble, that s. 118 has reference only to costs of proceedings worked out in insolvency; but that if it applied here the assignee had lost his lien by parting with the possession. *Re Silver*, 2 A. R. 1.

Relation Back of Assignee's Title.]—The title of the official assignee appointed under compulsory proceedings does not, under the Act of 1864, relate back to the assignment, which is held to be the act of insolvency; his appointment vests in him only the estate and effects of the insolvent "as existing at the date of the issue of the writ of attachment, in the same manner and to the same extent as if a voluntary assignment under the provisions of the Act had been at that date executed in his favour by the insolvent." *Thorne* v. *Torrance*, 16 C. P. 445; 18 C. P. 29.

Replevin.]—Goods are replevinable out of the hands of a guardian in insolvency, notwithstanding C. S. U. C. c. 29, s. 2. *Jameson* v. *Kerr*, 6 P. R 3.

Replevin.]—Where the goods of A. having been seized by the sheriff under an execution against B., had been handed over by the sheriff to an assignee, to whom the debtor had made a voluntary assignment in insolvency:—Held, that A. might maintain replevin against the assignee:—Held, also, that s. 50 of the Insolvent Act of 1869, could not apply against the plaintiff, who was not a creditor or in any way interested in the estate of the insolvent. *Burke* v. *McWhirter*, 35 U. C. R. 1.

Replevin.]—An official assignee appointed under the Insolvent Act of 1875, is an officer within C. S. U. C. c. 29, s. 2, and goods in his possession as such assignee cannot be replevied. *Barclay* v. *Sutton*, 7 P. R. 14.

Residence.]—The Act of 1865, s. 2, does not authorize a voluntary assignment to an official assignee in any part of either Upper or Lower Canada; but means only that it may be made to any official assignee entitled to take it under the Act of 1864, without compliance with the formalities mentioned therein. *White* v. *Cuthbertson*, 17 C. P. 377.

Residence—*Adoption of Invalid Appointment.*]—Held, following Hingston v. Campbell, 2 C. L. J. 299, and White v. Cuthbertson, 17 C. P. 377, that a voluntary assignment to an official assignee must be to one resident in the county within which the insolvent has his place of business; but semble, that the creditors may acquiesce in an assignment to a non-resident official assignee, and thus constitute him their assignee. *McWhirter* v. *Learmouth*, 18 C. P. 136.

Defendant's execution was handed to the sheriff on the 28th June, the assignment to the plaintiff made on the 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent and did not object to the assignment, and at which it was agreed to discharge the insolvent, was held on 28th August following:—Held, that even if the creditors had adopted plaintiff as their assignee, which did not appear, it would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting, not to that of the assignment. *Ib.*

Restraining Proceedings against Surety.]—This court will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency, notwithstanding several actions may have been brought against them, and the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become security. The proper mode of proceeding in such circumstances is as pointed out in Sinclair v. Baby, 2 P. R. 117. *Craig* v. *Milne*, 25 Gr. 259.

Revivor.]—When a defendant becomes insolvent after the service of the bill upon him, (but before the time for answering expires), and the suit is thereupon revived against the assignee in insolvency, it is necessary to serve the assignee with the bill as well as with the order to revive, or an order pro confesso cannot be obtained. *Smith* v. *Lines*, 1 Ch. Ch. 398.

Rights Higher than those of Execution Creditor.]—An assignee in insolvency may assert rights to the estate of the insolvent which cannot be enforced at the instance of an execution creditor. *Fisken* v. *Brooke*, 4 A. R. 8.

Security for Costs.]—An assignee in insolvency bonâ fide suing in discharge of his duty as such assignee will not be required to give security for costs on the ground that he is without means and not beneficially interested in the suit. *Vars* v. *Gould*, 8 P. R. 31.

Selecting Solicitor.]—The assignee has the sole right to select his own professional adviser, and cannot be made to change him, except upon reasonable ground. *In re Lamb*, 17 C. P. 173.

Setting Aside Judgment.] — Where final judgment in default of appearance to a specially indorsed writ was entered on the 23rd January, and execution issued on the 30th of same month, and a writ of attachment under the Insolvent Act of 1864 issued on the 3rd February, an application on the 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service, was held to be too late. *Dunn* v. *Dunn*, 1 C. L. J. 239.

Leave to the official assignee to defend on the merits, which, if granted, would have had the effect of destroying plaintiff's priority as against the attaching creditors, was refused, and the official assignee left to his remedy, if any, in term, as against the judgment on the ground of fraud. *Ib.*

Solicitor Assignee.]—The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate and used his own name as the attorney on the record. The plaintiff obtained a verdict:—Held, that under s. 32 of the Insolvent Act of 1875, he was entitled to tax disbursements only against the defendants. *Agnew* v. *Ross*, 8 P. R. 67.

Taxation of Solicitors' Costs.]—An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned the position and gave these attorneys the money of the estate remaining in his hands, with instructions to pay their own costs first, and then to hand the balance to the new assignee. This they did and rendered their bill of costs:—Held, that the estate of the insolvent was, within the meaning of C. S. U. C. c. 36, s. 38, the "party liable to pay," though "not chargeable as a principal;" and the second assignee was entitled to have the bill taxed. *In re A. & B.*, 6 P. R. 68.

Technical Objections to Chattel Mortgage.]—Under s. 39 of the Insolvent Act of 1875, an assignee represents the creditors for the purpose of avoiding a mortgage for want of compliance with the Chattel Mortgage Act. *Re Andrews*, 2 A. R. 24.

Technical Objections to Chattel Mortgage.]—A chattel mortgage, given to secure the mortgagee against his indorsements for a mortgagor, must shew on its face that the notes indorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be void against creditors or purchasers, but not against the

assignee in insolvency. *Ontario Bank* v. *Wilcox*, 43 U. C. R. 469.

Technical Objections to Chattel Mortgage.]—The assignee of an insolvent mortgagor can, for the benefit of creditors, impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act. *Re Barrett*, 5 A. R. 266.

Technical Objections to Chattel Mortgage.]—In trover for goods against an assignee in insolvency:—Held, following the last case, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do. *Snare* v. *Smith*, 45 U. C. R. 156.

Technical Objections to Chattel Mortgage—*Transfer of Right to Attack.*] On December 3rd, 1875, M. & D. mortgaged to the plaintiffs, amongst other goods, a stumping machine and lumber waggon complete, blacksmith's tools, lumber, &c., on the mortgagors' premises, which were described, with defeazance on payment of $1,255 on 1st June, 1876. There was a covenant that the mortgagees might enter and take possession and sell on default, or on any attempt by the mortgagors to sell or part with the possession of the goods without the mortgagees' assent, but no provision for the mortgagors remaining in possession until default. The affidavit of bona fides stated that the mortgage was not made for the purpose of protecting the goods against the creditors of M. & D.—not adding, or either of them—or preventing the creditors obtaining their claims against him, instead of them. On the 27th March, one F. issued an attachment in insolvency against M. & D., and on the 26th April, H. was appointed assignee. On the same day, H., in consideration of $300, assigned to F. all his right and interest as assignee to and in all the personal estate, &c., of said insolvents; and on the 26th April, F., after reciting the above purchase, in consideration of $708, assigned to defendant, out of whose possession the plaintiffs, on the 17th May, 1876, replevied the goods in question, claiming them under the mortgage:—Held, that the plaintiffs were entitled to succeed; that in the absence of evidence of the creditors' sanction the sale by the assignee could not be supported; that it could not be assumed that the assignee intended to pass any title to the goods free from the mortgage; that neither F. nor defendant was in a position to raise objections to the mortgage; and that the plaintiff had a right to replevy, though the mortgage was not due. Quære, whether an assignee in insolvency can raise technical objections to a mortgage not impeachable under the Insolvent Acts. Per Gwynne, J.—If the assignee could have avoided the mortgage in the interest of the creditors, he could not transfer such right. The learned Judge at the trial found that the description of the goods in the mortgage, and the affidavit, were sufficient; that the mortgage was not invalid as creating a preference or under the insolvent law; and that s. 125 of the Insolvent Act of 1875, did not apply; and the court concurred in these findings. *Bertram* v. *Pendry*, 27 C. P. 371.

Transfer of Right to Attack.]—On the 7th December, 1874, one L. made an assignment under the Insolvent Act of 1869, and the plaintiff was appointed assignee. On the 28th December, defendants filed their claim for $132,721.43, setting out certain warehouse receipts held by them as security, valued at $8,927.43, and other securities, also valued, which reduced the claim for proof to $99,458. At a meeting of creditors held on the same day, a proposal of a firm of L. & Co. to purchase the estate en bloc for $50,000, was accepted. On the 29th December, by resolution of the inspectors, defendants were authorized to retain these receipts at their valuation. On the 13th January, 1875, at a meeting of creditors, it was resolved that further inquiry should be made as to the validity of the receipts, and that the resolution of the inspectors be rescinded; but nothing more was done under it. On the 3rd February, 1875, a deed was executed by the assignee, by which, after reciting the agreement for sale to L. & Co., the assignee conveyed certain real estate specified "and all the entire estate, stock-in-trade, book debts and effects of said insolvent, of every nature and kind soever, and all the interest of the creditors in the said estate and effects," to hold "the same, and all benefit that can or may be derived therefrom, unto said purchasers," L. & Co. were creditors of the estate, and had been present at all the meetings of creditors. After this conveyance a dividend was declared and advertised, to which no objection was made, and the bank received it on the reduced amount, $99,458, proved for by them. Subsequently L. & Co. brought this action in the name of the assignee for the goods covered by the warehouse receipts, on the ground that the receipts were invalid. The assignee, however, stated that he had never objected to their validity, and had intended to allow defendants to retain them; and had given no consent to this action being brought in his name, except what was contained in the transfer; and there was no further evidence shewing that the assignee sold or intended to sell, or L. & Co. to purchase, the property in dispute:—Held, that the action would not lie, for the claim did not pass under the transfer by the assignee, who had not authorized the suit, and the court refused to substitute the names of L. & Co. as plaintiffs. Quære, whether, after what had been done by the assignee and inspectors, the claim could have been assigned. *Mason* v. *Merchants' Bank*, 27 C. P. 383.

Title of Firm's Assignees as against Creditor of Partner.]—V. and J. D. being in partnership, J. D. went out, and his father, D. D., took his place in the firm. About six months after this V. assigned to D. D. all the stock-in-trade, but the possession was not changed nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after plaintiffs' title accrued did not appear:—Held, that they must succeed; that they were clearly entitled to the goods themselves, for defendant, as creditor of one partner, could not seize them out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts. *Wilson* v. *Vogt*, 24 U. C. R. 635.

Trover.] — Insolvency — Sale of goods — Validity—Trover by assignees—Estoppel in

pais — Equitable plea. See *Mackenzie* v. *Davidson*, 27 C. P. 188.

Warehouse Receipts.] — Insolvent Act of 1869 — Warehouse receipts — Rights of pledgees as against the assignee. See *In re Coleman*, 36 U. C. R. 559.

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3. *Composition and Discharge.*

(a) *Conditions and Objections.*

Aiding Creditor to Obtain Judgment.]—The mere fact of a person in insolvent circumstances not defending one action, and defending and thus delaying another, is not illegal by the common law; but under the Insolvent Act it is fraud for an insolvent to cause his goods to be taken in execution to the prejudice of his general creditors, even though the preferred claim be a just one. It was not decided whether this would avoid the judgment; but if not, it was nevertheless an act of fraud for which some punishment should be awarded, though not necessarily to the extent of a perpetual refusal of the insolvent's discharge. *In re Jones*, 4 P. R. 317.

Assent of Majority—*Surety.*]—By a deed of composition and discharge made between the insolvents of the first part, and the several persons, firms and corporations who were creditors of the insolvents, thereinafter called the creditors, of the second part, —after reciting the insolvents' inability to pay their liabilities in full, and their agreement with their creditors for a composition and discharge upon the terms and in manner thereinafter mentioned, under the provisions of the Act of 1875, and the insolvents' agreement to secure the payment of the creditors thereinafter mentioned by their notes,—it was witnessed that in consideration of their indebtedness, and of the discharge thereby given, the insolvents covenanted and agreed with all their creditors collectively, and severally, to pay to them and to each of them the amount of the composition specified and agreed upon by several instalments; and for securing the payment of the last three instalments the insolvents covenanted to have conveyed to the assignee the composition notes given to one G. T. G. T., who was not a creditor but a surety to the plaintiffs for defendants' debt, without paying their claim, and without their consent, proved as a creditor and signed the composition deed, and without him there would not have been a sufficient statutory majority:—Held, on demurrer to the pleadings set out in the report: 1. that under ss. 10 and 61 of the Act of 1875, a non-assenting creditor need not have proved his claim to entitle him to the benefits of the deed; 2. that the deed was absolute, and not conditional on a delivery of the composition notes being made, the creditors' remedy being on the insolvents' covenant; 3. that the deed was not open to objection as providing only for the partnership debts, for that it applied both to the joint and separate creditors; 4. that under s. 2, s.-s. *h*, and ss. 49-52 of the Act of 1875, the consent to the deed of a majority of those creditors who have proved claims of $100 and upwards, and representing three-fourths in value of such claims proved, is required; 5. that G. T. had no right to prove. *Lewis* v. *Tudhope*, 27 C. P. 505.

Assent of Required Number of Creditors—*Surety—Fraud.*]—The plaintiffs were creditors of the defendants, insolvents, for $10,800, and not having proved, T., who was surety for the plaintiffs, without having paid the debt, proved therefor, fearing, as he alleged, that, if compelled to pay, he would have no recourse against the estate. One R., a surety for other creditors, in like manner proved. The proof of these claims was not contested, and a deed of composition and discharge was entered into, which was executed by T. and R., it being admitted that without computing one or the other of these claims there were not creditors to three-fourths in value executing; and on the production to the Judge of the assignee's certificate of there being the proper number and value of creditors executing, the deed was confirmed. The composition was to be paid by instalments, for which the insolvents were to give their promissory notes, and it was provided in accordance with a stipulation to that effect by the creditors, that the three last payments to the creditors, except T., were to be secured by the assignment of the dividends on the notes to be given to T., and such notes were accordingly assigned by him as such security, and the proceeds thereof applied in meeting a deficiency in such payments. After the deed had been confirmed and the estate handed back to the insolvents, the plaintiffs sent in proof of their claim, valuing their security, which the assignee refused to accept, because the estate had passed out of his hands, and he referred plaintiffs to the insolvents, but nothing further was done. The plaintiffs sued defendants on the common counts for the whole debt, and on a special count for the amount of the composition, alleging neglect in the defendants to give them the composition notes, or pay their debt:—Held, that the plaintiffs could not recover under the common counts, for that the deed of composition and discharge constituted a good defence thereto; and the special replications thereto, set out in the report, were not proved: for that even if the plaintiffs' debt were excluded therefrom there would still be the three-fourths in value of creditors executing; that defendants did not, as was alleged, procure T. to prove so as to defeat the plaintiffs, for that he did it of his own accord for the reason above stated, nor did the giving the notes to T. diminish the proportion each creditor was entitled to, nor had the assignment of the notes as such security the effect of postponing the time of payment of the notes. Held, however, that the plaintiffs were entitled to recover the amount of the composition, after deducting the value of their security; that no demand of the notes was necessary, it being defendants' duty to give them; nor, in case of composition, for the plaintiffs to have proved their claim; that what was done by plaintiffs amounted to a specification and valuation of their security, but, if not, defendants under the circumstances should not be permitted to set this up as a defence. *Lewis* v. *Tudhope*, 30 C. P. 279.

Assignee's Refusal to Act.] — Held, following Yarrington v. Lyon, 12 Gr. 308, that a voluntary assignment to an official assignee under the Act of 1864, s. 2, is not valid when the assignee has refused to accept or act under it; and in such a case a discharge obtained by the insolvent could have no effect. *Becher* v. *Blackburn*, 23 C. P. 207.

Assignment Invalid—*No Accounts.*]—Discharge refused, because assignment not made to the assignee where insolvent carried on business, and was not in duplicate, and insolvent had kept no proper accounts. *In re Sullivan*, 5 C. L. J. 71.

Books Not Kept.]—Under ss. 56 and 57 of the Insolvent Act of 1875, a Judge has no power to grant an insolvent his discharge, where he has failed to keep a cash book and account books suitable for his trade, even although such omission may not be due to any fraudulent intention. *Re Gooding*, 5 A. R. 643.

Books Not Kept.]—Where an insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge under the Insolvent Act of 1875 though such failure may not be owing to any improper motive. In this case, however, as the insolvent had kept certain books, which although imperfect were honestly meant as a business record, his discharge was only suspended for three months. *Re Bullivant*, 5 A. R. 638.

Books Not Kept.]—In order to absolutely disentitle an insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must shew that there were no books; or, if there were, in what respect they were defective. *Re Russell*, 7 A. R. 777.

Books Not Kept—*Deficiency not Accounted For.*]—The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of $40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily accounted for. He did not produce all his books, but it was proved that they were kept in such a manner that they would not shew the true state of his affairs. The cash book had never been balanced, and no balance sheet was ever made out; bills were discounted which did not appear in any of the books, and goods were transferred from his wholesale to his retail place of business without entry in the books that were kept:—Held, 1. that though an insolvent may be guilty of the offence of not fully, clearly, and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; 2. that the omission to keep any books prevents the Judge from granting a discharge, whether the intent be fraudulent or not; but, 3. when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; 4. that under the facts in this case the insolvent was not entitled to his discharge. Liberty to the insolvent to renew the application was given, if he should be so advised, on his producing the remainder of his books. *In re Hill*, 7 A. R. 694.

Concealment of Assets.]—Where an insolvent before the meeting of his creditors concealed a portion of his stock:—Held, (under the Insolvent Act of 1864) that his discharge was thereby avoided, and that it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed. The plaintiff, therefore, though he had signed a deed of composition and discharge, and the discharge had been confirmed, was held entitled to recover for his debt. *McLean* v. *McLellan*, 29 U. C. R. 548.

Concealment of Assets—*Partnership.*]—A final order of discharge obtained by an insolvent upon a deed of composition and discharge duly confirmed, will be vacated by this court, on bill filed by a creditor, party to the insolvency proceedings, where such discharge had been obtained by a fraudulent concealment of assets. An insolvent firm, on September 16th, 1878, made an assignment under the Insolvent Acts. On October 2nd, 1878, a deed of composition and discharge, under the said Acts, was executed, whereby the said firm covenanted to pay a certain dividend, and on February 28th, 1879, the Judge in insolvency made an order for its confirmation, a sworn statement of the assets and liabilities of the firm having been first duly filed by the members thereof. Long afterwards one of the creditors, who had consented, on payment of a certain dividend, to assign his claim to S. as trustee for the insolvent firm, and for the purpose of executing the said deed, though he himself refused to execute it, discovered that C., one of the members of the firm, had fraudulently concealed some of his assets, and he filed a bill in this court to have the said deed of composition, and the order confirming the same, declared void as against him:—Held, that the deed and order of confirmation must be vacated as regarded C., and the insolvency proceedings reopened, so that there might be a due administration of the assets thus withheld, and the assignment to S. must be prevented from being set up as a bar to such relief. *McGee* v. *Campbell*, 2 O. R. 130; reversing 28 Gr. 308.

Held, also, inasmuch as the assets fraudulently concealed were C.'s private property, and not the property of the partnership, the discharge should only be vacated as to private estate of C. *Ib.*

It also appeared that among C.'s assets was a certain sum received by him, or to which he had a claim, from a certain railway company as compensation for services rendered as temporary acting president:—Held, that C. was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder. *Ib.*

It appearing that part of C.'s assets was certain railway stock, obtained by him on a contract that he was to retain one-half if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, and he was to re-transfer:—Held, that the shares should have been returned in his sworn statement as part of his assets, for the language of the statute was large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee. *Ib.*

Consent of Creditors.]—The provisions of s. 11 of the Act of 1864, with reference to notices, do not apply to an insolvent who has a consent from his creditors to his discharge or has procured the execution by the requisite number of his creditors of a deed of composition and discharge, and who is applying for a confirmation of discharge. Section 9, s.-ss. 6 and 10, point out all that is to be done by the insolvent, to enable him to bring his appli-

cation before the Judge. *In re Waddell*, 2 C. L. J. 242.

Continuing Business After Insolvency.]—A trader, after discovering that he could not pay in full, continued his business, in the hope, which was not shewn to have been, absurd or unreasonable, that he would thereby be able to do so; and in the course of the business so continued contracted some new debts; but was unsuccessful, and found it necessary to assign under the Act:—Held, that he was not thereby disentitled to his discharge. *In re Holt*, 13 Gr. 568.

In such a case it may or may not be his duty to discontinue his trade, according to circumstances; continuing may be a fraud but is not necessarily so. *Ib.*

Debt Contracted by Fraud.]—Fraud in contracting debts before the Act (1864), is not to be excluded from consideration on an application to confirm the discharge. *In re Owens*, 12 Gr. 560.

Deficiency not Accounted For.]—The absence of any satisfactory statement how it came that a credit balance of $15,000 a short time before the insolvency was turned into a debit balance of nearly $13,000; the loan of $17,000 by the insolvent to his brother, to carry on a business which failed, and which was carried on without capital; the receipt of $1,250 by the insolvent a few months before his insolvency without any reasonable account of what had become of it; were considered to be circumstances which shewed that the insolvent was not entitled to his final certificate. *Hood* v. *Dodds*, 19 Gr. 639.

Explanation of Loss.]—Where creditors are called upon to accept a composition, they are entitled to know where the goods and money entrusted to the debtor are gone, and to what causes the loss is to be attributed. *Hood* v. *Dodds*, 19 Gr. 639.

An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts. *Ib.*

Failure to Pay Dividend.]—Held, that the insolvents were not entitled to a discharge under s. 65 of the Insolvent Act of 1875, as the facts, set out in the report of the case, did not shew that their failure to pay a dividend of fifty cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the meaning of the third proviso to that section. Quære, as to the effect of neglecting to mail such declaration to each creditor, as required by that section. *In re Galbraith and Christie*, 5 A. R. 358.

False Representations as to Assets.]—Where a trader, all whose property was heavily mortgaged, and who had large over-due debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth $4,000 more than he owed, and that he had no engagements he could not meet; this was held such fraud as disentitled him to his discharge. *In re Owens*, 12 Gr. 560.

Fraud.]—To a plea of discharge, confirmed by the Judge, the plaintiff replied a corrupt agreement between the insolvent and D. & Co., parties to the deed of composition and discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition, for which the insolvent gave them his note; and that the plaintiff and other creditors had no knowledge of such agreement until after the confirmation:—Held, a good answer, the confirmation not being made conclusive by the Act under such circumstances. *Thompson* v. *Rutherford*, 27 U. C. R. 205.

Fraud.]—In an action on a promissory note, with a plea of discharge under the Insolvency Act, and replication that the discharge was obtained by fraud, inasmuch as defendant had concealed from the assignee certain promissory notes, it appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least $300 of notes of a third person, she otherwise refusing to consent to a mortgage of the farm. It further appeared that defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shewn:—Held, that the plaintiff was on this evidence entitled to recover. *Golloghy* v. *Graham*, 22 C. P. 226.

Fraud—*Pleading.*] — A declaration, after declaring on two bills of exchange in separate counts, proceeded to aver that the debt for which the bills were given was contracted under such circumstances as to render the defendant liable to imprisonment under s. 136 of the Insolvent Act of 1875. To this averment defendant demurred, treating it as a third count, on the ground that it was defective in not alleging certain facts necessary to bring defendants within the provisions of the Act:—Held, that this averment was not the subject of either a plea or demurrer. *Rutherford* v. *Eakins*, 27 C. P. 55.

Fraud—*Pleading.*] — Where a defendant was sued for a debt, and, under ss. 92 and 93 of the Act of 1869, was charged in the declaration with fraud committed in incurring such debt:—Held, that such fraud might be proved in an action and defendant declared guilty, whether the case was tried by a common jury or by a Judge without a jury. Regina v. Kerr, 26 C. P. 214, distinguished, as having been an indictment for an offence under s. 147. The defendant in such a case may plead or demur to that part of the declaration which charges the fraud. *Elley* v. *Pratt*, 41 U. C. R. 365.

Fraud.]—To a plea of a discharge under the Act of 1875, confirmed by the Judge, the plaintiff replied that defendant purchased the goods sued for on credit at a time when he knew himself to be unable to meet his engagements, which fact he concealed from the plaintiffs with intent to defraud the plaintiffs of the said goods Section 63 of the Act of 1875 declares, inter alia, that a discharge under the Act shall not apply without express consent of the creditor to any debt for enforcing payment of which the imprisonment of the debtor is permitted by the Act. Section 136 enacts that a person guilty of what was charged in the replication shall be guilty of a fraud, and liable to imprisonment, "provided always that in the suit or proceeding taken for the

recovery of such debt the defendant be charged with such fraud, and be declared guilty of it by the judgment rendered in such suit or proceeding." The case was tried without a jury, and the Judge left it for the court to say whether, upon the facts as found by him, the defendant was guilty of fraud:—Held, affirming 40 U. C. R. 366, that the judgment referred to in s. 136 is the verdict of the jury, or the judgment given at the trial by the Judge, if the case is tried without a jury; and that the replication must fail, as the defendant had not been found guilty of fraud at the trial. *Rooney* v. *Lyons*, 2 A. R. 53.

Fraud.]—The plaintiff sued the defendant, an insolvent, who had obtained his discharge under a deed of composition and discharge, for a debt alleged to have been contracted under such circumstances that the imprisonment of the debtor for enforcing payment is permitted by s. 136 of the Insolvent Act, 1875:—Held, reversing 42 U. C. R. 469, that the plaintiffs had not precluded themselves from enforcing the claim by having proved it in the ordinary way, and not as a debt contracted by fraud; or by having taken notes made by the defendant and his sureties for the composition, and received payment of one of them. The term "dividend from the estate" in s. 63, includes a payment under a deed of composition and discharge. *McMaster* v. *King*, 3 A. R. 106.

Gambling.]—Gambling by a person who subsequently claims the benefit of the Act, is not fraud within the meaning of the Act of 1864; and quære, whether gambling is fraud at all under that Act. *In re Jones*, 4 P. R. 317.

Indorsement of Notes.]—The mere indorsement of renewal notes by a person in insolvent circumstances is not a violation of s. 8, s-s. 7, of the Act of 1864. *In re Jones*, 4 P. R. 317.

Joint and Separate Creditors—*Assent of Each Class Necessary.*]—Where there are joint and separate creditors, a deed of composition and discharge, although providing for all the creditors and dealing with all the estates, is invalid under s. 56 of the Act of 1875, unless the assent of the requisite proportion of the creditors of each class, joint and separate, is obtained. *In re Code and Crain*, 3 A. R. 255.

Joint and Separate Creditors.] — A deed of composition and discharge made only with an insolvent's partnership creditors is not binding on an individual creditor; and even if the deed could be held to extend to individual creditors, the fact of its purporting to be made, not with all the creditors, but only with those executing the deed, would prevent it affecting a non-executing creditor. *Pidgeon* v. *Martin*, 25 C. P. 233.

No Assets.] — On application for a discharge:—Held, on the facts set out, that the insolvent had an estate to be administered under the Insolvent Act. Quære, whether, if there had been no estate, proceedings could have been taken by the debtor. *In re Smith*, 4 P. R. 89.

No Assets.]—The defendant having been arrested under a ca. sa. in April, 1873, applied for a discharge from custody, on the ground that when the order was made, and for a long time previous, he was an insolvent under the Act of 1869. It appeared that being sued by the plaintiff, who was his only creditor, the defendant, in September, 1873, made a voluntary assignment under the Act to an official assignee, having then no assets and no expectation of any; and that he had since acquired none; and his own statement was, that he was driven to take advantage of the Act on account of the plaintiff's alleged claim, which he had no means of paying:—Semble, that he could not in this way become entitled to his discharge under the Act; and that the assignment, under the evidence, more fully set out in the case, must be regarded as a fraudulent device to defeat the plaintiff, by means of the abuse of the provisions of the Act. *Thomas* v. *Hall*, 6 P. R. 172.

No Assignment.]—Under s. 9 of the Act of 1864, a consent to a discharge is operative even without an assignment, provided the insolvent files an affidavit that he has no estate or effects to assign. In this case the only notice given was the notice to discharge. *In re Perry*, 2 C. L. J. 75.

No Notice by Assignee—*No Assets.*]—The other provisions of the Act being complied with, a discharge cannot be refused because of the neglect of the assignee to give notice, as required by s. 11, s-s. 1, of the Act of 1864, or because the insolvent had no estate. *Re Thomas*, 15 Gr. 196.

Non-assenting Creditors not Parties—*Estoppel by Acceptance of Composition—Secured Debt.*]—Held, 1. That a deed of composition and discharge under s. 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of $100 and upwards of the first part, and the insolvents of the second part, is valid, though the non-assenting creditors were not specially made parties to the deed. 2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the discharge. 3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the assignee to such election, is not to be estimated in considering the amount of indebtedness. *In re Lawson*, 5 C. L. J. 232.

Notice of Objections to Discharge.]—It is not necessary, under s. 54 of the Insolvent Act, 1875, to give the insolvent notice of the facts upon which the objecting creditors intend to contest the confirmation of a deed of composition and discharge. *Re Walker*, 2 A. R. 265.

Omission of Contingent Interest.]—An insolvent had the possibility of an interest under a will (the construction of which was incidentally considered for the purpose of the appeal) which, however, was omitted from his schedule of assets, as being of no value:—Held, that this omission was not an act of fraud. *In re Jones*, 4 P. R. 317.

Omission to State Causes of Insolvency.]—The insolvent swore to an affidavit verifying the statement of liabilities and assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. The defect was not pointed out for more than a year, and after

the discharge had been applied for, and the insolvent then swore to another affidavit supplying the omission:—Held, that the omission to furnish the statement within seven days from the assignment under s. 17 of the Insolvent Act, 1875, was immaterial, as it expressly gave the right to correct or supplement the statement, which had been done:—Held, also, that under s. 57, the omission complained of would not disentitle the insolvent to his discharge, as it was not wilful:—Held, also, that under the circumstances more fully set out in the report of the case, the opposing creditor was estopped from objecting to the omission. *Re Martin and English*, 5 A. R. 647.

One of Two Insolvents.]—Where a deed of composition made by one of two insolvents provided for his release on payment of a composition by him to the creditors, and directed a re-transfer to him of the estate, it was held invalid. *Re Walker*, 2 A. R. 265.

Preference—*No Accounts.*] — Giving up part of stock to a creditor—Evidence of fraudulent preference—Discharge refused—Conditional discharge—Effect of insolvent not keeping proper books of account. *In re Beare*, 3 C. L. J. 294.

Preference—*No Accounts.*] — The Judge in insolvency refused an insolvent his discharge on the grounds, 1. That he had made a preferential assignment in 1857. 2. Had kept no books of account shewing receipts and disbursements of cash, and other books suitable for his trade:—Held, that the first ground was not sufficient, for there was no law against it when made; and that as to the latter, considering that some three months only had intervened between the Act of 1864 and the application for discharge, and the inconsiderable nature of his business, the insolvent should not have been so severely dealt with, though this was wholly in the discretion of the Judge. But as the Judge, though doubtful as to it, had not inquired into the bona fides of the assignment of 1857, and the disposition of his property under it, the case was referred back to him for re-consideration on these points. *In re Parr*, 17 C. P. 621.

Semble, that such assignment, being valid when made, could be impeached, under s.-s. 6 of s. 9 of the Insolvent Act, 1864, only upon the grounds that by it the insolvent had fraudulently retained and concealed some portion of his estate, or had been guilty of evasion, &c., in his examination as to his effects. *Ib.*

Quære, whether fraud committed before the Act is fraud within the meaning of the Act, so as to be a valid ground of opposition to a discharge. *Ib.*

Preference — *No Accounts—Compliance with Act.*]—It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as were considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The county Judge granted a discharge suspensively, to take effect four months after the order. *In re Lamb*, 4 P. R. 16.

Upon appeal from this order by a creditor, the Judge in chambers thought that the Judge below had acted with extreme leniency, and though he would not interfere with the order, dismissed the appeal, but without costs. *Ib.*

Remarks upon the breach of duty in not keeping proper books of account. *Ib.*

The requirements of the Act on debtors asking for their discharge should be peremptorily insisted on. *Ib.*

Preferential Payments — *Impossible Conditions.*]—It appeared that the assignment was made on the 10th June, 1868; that on the 15th April previous the insolvents had paid to their father two promissory notes, made by them in July and August, 1867, at three months, for $934. The father in his examination swore that these notes were given by the insolvents for their respective private debts bonâ fide due to him for money lent and paid, and for their board between 1863 and 1866; and that he had no knowledge of their business until the 27th April, 1868, when he was asked by one of them for an advance of $2,000, which he refused, not being satisfied with the statement of their affairs then produced to him. His statement was confirmed by the insolvents. The learned county court Judge upon this evidence decided that the payments to the father were preferential, and he made the discharge of the insolvents within three years conditional upon their payment of the amount so paid. Upon appeal:—Held, 1. That the evidence could not be assumed to be untrue, and that the payments therefore could not be treated as preferential. 2. That if this were otherwise, the order could not be upheld, for the statute only authorizes conditions within the power of the insolvents to comply with. *In re Wallis*, 29 U. C. R. 313.

Previous Application Refused.]—It is no objection to an application by an insolvent for a discharge under ss. 64 and 65 of the Insolvent Act, 1875, that a previous application under s. 56 to confirm a deed of composition and discharge had been refused, where it appeared that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims. *Re Russell*, 7 A. R. 777.

Quære, whether an assignee would be justified in reconveying the estate to the insolvent under the direction contained in a deed so insufficiently executed. *Ib.*

Purchase When Insolvent.] — A purchase of goods by persons unable to pay their debts in full is not fraudulent within s. 8 of the Insolvent Act, 1864, or a reason for refusing the discharge, unless such inability is concealed from the creditor with intent to defraud him. *In re Garratt*, 28 U. C. R. 266.

Retention or Concealment of Property.]—Upon his appointment the assignee took an inventory of the property, but owing to the execution of the deed of composition and discharge, afterwards declared inoperative, did not remove it:—Held, not a retention or concealment by the insolvent, so as to disentitle him to his discharge; in such a case the retention and concealment necessary to disentitle an insolvent to his discharge must be wilful and fraudulent. *Re Russell*, 7 A. R. 777.

Secret Benefit to One Creditor — *Costs.*]—Where, under the Act of 1875, creditors of the insolvent signed a deed of composition and discharge upon the assignee giving them his note to cover certain law costs which they had incurred in endeavouring to recover the claim, and there was not a sufficient number in value of creditors signing without them:

—Held, that the deed was invalid, even though the act of the assignee was unauthorized by the insolvent. *In re McRae*, 1 A. R. 387.

Settlement in Good Faith.]—A post nuptial settlement upon his wife was made by an insolvent at a time when he was not aware of his inability to meet his liabilities, and while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful:—Held, no ground for refusing the insolvent his discharge. *Re Russell*, 7 A. R. 111.

Unfavourable Conduct Without Fraud.]—Held, that the facts set forth in this case, though unfavourable to the insolvent, were distinguishable from acts or other misconduct constituting fraud, and that unless the latter be shewn, the insolvent is entitled to the benefit of the statute. *In re Smith*, 4 P. R. 89.

(b) *Effect of Discharge.*

Claim for Costs.]—To an action for attorney's costs defendant pleaded his discharge under the Act of 1864, alleging that the plaintiff's name and residence, with a statement of defendant's indebtedness to him being for a balance of costs in two suits specified, were stated in his schedule filed, and that he was not aware before obtaining his discharge of the exact amount of such indebtedness. The plaintiff replied that his name was not mentioned in the schedule for any sum or amount whatever:—Held, on demurrer, that the debt due to the plaintiff was, under the circumstances, sufficiently stated in the schedule. *Cameron* v. *Holland*, 29 U. C. R. 506.

The statute (Act of 1864) is substantially complied with if the debt is set out in such a manner as cannot mislead, and leaves no doubt as to the debt referred to, and the amount is capable of being ascertained by the creditor. *Ib.*

Claim not Mentioned in Schedule—*Indefinite Reference.*]—To an action of covenant contained in a mortgage the defendant pleaded a discharge in insolvency under a deed of composition and discharge, but to which the plaintiff was no party. Neither the plaintiff's name nor debt was mentioned in the sworn statement exhibited at the first meeting of creditors, nor was there any supplementary statement, as provided for by the Act, subsequently furnished containing any such reference, but it was urged that a couple of lists containing very indefinite references thereto, and furnished to the assignee prior to the meeting, and from which the sworn statement was made, might be deemed to be such supplementary statements:—Held, that they could not so be considered, and more especially so, as it appeared from the evidence that the plaintiff's name and debt had been intentionally omitted from the sworn statement. *Sanderson* v. *Dixon*, 29 C. P. 377.

Claim not Provable.] — Declaration: first count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance, defendant had granted one of the lots to S. Second count, on the covenant for quiet possession in the same deed. Breach, that before making it defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in chancery and foreclosed his mortgage, by which the plaintiffs lost this lot. Third count, that defendant being possessed of a lot of land, mortgaged it to S. for £258 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee, for $22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land and were put to costs. Fourth count, common money count. Plea: that after the time when defendant is alleged to have become indebted and liable to the plaintiffs, and after the Insolvent Act of 1864, defendant made an assignment under it, and in his schedule the alleged claim of the plaintiffs, which was then, if they ever had any claim, provable against defendant's estate, was included; and that afterwards defendant duly obtained an absolute discharge under said Act from the claim of his creditors, including the plaintiffs, which was duly confirmed:—Held, plea bad, as to the first three counts; for the plaintiffs' claim under these counts could not, under the Act of 1864, have been proved against defendant's estate—not being a debt due and payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened before the first dividend, but for unliquidated damages—and the discharge therefore did not release it. *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498.

Conclusive Effect.]—Evidence, which is fully set out in the judgment, was given to prove that the deed of composition and discharge pleaded was not executed by the requisite proportion of creditors in number and value, owing to a claim having been improperly withdrawn:—Held, that the confirmation of the deed was final and conclusive, and that this court could not go behind the Judge's order. Semble, that, under the evidence stated in the case, the claim could not be considered as withdrawn. *Rooney v. Lyons*, 40 U. C. R. 366; 2 A. R. 53.

Condition Requiring Consent of Creditors.] — A deed professing to be under the Act of 1875 was made between the insolvent of the first part, certain sureties of the second part, and "the several firms, persons, and corporations who are creditors of the parties of the first part, and are also mentioned in the annexed list, of the third part." It provided for the payment of a composition of 75 cents in the dollar, which payment was guaranteed by the sureties, and concluded with the following clause:—"This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars;"—Held, that this clause only applied to creditors mentioned in the annexed list, and that certain other creditors refusing to execute the deed did not prevent it from being operative. *Gault* v. *Baird*, 4 A. R. 436.

Debt not Mentioned in Schedule—*Judgment Summons.*]—A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act. If it did, a party applying for protection from arrest should shew clearly that the name of the plaintiff was in his schedule, and this is not

sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there. *In re Mackay* v. *Goodson*, 27 U. C. R. 263.

Debt not Mentioned in Schedule.]—Plea to a promissory note, an absolute discharge duly obtained under the Act of 1864, from the Judge, from plaintiff's and all other debts. Replication, that plaintiff's name, as a creditor, and the said note and cause of action, were not mentioned in defendant's schedule annexed to his assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate:—Held, on demurrer, replication good; that it is still necessary under the Insolvent Acts to have a schedule of creditors prepared or annexed to the deed of assignment; and that the effect of the discharge obtained under the Insolvent Act of 1864 by an insolvent, is limited to the debts and causes of action set forth in his schedule, either originally or by supplement. *King* v. *Smith*, 19 C. P. 319.

Debt not Mentioned in Schedule—*Indirect Description.*]—To an action of covenant in a mortgage to pay money, defendant pleaded that, becoming insolvent after execution of the mortgage, he made an assignment; that plaintiff's claim was known as that of the "Wood Estate," and was so described in the schedule submitted to the assignee and creditors; that the plaintiff resided abroad, and was represented in Canada by M., who had notice of the appointment of said assignee; that on the expiry of a year defendant obtained his discharge absolutely, by which he was discharged from plaintiff's claim. Replication, that the order for discharge was made before 1st September, 1869, and that the plaintiff's name was not mentioned as creditor in any schedule, and his claim was never proved against defendant's estate. Rejoinder, that plaintiff's claim was known as that of the "Wood Estate" (plaintiff representing and being entitled to said estate) and was so entered in the schedule filed by defendant with assignee, and that the plaintiff was represented by M., who had notice, &c.:—Held, on demurrer, rejoinder good. King v. Smith, 19 C. P. 319, distinguished. *Farrell* v. *O'Neill*, 22 C. P. 31.

Debt not Mentioned in Schedule.]—To an action on a guarantee, defendant pleaded his insolvency and issue of an attachment, and that, not having procured assent of creditors, he did after a year from date of issue of attachment, apply to a Judge for a discharge, which was absolutely granted after hearing defendant and creditors. Replication, that defendant, before making of order of discharge, did not schedule plaintiff's claim, nor did he by a supplementary or any list of creditors, previous to making of said order, set forth plaintiff's claim, which was not, in fact, ever furnished to the assignee or proved against defendant's estate:—Held, following King v. Smith, 19 C. P. 319, replication good. *Palmer* v. *Baker*, 22 C. P. 59.

Delay and Acquiescence.]—Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a schedule creditor, issued a fi. fa. against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him, and his assets taken; and also because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was being granted, raise the objection of no assets:—Held, that the fi. fa. must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment. Semble, however, that the plaintiff, by his conduct and the lapse of time, was precluded. *Parke* v. *Day*, 24 C. P. 619.

Estoppel.]—In this case, after the assignment and execution of the deed of composition and discharge, defendant, the insolvent, permitted an arbitration on the plaintiff's claim to be proceeded with, personally attending the arbitration, and not setting up the deed as a bar:—Held, that this would preclude defendant from afterwards setting up such deed as a ground for setting aside a fi. fa. against him issued on the award. *Pidgeon* v. *Martin*, 25 C. P. 233.

Execution Creditor Refusing to Assent.]—In August, 1872, the plaintiff issued a fi. fa. against defendant's lands, a portion of which defendant, in November, sold to one K. On the 1st May, 1873, defendant made an assignment in insolvency, and on the 31st obtained a deed of composition and discharge from the necessary proportion of his creditors. On the 12th August this was confirmed by the county Judge, and on the 15th August defendant's estate was re-conveyed to him by the assignee. The plaintiff was one of the duly scheduled creditors, but took no part in the insolvency proceedings, and although requested to remove his writ refused to do so, and advertised the lands for sale, contending that the sale to K. was a withdrawal of those lands from the defendant's assets, so that they never passed to the assignee:—Held, that the plaintiff's debt was discharged by the insolvency proceedings; that the fact of the sale to K. could not alter the plaintiff's position; and that his only remedy was under the composition and discharge. The proceedings on the fi. fa. after the assignment were therefore set aside. *Davidson* v. *Perry*, 23 C. P. 346.

Forum.]—The court of chancery will not entertain a suit to set aside a composition and discharge in insolvency for fraud, or upon any other grounds which are open to creditors before the Judge in insolvency, unless special circumstances intervene in the case. *Close* v. *Mara*, 24 Gr. 53.

Where a bill was filed for that purpose, alleging as ground for the relief sought fraud or evil practice in procuring the consent of the creditors to the discharge of the insolvent, or their execution of the deed of composition or discharge, a demurrer for want of equity was allowed. *Ib.*

Fraudulent Discharge—*New Creditors—Priorities—Costs.*]—An insolvent having compounded with his creditors and had his goods restored to him, resumed business, with the knowledge of his assignees and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment, under the Insolvent Act of 1869, was sued out against him by his subsequent creditors:—Held, that they were entitled to be paid out of his assets in

priority to the former creditors. *Buchanan* v. *Smith*, 17 Gr. 208: 18 Gr. 41.

In such a case the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. *S. C.*, 18 Gr. 41.

No Assets—*Judgment for Seduction and Breach of Promise.*]—In 1866 judgment was recovered against the defendant in this action for breach of promise of marriage, and in another for seduction. The defendant then made an assignment under the Insolvent Act, 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after twelve months he petitioned for his discharge. The application was duly advertised, and no opposition being made, was granted. He subsequently acquired some property, and execution was then issued in this action:—Held, that the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, but as a matter for the consideration of the insolvent court upon the application therefor, and that unless attacked for fraud it was a complete answer to the plaintiff's claim:—Held, also, that the plaintiff's claim was one which was barred by the discharge. Thomas v. Hall, 6 P. R. 172, and Parke v. Day, 24 C. P. 619, commented upon. *Forrester* v. *Thrasher*, 9 P. R. 383; 2 O. R. 38.

Privileged Claim.]—To an action by a commercial traveller for wages, defendants pleaded a deed of composition and discharge in insolvency. The plaintiff replied that the claim was privileged:—Held, reversing 45 U. C. R. 188, that privileged claims are not within the class of debts mentioned in s. 63 of the Insolvent Act of 1875, to which a discharge does not apply without the consent of the creditor. *Fryer* v. *Shields*, 6 A. R. 57.

Reservation of Rights as to Collateral Security.]—After an assignment in insolvency in 1875, a deed of composition and discharge was executed, by which the insolvent covenanted to pay 30 cents in the $ and give each creditor indorsed notes therefor, and the creditors in consideration thereof released him from all their respective claims, "saving and reserving the rights which any of them may have against any other person, or in respect of any security held by them, or any of them." A. & Co., who were creditors executing the deed, had a claim amounting to $2,758, for $800 of which they held collateral security in the shape of promissory notes, all over due except one for $52. The composition on their claim, amounting to $827, having been placed in the assignee's hands for them:—Held, that A. & Co. were entitled to it in full, and to retain their securities, and were not bound to value said securities. *In re Stern*, 37 U. C. R. 296.

Schedule of Debts—*Security not Mentioned.*]—In a schedule of debts appended to a deed of arrangement between a debtor and his creditors, a claim was inserted under the head of "Merchant's account:"—Held, that the claim was not improperly described, although at the time of entering into such deed the account was fully secured by a mortgage on real estate and other securities. *Henderson* v. *Macdonald*, 20 Gr. 334.

Seduction.]—Under the Insolvent Act of 1864, s. 9, s.-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against the defendant for seduction. *Benninger* v. *Thrasher*, 9 P. R. 206, 1 O. R. 313.

Unpaid Calls on Stock.]—The plaintiffs sued defendant as a shareholder in their bank for calls, and defendant pleaded his discharge under the Acts of 1869 and 1875, the assignment having been made under the former, and the deed of composition and discharge filed under the latter, Act. It appeared that the only mention of the plaintiffs' claim in defendant's statement of affairs and schedule was this entry in the statement of assets, "25 shares St. Lawrence Bank stock; amount paid up $500," (the plaintiffs' name having been changed from St. Lawrence Bank):—Held, that the plaintiffs' claim was discharged. The replications were also held defective in not shewing that the plaintiffs had no notice of the proceedings. *Standard Bank of Canada* v. *Johnson*, 42 U. C. R. 16.

(c) *Form of Discharge and Procedure.*

Assignee Not a Party.]—It is not necessary that an assignee in insolvency should be a party to a deed of composition and discharge. *Dredge* v. *Watson*, 33 U. C. R. 165.

Execution by Insolvents.]—A deed of composition and discharge under s. 8, s.-s. 4, of the Act of 1864, purporting to be between the insolvents of the first part, and a majority of the creditors of $100 and upwards, of the second part, was held invalid, because not executed by the insolvents. *In re Garratt*, 28 U. C. R. 266.

Execution by Insolvents—*Execution for Procuration.*]—G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county Judge on the 2nd December, 1868, but the confirmation was reversed in this court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the Judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note:—Held, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts. Per Richards, C.J. The deed was invalid also because not properly executed by the insolvents. Per Wilson, J. Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under s. 9, s.-s. 2, of the Act of 1864, were necessary after the execution by the insolvents, and for want of this, it was ineffectual:—Held, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it:—Held, also, that

the plaintiff was not prevented, by having proved his claim before the assignee, from going on with this action. *Allan* v. *Garratt*, 30 U. C. R. 165.

Firm.]—The only composition which the Act of 1875 provides for in the case of an insolvent firm is one extending to all the partners, and including both the creditors of the firm and of the individual members. *Re Walker*, 2 A. R. 265.

Gazette.]—Notice of application for discharge in Canada gazette, and not in local gazette:—Held, sufficient. *In re Huffman*, 5 C. L. J. 71.

Insolvent's Examination.]—On an application for discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is as to the weight to be attached to it. *In re Holt and Gray*, 13 Gr. 568.

Notice to Creditors.]—On an application for a discharge under s. 9, s.-s. 10, of the Act of 1864:—Held, unnecessary to mail notices to creditors under s. 11, s.-s. 1. *In re Starling*, 2 C. L. J. 393.

Opposition by Unscheduled Creditor.]—A creditor, although not named in the schedule annexed to the assignment, may oppose the confirmation of discharge. The insolvent should be present when application is made for confirmation. *In re Stevenson*, 1 C. L. J. 52.

Partnership and Separate Creditors.]—Such a deed to be operative, must provide for the separate creditors of each partner, as well as those of the firm. *In re Garratt*, 28 U. C. R. 266.

Proving Claims.]—Insolvency—Composition and discharge—Unnecessary for creditors to prove debts to enable them to execute deed of—Schedules conclusive—Confirmation refused. *In re Langs*, 4 C. L. J. 283.

Time.]—Semble, that if an insolvent obtains the consent of the required number of creditors, or the execution of a deed of composition and discharge, he may at once make the application without waiting for the expiration of a year; he is not precluded however, from applying after the expiration of a year, under s. 64 of the Insolvent Act, 1875. *In re Hill*, 7 A. R. 694.

(d) *Miscellaneous Cases.*

Application of New Act.]—Held, that the Act of 1869 regulates the procedure, after its passage, in insolvency proceedings commenced under the Act of 1864, and consequently that the discharge of an insolvent, who had made an assignment under the Act of 1864, intituled "The Insolvent Act, 1869," was valid. *Carnegie* v. *Tuer*, 6 P. R. 165.

Construction—*Partnership and Separate Creditors.*]—Action of debt by the plaintiff claiming under a deed of composition and discharge, as assignee of the assignee in insolvency of a co-partnership, whereby the debt in question was assigned to him. Plea, setting out the deed whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them fifty cents on the $ of their respective claims against the said insolvent firm, and on confirmation of the deed to pay the costs respecting the insolvent firm's estate * * and the preferential claims against the said firm, in consideration of which "the said creditors" released to the insolvents their claims against them, and directed a conveyance of the insolvent firm's estate to them, and plaintiff averring that at the time of the assignment of the debt to the plaintiff there were separate debts of the insolvent, or one of them, unpaid and unsatisfied, which were not provided for by the deed:—Held, that the deed provided for the payment of firm creditors only, and did not include separate creditors, and therefore that the plaintiff's title to the debt failed. *McKitrick* v. *Haley*, 46 U. C. R. 246.

Discharge From Arrest.]—An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts. *Hood* v. *Dodds*, 19 Gr. 639.

Notice of Intention to Reconvey.]—Declaration on the common counts. Plea, that the plaintiff before action made an assignment under the Insolvent Act of 1869, to an official assignee, in whom the causes of action became vested. Replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed, transferred to the plaintiff all the estate, &c., theretofore belonging to the plaintiff and then vested in the assignee. Rejoinder, that after the deposit of the deed of composition and discharge with the assignee by the plaintiff, the assignee did not immediately give notice of such deposit by advertisement as required by the Act:—Held, on demurrer, rejoinder good, for by the statute the giving of such notice is a condition precedent to the reconveyance by the assignee, which, without it, does not bind non-assenting creditors. Held, also, replication good, for under the averment that the assignee duly reconveyed, the plaintiff would be bound to prove such notice, in the absence of a confirmation by the Judge. *Nicholson* v. *Gunn*, 35 U. C. R. 7.

Pleading—*Discharge.*]—To an action on a promissory note and on the common money counts, defendant pleaded, 1, that after making the note and incurring the liability he became insolvent, and a deed of composition and discharge, under the Insolvent Act of 1869, was entered into and executed by a majority of creditors, whereby defendant was discharged, which discharge was confirmed by the county court Judge; 2, that after making the note defendant became insolvent, assigned to an official assignee, and duly set forth plaintiff's claim, which plaintiff duly proved, after which a majority in number of creditors consented in writing to a discharge, which was duly confirmed, &c. Replication, to first plea, setting out the deed of composition, acknowledging the receipt from assignee of defendant's estate of certain promissory notes, indorsed, for certain amounts, and payable at certain dates, and accepting same in payment, and stating that the creditors therein named, (of whom plaintiff was not one) ac-

cordingly discharged him, and authorized the restoration of the estate to him. Replication to second plea, that the alleged consent in writing was the deed of composition and discharge in the above replication set out, and that, in pursuance of said deed, said assignee restored to defendant his estate. Replication, on equitable grounds, that the composition was not made in good faith, nor for as large an amount as it should have been, as defendant well knew:—Held, on demurrer, that the replications to the 1st and 2nd pleas were good, the deed of composition as set out being insufficient, and that the first plea was bad: that the 2nd plea was not open to the objections taken to it, set out in the case, though, quære, whether good in all particulars against objections not taken:—Held, also, that the equitable replication was bad. *Shaw* v. *Massie*, 21 C. P. 266.

Pleading — *Discharge.*] — To an action upon notes by the payee against the maker the defendant pleaded that after giving the note he made a voluntary assignment in insolvency, and thereby obtained a discharge by a deed of composition and discharge duly executed under the Insolvent Act of 1869, in the schedule to which the plaintiff appeared as a creditor. The plaintiff replied, setting out the composition deed verbatim. It purported to be made between defendant of the second part, and twenty-eight persons of the first part, described as "all the creditors of said insolvent, constituting more than the majority in number of those of the creditors of said insolvent who are respectively creditors of said insolvent for sums of $100 and upwards, and representing more than three-fourths in value of the liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents." From this it appeared that three creditors were named in the schedule for an aggregate amount of $1,276, who were not named in the deed as parties, though two of them had executed it. The replication was demurred to, and exceptions taken to the plea:—Held, that the plea was bad in not shewing that the deed was made for the benefit of all the creditors; and that the replication to it, shewing that the deed was in fact not so made, and that it had not the assent of those creditors who represented three-fourths of the value of the liabilities which were subject to be computed for that purpose, was good:—Held, also, that the plea was defective in not shewing that defendant was a trader; but that the replication setting out the deed in which he was described as merchant, cured this defect:—Held, also, that it was not necessary here, though in some cases it would be, to aver that the parties to the deed were creditors within the meaning of the Act, or to negative the plaintiff being a special creditor, it appearing sufficiently from the nature of the claim sued for that he was not. *Dredge* v. *Watson*, 33 U. C. R. 165.

Pleading — *Discharge — Objections.*] — Declaration: for money paid by the plaintiff for T. H. and F. H. Fifth plea, in substance, that T. H. and F. H., being co-partners in trade, on the 5th March, 1873, made an assignment in insolvency; that on the 17th a deed of composition and discharge was executed by the proper number and value of their creditors on certain terms, which were duly carried out by the insolvents: that there were no separate creditors of either of the insolvents: that the deed was duly confirmed by the Judge: that two notes became due in December, 1872, made by the plaintiff for the insolvents' accommodation, and were dishonoured, and were then and up to the payment of the composition held by the Bank of British North America: that the liability of the insolvents to the bank was set out in the statement of their affairs at the first meeting of creditors, in which these notes were stated to have been made by the plaintiff for their accommodation: that the bank after the assignment delivered to the assignee their claim against the insolvents, and proved for the full amount of the two notes, and were creditors until they received the notes for the composition agreed upon: that they executed the deed and received the composition: and after they had proved their claim the plaintiff, as surety for payment of the notes, was obliged to pay to the bank the amount of the notes, less the composition received by the bank: and part of the plaintiff's claim herein pleaded to is for the said money so paid by him to the bank. The sixth plea was the same as the fifth down to the last averment—of payment by the plaintiff to the bank—which was omitted; and it was alleged that it was agreed between the plaintiff and the bank, in respect of the same two notes, that the plaintiff should pay the bank one-half of them, and that the bank in order to realize the other half, should proceed against the insolvent estate for the whole: that the plaintiff accordingly paid one-half of said notes to the bank, and the bank proved for and received the composition upon the whole, and the money so paid by the plaintiff to the bank is part of the claim sued for and now pleaded to. The seventh plea was to different sums from those already pleaded to. It followed the fifth plea down to and including the averment of the confirmation of the composition and discharge; and then alleged that the plaintiff had notice and knowledge of all said facts and of those hereinafter mentioned: that a note for $750 made by the plaintiff to and indorsed by the insolvents, and held by the Bank of Montreal, became due and was dishonoured in November, 1872, and another similar note for $1,184, in December, 1872, held by the Ontario Bank: that these notes were made for the accommodation of the insolvent, of which the banks had notice: that the plaintiff before the assignment paid the said notes to said banks, and took them up, and was a creditor of the insolvents therefor until the deed of composition: that part of the plaintiff's claim in this suit, and herein pleaded to, is for the money so paid: that all knowledge of such payments was purposely withheld from the insolvents by the plaintiff until after the first meeting of creditors after the assignment: that the liability of the insolvents for said two notes was mentioned in the statement of their affairs exhibited at said meeting; and the liability of the insolvents to the plaintiff for the amounts so paid by the plaintiff was shewn by a supplementary list of creditors previous to the discharge, and in time to permit the plaintiff obtaining the same dividend as the other creditors: that the plaintiff at the time of the assignment owed the insolvents $179, which the assignee had the right to set off, and the insolvents were always ready to give notes for the composition of plaintiff's claim as required by the deed, but the plaintiff has always refused to

prove his claim against the estate: that forthwith after the insolvents became aware of the plaintiff having paid said notes, they deposited with the assignee notes for the composition on plaintiff's claim in accordance with the deed, after deducting said $179, which notes remain ready for the plaintiff; and all things have been done, &c., necessary to make said deed binding on the plaintiff as if he were a party thereto. Second replication, to the three pleas: that there were separate creditors to each of the insolvents at the time of the assignment and of the deed of composition and discharge, and that the plaintiff was not a party to nor did he execute said deed:—Held, on demurrer, that the traverse of there being no separate creditors, as alleged in the pleas, was proper; but that the averment that the plaintiff did not execute the deed was no answer to the pleas, for under the facts there stated execution by him was unnecessary. Third replication, to fifth plea: that the moneys pleaded to were paid by plaintiff to the bank before the bank had proved their claim on the notes, and the plaintiff at the date of the deed of composition was a creditor in respect thereof; and the insolvents never mentioned their liability to the plaintiff therefor in any statement of their affairs, or supplementary list, or in the deed; and said claim was never proved against the estate:—Held, no answer to the plea, for that, upon all the facts set out, enough was not shewn to make the dealings of the assignee and of the insolvents with the bank as holders of the note unavailing. The fourth replication to the sixth plea was the same as the third replication, and was held also bad. Fifth replication to the seventh plea: that the plaintiff's name as a creditor, and the claim in that plea mentioned, were not mentioned in the statement exhibited at the first meeting of creditors, or in any supplementary schedule furnished in time to permit plaintiff to obtain the same dividend as other creditors:—Held, replication good: that, under the Act of 1869 there must be a statement of the creditors exhibited at the first meeting of creditors, as well as of the insolvent's affairs; but that the statement presented at the first meeting, as set out in the plea, did sufficiently describe the plaintiff as a creditor; and as the plea therefore alleged that he was so specified, the plaintiff had a right to traverse it. *Preston* v. *Hunton*, 37 U. C. R. 177.

Pleading Discharge.]—To a declaration on the common counts, defendant pleaded that the plaintiff before action assigned, under the Act of 1875, to an official assignee, in whom the alleged cause of action became vested. Second replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed by the requisite proportion in number and value of the plaintiff's creditors, by deed duly transferred to the plaintiff all the estate vested in the assignee. Rejoinder, that the discharge was not duly confirmed by the court or a Judge:—Held, on demurrer, replication bad, for not shewing that the discharge was confirmed, without which, by s. 66 of the Act, it could have no effect; and that the rejoinder was good. Semble, that the replication should have alleged also that the creditors signing had proved their claims and represented at least three-fourths in value of the claims of $100 and upwards which had been proved, as required by ss. 49 and 52. *Graham* v. *McKernan*, 42 U. C. R. 368.

Promise to Pay Discharged Debt.]—An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it. *Austin* v. *Gordon*, 32 U. C. R. 621.

Promise to Pay Discharged Debt.]—Held, that a promise to pay a debt from which a discharge under the Act of 1869 had been obtained, is founded on a good consideration, and may be enforced. *Adams* v. *Woodland*, 3 A. R. 213.

Revivor of Original Claims.]—Two traders, E. & R., having become insolvent, an agreement was entered into between them and their creditors, whereby it was stipulated that R. should retire from the partnership, and that E. & G. should form a new co-partnership, and that the creditors of E. & R. should accept the notes of the new firm for fifteen shillings in the pound of their claims. By the deed of composition it was expressly agreed that in the event of E. & G. becoming insolvent before the notes securing the fifteen shillings in the pound were paid, their original debts should revive against E. G. and R., and that the creditors should be entitled to rank on the estate of E. & G. for the full amount of their respective claims against the firm of E. & R., less any sum which might have been paid to them by E. & G. on account of said debts. Before the notes were all satisfied E. & G. were compelled to make an assignment in insolvency:—Held, that the creditors were entitled to prove against the estate of E. & G. for the full amount of their original claims against E. & R., giving credit for such sums as had been paid to them by E. & G. in respect of the composition notes; and that the agreement for the revivor of the original demands was not in the nature of a penalty. *Watson* v. *Mason*, 22 Gr. 180.

Reversed on appeal, *ib.* 574.

Surety—*Assignee of Judgment.*]—On 2nd May, 1867, defendant B. made an assignment under the Insolvent Acts; and on the 27th, a deed of composition and discharge was executed by B., and by R. (who had been sued as B.'s surety) and other creditors, as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th February, 1868, plaintiff obtained judgment. On 13th February, R. took an assignment of the judgment from the plaintiff, paying part only of the judgment debt. On an application by defendant B. to have his name struck out of the proceedings and the judgment stayed as against him, on the ground that the plaintiff was a party to the deed of composition and discharge:—Held, that B. was entitled to this relief as well against the plaintiff as against R., and that he had accounted for his delay by a reasonable supposition that the plaintiff was proceeding on the judgment to recover the balance of the debt from defendant R. Semble, that the assignee of a judgment can not enforce it, if his assignor could not. *Marten* v. *Brumell*, 4 P. R. 220.

Sureties—*Pleading — Understatement of Claim.*]—Declaration, on a joint and several note made by defendants payable to plaintiff. Plea, (by two defendants) that the note was made by them as sureties for the other defendant, with notice thereof to plaintiff, who

took the same upon the express agreement that they should be liable thereon only as such sureties: that the plaintiff, while holder of said note, without their knowledge or consent, after the accrual of the alleged claim, and before action, by deed released the other defendant, the said release being headed as follows: "Insolvent Act of 1864," &c. The release, also, in the body of it, referred to the "Insolvent Act of 1864:"—Held, plea bad; for the court was bound to look upon the plea as setting up a discharge under the Insolvent Act, and by s. 9, s.-s. 4, of that Act, the plaintiff's rights were expressly preserved to him against all other persons liable for or with the insolvent:—Held, also, that if it was desired to rely on the release as valid at common law, it should have been accompanied with such averments as would have shewn it to be operative, or it should not have been set out in hæc verba, but its legal effect only should have been stated, and its efficacy left to be established by such facts as it was contended contributed thereto. Semble, that a creditor under a composition deed, either under the Insolvent Act or otherwise, cannot give a general release, and subscribe for a particular sum, as being apparently his whole claim, and afterwards advance other demands as not included in this discharge, for this would be a fraud on the other creditors. *Fowler* v. *Perrin*, 16 C. P. 258.

Voluntary Payment after Discharge.]—The mere fact that an insolvent, after having obtained his final order for discharge, makes a voluntary payment on a claim existing against him before his insolvency and which is extinguished by such discharge, is not sufficient to revive the debt, for that purpose an express undertaking to pay the amount must be proved. *McDonald* v. *Notman*, 25 Gr. 608.

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4. *Creditors.*

(a) *Who may Claim.*

Damages—*Bailment.*]—The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with:—Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent; that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground; that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages:—Held, also, that a claim for compensation as to a certain number of barrels not of the quality agreed for was clearly a claim for unliquidated damages, and could not be proved. *In re Williams*, 31 U. C. R. 143.

Debt not Due.]—A creditor whose debt is not yet due may proceed against his debtor who is insolvent, as he might have done if his debt had been overdue. But, in this case, it appearing that the debtor did not owe more than $100 beyond this debt, none of which was at the time due, and a portion not payable for several years, the court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation. *In re Moore* v. *Luce*, 18 C. P. 446.

Debt Revived.]—By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Insolvent Act of 1864:—Held, that the stipulation as to the whole debt was not illegal, and that there having been default, before the insolvency, the creditor was entitled to prove for the whole debt. *In re McRae*, 15 Gr. 408.

Wife — *Costs.*] — The claimant was the wife of the insolvent, and claimed to prove against his estate for money lent and interest thereon. The contestants disputed the claim. The Judge having found all questions of fact in favour of the claimant:—Held, that the fact of the claimant being the wife of the insolvent did not debar her from proving against his estate as a creditor, but that under the circumstances the question was a fair one for judicial inquiry, and no costs were allowed the claimant. *In re Dangerfield*, 13 C. L. J. 42.

Wife.] — A married woman, married in 1869, transferred certain shares, which formed part of her separate estate, to her husband, the insolvent, in 1871, for the purpose of being used in his business, upon a promise of repayment by him:—Held, that she was entitled to prove as a creditor. Clear and convincing evidence of the bona fides of such a claim, and of the actual creation of the debt at the time of the alleged loan, should be given before admitting it to proof. *Re Miller*, 1 A. R. 393.

(b) *Rights and Liabilities.*

Agent of Creditor.] — Appointment of agent for a creditor claiming to advise in the choice of an assignee must be in writing, and filed of record. *In re Campbell*, 1 L. J. 135.

Contestation of Claim.]—The creditors of an insolvent consented, by an agreement, that the plaintiff, as guardian of the estate, and the defendant should sell certain timber manufactured by the insolvent, and pay defendant out of the proceeds $5,500, which he claimed, upon defendant giving to the guardian his bond to repay the same, or so much as defendant might not be entitled to; defendant (it was said in the agreement) claiming such timber, or a lien on it, and the creditors insisting that the estate owned or had some claim thereon. The bond recited this agreement, and the condition was that the defendant should repay such portion of the $5,500 as he should not be entitled to. The plaintiff sued on this bond, averring the sale of the timber and payment to defendant of the

$5,500; and that defendant was not entitled to the same, but had not repaid it. Defendant pleaded that he duly established his right to the $5,500 by filing with the assignee the particulars of his claim thereto, duly verified, as provided by the Insolvent Act of 1869. The plaintiff replied, setting out the particulars of defendant's claim and verification thereof (which shewed it to be the claim in question), and alleged that such claim had not been placed on any dividend sheet, nor in any manner adjudicated or awarded upon. To this the defendant rejoined, that it had not been contested or objected to, and that plaintiff, as assignee, had not prepared any dividend sheet of the estate:—Held, rejoinder good; for that, looking at the position of the parties, and the agreement, the meaning of the bond was, that defendant should repay what, after a contestation of his claim, it might appear that he was not entitled to rank for; and the action, therefore, was premature. *Hall* v. *Dunsford*, 32 U. C. R. 1.

Proof of Debts.]—Debts must be proved before the assignee and not before the Judge. *In re Stevenson*, 1 C. L. J. 52.

Sale after Action by Two Creditors.]—In ejectment plaintiff claimed title under a deed from the assignee in insolvency of P. D. Prior to the issue of the writ of attachment in insolvency P. D. had conveyed the property to his brother L. D. Two of the creditors claimed that the deed was fraudulent, and made a demand under s. 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the creditors, refused to do, whereupon the two creditors obtained from the Judge an order under that section authorizing them to take the proceedings on their own behalf. Proceedings were thereupon taken and the deed set aside. The land was advertised, the period therefor being shortened by the Judge, and was sold to F., but in reality to the plaintiff, to whom F. conveyed. The assignee was notified of the sale and requested to execute a conveyance to the purchaser, which, under instructions from the creditors, he refused to do, whereupon an order was obtained from the Judge directing the assignee to execute the deed, the assignee's solicitor attending and opposing the making of the order. Under s. 68 the "benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit:" and under s. 75, no sale is to be completed unless it "has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose or by the inspectors:" and also the period of the advertisement might be shortened "by the creditors with the approval of the Judge:"—Held, that the sale and the deed thereunder was valid. *Donovan* v. *Herbert*, 9 O. R. 89; *S. C.*, 12 A. R. 298.

An appeal to the supreme court was dismissed. *Cassels' Dig.* 653.

(c) *Secured Creditors.*

Collateral Security to Indorser—*Rights of Holders of Paper.*]—In February, 1858, S. & B. and E. B. became accommodation indorsers for A. B. for $15,000, and E. B. alone indorsed for an additional sum of $5,000, A. B. giving a chattel mortgage on his personal effects, including certain bills, notes and overdue accounts, as security against their liability as indorsers. At the same time, E. B. executed to S. & B. a mortgage on his farm to secure them to the extent of $5,000 or so much as might remain unpaid of such $15,000 after applying the proceeds of the chattel property so mortgaged in payment thereof. In July following, A. B. executed another indenture or trust deed, reciting such mortgage, and he thereby assigned all outstanding debts due or owing to him, including all bills, notes, judgments, and book accounts, to enable the indorsers "to pay, satisfy, and discharge the said accommodation paper so indorsed by them as aforesaid." In 1862, the indorsers who had the management of the securities, had reduced the $20,000 indebtedness to about $6,900, when E. B.'s farm was sold and the sum of $5,000 secured thereon was paid to the banks, who held the accommodation paper, thus reducing the claim of the banks to $1,900, for which they accepted the composition notes of S. & B. at 8s. 9d. in the £, they having about this time made a composition with their creditors. Nearly all of these composition notes S. & B. subsequently paid. Some time afterwards and before default in payment of any of the composition notes, S. & B. became insolvent; an assignee of their estate was duly appointed, and the banks proved upon their estate for the unpaid composition notes. About a month afterwards A. B. became insolvent, and at the time of the present proceedings E. B. had also become insolvent. Amongst the effects so assigned by the deed of July was a judgment against the defendants, the railway company, recovered against them by A. B., which together with one recovered against the company in the names of S. & B. and E. B., was compromised at $1,500:—Held, that the deeds of assignment did not create a trust of the moneys received upon such compromise in favour of the banks; and that under the rule in Ex parte Waring, 19 Ves. 345, their only right was to rank upon the estate of S. & B. for the composition notes remaining in their hands. *Allchin* v. *Buffalo and Lake Huron R. W. Co.*, 23 Gr. 411.

Collateral Security to Accommodation Indorser—*Rights of Holders of the Paper.*]—R. made a mortgage on certain lands in favour of M. & B., with a proviso to be "void on payment of $20,000, or such other sum or sums as might be due and owing to M. & B., by reason of their having to pay, take up, or retire, any notes or bills indorsed or accepted by them for R. M. & B. indorsed notes for R.'s accommodation, which were discounted by the plaintiff bank, and while several of them, amounting in all to $24,000, were outstanding, R., as also M. & B., became insolvent:—Held, that as to the extent of such accommodation paper as the bank held they were entitled to the benefit of the mortgage, and to have it realized, and the proceeds applied to retire the notes, in priority to other creditors; but that in respect of any notes held by the bank which had been given by M. & B. in liquidation of the debts due them, the bank could only prove against the estates of the insolvents. Ex parte Waring, 19 Ves. 345, approved of and followed. *Molsons Bank* v. *Blakeney*, 25 Gr. 513.

Collateral Security to Lender—*Rights of Holder of Paper.*]—M. borrowed $1,500 from M. & Co., giving them

as security a chattel mortgage, and his promissory note at three months, which they discounted at Molsons Bank. No assignment of the mortgage was ever made to the bank, nor did they deal with M. & Co. in reliance on it. When the note became due M. & Co. paid $600, and renewed for $900. Shortly afterwards, both M. and M. & Co. became insolvent, and the bank claimed the benefit of the mortgage:—Held, that the bank was not entitled to a prior claim upon the security over the assignee of M. & Co., in respect of the $600, and the rule in Ex parte Waring, 19 Ves. 345, gave them no assistance. *In re Morton* v. *MacCrae*, 3 A. R. 202.

Collateral Security.]—When the plaintiff proved his claim against the insolvent's estate he held, as collateral security, certain overdue notes, which he did not mention, and he afterwards received certain payments on them:—Held, that such payments could not be allowed as a set-off in this action on a note given for a composition agreed on under R. S. O. 1877 c. 50, s. 142. *Fitch* v. *Kelly*, 44 U. C. R. 564.

Effect of Retaining Security.]—When an assignee in insolvency elects, under s. 84 of the Insolvent Act, 1875, to allow a creditor to retain, at a valuation, the property which he holds as security for his debt, the creditor becomes a purchaser at that valuation, freed from any right or equity to redeem on the part of the insolvent or his estate. *Bell* v. *Ross*, 11 A. R. 458.

Election to Rely on Security.]—The insolvent, in February, 1868, executed a mortgage on lands and an assignment of goods to trustees for the benefit of B. G. & Co., and other creditors named; and in August following he made a voluntary assignment under the Insolvent Act. The trustees after this assignment sold part of the real estate under the power of sale and received part of the proceeds of the goods. B. G. & Co. then claimed to prove against the estate for the balance due to them above what they had received from the trustees. The official assignee held that they had lost their right, having elected to look to their security instead of bringing it in under s. 5, s.-s. 5, of the Insolvent Act of 1864; and his award was confirmed by the county Judge on appeal:—Held, that the mere fact of the sale did not necessarily exclude them from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced or were recompensed for any loss thereby, they should still be allowed to prove. *In re Hurst*, 31 U. C. R. 116.

Mortgagee's Power of Sale.]—Where a mortgagor becomes insolvent, the mortgagee is not compelled to go in under the Act, but may proceed under his power of sale. *Gordon* v. *Ross*, 11 Gr. 124.

Options of Secured Creditor.]—A creditor holding security from the insolvent may, under ss. 84 and 106 of the Act of 1875, assume any one of three positions:—either release his security and prove as an unsecured creditor, or he may value his security and prove for the whole debt less the valuation, or he may outside of insolvency proceedings realize his security in any manner authorized by law. The plaintiff, who was mortgagee of lands of the insolvent, obtained against the assignee the usual decree for sale with a special direction that he should be at liberty to prove against the estate for any deficiency:—Held, that under ss. 84 and 106, the plaintiff was not entitled to prove for such deficiency. In re Hurst, 31 U. C. R. 116, commented on, and questioned. *Deacon* v. *Driffil*, 4 A. R. 335.

Partners Claiming Inter se on Dissolution of Firm.]—*See Hall* v. *Lannin*, 30 C. P. 204. *Post*, Partnership and Separate Estate, col. 591.

Realizing Security.]—Under the Insolvent Act of 1875, a creditor holding security at the time of the insolvency, cannot realize the security, and prove on the estate for the balance. In re Hurst, 31 U. C. R. 116, commented on. *Re Beatty*, 6 A. R. 40.

Rectification of Mortgage after Valuation.]—In proceedings in insolvency mortgagees claimed to rank upon the insolvent estate for the excess of their claim over the value placed by them upon the mortgaged premises, after which they discovered that certain property intended to be included in the security had, by mutual mistake, been omitted therefrom, whereupon they filed a bill in the court of chancery to have the mortgage rectified and the security realized:—Held, that the fact of the mortgagees having so proceeded in insolvency formed no objection to the relief asked, and the court ordered a rectification of the instrument as prayed; as this was relief dehors the administration of the assets in which the Judge in insolvency could not give adequate relief, remitting the parties back to the insolvency proceedings with a view of the same or a new valu being placed by the mortgagees on their security, in order that the assignee and creditors might proceed under the statute; and in the event of those proceedings resulting in the security being retained by the mortgagees, the court directed the bill to be retained to enable them to resume proceedings here to realize the security, for which purpose it would be necessary simply to file a petition stating shortly the proceedings taken and their result. *Cameron* v. *Kerr*, 23 Gr. 374.

Reducing Valuation.] — Two secured creditors duly proved their claim, valuing their security; and the assignee elected to allow them to retain such security. Upon the application of these creditors, after such election, for leave to withdraw their proof and reduce the value placed on their security, and prove against the estate for the sum by which it should be reduced, on the ground that the valuation was excessive, and had been made inadvertently:—Held, that they were bound by the value stated in their affidavit of claim. *Re Street*, 15 C. L. J. 86.

Separate Debt Secured by Partnership.]—Where a creditor holds security on the partnership estate for the individual liability of an insolvent member of the firm, he is entitled to prove against the separate estate without putting a value on such security. *Re Jones, Ex parte Consolidated Bank*, 2 A. R. 626.

Taking Over Security.]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mort-

gaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but notwithstanding this conveyance continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—Held, on a case stated in the action for the opinion of the court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of s. 19 of the Insolvent Act of 1865 had been complied with; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior incumbrances; and that therefore his payments kept alive the plaintiffs' rights. *Trust and Loan Co.* v. *Stevenson*, 20 A. R. 66, reversing 21 O. R. 571.

Time and Mode of Electing to Retain.]—Where the secured creditor has valued his security for the purpose of proof, the policy and express language of the Insolvent Act, 1875, require that the decision of the assignee shall be promptly made. A formal resolution of the assignee allowing the creditor to retain the property is not necessary. Therefore, where the assignee had ample means of knowing the value of the assets before the creditor proved his claim and valued his security in January, 1879, and where no meeting of creditors was held after that date till the 30th July following, and the estate was sold without any reference to the security; and where nothing further was done by the assignee until the 13th October following, when he wrote to the creditor: "Your claim as filed shews a balance over security of $3,091.13, but Mr. Leitch (the purchaser of the estate) disputes your claim to any dividend, on the ground," &c., it was:—Held, that the assignee had signified his election to allow the creditor to retain the security, and his abandonment of any right to redeem it for the estate. *Bell* v. *Ross*, 11 A. R. 458.

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5. Fraudulent and Preferential Transactions.

Acceleration of Delivery of Goods.]—S. on the 25th November, 1864, agreed to deliver certain timber to plaintiff at T. in New York, in May, June, July, and August, 1865, $1,500 payable down, the same sum on the 15th January, 1st March, and 1st April, 1865, and the balance on delivery at T. On the 14th December following he assigned the timber of L., as security for certain advances in goods which L. agreed to make to enable him to get it out, and on the 27th February, 1865, formally delivered it to L.'s son, who, after consulting with S., wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty; that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking a delivery before they could interfere. On the 11th March the plaintiff accordingly paid L.'s claim, and took a delivery. On the 3rd March L. had served a writ on S., telling him it was to secure precedence; and an execution was obtained in this suit, under which the sheriff seized. On the 14th April S. made an assignment under the Insolvent Act of 1864 to the defendant. He admitted that he was insolvent on the 11th March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it:—Semble, that these facts shewed the delivery to the plaintiff to be a transfer by S., "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under s. 8, s.-s. 4, of the Insolvent Act of 1864. *Adams* v. *McCall*, 25 U. C. R. 219.

Advance and Antecedent Debt.]—A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed $50,000, to advance them $15,000 more; and, in order to obtain the advance, they offered to secure both debts by a mortgage of the real estate of one of the partners, worth $30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors:—Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency. *Royal Canadian Bank* v. *Kerr*, 17 Gr. 47.

Advances in Good Faith — *Onus of Proof.*]—Where the court is satisfied that an arrangement for advance on mortgage within the thirty days, between a creditor and his debtor, is entered into bonâ fide, in order to aid the debtor with the view of enabling him to discharge his obligations, such arrangement will be sustained, notwithstanding that its effect is to give such creditor a preference over other creditors for the full amount of his claim, including a prior indebtedness, and that the debtor became insolvent within thirty days from the time of entering into such arrangement. In such a case the onus of proving the bona fides of the transaction is cast upon the creditor claiming the benefit of the security. *Smith* v. *McLean*, 25 Gr. 567.

Advances of Goods and Antecedent Debt.]—A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied:—Held, not such a preference as rendered the chattel mortgage void. *Risk* v. *Sleeman*, 21 Gr. 250.

After Acquired Property.]—Although the rule at law is, that an instrument intended either to assign or charge chattels of which the assignor has not the possession, is imperfect without some subsequent act of the assignor, the same is not the case in equity; neither does it prevail in insolvency proceedings, where the court is bound to work out the equities between the parties. Under the circumstances of this case, the mortgagee was held entitled to after acquired property as against the assignee in insolvency. *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 492.

Agreement to Give Security.] — In 1869 C. lent money to N. on an express agree-

ment that it was to be secured by mortgage on certain property; and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent:—Held, that the mortgage was valid. *Allan* v. *Clarkson*, 17 Gr. 570.

Agreement to Give Security.]—Held, under the circumstances set out in the report, that the promise to give security on a certain ship "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under s. 133 of the Insolvent Act of 1875:—Held, also, that the provisions of the Merchants' Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act. *Jones* v. *Kinney*, 11 S. C. R. 708.

Assignment of Moneys Payable under Contract.]—The plaintiffs, who were sub-contractors for the stone and brickwork of a public school, and who were to receive payment from the principal contractors, who alone were recognized by the public school board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractors by the board. The contractors were at the time unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim:—Held, that the transaction was an unjust preference under s. 133 of the Insolvent Act of 1875; and, semble, that it was also within the meaning of ss. 130 and 132, and the plaintiffs could not maintain a suit to enforce payment of the balance assigned to them. *Griffiths* v. *Perry*, 6 A. R. 672.

Bonus to Indorsing Creditor.]—Upon the arrangement for a deed of composition and discharge, the creditors required security for payment of the composition, and one Meikle, a creditor, agreed to indorse the composition notes upon receiving a mortgage upon the property settled upon the insolvent's wife, securing him in respect of his indorsations, and on payment of $250 in addition to his composition:—Held, not a fraudulent preference within the meaning of the Act. *Re Russell*, 7 A. R. 777.

Collateral Security to Discount.]—A bank having cashed a bill of exchange, and taken by way of collateral security a bill of sale of certain goods of the drawer, this transaction was held not invalidated by the drawer's insolvent circumstances at the time. *Newton* v. *Ontario Bank*, 13 Gr. 652, 15 Gr. 283.

Contemplation of Insolvency.]—K. had a line of discount with the defendants of $20,000, for which $5,000 collaterals were deposited as security. Some time afterwards his indebtedness to the bank was nearly doubled, when the agent insisted upon obtaining additional security by deposit of further collaterals, and which some months before the insolvency were deposited. This was impeached by the assignee in insolvency of K. as being an unjust preference of the bank:—Held, affirming 28 Gr. 449, that the transfer to the defendants of the securities as collateral was valid, the plaintiff having failed to establish that K. contemplated insolvency:—Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had, in fact, made the transfer in contemplation of insolvency. *Nelles* v. *Bank of Montreal*, 7 A. R. 743.

Another transfer had been made to the bank within thirty days of the insolvency, which was also impeached, but upon the faith of which the bank had made advances to K. exceeding the value of the securities so transferred, which would not otherwise have been made:—Held, that the bank had not thereby obtained an unjust preference, and therefore the transaction could not be impeached. *Ib.*

The insolvent made a cash payment of $1,000 to the bank a few days before his insolvency, but it was sworn that he had been allowed to overdraw upon an agreement to cover it by this payment, and it was not shewn that the bank manager had, at that time, probable cause to believe in his inability to meet his engagements in full:—Held, that this money could not be recovered back. *Ib.*

Contemplation of Insolvency.]—W., the respondent, was a private banker who had had various dealings with one D., and had discounted for him at an exorbitant rate of interest notes received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but, being a man of very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of $4,000 or $5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to W., who advanced him $300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by W. D. executed a mortgage in favour of W. and was granted a reduced rate of interest on his indebtedness, and was told he would have to work carefully to get through. D. became insolvent about four months afterwards. In a suit by McR., as assignee, impeaching the mortgage to W., it was:—Held, affirming 7 A. R. 103, that McR. had not satisfied the onus which was cast upon him by the Insolvent Act, of shewing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency. *McCrae* v. *White*, 9 S. C. R. 22.

Contemplation of Insolvency.]—To avoid a transaction under s.-s. 4 of s. 8, not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor to whom the transfer or payment is made over the other creditors. *McWhirter* v. *Thorne*, 19 C. P. 302.

Contemporaneous Advances—*Surety.*]—A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, s. 130:—Held, under the circumstances stated in the report of this case, that the defendant might hold a mortgage in his favour created by a person in insolvent circumstances for certain advances made by the mortgagees contemporaneously with the execution of the incumbrance, and also for future advances intended to be secured thereby, though it was not shewn that such advances were made for

the purpose of enabling the mortgagor to carry on his business, but that such mortgage was not a valid security for antecedent advances made by the mortgagee, nor for notes indorsed by the mortgagee for the mortgagor, but not paid, in respect of which therefore he had been a surety only, not a creditor. *Smith* v. *Harrington*, 29 Gr. 502.

Contemporaneous Liability.]—Declaration in detinue and trover for goods. Plea, that one J., the owner, being a debtor unable to meet his engagements, and in contemplation of insolvency, mortgaged the goods to the plaintiff, and within thirty days thereafter made a voluntary assignment in insolvency to the defendant, the official assignee; that the mortgage was made to the plaintiff as a creditor of and surety for J., whereby the plaintiff obtained an unjust preference over J.'s other creditors, who were thereby injured and obstructed, wherefore the mortgage was void, and defendant as assignee took the goods. The plaintiff replied that J. being a retail dealer, and wanting goods to carry on his business, asked the plaintiff to indorse notes to enable him to purchase them: that the plaintiff consented, on condition that J. on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise the plaintiff might sell the goods for his own protection: that the plaintiff accordingly indorsed, and J. with the notes purchased goods, which he mortgaged to the plaintiff, as agreed on, with other goods, for the bonâ fide and sole consideration of perfecting the said agreement; that J. afterwards, without the plaintiff's consent, assigned to the defendant, who took with notice of the mortgage, and was proceeding to sell the goods, when the plaintiff forbade him and demanded them:—Held, that the replication was good, for that the plaintiff only became a creditor by the actual transaction, in which he gave the equivalent in the new goods purchased procured on his credit; and under these circumstances, the plaintiff being ignorant of J.'s position, the mortgage was not avoided by the Insolvent Act (s. 8, s.-s. 1, 3, 4), though its effect might be to delay creditors. Quære, whether it was voidable under s.-s. 2. *Mathers* v. *Lynch*, 27 U. C. R. 244.

Held, that the mortgage in this case, given under circumstances fully set out in 27 U. C. R. 244, was good as against creditors, the jury having found it to be bonâ fide; and that notice to the official assignee of the mortgagee's claim was immaterial. S. C., 28 U. C. R. 354.

Conveyance Before the Act.]—The Act of 1864 does not invalidate conveyances previously executed, and valid when executed. *Gordon* v. *Young*, 12 Gr. 318.

Creditors Not Obstructed—*Contemplation of Insolvency.*]—A transfer of property by a debtor, which gives a creditor a preference over the other creditors, is not necessarily void as one by which creditors are injured, obstructed, or delayed; and where such a preference was not made in contemplation of insolvency, and was not unjust, it was held valid. The insolvent, six months before an attachment issued against him, conveyed his equity of redemption in certain lands to the defendant, upon trust to sell the same, and apply the proceeds, after payment of the mortgage, in payment of the pre-existing debts due to the defendant and one T., and to pay over the surplus, if any, to the insolvent. The insolvent had previously failed to effect a sale of the land for more than the mortgage debt. It did not appear clearly what other property the insolvent had at the date of the deed, or what other debts he owed. The estate, however, which came into the hands of the assignee, consisted of a watch, while the claims proved amounted to $277.80. The evidence did not shew that the deed was made in contemplation of insolvency. The learned Judge at the trial found that there was no fraud or preference in the making of the deed, and that it was a bonâ fide transaction:—Held, reversing 28 C. P. 132, that the deed was not void under ss. 130 or 132 of the Act of 1875, as the evidence did not shew that the creditors were injured, obstructed, or delayed; nor under s. 133, as it did not appear that it was an unjust preference, or made in contemplation of insolvency. *McEdwards* v. *Palmer*, 2 A. R. 439.

Equitable Assignment—*Intention.*]—A debtor had executed several chattel mortgages to secure indorsers of his paper, and afterwards a power of attorney to their appointee to sell and pay the mortgage debts. The validity of the mortgages under the Act for the registration of chattel mortgages was disputed and not decided, it being held, that the power was in effect an equitable assignment: that the transaction was neither a mortgage nor a sale: that the instrument did not require registration; and that it was a valid assignment under the insolvent law, on the ground of having been executed to give effect to what was intended by the mortgages as understood by the parties thereto. *Patterson* v. *Kingsley*, 25 Gr. 425.

Exchange of Cheques.]—A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheque. A cheque of A.'s had been dishonoured, and the holder called at A.'s office the same day, and a clerk, in the ordinary course of business, gave the holder B.'s cheque to pay the dishonoured cheque. The next day A. stopped payment:—Held, following McWhirter v. Thorne, 19 C. P. 302, that the transfer was not a fraudulent preference under the Insolvent Act of 1869. *City Bank* v. *Smith*, 20 C. P. 93.

Exchange of Securities — *Relation Back.*]—M. had in his warehouse 2,500 bushels of rye, belonging to T. & W. They owed him $1,400, made up of money due for storing that and other grain, for grain supplied to them, and for balance of account. T. & W. were insolvent, and their creditors pressing them, of which M. was aware. They demanded the grain more than once, alleging that it would enable them to meet their creditors' immediate demands, but M. refused, saying it was his only security; and in the end T. offered, if M. would give it up and a receipt of the debt due to him by T. & W., to assign to M. his interest in a vessel, then worth about $1,600. This M. assented to, and on the 20th November, T. executed a bill of sale of his interest to M., and received the grain. This transfer, however, being informal, was returned by the custom house authorities, and another one executed on the 5th

December. On the 7th January an attachment in insolvency issued against T.:—Held, that as M. had demanded payment, and the transfer was made on the express condition that the rye should be given up, the transaction must be regarded as not a voluntary one, and therefore not one by which M. had obtained an unjust preference. Held, also, that the transaction must be looked at as if carried out on the 28th November. *McFarlane* v. *McDonald*, 21 Gr. 319.

Expenditure for Wife Before and After Marriage.]—The insolvent had conveyed by way of settlement to his intended wife a lot of land on which he had commenced a house, but which was not completed until after the marriage. On a bill filed by the assignee in insolvency, the court declared that for so much of the buildings as was completed after the marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Gr. 156.

Following Proceeds.] — A conveyance void against creditors was made in December, 1868, through a third party, to the owner's wife; the husband in November, 1869, became insolvent, and in June, 1870, joined his wife in a sale of the property to a purchaser without notice; a conveyance to the purchaser was executed and registered, and the purchaser gave the wife a mortgage for part of the purchase money, and paid her the residue in cash. On a bill by the assignee in insolvency he was declared entitled to the mortgage, and to any of the money which still remained in the wife's hands, and to any property, real or personal, which she had purchased with the residue, and still owned; but the court refused to direct an inquiry whether she had separate estate, in order to charge the same with any of the residue which had been spent by her, or with the costs of the suit. *Saunders* v. *Stull*, 18 Gr. 590.

Fraudulent Purchase—*Repeal of Act.*] —Where a judgment has been recovered for a debt without fraud being charged under s. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud, even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lightbound* v. *Hill*, 32 C. P. 249.

Quære, whether, where an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud was a proceeding that might be continued thereunder under the terms of the repealing Act, 43 Vict. c. 1 (D.), or of the Interpretation Act, 31 Vict. c. 1 (D.); and whether, also, s. 136 of the Insolvent Act of 1875 was ultra vires the Dominion Parliament. Remarks as to the difference between s. 136, and the corresponding provision in s. 92 in the Insolvent Act of 1869. *Ib.*

Good Faith.]—In December, 1874, D. executed a mortgage for $2,000 in favour of his sons, to secure moneys advanced by them for the erection of buildings on the mortgage premises, and in July following he conveyed the same property, with other lands, to his daughter in trust for his wife, who had advanced $700 for the same purpose. Subsequently the sons, intending to benefit their mother, executed a statutory discharge of their mortgage. In July, 1876, D. having become insolvent, his assignee instituted proceedings impeaching the conveyance to the wife as a fraud upon creditors, and which she admitted on her examination, though denied by her answer, to have been by way of security only. The court negatived fraud in both transactions, and made a decree for redemption, declaring the wife entitled to be paid the two sums of $700 and $2,000, and her costs. The maxim "Ignorantia juris neminem excusat" treated of and explained. *Smith* v. *Drew*, 25 Gr. 188.

Good Faith — *Indefinite Promise.*] — In May, 1874, A., a manufacturer, opened an account with a bank, representing himself as being in good circumstances with a capital of $20,000 over all his liabilities, which was believed by C., the bank agent, who thought him doing a flourishing business, and A. then promised to keep C. always well supplied with collaterals for any accommodation afforded him. In December, 1875, A. applied to C. for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the bank for advances to be made to him; which proposal was acceded to by C. Advances were accordingly made, for which receipts were deposited with C. on the 19th January, 25th January, 1st February, and 7th February. On the 26th February, A., in compliance with a demand by some of his creditors, executed an assignment in insolvency. On a bill filed to impeach these transactions as an unjust preference, the court, being satisfied that they all took place in good faith, and not in contemplation of insolvency: —Held, that the bank was entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignment in insolvency, but in respect of such of them as were deposited within the thirty days the bank could not claim any lien or priority. Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security. The promise, however, to keep C. well supplied with collaterals was of too vague and general a character to entitle the bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold (without specifying any quantity), and C. was to judge of the amount of the advances to be made:—Held, that this agreement was not so vague or uncertain as to prevent the bank obtaining security for advances. *Suter* v. *Merchants Bank*, 24 Gr. 365.

It is incumbent on a party seeking to impeach as an unjust preference, a transaction between a debtor and his creditor occurring more than thirty days before insolvency, to prove that such transaction took place in contemplation of insolvency. A. owned a barley mill, which he was endeavouring to sell to one T., whose notes he was to accept in payment, and in December, 1875, he arranged with C. that these notes were to be handed over in security for all his notes then under discount. Subsequently, and on the 7th February, 1876,

the sale to T. having fallen through, he executed a memorandum in writing transferring to C. "as collateral security against paper discounted for me, my right, title, and interest in a barley mill * * keeping the privilege of disposing of the same and handing to you the promissory notes of the" purchaser:—Held, that this was not an unjust preference: that the bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security, on the sale falling through, to obtain an assignment of the mill itself. *Ib.*

Intent to Defeat Creditors.]—F., an hotelkeeper, being largely indebted, sold to A. B., his principal creditor, on the 19th January, 1875, by notarial deed, duly registered, certain movable and immovable property, being the bulk of his estate, comprising the hotel and furniture, for $15,409.50. The immovable property, valued by official assessors at $22,000, was sold for $10,000. The sale was also made subject to a right of redemption by F. on re-imbursing, within three years, the stipulated price of $15,409.50, and interest at the rate of 8 per cent., with a provision that, in case of insolvency or default of payment, this right of rémeré should cease. No delivery took place, and ten months later F., who remained in possession of the property under a lease from A. B. of the same date as that of the sale, also became bankrupt. In the meantime A. B., with F.'s consent, had leased the furniture to T. and J., in whose hands it was when appellant (F.'s assignee) revendicated it as part of the insolvent estate. T. and J. did not plead but A. B. intervened and claimed the effects under the deed of sale above mentioned. The assignee contested the intervention, alleging that deeds passed on the 19th January, 1875, had been made by F. in fraud of his creditors:—Held, that there was sufficient evidence to prove that the object of the transaction was to defeat F.'s creditors generally, and therefore the deeds of sale and lease of 19th January, 1875, were null and void under Arts. 1033, 1035, 1040 and 933 C. C. L. C., and ss. 86 and 88 of Insolvent Act of 1869, and s. 3, s.-s. 13, of Insolvent Act of 1875. *Rickaby* v. *Bell*, 2 S. C. R. 569.

Mortgage.]—Two mortgages were created by a debtor in favour of a creditor, whose claim consisted of promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. On a bill filed by the assignee in insolvency to set aside these mortgages, the court held them void as an "unjust preference" under the Insolvent Acts of 1864 and 1869. *Payne* v. *Hendry*, 20 Gr. 142.

Mortgage of Goods to Vendor.]—The plaintiff claiming under a chattel mortgage for $2,000, as against an execution creditor, called the mortgagor, who swore that when it was given he was not insolvent, having real estate, and a claim against a railway company for which two years previously he had refused $100,000; but there were several unsatisfied judgments and executions against him. He stated also, that the mortgage was given for the price of the property covered by it, household furniture, which he had bought from the plaintiff; and that the terms of his purchase were cash, but being disappointed in getting the money to pay, he had offered either to let the plaintiff take back the furniture or give him a mortgage on it, which latter the plaintiff accepted. The jury having found that this mortgage was given by the mortgagor being insolvent, with intent to give the plaintiff a preference over his other creditors:—Held, that there was evidence to go to them of the mortgagor's insolvency, but that if the mortgage was given under the circumstances stated by him, it was not a preference. A new trial was therefore granted. *Hersee* v. *White*, 29 U. C. R. 232.

Mortgage within Thirty Days.]—An insolvent, within thirty days of his insolvency, executed a mortgage to the defendant for alleged money advances. A composition was agreed upon, and as a collateral security therefor defendant assigned this mortgage to the assignee. The composition was apparently not carried out, and the plaintiff, the assignee, brought ejectment to recover the mortgaged premises, claiming both under the assignment in insolvency, and that the mortgage was fraudulent against creditors:—Held, upon the evidence set out in the case, that the mortgage was rightly found to be fraudulent as against creditors, and that the plaintiff was entitled to recover. *Davidson* v. *House*, 43 U. C. R. 592.

No Knowledge of Insolvency.]—C. & P. carrying on business in partnership, being indebted to the plaintiff's firm for money advanced to carry on their business, in consideration that the firm would indorse a note held by C. & P., agreed to execute a mortgage securing their indebtedness, and for the indemnity of the firm against this and other indorsements. Eighteen months after the execution of such mortgage C. & P. became insolvent:—Held, in the absence of evidence of knowledge on the part of the mortgagees of the inability of C. & P. to meet their engagements or of any mala fides in entering into the agreement, that the security could not be impeached under either the 130th, 131st, 132nd, or 133rd section of the Act of 1875. *Cook* v. *Rogers*, 26 Gr. 599.

Onus of Proof — *Pressure* — *Insurance.*]—In this case the insolvent, about two months before the attachment against him and his assignment consequent thereupon, assigned to defendant, a creditor, a policy of insurance upon merchandise in security for a debt about to be placed in suit, and the insurance company upon a fire paid over the proceeds of the policy to the creditor to the extent of his debt. The plaintiff claimed as assignee to recover back this amount, and he called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency; that his intention was, with the remaining assets and the residue of the moneys from the policy after paying defendant, to re open his business, but that he was driven into insolvency by the act of a creditor, who, though he had promised him time, sued out a writ of attachment against him:—Held, that the onus being upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency, (it not having been made within thirty days of the issue of attachment, or of the execution of the deed of assignment), the evidence produced by him failed to establish this fact, and that the verdict, therefore, for the defendant was right:—Held, also, that there was no fraudulent preference, it not being pretended

that the assignment of the policy was the spontaneous act of the debtor, but the fair inference being that it was made in consequence of pressure by the creditor:—Held, also, that s.-s. 5 of s. 8 clearly did not apply to this case, the money received by defendant not having been a payment by a debtor unable to meet his engagements in full, but having been received under the assignment of the policy, and from the company; that the assignment being valid it was quite immaterial whether when the money was paid the defendant knew, or had probable cause for believing in, the then inability of the insolvent to pay his debts in full. *McWhirter* v. *Thorne*, 19 C. P. 302.

Onus of Proof.]—The insolvent on the 17th September, 1877, gave a mortgage to the defendant, the alleged consideration being a prior debt of $600 and an advance in cash of $1,800. On the 18th October the writ of attachment issued. It was not pretended that any money was paid before the 1st October:—Held, that the onus of supporting the transaction was upon the defendant, and that the evidence was wholly insufficient, and on a bill filed by the assignee in insolvency the mortgage was set aside. *Rice* v. *Bryant*, 4 A. R. 542.

Onus of Proof—*Corroboration.*] —The bill was filed by the assignee in insolvency of one T., to set aside a mortgage given by him shortly before his insolvency, alleging that the defendant T. N., who was indorser of a note for $2,000 made by T., procured the mortgage in question for that amount to be made in the name of his brother J. N., and that he gave J. N. the $2,000 with which the note was retired. T. N. swore that he paid J. N. the money in discharge of a debt due by him to J. N. and P. N., another brother. J. N. also swore that the mortgage moneys belonged to him and P. N. but their evidence was uncorroborated, and P. N. was not called:—Held, that under the suspicious circumstances which surrounded this case, the onus was wholly upon the defendants, to prove not only that a debt was due from T. N., J. N. and P. N., but that the money received by them in payment thereof had been honestly advanced to T. on the security of the impeached mortgage, which the evidence set out in the report failed to establish. The rule laid down in Merchants' Bank v. Clarke, 18 Gr. 594, that transactions of this kind should not be held sufficiently established by the uncorroborated testimony of the parties thereto, approved of. *Morton* v. *Nihan*, 5 A. R. 20.

Payment.]—On the 18th October the insolvents sold goods to one C., taking his note for the price, which on the same day was taken by C., and by the defendant, and one of the insolvents, to a bank, and there left to be applied in payment of notes made by the insolvents and indorsed by defendant. On the 20th the insolvents made a voluntary assignment, being pressed to do so by threats of compulsory liquidation:—Held, that the transaction being within thirty days before the assignment, was a transfer to defendant by way of payment, giving him an unjust preference, and therefore void under s. 8, s.-s. 1; that there was evidence also that it was made by the insolvents when unable to pay, with a person knowing such inability, and therefore made with intent to defraud their creditors; and that it was also a payment to defendant under s.-ss. 5:—Held, also, that under s.-ss. 4 and 5 the assignee might recover in trover for the goods sold, though before his title accrued the note had been discounted and the proceeds applied on defendant's indorsations. *Churcher* v. *Cousins*, 28 U. C. R. 540.

Payment — *Creditor no Knowledge.*] — Held, that a payment by an insolvent after attachment against him, on account of a draft discounted by defendants for him, and dishonoured by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from him. *Roe* v. *Royal Canadian Bank*, 19 C. P. 34; followed in *Roe* v. *Bank of British North America*, 20 C. P. 351.

Payment—*Valuable Security Given Up.*] —Action by the assignee of B. & P., to recover back $190 paid by them to defendant within thirty days next before the assignment, they being then unable to meet their engagements in full, and defendant knowing such inability, or having probable cause for believing it to exist. Plea, on equitable grounds, that before the alleged payment, B. & P., being retail merchants, requested defendant to lend to them for the purpose of carrying on their business, and he did lend, from time to time, various sums of money, upon the express agreement that such moneys should be repaid to defendant out of the proceeds of the daily sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P. upon trust to repay, and should be charged with and applied in repaying, the defendant the amount lent by him; that at the time of the payments defendant was the creditor of B. & P. to an amount not less than the $190, for moneys advanced upon the said express agreement, and the moneys paid to defendant by B. & P. were paid out of and formed part of the proceeds of said daily sales, and were applied by defendant upon and on account of the moneys lent to defendant upon the said agreement, and not otherwise:—Held, on demurrer, plea good; for that the agreement between B. & P. and defendant, gave defendant an equitable claim and mortgage on their goods, which, under the proviso to s. 90 of the Insolvent Act of 1869, was a "valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded. *Churcher* v. *Johnston*, 34 U. C. R. 528.

Payment of Indorsed Note.]—A trader being in embarrassed circumstances, sold out his business, and out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, and shortly afterwards went into insolvency. The evidence did not shew that the indorser was aware or was a party to the payment in any way, and it was by no act of his that the note was so paid:—Held, under the circumstances, that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note. But, where the payment of a note had been procured by the indorser, he was, under s. 89 of the Insolvent Act of 1869, (in effect the same as section 133 of the Act of 1875), held liable to make good the amount thereof. *Botham* v. *Armstrong*, 24 Gr. 216.

Payment of Money—*No Knowledge of Insolvency.*]—A payment by an insolvent in the ordinary course of business within thirty days before an assignment or the issue of a

writ of attachment, is not void under s. 134 of the Act of 1875, unless the payee knows of the insolvent's inability to meet his engagements in full, or has probable cause for believing the same to exist. Held, also that a money payment not avoided under that section cannot be avoided under s. 133 by shewing that it was made in contemplation of insolvency, and that it gave the debtor an unjust preference, as a payment in money does not come within that section. Ex parte Simpson, 1 DeG. 9, distinguished. *Smith* v. *Hutchinson*, 2 A. R. 405.

Payment of Note at Request of Sureties.]—The insolvent paid a note to the holder at the request of his sureties, who had given a mortgage to secure the amount of the note, within thirty days of his being placed in insolvency. It appeared that when the sureties made this request neither they nor the creditor who held the note and mortgage knew or had probable cause for believing that the insolvent was unable to meet his engagements in full:—Held, that the payment was not void within s. 134 of the Act of 1875, and that the assignee had no right to have the mortgage reinstated as against the sureties. *Nelles* v. *Paul*, 4 A. R. 1.

Payment by Agent—*Valuable Security Given Up.*]—A., carrying on business at St. Catharines, sold out his whole stock-in-trade and book debts, the purchasers assuming certain of the liabilities and paying an amount in cash. The sale was arranged and carried out by R., a creditor of A. and the father of one of the purchasers, into whose hands the purchase money was paid. A. was indebted to defendant in two notes given for goods purchased from defendant. These were paid by R. within thirty days of A. being declared an insolvent, and out of the purchase money in R.'s hands. The payment was effected by drafts drawn by defendant on R., accepted by R., and discounted by defendant at a bank, to whom R. paid the amount thereof. The plaintiff, as assignee in insolvency of A.'s estate, sued defendant to recover back the moneys so paid to him, and the learned Judge, who tried the case without a jury, found that defendant knew or had probable cause for believing that A. was insolvent. The defendant set up that the drafts were drawn and the money paid by R. under a personal undertaking by him contained in certain letters written to defendant. The learned Judge at the trial found for the plaintiff, and on motion to enter the verdict for the defendant, the court being equally divided, the rule dropped, and the verdict stood; but for the purposes of appeal the rule was directed to be discharged without costs. *Miller* v. *Reid*, 29 C. P. 576.

Held, affirming the above judgment, that the plaintiff was entitled to recover; that the evidence shewed that defendant had probable cause for believing A. to be insolvent when he received the money, which clearly belonged to A.; and that R. made such payment out of A.'s money and as his agent. Held, also, that the acceptance was not a valuable security within s. 134 of the Insolvent Act of 1875, which the assignee was obliged to restore to the defendant as a condition precedent to the prosecution of the suit. *S. C.*, 4 A. R. 479.

Payment of Discounted Note.]—The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency. In an action by the assignee to recover the amount from the defendants as being a payment within s. 134 of the Insolvent Act of 1875:—Held, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors. *Miller* v. *Harvey*, 6 A. R. 203.

Payments to Surety.]—G., in 1878, being unable, on account of depression in business, to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of $6,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be indorsed to their satisfaction. N. (the respondent) agreed to indorse the last notes on condition that G. should deposit in a bank in his (N.'s) name $75 per week to secure him for such indorsation, and G. signed an agreement to that effect. Thereupon N. indorsed G.'s notes to an amount of over $4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after having deposited $2,007.87 in N.'s name, in the Ville Marie Bank, failed, and N. paid the notes he had indorsed, partly with the $2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B., for the benefit of all G.'s creditors:—Held, that the arrangement between G. and N., by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance, and not in contravention, of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference. *Beausoleil* v. *Normand*, 9 S. C. R. 711.

Pressure—*Belief as to Continuance of Business.*]—The Insolvent Act (1864) forbids mortgages of real estate to a creditor by way of preference. *Curtis* v. *Dale*, 2 Ch. Ch. 184.

But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so) and made a mortgage of real estate under pressure on the part of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency. *Ib.*

Pressure—*No Knowledge of Insolvency—Whole of Assets Mortgaged.*]—The insolvent, an innkeeper, on the 12th August, 1869, gave the plaintiff a mortgage upon the whole of his property, payable in six months, for an overdue debt. The attachment in insolvency issued on the 6th December following, and the assignee seized and sold the goods. The evidence shewed that the mortgagor knew or had strong reasons to believe himself to be insolvent when he gave the mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors:—Held, that under these circumstances it was not void under the Insolvent

Act as against the assignee. *Archibald* v. *Haldan*, 31 U. C. R. 295.

Pressure—*Part of Assets—No Knowledge of Insolvency.*]—A mortgage was obtained by pressure from an insolvent person, a miller, three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforceable for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid. *McWhirter* v. *Royal Canadian Bank*, 17 Gr. 480.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him by pressure a mortgage on his chattels used in his business. This mortgage was held void against the assignee in insolvency. *Ib.*

Pressure — *Advances.*] — On the 11th September, M. H. and R. H. her husband made a chattel mortgage to the Dominion Bank to secure a previous indebtedness of R. H. to the bank. No future day was named for the payment, and the proviso for possession until default was struck out. A writ of attachment in insolvency was issued against R. H. on the 4th October, 1875, and the assignee took possession of the mortgaged chattels then in the debtor's possession. The bank claimed the chattels under the mortgage, which the assignee contended was void as against the creditors. The bank thereupon petitioned for an order directing the assignee to deliver up the goods. It appeared that the debtor had long previously been embarrassed; that most of his paper was under protest; that his real estate was also mortgaged to the bank and others, and no pressure was shewn to obtain the mortgage, and no promise was made of any future advance. The Judge in insolvency declined to grant the order petitioned for, holding the mortgage void under ss. 130 and 133:—Held, under these circumstances, after an elaborate review of the English and Canadian authorities bearing on the subject, that the chattel mortgage was fraudulent and void as against creditors, and the appeal was dismissed, with costs. *In re Hurst*, 6 P. R. 329.

Pressure — *Threats of Criminal Proceedings—Simulated Pressure.*] — A preference which a debtor is induced to give by threats of criminal or other proceedings, is not void under 22 Vict. c. 96, or the Insolvent Act of 1864. But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure, for the mere purpose of giving effect to the debtor's desire and intention to give a preference. *Clemmow* v. *Converse*, 16 Gr. 547.

Pressure—*Presumption.*] — Two cousins, H. and R., entered into partnership in trade, R. furnishing all the capital (about $1,400). After eighteen months R. retired from the business, assigning as a reason therefor his having become possessed of the family homestead, the management of which it was necessary for him to superintend. On R.'s retirement he sold his interest to S., a brother of H., for about $1,230, and paid partly by two promissory notes, one for $80 at a short date, and the other for $1,080 at a year, indorsed by two other brothers, and the residue by $70 in cash, supplied by one of the indorsers, S. having been without any means of his own. Shortly afterwards (about three or four months) S. withdrew from the business, making way for J., a brother-in-law of H. and S., who put $1,000 into the business, but paid nothing to S. for the transfer of his interest. The smaller note was duly paid, but the larger note was not met at maturity, and it was alleged that there was an understanding for an extension of time for payment; R. omitted to give the indorsers notice of dishonour, and some months afterwards, claiming that the partnership effects were, under the circumstances and a prior verbal arrangement, answerable for the note, applied to H. and J. (the new firm) for payment thereof, and they being unable to meet the demand assigned to R. certain accounts, and executed in his favour a chattel mortgage on nearly the whole of their assets, as security for its ultimate payment. Within thirty days after the execution of these instruments H. and J. were placed in insolvency by other creditors:—Held, that such assignment and mortgage were void, as an unjust preference made in contemplation of insolvency, within s. 89 of the Act of 1869 (32 & 33 Vict. c. 16). The court divided upon the question whether the presumption referred to in s. 89 of the Act of 1869, is or is not a rebuttable one. But per curiam, mere pressure will not, under any circumstances, validate such transactions. *Davidson* v. *Ross*, 24 Gr. 22.

Pressure.]—Traders, who had been in business for about eight months, and were at the end of that time in insolvent circumstances, had sent an order for goods to their largest creditor, whose account against the firm had increased to double the amount it was originally agreed that it should be, which goods were packed up, but not sent for some days, when one of the firm waited on the creditor, taking with him a list of debts due the firm, intending, by arrangement with his partner, to offer to assign to the creditor such of these accounts as the creditor should select, and which he accordingly did offer on being asked if he could pay any money on account, and a transfer thereof was accepted by the creditor:—Held, that this was sufficient pressure on the part of the creditor to prevent the assignment being considered a preferential one within the Act. *Keays* v. *Brown*, 22 Gr. 10.

Pressure.]—Held, that even if pressure had been proved in the case, it could not, under the ruling in Davidson v. Ross, 24 Gr. 22, have validated the assignment. *Davidson* v. *McInnes*, 22 Gr. 217, 24 Gr. 414.

Presumption—*Onus of Proof—Pressure.*]—Under s. 89 of the Insolvent Act of 1869, the presumption that transactions within thirty days next before the assignment, &c., were made in contemplation of insolvency, is not conclusive, but may be rebutted. In this case the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for $900, of which $400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in, and on the 9th he purchased from the insolvent about $1,400 worth of pork, on condition that $600 should go upon the mortgage, and he paid the balance of the purchase money

to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought this suit against the creditor to avoid the transaction. The creditor said he did not wish to press the debtor in any way, but wanted his money. The debtor owed about $3,000, and his property produced only $1,000. There was contradictory evidence as to defendant knowing or having probable cause for believing that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favour of the defendant, the creditor, the court held that the transaction was not avoided by force of the statute; and upon the facts they refused to interfere:—Held, also, that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases. *Campbell* v. *Barrie*, 31 U. C. R. 279.

Principal and Agent—*Evidence.*]—The plaintiff purchased barley from R., telling him to consign it to C. and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to protect himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley the plaintiff paid to him $540 as margin to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold; and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:—Held, that the plaintiff was entitled to it, for the barley was his, and the money the proceeds of its sale, never came into C.'s hands, or was mixed with his general assets. C. had advanced by paying R.'s draft more than the proceeds of the barley, and it was contended therefore that there was no surplus available for the plaintiff: but held, that the plaintiff was entitled to deduct from such advance the sums paid by way of margin. After C. had absconded the plaintiff went to his office to ask about his barley, and there saw R., the manager of C.'s business, who went with him to the bank and had a conversation with the cashier:—Held, that their evidence of what passed was clearly admissible. *Cotter* v. *Mason*, 30 U. C. R. 181.

Probable Cause for Knowledge of Insolvency.] — The learned Judge found, under s. 130 of the Act of 1875, that the mortgagee did not know of the insolvents' inability to meet their engagements, but that it was notorious, and that he had probable cause for believing it, so that the mortgage must be presumed to be made with intent to defraud creditors: and as a conclusion from these facts, he found that such intent was known to the mortgagee, and that s. 132 also applied:—Held, that the finding of the facts required by s. 130 was sustained by the evidence; but that the conclusion from these facts was not warranted, and that s. 132 therefore did not apply. *Re Andrews*, 2 A. R. 24.

Sale for Pre-existing Debt.]—A person being insolvent sold his property to a creditor, the consideration being a pre-existing debt, and a sum in addition sufficient to make up the price agreed upon as the value of the property sold; the amount so received by the debtor being by him paid over, with the knowledge of the purchaser, to another creditor; and three months after this sale the debtor made an assignment under the Insolvent Act. On a bill filed by a creditor, the sale was set aside and a re-sale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if any, to be paid over to the assignee in insolvency. *Coates* v. *Joslin*, 12 Gr. 524.

Sale of Stock-in-trade—*Notes Handed to Creditor—Pressure.*]—A trader, who was indebted to the amount of $8,000, and claimed to have assets, consisting of stock-in-trade, book, and other debts due to him, to the amount of about $8,500, agreed with one of his creditors to sell off his entire stock-in-trade, procure notes therefor, and hand the same over to the creditor in discharge of his claim, which was accordingly done by the debtor to an amount of about $6,000; leaving only the book debts, which it was shewn would pay not more than twenty-five per cent. on the claims of the remaining creditors. At this time about one-half of the claim of the creditor so paid off was not due:—Held, that under the circumstances this was a preferential assignment within the meaning of the Insolvent Act, and as such fraudulent and void against the general body of creditors; and that it could not be supported as having been procured by pressure. *Davidson* v. *McInnes*, 22 Gr. 217; 24 Gr. 414.

Sale of Stock-in-trade at a Sacrifice.]—The plaintiff, who lived in Stirling and carried on business there, went to Belleville, about twenty miles distant, where he saw for the first time about mid-day one G., who was in business there. They discussed the purchase by the plaintiff of G.'s stock-in-trade, amounting to something over $4,000, but concluded no bargain. The plaintiff then went home, realized all his available assets, part at a sacrifice, returned to Belleville between nine and ten the same night with his son, at once commenced taking stock with G., finished next evening between five and six, and then, without making any inquiry as to G.'s position or taking any advice on the subject, according to his own statement, purchased the stock at 90 cents on $, and paid over to G. in cash the purchase money, $4,279. G., who was insolvent at the time, being indebted in about $17,000, with less than $5,000 of assets, absconded that night with the money. Other evidence went to shew that the plaintiff in fact purchased the business at 35 per cent. discount, i. e., for $2,700, and there were other circumstances of suspicion:—Held, that the jury properly found the sale to be fraudulent and void under ss. 86 and 88 of the Insolvent Act of 1869:—Held, also, that even if the plaintiff were innocent of wrongful intent, the sale of his whole stock-in-trade was in itself an act of bankruptcy. *Brooks* v. *Taylor*, 26 C. P. 443.

Sale or Transfer Within Thirty Days—*Presumption—Accommodation Acceptor.*]—Where a sale or transfer of goods is made to a creditor within thirty days before the issuing of a writ of attachment in insolvency:—Held, that the statutory presumption raised by s. 133 of the Act of 1875, that it is done

in contemplation of insolvency, is not displaced by merely shewing that the sale or transfer was bonâ fide, or that the creditor did not know or had not probable cause for believing the insolvent was unable to meet his engagements.

In this case the goods were delivered to the defendant, an accommodation acceptor of a draft drawn on him by insolvents, and protested for non-payment, upon the defendant agreeing to take up the draft, which he did. The only evidence as to the condition of the insolvents' affairs was, that within three days after the delivery of the goods the insolvents made an assignment in pursuance of the Act, their liabilities being upwards of $147,000:—Held, under these circumstances, that the sale must be deemed to have been made in contemplation of insolvency, and there being no evidence displacing such presumption, the defendant, if a creditor, must be assumed to have obtained an unjust preference, notwithstanding the jury expressly found otherwise:—Held, however, that an accommodation acceptor who has not paid the draft is not a creditor within the meaning of s. 133 of the Act, so as to avoid a sale made in good faith and in the ordinary course of business. *Evans* v. *Ross*, 30 C. P. 121.

Substitution of Debtors.]—Knox being indebted to one Kyle, and Kyle to defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by s. 8, s.-s. 4, of the Insolvent Act of 1864; but held, not, for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the Act, and so avoided, this would not entitle the plaintiff to the note. *McGregor* v. *Hume*, 28 U. C. R. 380.

Threat of Criminal Proceedings—*Foreign Country.*]—An insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs. *Roe* v. *Smith*, 15 Gr. 344.

Threat of Criminal Proceedings.]—A preference which a debtor is induced to give by threats of criminal or other proceedings, is not void under the Indigent Debtors Act of 1859, or the Insolvent Act of 1864. *Clemmow* v. *Converse*, 16 Gr. 547.

Transfer of Goods to Creditors—*Procedure.*]—The prisoners were indicted under s. 147 of the Insolvent Act of 1869, for having within three months preceding the execution of an assignment in insolvency pawned, pledged, and disposed of, otherwise than in the way of trade, certain goods which had remained unpaid for during the said three months. The goods, which had been purchased on credit, the period of which had not expired when the prisoners were indicted, were given on the day of assignment, but before its execution, to a clerk on account of salary due to him, and to indemnify him against accommodation indorsements, to a carter in their employment, in satisfaction of a sum of money previously deposited with them, and to a person who had given them accommodation notes. The indictment was found on the 25rd October, but the information had been laid and the prisoners arrested before the 1st September, when the Insolvent Act of 1875, came into force:—Held, that the disposal of the goods as above was an offence within s. 147; and that it was no objection that such disposal was not to their own use, but to satisfy creditors, and that the time of credit on which the insolvents had purchased the goods had not expired when defendants made their assignment. *Regina* v. *Kerr*, 26 C. P. 214.

By s. 149 of the Act of 1875, the Act of 1869 was repealed, but there was a saving clause as regarded proceedings commenced and pending thereunder, and as regarded all contracts, acts, matters, and things made and done before such repeal, to which the said Act of 1869 would have applied:—Held, that the prosecution as well as the offence came within the saving clause, the laying of the information being the commencement of the prosecution, while the said disposal was a contract, &c., done before such repeal. *Ib.*

Section 148 of the Act of 1869 provided that all offences punishable under that Act should be tried by a special jury. Section 141 of the Act of 1875 directed that all offences punishable under that Act should be tried as other offences of the same degree; and by s. 159, as respects matters of procedure merely, the provisions of that Act should supersede the Act of 1869. In this case, before the trial, the Crown gave notice of and struck a special jury, who were in attendance at the trial, but the Crown, notwithstanding, elected to call and try the case by a common jury. The prisoners' counsel objected thereto, and the case proceeded, the prisoners entering into a full defence, but subject to such objection, which was renewed at the close of the case, with the further objection that there had been a mistrial:—Held, that the case should have been tried by a special jury, for the offence was not punishable under the Act of 1875, and the matter was not one of procedure within s. 149; that there had therefore been a mistrial, and the prisoners under the circumstances had not waived their right to insist upon their objection; and that this was a "question of law which arose on the trial," which might properly be reserved, and not an objection to be raised by challenge to the jury. *Ib.*

Transfer by Partner to Co-partner of Interest in the Firm.]—A partnership existing between two persons was within three months of the issue of the writ of attachment in insolvency dissolved, and one of the partners transferred his interest in the partnership property to the other, but at the time of such transfer the firm, as well as the partners individually, were insolvent, which they were aware of or had probable cause for believing. Afterwards the remaining partner and the firm were placed in insolvency by compulsory liquidation, and a different assignee appointed for each:—Held, that the transfer was fraudulent and void, and that nothing passed under it; and that the assignee of the firm, therefore, and not of the separate partner, was entitled to the effects of the partnership; and an order made by the county Judge for the transfer of such property from the separate to the joint

assignee was confirmed:—Held, also, that even if the partnership creditors could prove against the effects in the hands of the separate assignee, so that all that was required was a direction to that effect, as the making of the order was purely a matter of discretion the court would not interfere. *In re Caton*, 26 C. P. 308.

Transfer of Insurance Loss.]—G. & C., a manufacturing firm, being unable to meet a note given to plaintiff in the course of their business, at the plaintiff's request gave him a chattel mortgage for $1,500 and interest, on certain machinery and tools in their manufactory, payable in eleven months, the mortgage containing a covenant by the mortgagors to insure against fire, and on demand to assign the policy to the plaintiff. No insurance was effected after the mortgage was executed, and shortly thereafter the property was destroyed by fire. The mortgagors, however, held several insurances on the property, one of which was on the chattels, but was invalid, and another in a mutual company, was on the building only in which these goods were, not on the goods. Some days after the fire G. & C., the mortgagors, with the knowledge that they were in insolvent circumstances, and within thirty days of being declared insolvent, gave the plaintiff an order on this company for a certain amount of money:—Held, that the order was void, under s. 133 of the Act of 1875. *Smyth* v. *Morton*, 30 C. P. 566.

Warehouse Receipts — *Unregistered Chattel Mortgage.*]—On the 13th September, 1866, S. agreed to deliver on account of K. at a railway station when wanted, 600 boxes of factory cheese, at a certain rate per pound, and to keep the same insured until wanted. The weight had not then been ascertained, in fact all had not been manufactured. Subsequently, two warehouse receipts, dated respectively 21st September and 9th October, were given to K., one for 320, the other for 230 boxes, signed by S. and specifying the weight of the cheese. On the 22nd October, K. mortgaged to plaintiffs 400 boxes of cheese, purchased by him from S. on or about the 13th September, and then in the curing house of S., to secure moneys advanced to him by plaintiffs, upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese:—Held, that even if the property did not pass before the 21st September, the subsequent insolvency of S. did not affect K.'s right; for that the Insolvent Act of 1864, s. 8, s.-s. 2, did not apply, as there was no evidence of obstructing or injuring creditors, but the contrary, the property having been sold at its full value; but, even if the case were within that clause the contract would be voidable only under the order of a competent tribunal, upon such terms as to the protection of the person from actual loss or liability as the court might direct:—Held, also, that the mortgage to the plaintiffs was valid, having been taken "by way of additional security for a debt contracted to the bank in the course of its business," and therefore within C. S. C. c. 54, s. 4; that it could not be impeached by any one for want of filing but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant, his assignee in insolvency. *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

Warehouse Receipts.]—Debt secured to bank by invalid warehouse receipts—Payment thereof by another bank and substitution of new receipts — Validity of the transaction under the Insolvent Act of 1876. *Milloy* v. *Kerr*, 43 U. C. R. 78; 3 A. R. 350; 8 S. C. R. 474.

Whole Estate Assigned—*Advances.*]—An assignment of the whole of a debtor's estate to secure a pre-existing debt is valid where a further advance is made, and there is a bonâ fide expectation and intention that the business of the debtor will be carried on. The insolvent gave one of his creditors a chattel mortgage upon the whole of the stock then in, or which at any time during its continuance might be in, his store, for an existing debt and a fresh advance; but the evidence set out in the report shewed that the advance was not made with the bonâ fide belief and intention that the business would be carried on through the relief afforded:—Held, that the mortgage was fraudulent, and could not be supported even for the further advance. *Kalus* v. *Hergert*, 1 A. R. 75.

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6. *Liens, Executions, and Privileged Claims.*

Court Sale—*Costs.*]—Where, previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit of chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity, the assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors:—Held, that such lands were subject to the order for sale, and the motion was refused with costs; the assignee, however, was considered entitled to his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors. *Yale* v. *Tollerton*, 2 Ch. Ch. 49.

Division Court Judgments.]—Section 59 of the Act of 1869 applies to judgment debts recovered in division courts, on which execution had been issued to, and the money levied thereunder by, a bailiff of such courts, although the section speaks only of executions delivered to the sheriff. *Patterson* v. *McCarthy*, 35 U. C. R. 14.

It was objected that defendant received the money only as clerk of the court, but it appeared that the sale had taken place after the assignment, and held, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be. *Ib.*

Execution—*Assignment not in Accordance with the Act.*]—On 30th January, 1865, W. B. executed before a notary public in Lower Canada, to the plaintiff Rose, an instrument which purported to be an assignment under the Act of 1864, but which was informal in several particulars. On the 24th February following, defendant issued execution against the goods of W. B. and gave it to the sheriff. On the 10th March following, the other plaintiffs issued an attachment under the Insolvent Act, under which an official assignee was appointed by the county Judge, and on the same day the sheriff seized the goods of W.B., after the issue of the attachment, but under the de-

fendant's execution:—Held, that the execution must prevail: for that the subsequent proceedings in insolvency avoided the assignment to Rose, and the execution being in the sheriff's hands before the issuing of the attachment, bound the goods at common law from its date, and under the Statute of Frauds from its delivery to the sheriff. *Rose* v. *Brown*, 16 C. P. 477.

Execution—*Assignment not in Accordance with the Act.*]—Proceedings in compulsory liquidation taken after the execution of an assignment for the benefit of creditors not made in accordance with the Act of 1864, render it absolutely void as against creditors of the insolvent, so as to let in intermediate execution creditors. *Thorne* v. *Torrance*, 16 C. P. 445; 18 C. P. 29.

Execution.]—Where an attachment under the Absconding Debtors Act was received by a sheriff and acted upon, and afterwards writs of fi. fa. were placed in his hands, and he subsequently received an attachment under the Insolvent Act of 1864:—Held, that defendant's property passed to the official assignee, but that he must give the execution creditors the priority to which they would be entitled. *Henry* v. *Douglass*, 1 C. L. J. 108.

Execution—*Time.*]—Judicial proceedings and statutes take effect in law from the earliest period of the day upon which they are respectively originated and come into force. M. recovered a judgment and issued a fi. fa. goods against R. The writ was given to the sheriff at half-past ten and a levy made about 11 a.m. On the same day, but after the levy, C. sued out against R. an attachment in insolvency, which the sheriff received at 11.30 a. m. On the same day, also, the Insolvent Act of 1865 came into force (the Royal assent being given thereto on the same day, but not till the afternoon), by which in effect this execution, unless theretofore issued and delivered to the sheriff, was postponed to the attachment:—Held, that the fi. fa. could not be considered as having been so issued and delivered, and therefore, by virtue of the Act, the attachment prevailed over the execution:—Held, also, that the execution creditor was not entitled to any lien for his costs. Semble, that the issuing of the attachment was a judicial act, and by it the property of the insolvent vested in the assignee by relation before it was seized under and before any lien attached by virtue of the execution. *Converse* v. *Michie*, 16 C. P. 167.

Execution—*Costs.*]—A stay of proceedings was given to a sheriff on an execution in his hands by the attorney for the execution creditors:—Held, that the execution, under which they claimed priority over an official assignee, had not been placed in the sheriff's hands for execution until too late to give them priority as regarded the balance due thereon, the assignment having been made within thirty days after the time the writ was given to the sheriff for execution; but that the execution creditors were entitled to their costs of suit to be proved as a privileged claim. *In re Fair and Buits*, 2 C. L. J. 216.

Execution.]—Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the Insolvent Act; the conditions of the agreement having been so far performed:—Held, 1. That the writs were not in the sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the sheriff took priority. 2. That the seizing creditors had no lien for their costs under ss. 3, 12, 13, of the Act of 1865, the lien there given applying solely to the law of Quebec. [But see next case.] 3. That the sheriff had no lien or claim on the goods seized for his fees. *In re Ross*, 3 P. R. 394.

Execution.]—Held, overruling the above case, that under s. 13, a judgment creditor who had an execution in the sheriff's hands at the making of the assignment, was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent. *In re Heyden*, 29 U. C. R. 262.

Execution.]—Defendant's execution was handed to the sheriff on the 28th June, the assignment to the plaintiff made on the 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent and did not object to the assignment, and at which it was agreed to discharge the insolvent, was held on 28th August following:—Held, that even if the creditors had adopted plaintiff as their assignee, which did not appear, it would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting, not to that of the assignment. *McWhirter* v. *Learmouth*, 18 C. P. 136.

Execution.]—M., under a fi. fa. at his own suit against D., which was the first in the sheriff's hands, purchased certain land in September, 1867. D. had in April previous made a voluntary assignment, under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale, under the amending Act, 29 Vict. c. 18, s. 17. M. claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The court, under these circumstances, discharged with costs an application by M. for a mandamus to compel the sheriff to convey, to which the assignee was no party. *In re Moffatt*, 27 U. C. R. 52.

Execution.]—On the 10th May, 1873, K. executed a voluntary assignment to the official assignee, who, on being told of it, advised a private arrangement in order to save expense. On the 12th the plaintiff recovered judgment, and issued an execution against K., to defendant, a division court bailiff, who seized a pair of horses, and took a bond for their forthcoming. On the 2nd June defendant, having again taken the horses, advertised them for sale under the execution. The assignee finally received and acted under the assignment on the 7th June, and claimed the horses from defendant, who gave them up to him. In an action against defendant and his sureties for not selling sooner under the execution:—Held, 1. That the horses passed to the assignee on the execution of the assignment, though he did not assent to or act under it until the 7th June, and that there was no breach of duty, therefore, on defendant's part in not selling before the claim was made. 2. That even if defendant was guilty of neglect the plaintiff had sustained no damage, for if he had proceeded to sell, the assignee would no doubt have claimed, and no benefit could have re-

sulted to the plaintiff. *Brown* v. *Wright*, 35 U. C. R. 378.

Execution.]—The plaintiff issued a fi. fa. lands on the 7th June, 1865, and renewed it from time to time until 4th June, 1867. On 30th March, 1867, defendant obtained his discharge in insolvency. Plaintiff had proved his claim for the full amount of the judgment in the insolvent court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so. The court set the fi. fa. aside with costs. *Dickinson* v. *Bunnell*, 19 C. P. 216.

Execution—*Chattel Mortgage.*]—An execution against an insolvent debtor is superseded by an attachment in insolvency, and a chattel mortgage void against an execution creditor, but good against an assignee in insolvency, prevails over an execution so superseded. *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

Execution—*Interpleader.*]—An execution was delivered to a sheriff against the goods of the defendant, upon which he seized certain goods. These goods were claimed by the guardian in insolvency of the estate of the defendant, against whom a writ of attachment under the Insolvent Act had also issued to the same sheriff. The sheriff applied for relief under the Interpleader Act:—Held, that under 28 Vict. c. 19, s. 2, he was entitled to protection, and an issue was directed. *Burns* v. *Steel*, 2 C. L. J. 189.

Execution — *Mortgage Action.*] — The mortgagor of land having made an assignment in insolvency, subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by the prior mortgagee, it was held that, in the absence of proof of waiver by the plaintiff of his rights, the plaintiff was entitled to priority as against the creditors of the mortgagor under the assignment in insolvency. *Darling* v. *Wilson*, 16 Gr. 255.

Execution — *Money Realized.*] — Held, under s. 13 of the Act of 1865, that where before the assignment the money had been made by the sheriff under a fi. fa. against the insolvent, the execution creditor was entitled to it; for that the section applied only where, but for its provisions, a lien would have existed on the property in question at the execution of the assignment, and not where it had been converted into money which belonged to the execution creditor:—Held, also, that under the circumstances of this case, the money must be treated as received under the execution. *Sinclair* v. *McDougall*, 29 U. C. R. 388.

Execution—*Sale.*] — Where a sale has been made under an execution against a judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors. *Brand* v. *Bickle*, 4 P. R. 191.

A sheriff has a right to an interpleader in such a case, when the proceeds are claimed by an official assignee. *Ib.*

Execution—*Sale.*]—By s. 13 of the Insolvent Act of 1865, the divesting of any lien or privilege, (i. e. priority of right) extends only to the levying upon or seizing under the execution, not to the sale thereunder. In this case an execution had been placed in the sheriff's hands on the 15th March, 1866, and on the 26th a sale thereunder, commenced at 10 a.m., was completed at 11 a.m., at which hour a writ of attachment was placed in the sheriff's hands against the defendant:—Held, that the attachment could not prevail over the execution. Converse v. Michie, 16 C. P. 167, distinguished. *Whyte* v. *Treadwell*, 17 C. P. 488.

Mortgage—*Trespass.*]—The defendant as official assignee, having taken possession of certain goods and premises, and being sued by a mortgagee, claimed a deduction from the plaintiff's damages for rent, insurance, and taxes paid by him out of the proceeds of sales:—Semble, that it should have been allowed only if due when he took possession; but this did not appear, and under the circumstances the court refused to interfere. *Mathers* v. *Lynch*, 28 U. C. R. 354.

Mortgage—*Trespass.*] — An official assignee, sued for trespass in taking and selling goods, pleaded (relying upon s. 50 of the Insolvent Act of 1869), that before the writ of attachment hereinafter mentioned, one C. mortgaged the goods to the plaintiff; that while said goods were in C.'s possession, the mortgage providing that he should retain them until default, the sheriff seized the goods under an attachment in insolvency issued at the suit of M., and placed them in the custody of defendant, being an official assignee and guardian, and defendant being afterwards duly made assignee of C.'s estate, sold the goods—which are the alleged trespasses:—Held, a bad plea, for only negativing a default by C. when the attachment issued, not when the defendant received and sold the goods. *Archibald* v. *Haldan*, 30 U. C. R. 30.

Semble, that the section referred to only restrains a suit by creditors who had proved, or can prove, on the estate, and does not prevent a mortgagee from suing in trespass for a wrongful taking of the goods. *Ib.*

Mortgagee not Entitled to Take Goods.]—Where goods were mortgaged, and after default remained with the mortgagor, who made an assignment in insolvency, and handed them over to his assignee:—Held, that the mortgagee could not take them out of the assignee's possession, but must enforce his claim under the Insolvent Act, and that he was a trespasser in so taking them. *Dumble* v. *White*, 32 U. C. R. 601.

Mortgagee — *Distraining for Interest.*] —One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that in case of default defendants might distrain. M. made an assignment under the Act of 1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, defendants distrained therefor on these goods, which were still upon the mortgaged premises:—Held, that defendants' only remedy was by application under s. 50 of the Insolvent Act, and that they had no right to distrain. *Munro* v. *Commercial Building and Investment Society*, 36 U. C. R. 464.

Mortgagee of Goods in Possession.]—Goods and chattels in the possession of a mortgagee of them cannot be seized and sold,

and the proceeds paid over to a sheriff acting under a writ of attachment in insolvency against the mortgagor. Held, also, that the possession of the defendant, to whom such goods had been sent by the plaintiff, the mortgagee, to be sold, and their proceeds paid over to him, was the possession of the mortgagee; and defendant having in such case assented to the seizure by the sheriff, and, acting under his directions, sold the goods and paid over the proceeds, was liable to repay them to the mortgagee. *Watson* v. *Henderson*, 25 C. P. 562.

Priorities.]—Seizure under division court executions—Claim under chattel mortgage—Attachment in insolvency—Priorities as between assignee, execution creditor, and the mortgagee—Action by plaintiff, claiming under chattel mortgage—Right of plaintiff to avail himself of assignee's title. *O'Callaghan* v. *Coxon*, 41 U. C. R. 272.

Rent.]—A landlord, in case of his tenant's insolvency, has no privilege or preference for rent over any other claim; his only protection lies in his right to a preferential lien on property on the demised premises. On the facts set out in this case, it was held, that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal. *In re Kennedy, Mason* v. *Higgins*, 36 U. C. R. 471.

Rent.]—Defendant, in consideration of the yearly rents, covenants, and conditions in the lease contained, leased certain premises to one M. at an annual rent, and as one of the covenants or conditions, in consideration of which the demise was made, after reciting that M. had agreed to pay $700, by way of additional rent, for the purchase of the goodwill of the demised premises, M. covenanted to pay the $700 in ten quarterly payments of $70 each, with a proviso that in case of breach of any of his covenants, the said $700, due and payable by way of rent, with a further covenant that if the term granted should be seized under execution or on attachment against M., or if M. should make an assignment or become bankrupt or insolvent, or take the benefit of any Insolvent Act, the then current quarter's rent should immediately become due and payable and the term become void. M. failed to pay any portion of the $700, and after the accrual of the third quarterly payment became insolvent:—Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of $70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the statute 8 Anne c. 14, s. 6, or s. 14 of the Insolvent Act of 1865, distrain for the whole $700. *Griffith* v. *Brown*, 21 C. P. 12.

Rent—*Distress.*]—Section 81 of the Insolvent Act of 1869 restricts the landlord to one year's rent, even where he has distrained for more before the insolvency of the tenant. *Griffith* v. *Brown*, 21 C. P. 12, distinguished. *Mason* v. *Hamilton*, 22 C. P. 411, reversing 22 C. P. 190.

Rent.]—Under the Insolvent Act, 1875, ss. 74-125, the assignee is bound to recognize the claim of the landlord, although he may not have distrained, as a "preferential lien" with respect to the goods on the demised premises, for whatever rent became due during the year before the assignment or attachment. The lease, dated 15th December, 1875, for ten years, made the first year's rent payable in advance, and contained a proviso that in the event of insolvency "the term shall immediately become forfeited and void, but the next succeeding current year's rent shall, nevertheless, be at once due and payable." The assignment in insolvency took place on the 22nd September, 1876:—Held, that the landlord was entitled to the first year's rent, as a preferred claim, but that the proviso was void as being a fraud on the Insolvent Act, and that he therefore could not prove for the second year. *In re Hoskins and Hawley*, 1 A. R. 379.

Rent.]—One E. agreed to rent certain premises for ten years on condition that certain improvements were made. The agreement was evidenced by a letter from the landlord, to the terms of which E. assented. After the alterations were completed E. entered, and while still in possession under this agreement became insolvent. The inspectors cancelled the lease, and delivered up the premises at the end of the current year, whereupon the landlord claimed to be allowed damages under the 70th and three succeeding sections of the Insolvent Act, 1875:—Held, that these sections are not limited to leases valid at law, but they apply equally to leases valid in equity: that here the execution of a formal lease could have been compelled; and that the landlord was therefore entitled to prove for damages for the cancellation. *Re Erly*, 2 A. R. 617.

Rent.]—Where the landlord distrained for six months' rent while the goods were in the tenant's possession, and afterwards, the goods being in the hands of the bailiff, an attachment in insolvency issued against the tenant:—Held, that the assignee was not entitled to the goods without paying or tendering the rent, and that not having done so, the landlord was entitled to proceed and sell. Mason v. Hamilton, 22 C. P. 411, distinguished. *McEdwards* v. *McLean*, 43 U. C. R. 454.

Rent.]—Upon the insolvency of the lessee, the assignee in insolvency sold the insolvent estate, including the goods upon the demised premises, on credit, without paying the rent due thereon:—Held, that the landlord was entitled to an order for immediate payment of the arrears. Remarks as to the personal liability of the assignee under such an order. *In re McCraken, Dallas* v. *Stinson*, 4 A. R. 486.

If before the assignment or attachment in insolvency the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears of rent. *Ib.*

After the assignee has taken possession the landlord cannot seize, but he is entitled to be paid the six months' arrears out of the proceeds of the goods on the demised premises in preference to any other claim. *Ib.*

The landlord is not a privileged creditor, but is only entitled to a lien upon the proceeds of the goods of the insolvent which he might have distrained. *Ib.*

If the assignee sells the goods upon credit he must arrange with the landlord before the

goods are removed, otherwise he becomes liable to an order for immediate payment. *Ib.*

If the creditors or inspectors order him to make such a sale, and do not provide him with the means of satisfying the landlord, he should apply to the Judge for directions. *Ib.*

Whenever the assignee remains in possession unreasonably long without realizing and paying the landlord, the latter may invoke the summary jurisdiction of the court. *Ib.*

Sheriff in Possession—*Costs.*]—When an assignment is made under the Insolvent Act of 1869, it is the duty of a sheriff, who has seized goods under a fi. fa. against the insolvent, to surrender the goods to the assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has, in the proceedings in insolvency. *Blakely* v. *Hall*, 21 C. P. 138.

Taxes—*Distrainable Effects.*—Upon the insolvency of the lessees, there were goods upon the premises belonging to them, and other goods stored with them, sufficient to pay the taxes in arrear; and a warrant being issued, the bailiff notified the assignee, but forbore to distrain, on the assignee's promise to pay, which promise was confirmed by the inspectors of the estate. The goods having been afterwards removed, an order was made directing the assignee to pay the taxes forthwith, with all costs. *In re Bowes*, 5 A. R. 353.

Vendor's Lien.]—On the sale of a woollen factory and machinery, it was stipulated that, until the purchase money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, and the latter, to secure the unpaid purchase money, executed a mortgage which purported to be of the factory only, and did not mention the machinery. The purchasers resold, the vendee having notice of the covenant, and the vendee subsequently became insolvent:—Held, that the covenant against removing the machinery remained in force and that the vendee's assignee in insolvency, was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise. *Crawford* v. *Findlay*, 18 Gr. 51.

Wages—*Dividend Sheet.*]—A demand for wages was made as a preferred claim to an assignee. The creditors, at a meeting, passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county Judge, calling on the assignee to shew cause why he should not pay the claim, and the assignee not appearing evidence was taken before the Judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand:—Held, that the direction by the creditors to pay these preferential claims without putting them on the dividend sheet, was illegal. *In re Cleghorn and Munn*, 2 C. L. J. 133.

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7. *Partnership and Separate Estate.*

Assignment Limited to Partnership Assets.]—The insolvents, who were partners, made an assignment expressed to be in pursuance of the Insolvent Act, but attempted to limit its operation by inserting after the general description of property in the statutory form the words "of and belonging to the said co-partnership." Each of the partners had separate estate, and separate creditors. The assignee, acting under advice, only took possession of the partnership estate. Shortly afterwards M., a brother of one of the insolvents, offered to purchase the partnership estate, and upon sufficient in number and value of the joint creditors signing a deed of composition and discharge, the assignee transferred the estate to him, without any authority from the creditors, and without calling any meeting under s. 49, to take the deed into consideration. At a subsequent meeting of the joint creditors, resolutions were passed approving of the deed, of the sale to M., and of the action of the assignee. The dissentient joint creditors petitioned the county Judge to order the assignee to take possession of the separate estates, and to account for any loss occasioned by his omission to take possession of them, and for the value of the estate transferred to M. The learned Judge ordered the assignee to take possession of the separate estates, but did not deal with the other subjects of the petition. From this order the petitioners appealed:—Held, that the deed was void as to the appellants; and that it could not be supported under s. 38, being a sale en bloc within the meaning of the proviso prohibiting such a sale without the previous sanction of the creditors. Held, also, that the assignee was liable to account for any loss the dissentient joint creditors might sustain in consequence of such sale. The appellants were allowed their costs of appeal; and the assignee's costs, in view of all the facts, were allowed out of the estate. *Re McLaren and Chalmers*, 1 A. R. 68.

Dissolution of Firm—*Partners Claiming Inter Se.*]—Upon the dissolution of a partnership between W. and McC., it was agreed that all the partnership property and assets should be vested in W., who was to collect all the debts and pay the liabilities of the firm, and that an account should be taken of the co-partnership business to ascertain the respective shares or interest of the partners therein, or the amount payable by either to the other, W. to be charged with the value of the assets and to be credited with the liabilities, and all that remained to be done was to ascertain, by taking an account, the indebtedness existing between them. McC. then carried on business on his own behalf, and becoming insolvent, made an assignment to the plaintiff as assignee in insolvency. It was claimed that upon taking accounts between McC. and W., a balance would be found due to W., for which he was entitled to rank upon McC.'s estate:—Held, that W.'s claim was an equitable debt, capable of being ascertained by the court, and for which therefore he was entitled to so rank on McC.'s estate. *Hall* v. *Lannin*, 30 C. P. 204.

Double Proof.]—The appellants, in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him indorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under s. 69 of the Act of 1869, specifying and putting a value on the separate lia-

bility of C.:—Held, that the appellants, under the Act of 1864, could not rank both upon the separate estate of C. and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability:—Held, also, that the appellants could treat the payee and indorser as having incurred a separate liability by his indorsement, distinct from his joint liability as a maker:—Held, also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted from the exceptions in the repealing clause. *In re Chaffey*, 30 U. C. R. 64.

Double Proof.] — The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately indorsed the note. *Re Baker*, 3 Ch. Ch. 499.

Double Proof.]—W. carried on business separately and as a member of the firm of W. & S. The joint and several notes of W. & S. and W. were given to secure debts due by the firm, and shortly afterwards both W. & S. and W. made assignments in insolvency:—Held, that under s. 84 of the Insolvent Act of 1875, the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of W., and (the partnership not having assumed the liability) against W.'s estate for the full amount of the debt. The rule against double proof in such cases was abrogated by s. 60 of the Insolvent Act of 1869, which contained the same provisions as s. 84 of the Act of 1875. Re Dodge and Budd, 8 C. L. J. 51, commented on, and not followed. In re Chaffey, 30 U. C. R. 64, distinguished. *In re Wilson, Carter* v. *Woodruff*, 3 A. R. 151.

One Partner Continuing Business.]—Where, upon the dissolution of a firm, the business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm. *Re Walker*, 6 A. R. 169.

Held, that under s. 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, and if partly out of each class of assets, it should be divided pro ratâ between each class of debts. *Ib.*

Partnership After Composition.]—On the insolvency of C. & Coombe the requisite proportion of creditors granted C. his discharge, and sold him the insolvent estate at a certain price, for which he gave his promissory notes payable at intervals. Shortly afterwards he entered into partnership with one M., and a memorandum was executed by them, by which they agreed that this estate should form their stock-in-trade, and become their property equally, and they equally assumed the liability for the amount of the composition notes. While the greater part of these notes was still unpaid, they made an assignment in insolvency. From their assets sufficient was realized to pay their partnership creditors in full, and leave a surplus. During the partnership of C. & M., M. had advanced $500 to the firm, and C. had drawn out of the business $88.26 in excess of his share. The creditors of C. claimed that the whole of the surplus should be applied toward the payment of the composition notes; but, held, that M. was first entitled to be paid the $588.26 with interest upon the $500, as that was a loan to the firm, but no interest upon the overdraft; and that C., and through him his creditors, had a right to insist upon the composition notes being paid before any of the residue of the surplus was divided between C. & M. *Re Cleverdon*, 4 A. R. 185.

Retiring Partner — *Subsequent Insolvency of Continuing Partners.*]—The creditors of a partnership consisting of three partners, consented to give them an extension on several conditions, one being that one of the partners should retire from the firm. When the dissolution took place a sum of $1,198 stood in the books of the partnership to the credit of the retiring partner, but nothing was said at the time in reference to this claim:—Held, that this claim was not provable against the estate of the continuing partners on their insolvency. *In re White and Gibbon*, 4 A. R. 416.

Separate Estate Solvent.]—Two partners, before the Insolvency Act, assigned their joint and separate estates together, for the benefit of their joint and separate creditors, pari passu. An assignee under the Act, afterwards appointed, filed a bill to set aside these assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property, and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing that both the separate estates were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs. *McDonald* v. *McCallum*, 11 Gr. 469.

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8. *Practice and Procedure.*

(a) *Appeals.*

Affidavits—*Order.*]—Where the affidavits on which an allowance of an appeal from a county court Judge was sought were not intituled in any court, they were not allowed to be read. *In re Sharpe*, 2 Ch. Ch. 67.

An objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal.

Where the appellant was described as Wm. Darling, and the opposing creditors appeared to be Wm. Darling & Co., it was considered ground for refusing to entertain the appeal. *Ib.*

An appellant in insolvency must apply promptly. *Ib.*

Death of Appellant.]—When an insolvent, who has appealed from the decision of a county Judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails. *Lawrie* v. *McMahon*, 6 P. R. 9.

Decision of Assignee.]—A demand for wages was made as a preferred claim, to an

assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county Judge, calling on the assignee to shew cause why he should not pay the claim, and, the assignee not appearing, evidence was taken before the Judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The assignees afterwards paid the claim as reduced, but refused to pay any costs; upon which the Judge's order was made a rule of court, and execution issued thereupon against the goods of the assignee. Held, that the county Judge had no power to adjudicate upon the claim until it had been decided upon by the assignee, and in this case there was no decision of the assignee to appeal from. *In re Cleghorn and Munn*, 2 C. L. J. 133.

Delay.] — A writ of attachment issued against R. & Co. on an acceptance in the name of the firm given for a debt contracted before G. became a member thereof. A bill of exchange for this debt had been accepted in the firm's name after G. joined it, in consideration of which an extension of time was given, and it passed through the books, and was never repudiated by G. This acceptance matured after G. had retired from the firm, (which change, however, was not registered in compliance with R. S. O. 1877, c. 123,) and being unpaid, the acceptance upon which the writ of attachment issued was given. Seven weeks after the writ of attachment had been served upon him, G. moved to set it aside, accounting for his delay on the ground that the solicitor whom he had instructed to move had been called away by urgent business:—Held, without deciding whether such an application can be made after the five days prescribed by s. 18 of the Insolvent Act of 1875, that the appeal could not be entertained, for that the delay was not sufficiently accounted for. Held, also, that G. was clearly liable to the attaching creditors on this acceptance. *Ex parte Griffin, In re Rankin*, 3 A. R. 1.

Discharge — *Time—Material—Security.*] —The decision of a county court Judge on an application by an insolvent for his discharge from imprisonment, is appealable. *Hood* v. *Dodds*, 19 Gr. 639.

A petition of appeal from the decision of a county court Judge, acting in insolvency, need not set out all the evidence, documents and materials used before the Judge. What is needed is, that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceedings appealed from, and the materials to be used on the argument of the appeal. *Ib.*

An order in insolvency was made on the 24th December. The fifth day thereafter fell on a Sunday:—Held, that service of notice of appeal on the Monday following was in time. *Ib.*

It is not necessary that the bond for security to be given on an appeal in insolvency should be executed in presence of a Judge. *Ib.*

Findings of Fact.]—The appellate court will, on appeals from the Judge's ruling in insolvency—as on appeals from other courts—in cases where the evidence is contradictory, be governed in a great measure by the opinion of the Judge who has seen the witnesses give their testimony; yet where giving full credence to all the witnesses relied on by the Judge, the court differed in opinion from him as to the effect of that evidence, the court reversed the finding of the Judge. *Re Weeks*, 23 Gr. 252.

In proceedings before the county court Judge a claim was put in by the mother of the insolvent, which the creditors opposed the allowance of, on the ground that the mother was indebted to the son in a greater sum than her claim—such claim being distinctly proved by the claimant, her husband, and the insolvent. The Judge allowed the claim, from which allowance the inspectors of the estate appealed, and then sought to impeach the claim of the mother altogether as being fraudulent—the only objection suggested in opposition to the evidence stated being the fact that the money said to have been deposited in the bank by the claimant was in gold (sovereigns), which the court was asked to assume was so improbable and incredible as to be evidence of fraud. The court, however, on the ground that the Judge who saw the parties give their evidence had thought the proof of the bona fides of the debt sufficiently established and had allowed the claim, agreed in the conclusion at which the Judge had arrived, and dismissed the appeal with costs. *Ib.*

Leave.]—On an application to a Judge in chambers for the allowance of an appeal from the decision of the Judge in insolvency, an order was made referring the matter to the appellate court, without directing a special case to be settled between the parties, but no objection was made on this ground:—Held, that this was only an irregularity which might be waived, and if not waived ought to have been objected to by a rule to set aside the proceedings on that ground, in accordance with In re Parr, 17 C. P. 621; and that as the petition of appeal had been filed by permission of the court, and the appellant authorized to serve notice of hearing of appeal for a day named, the case was properly before the court for adjudication. *In re Sharpe*, 20 C. P. 82.

No Formal Order.]—An insolvent had been refused an absolute discharge by a county Judge, from whose decision he appealed. The Judge gave his reasons in writing, and concluded, "I must refuse his discharge absolutely, and must deny the prayer," &c.:—Held, an order which could be appealed from, no formal order having been drawn up and signed. *In re Jones*, 4 P. R. 317.

Non-production of Books.]—An insolvent was ordered by a county Judge to produce certain books and papers. These were at the time at Bruce Mines, and the insolvent did not feel called upon to go there for them, and an order was made ex parte for his committal for disobedience of the order. The insolvent had, however, in the meantime, taken the books to Montreal and given them to one H. to hand to the assignee. He was then arrested, and subsequently applied for his discharge, which was refused. The books were afterwards handed over to the proper person, though in a mutilated condition, which mutilation the insolvent said must have been done at Montreal. He then again applied for his discharge on the ground that he had complied with the order, and that the imprisonment was for compulsory purposes only. The county Judge, however, made an order refusing the

application, and the insolvent then appealed from this last order to a Judge in chambers at Toronto. It was urged that the warrant of arrest was insufficient on its face: that no demand was made of the books, or refusal to give them shewn, and therefore no contempt; and that the power of imprisonment was only to enforce compliance with the order, and not in poenam:—Held, under the Acts of 1864 and 1865 that the Judge at Toronto had no right to inquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment authorized by the statute, or whether the warrant was an order, and so an appealable matter under the Acts: that the last order of the county Judge was not improperly made, and the appeal was merely from that order. *McInnes* v. *Davidson*, 4 P. R. 183.

The purposes for which imprisonment is imposed enumerated. Quære, whether in this case the imprisonment was coercive or punitive. *Ib.*

Notice—*Security.*]—Under ss. 83, 84, of the Act of 1869, the application in appeal must be served upon respondent, and security for costs given, within five days from the day on which judgment is rendered. It is not enough to serve notice and file bond. *In re Thomas*, 6 P. R. 252.

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

Time.]—Notice of application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days. *Re Owens*, 12 Gr. 446.

Where the notice was served in time, but named a day for the application which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable. *Ib.*

Objections to the security on an appeal from the county court Judge, under the Insolvent Act, 1864, are to be made to such Judge. *S. C., ib.* 590.

Time.]—An application for a discharge was dismissed by the county Judge on 17th September. On the 23rd the insolvent gave notice of an intended application on the 24th to a Judge at Osgoode Hall for leave to appeal:—Held, that this notice was clearly insufficient, but on the authority of Re Owens, 12 Gr. 446 (which was, however, doubted), and in favour of the liberty of a subject, the notice was amended. Quære, as to the materials that should be before the Judge on such an application. *In re Davidson*, 4 P. R. 153.

(b) *Granting and Setting Aside Attachment.*

Intention to Dispose of Property—*Proof Required.*]—The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor, does not bring the debtor within s. 3, clause *c.*, of the Act of 1864. *Sharpe* v. *Matthews*, 5 P. R. 10.

In intituling affidavits for an attachment under this Act, form F. should be followed. *Ib.*

Section 3, s.-s. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency. *Ib.*

Proof Necessary.] — Semble, that the omission to describe the parties in the intituling of an affidavit for an attachment under the Act of 1875, is not a fatal objection if the description appear in the body of the affidavit:—Held, 1. That the omission to state in the creditor's affidavit, under s. 9, that the defendant owed him not less than $200 "over and above the value of any security which he holds for the same," is a fatal defect. This statement is part of the creditor's case. 2. A debtor when applying under s. 18 for relief from attachment proceedings against him, can except to the creditor's case on the face of it, as well as shew by contra evidence that it is not maintainable. 3. And if he can shew that the writ never should have been issued, he is entitled not only to have the attachment made under a writ set aside, but also the writ itself, in like manner as a creditor is entitled under s. 14. *McDonald* v. *Cleland*, 6 P. R. 289.

Right to Withdraw.]—A creditor issuing an attachment under the Act of 1864, cannot after five days from the return day of the writ withdraw the attachment, so as to prevent another creditor from intervening for the prosecution of the cause. *Worthington* v. *Taylor*, 10 L. J. 333.

Substitutional Service.] — A Judge in insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; and in this case the court, on appeal, refused to interfere with an order for such rescission. *Eaton* v. *Shannon*, 17 C. P. 592.

Time — *Affidavits.*] — A trader having ceased to meet his liabilities, a demand was served upon him on 31st January, 1865, requiring him to make an assignment. On 6th February, (the 5th being Sunday) an order was granted for and attachment issued. One of the affidavits filed on the application for attachment was sworn to on 4th February. On an application to set aside the writ and all proceedings for irregularity, it was held, 1. that the order for the issuing of the writ was not made too soon; 2. that it was immaterial that one of the affidavits was made within the five days allowed for petitioning under s.-s. 3, or for making an assignment in accordance with the demand; 3. that the attachment should have been indorsed with a statement that the same was issued by order of the Judge of the county court; but an amendment was allowed on payment of costs by plaintiffs; 4. objections that the affidavits of two credible witnesses were not filed at the time of issuing attachment, that the proceedings were not taken within three months, &c., and that sufficient time was not allowed to defendant to give notices required by the Act for taking proceedings on a voluntary assignment, were overruled. *McInnes* v. *Brooks*, 1 C. L. J. 162.

Time.]—An application under s. 18 to set aside a writ of attachment for a substantial insufficiency in the affidavit must be made within five days from the issue of the writ. *Carrier* v. *Allin*, 2 A. R. 15.

(c) *Miscellaneous Cases.*

Action Authorized Against Wishes of Majority.]—The county Judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings. *In re Lambe*, 13 Gr. 391.

The assignee appealed from such an order in the interest of the creditors, whose transactions the suit impeached for fraud, and the appeal was dismissed with costs; the court observing that it was not his duty to appeal from such an order at the expense of the estate. *Ib.*

Assignment—*Forum in Which Validity is to be Tested.*]—Declaration for entering a mill and taking and converting plaintiff's goods. Plea, in substance, that the plaintiff's claim to the goods and mill is only under a mortgage made by one W., who, before the grievances complained of, made an assignment under the Insolvent Act of 1869, to defendant of all his estate and effects, including this mill and goods, subject to plaintiff's mortgage; that W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such assignee; and except as assignee defendant has in no way interfered with the mill or goods; that the plaintiff's alleged right of property can be determined by the county Judge; and that this court has no jurisdiction to try the same:—Held, on demurrer, plea good, the plaintiff, under the facts stated, being restricted by s. 50 of the Insolvent Act of 1869, to the remedy there given. *Crombie* v. *Jackson*, 34 U. C. R. 575.

Committal.]—An insolvent cannot legally be committed under s. 29 of 29 Vict. c. 18, without an opportunity of shewing cause, and it should appear in the order of committal that he has had notice of the order for delivery, &c., for non-compliance of which committal is asked. *In re Hicks*, 5 P. R. 88.

Complaining of Sale — *Forum.*] — In case of a sale by an assignee in insolvency being open to objection on the part of the creditors, the remedy of objecting creditors is by an application to the county court Judge, not by suit in chancery in the first instance. *O'Reilly* v. *Rose*, 18 Gr. 33.

Disagreement Between Majority in Number and Majority in Value.]—A disagreement having arisen between the majority in number and the majority in value of the creditors, a motion to adjourn, under s. 11, s.-s. 2, of the Act of 1864, was opposed by the latter; whereupon application was made to the county Judge to dispose of the matter, who ordered that the majority in number might proceed in chancery, in the assignee's name, against the majority in value:—Semble, that neither party could legally oppose the adjournment, if insisted upon by the other, as the objecting party might thus prevent the Judge from adjudicating between them, as intended by the Act; but that such adjournment should have followed as of course, and upon a similar division of opinion the Judge should have decided between the two sets of resolutions, and might then have directed the assignee to proceed in chancery, or otherwise contest the claim of those creditors whose debt was disputed. But held, that the Judge had power to make the order in question, and it was not, therefore, advisable to interfere with it. *In re Lamb*, 17 C. P. 173.

Foreclosure of Mortgage.]—Under the Act of 1869, the jurisdiction of the court of chancery to decree foreclosure upon a mortgage is not taken away, and a mortgagee must still proceed in that court to obtain such relief against the official assignee of the mortgagor, there being no proper machinery in the insolvent court under which foreclosure can be obtained or for serving parties out of the jurisdiction, or for calling in parties to establish their claims upon the mortgaged premises. *Henderson* v. *Kerr*, 22 Gr. 91.

Funds Payable to Incumbrancers.]—Certain funds had come to the hand of an official assignee, but were payable to incumbrancers under claims arising before the insolvency; the Judge in insolvency under the Act of 1864, had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed. *Re Stewart*, 3 Ch. Ch. 95.

Interpleader.]—A writ of attachment issued, under which the assignee in insolvency seized goods, which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant and the creditors who had sued out the writ, on which relief was afforded to the assignee, without requiring him to apply to the Judge of the insolvent court under s. 125 of the Act of 1875; and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit; and the assignee was given a lien on the goods in his hands for his costs. *Wells* v. *Hews*, 24 Gr. 131.

Interpleader.]—Action by assignee for debt—Application for interpleader with attaching creditors of insolvent — Practice. *Picken* v. *Victoria R. W. Co.*, 44 U. C. R. 372.

Jurisdiction of Insolvent Court.]—The object of the Legislature in creating the insolvent court, is to administer the estates of insolvents, and the court of chancery will not, unless in a very exceptional case, interfere with the jurisdiction thus created. Therefore, where a bill was filed for the purpose of winding up the affairs of an insolvent insurance company, a demurrer for want of equity was allowed, although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets and wind up the affairs of the company. *McNeil* v. *Reliance Mutual Fire Ins. Co.*, 26 Gr. 567.

Jurisdiction of Insolvent Court.]—In 1875, J. M. and D. M. entered into partnership, certain assets of J. M. being transferred to the partnership but nothing being said as to his liabilities. In 1876, the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, and a surplus remained. D. M. then petitioned

the county Judge in insolvency to divide the said surplus between him and J. M. B. then commenced this suit against D. M. to have it declared that the said partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent and void, and that the court might take an account of the partnership property and make division, and for an injunction restraining D. M. from further proceeding with his petition:—Held, that the insolvent court had jurisdiction to deal with the matter, and this being so, was the proper tribunal to do so, and this court would not interfere. *Bell* v. *McDougall*, 2 O. R. 618.

Partners in Different Counties—*Jurisdiction.*]—E., living at Brantford, and James and John G., living in Dundas, carried on business at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an official assignee in that county. On the following day E. made an assignment of his estate, under the Act, to an interim assignee in the county of Brant, and F. was afterwards appointed assignee by the creditors. K. & Co., creditors of E. & Co., filed a claim in Brant under E.'s assignment, which other creditors objected to, and the assignee, having heard the parties, made his award:—Held, that the county Judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal. *In re McKenzie*, 31 U. C. R. 1.

Petition—*Procedure.*] — The Insolvent Acts of 1864 and 1865, do not require the petition in appeal to be signed by the insolvent or his attorney. Notice must be served on the assignee of the day for presenting the petition to the court. The petition must be addressed to the court, not to the chief justice; but this irregularity may probably be corrected. The neglect by the assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be for enlarging the hearing, and proceeding against the assignee for his neglect or contempt. Points not taken in the court below are not open to parties in appeal. Semble, that the more proper mode of raising such technical objections is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits. *In re Parr*, 17 C. P. 621.

Place and Time of Meetings—*Records.*]—Under the Act of 1864, the county town of the county in which the assignment is filed is the place where the assignee should call all meetings. Not less than two weeks should intervene between the first publication of the notice and the day of meeting. The notice must be published in a newspaper at or nearest the place where the meeting is to be held. All papers and minutes of proceedings in insolvency should be forthwith filed and entered of record in the proper office. *In re Atkins*, 2 C. L. J. 25.

Privilege—*Creditor.*]—A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents, by alleging that he is a creditor. *In re Hamilton*, 1 C. L. J. 52.

Sale Advertisements.]—Advertisements by assignees in insolvency for the sale of property of the insolvent should describe the property and state the title with the distinctness required in equity in the case of advertisements by trustees and other officials. *O'Rielly* v. *Rose*, 18 Gr. 33.

Sale of Book Debts.]—Under s. 67 of the Insolvent Act of 1875, all debts exceeding $100 must be sold separately, unless where there is a sale of the whole estate en bloc; and the purchaser of such a debt, otherwise than the section directs, cannot recover against the debtor. *Fisken* v. *O'Neill*, 6 A. R. 99.

Sale—*Jurisdiction of Insolvent Court.*]—The summary jurisdiction of the Insolvent Court under ss. 28, s.-s. *b*, and 125, of the Act of 1875, only applies to creditors who are entitled to prove on the estate, or to persons who have an interest in the assets of the estate. The insolvent court has no jurisdiction to entertain a petition by a purchaser, who is not a creditor, to recover from the assignee a deposit paid upon a purchase at auction of the insolvent's estate. It was objected that the sale of the insolvent's interest in a mortgage made to him and another was invalid, as the assignee had not followed the conditions prescribed by either s. 75 (as amended) or s. 67 of the Insolvent Act of 1875:—Held, that such an interest is not "real estate" within the meaning of s. 75: that s. 67 did not apply to the sale of a single asset, such as a mortgage; and that the sale was within s. 38, under which the assignee had acted, and with which, under the circumstances set out in the report, he had sufficiently complied. *Re Parsons*, 4 A. R. 179.

Service of Papers—*Affirmation.*]—Practice—Service of papers—Irregularity, who may object to—Setting aside proceedings—Affirmation by Quaker—Taken before plaintiff's attorney—Plaintiff, a surety and joint maker, taking up a note before due, so as to take proceedings in insolvency against joint maker. *Hilborn* v. *Mills*, 5 C. L. J. 41.

Solicitor.]—Retainer of solicitor by assignee under Insolvent Act 1875. Liability for costs. See *Butterfield* v. *Wells*, 4 O. R. 168.

Witness Fees.] — A witness appearing upon an order granted by the Judge under s. 10, s.-s. 4, of the Act of 1864, is not bound to be sworn until his expenses are paid. *Worthington* v. *Taylor*, 10 L. J. 304.

The insolvent who appears by virtue of the same order, is not entitled to claim his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in s.-s. 1 of s. 10. *Ib.*

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9. *Miscellaneous Cases.*

Action to Set Aside Settlement—*Parties.*]—A bill was filed by assignees under

the Act to set aside a settlement by the insolvent, on the marriage of his daughter, with a secret trust in his own favour. The bill charged that the insolvent defendant was in the enjoyment of the property, and prayed costs against all defendants. A demurrer by the insolvent, on the ground that he was not a proper party, was allowed. *Wilson* v. *Chisholm*, 11 Gr. 471.

Constitutional Law.]—Held, that s. 50 of the Act of 1869 was not beyond the power of the Dominion Parliament, as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency. *Crombie* v. *Jackson*, 34 U. C. R. 575.

Constitutional Law — *Fraudulent Purchase out of Jurisdiction.*]—P. et al., merchants carrying on business in England, brought an action for $4,000 on the common counts against J. S. et al., and in order to bring S. et al. within the purview of s. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. et al. from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when S. et al. made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. et al., thereby becoming their debtors with intent to defraud P. et al. J. S. (appellant) amongst other pleas pleaded that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea P. et al. demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto. Per Ritchie, C.J., and Fournier, J.:—1. That s. 136 of the Insolvent Act of 1875 is intra vires the Parliament of Canada. 2. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency over which subject matter the Parliament of Canada has power to legislate. 3. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of s. 136 of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed. Per Gwynne, J.:—The demurrer did not raise the question whether s. 136 of the Insolvent Act of 1875 is or is not ultra vires the Dominion Parliament, for whether it be or not, the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore, if the appeal be entertained it must be dismissed. Per Strong, Henry and Taschereau, JJ.:—There being nothing either in the language or object of s. 136 of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second count of the declaration. In this view, it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed. The court being equally divided, the appeal was dismissed without costs. *Shields* v. *Peak*, 8 S. C. R. 579; *S. C. sub nom. Peck* v. *Shields*, 6 A. R. 639; *S. C.*, P. 112.

Declaration of Partnership in Action by Assignee of Firm.]—Upon a bill filed by the plaintiff, as assignee in insolvency of the firm of S. J. & Co., seeking to have defendant declared a member of the firm, and to vest his property in the plaintiff as such assignee, the Judge of the county court of Brant, sitting for the Chancellor, made a decree as asked. Objection to the jurisdiction of the court of chancery to entertain such a bill was taken for the first time in the reasons of appeal:—Held, that the court of chancery had jurisdiction under general order 538 to declare defendant a partner, as upon proof of the partnership the plaintiff could have asked to have the partnership accounts taken; but that it had no power to vest defendant's property in the plaintiff. *Botham* v. *Keefer*, 2 A. R. 595.

Plea of Insolvency — *Discharge not Pleaded—Judgment after Certificate Granted.*]—T. J. W. sued F. B., and, on 9th June, 1873, F. B. assigned his property under the Insolvent Act of 1869. On 6th August, F. B. became party to a deed of composition. On the 17th October, F. B. pleaded puis darrein continuance, that since action commenced he duly assigned under the said Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 19th November, 1873, the insolvent court confirmed the deed of composition and F. B.'s discharge, but F. B. neglected to plead this confirmation. Judgment was given in favour of T. J. W. on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule nisi to set aside proceedings was obtained and made absolute:—Held, that F. B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. *Wallace* v. *Bossom*, 2 S. C. R. 488.

Interest.]—After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee:—Held, that notwithstanding the provisions of s. 99 of the Insolvent Act, interest was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only:—Held, also, that the claim to such interest was properly brought before the court by petition filed by the inspectors, who, acting under a resolution of creditors, had requested the assignee to pay such interest. *In re McDougall*, 8 A. R. 309.

See Stewart v. *Gage*, 13 O. R. 458.

Lease — *Re-assignment.*] — The plaintiff sued defendant for the use and occupation of a store from the 1st April to the 1st July, 1875. Defendant had made an assignment under the Act of 1869, on the 20th April, but the assignee only occupied the shop while removing the goods to another store which the defendant owned, when he returned the key to the defendant. On the 1st May a

deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon its confirmation. The deed was confirmed on the 14th June, when defendant was allowed to continue on his own account the business which, since his assignment, he had nominally conducted on behalf of the assignee: but no written re-conveyance was ever made. It was proved, however, that people who wished to see the store applied to defendant and were shewn over it by his son; that the plaintiff's agent had recognized defendant as having possession by sending people who inquired about the shop to him as being the person who had it to dispose of: that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequence of the deed of confirmation, and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st July:—Held, that the action for use and occupation would lie against defendant, notwithstanding the assignment, as the evidence shewed an occupation with the mutual recognition of the plaintiff as landlord and the defendant as tenant, and a sufficient transfer from the assignee to defendant. *Blackburn* v. *Lawson*, 2 A. R. 215.

Previous Unsuccessful Action by Creditor.]—To a bill filed by the assignee in insolvency of P. D., for the creditors other than D. & J. S., to impeach a sale of real estate to the defendant, the answer set up that before the proceedings in insolvency a bill was filed by D. & J. S. as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question as a fraud upon creditors, and that the bill was dismissed upon the merits. It was further alleged, that the case made by the two bills was substantially the same, and that the defendant believed that the evidence in this suit would be similar in effect to that upon which the decree refusing relief was founded:—Held, that the decree was not a bar to this suit. Held, also, that the bill (set out in the report) sufficiently averred the delivery of the alleged deed, and that the defect, if any, was removed by the answer. *Smith v. Doyle*, 4 A. R. 471.

Undischarged Insolvent Indorsing Over Note.]—The defendants, in ignorance of one P. being an undischarged insolvent, made a promissory note to him, which P. indorsed for value to the plaintiff, who was fully aware of P.'s insolvency:—Held, that the plaintiff was entitled to recover. *Perkins* v. *Beckett*, 29 C. P. 395.

VII. Miscellaneous Cases.

Administration — *Costs of Proving Claim.*]—In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts. *In re Ætna Insurance Company of Dublin*, 17 Gr. 160.

Administration — *Executions.*]—In case of a debtor dying leaving insufficient to pay his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Meyers* v. *Meyers*, 19 Gr. 185.

Administration—*Joint and Separate Estate.*]—The rule in equity as well as in bankruptcy is, that the separate estate of a partner is to be applied first in discharge of his separate debts; and in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them, is treated as a separate debt provable and payable pari passu with the other separate creditors of such partner in case of his death insolvent. The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. While the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate; the assignee in a suit for administering the separate estate of the guilty partner claimed to prove the amount against the separate estate; but the master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners; and the court held that the assignee was not entitled to prove for a larger sum. *Baker* v. *Dawbarn*, 19 Gr. 113.

Administration — *Paid Creditors Accounting to Unpaid Creditors.*]—Where certain creditors of a deceased insolvent sued his executor, recovered judgment and sold his real estate, and got paid in full:—Held, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ under the Act 29 Vict. c. 28. *Bank of British North America* v. *Mallory*, 17 Gr. 102.

Administration — *Wife's Mortgage.*] — Where a wife joins in a mortgage, she is not entitled, on the death of her husband insolvent, to have the debt paid in full out of the assets to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Gr. 113.

Agreement to Arbitrate.]—By a contract between C. & Co. and the defendants, it was agreed that all matters in dispute connected with the contract should be settled by arbitration. C. & Co. became insolvent, and this suit was brought by their assignee in insolvency to recover the cost of the construction of the railway. Upon the application of defendants under s. 167 of the C. L. P. Act (C. S. U. C. c. 22), an order was granted staying all proceedings in this suit, it being held, that the circumstance that the contractor had become insolvent did not take the case out of the statute. *Johnson* v. *Montreal & Ottawa R. W. Co.*, 6 P. R. 230.

Constitutional Law.] — Held, that the statute 33 Vict. c. 40 (D.), which recites the insolvency of the Bank of Upper Canada, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid, is within the powers of the Dominion Parliament, under s.-s. 21 of s. 91 of the B. N. A. Act. *Regina* v. *County of Wellington*, 17 O. R. 615, 17 A. R. 421, *S. C.* in the supreme court, *sub nom. Quirt* v. *The Queen*, 19 S. C. R. 510.

Crown.] — Priority of the Crown over other creditors to payment of moneys deposited in a bank that has become insolvent. *See Regina* v. *Bank of Nova Scotia*, 11 S. C. R. 1; *Liquidators of the Maritime Bank* v. *Regina*, 17 S. C. R. 657.

Dower.]—Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the footing that she was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children:—Held, that, notwithstanding the opposition of creditors, the widow should be allowed a gross sum. *Re Rose*, 17 P. R. 136.

Foreign Assets — *Bankruptcy.*] — A bill was filed in this court for the purpose of administering an estate in the Province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as manager for the trustees, and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of want of jurisdiction. The court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings. *Grant* v. *Eddy*, 21 Gr. 45, 568.

Fraudulent Succession.] — Acceptation of an insolvent succession—when obtained by fraud. See *Ayotte* v. *Boucher*, 9 S.C. R. 469.

Insolvent.] — Remarks as to the meaning of the term "insolvent." *Sutherland* v. *Nixon*, 21 U. C. R. 629. See also *Hersee* v. *White*, 29 U. C. R. 232; *Groves* v. *McArdle*, 33 U. C. R. 252.

Insolvent.]—Construction of words "insolvent" and "bankrupt" in a by-law. See *Temple* v. *Toronto Stock Exchange*, 8 O. R. 705.

Insolvent Insurance Company — *Deposit.*]—The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders; and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders. *In re Ætna Insurance Company of Dublin*, 17 Gr. 160.

Insolvent Next Friend.]—A bill was filed on behalf of a married woman by her next friend, who was procured by her solicitor so to act, but without her privity; the next friend being at the time insolvent, and no security for costs being given, and no written consent of the next friend being filed with the bill. On an application to take the bill off the files, it was ordered that unless the plaintiff's bill be amended by substituting a proper person as the next friend, the bill should be taken off the files, and costs were allowed to defendant. *Waters* v. *Peters*, 8 L. J. 328.

Insurance Company — *Government Deposit.*]—An insurance company had been licensed under 31 Vict. c. 48 (D.), to transact fire and inland marine insurance business, although its original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine. The holders of ocean marine policies, though resident in Canada, were held not entitled to rank as creditors on the fund deposited with and remaining in the hands of the government, in the event of the company becoming insolvent. *Green* v. *Provincial Ins. Co.*, 26 Gr. 354, 4 A. R. 521.

Mortgage.]—As to effect of extinguishment of mortgage after assignment in insolvency by mortgagor. See *In re Music Hall Block, Dumble* v. *McIntosh*, 8 O. R. 225.

Partnership and Individual Creditors—*Prevention of Preference.*]—This court has jurisdiction, and it will exercise it, to prevent the creditor of one partner obtaining an undue preference over the creditors of the firm by means of proceedings in this court. When, therefore, a purchaser at sheriff's sale of the interest of one partner filed his bill for an account and receiver, and the receiver obtained possession of the stock-in-trade, leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed. *Felan* v. *McGill*, 3 Ch. Ch. 68.

Plaintiff's Insolvency.]—When a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void, but on the fact being brought before the court such order will be made as may be just. *McKenzie* v. *McDonell*, 15 Gr. 442.

Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the court made an order at the instance of the defendant staying proceedings until all proper parties should be brought before the court. *Ib.*

Plaintiff's Insolvency.]—A motion by a defendant to dismiss after an abatement caused by the bankruptcy of a sole plaintiff and before revivor was refused; his proper course being to serve the assignee of the plaintiff in insolvency with notice to revive within a limited time. *Cameron* v. *Eager*, 6 P. R. 117.

Representative Action.]—A large body of creditors may be represented by one or more of the number, but the bill must disclose a sufficient reason for this course. Where a bill stated that the creditors of the said L. entitled to the benefit of the said indenture are too numerous to make it practicable to prosecute this suit if they were all made parties:—Held, that such statement was too general. Quære, whether necessary to furnish proof of such statement, and whether in a creditor's suit any decree can be made without previous proof of his debt. *Michie* v. *Charles*, 1 Gr. 125.

Trustee's Insolvency.]—The insolvency of a trustee, or his leaving the country in debt to reside in a foreign country, is a sufficient ground to remove him from the trust. *Gray* v. *Hatch*, 18 Gr. 72.

See CONSTITUTIONAL LAW, II. 5—LANDLORD AND TENANT, XIII. 2—MALICIOUS PROCEDURE, III. 2—SHERIFF, III.

BANKS AND BANKING.

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I. AGENTS, DIRECTORS, AND OFFICERS.

Agent—*Excess of Authority.*]—An agent of a bank, who was also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and, without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents:—Held, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed. *Merchants' Bank of Halifax* v. *Whidden*, 19 S. C. R. 53.

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

Agreement to Deliver Cheque.] — A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day or on the happening of a specified event. *Grieve* v. *Molsons Bank*, 8 O. R. 162.

Committee of Shareholders.] — Held, that the defendant (sued jointly with others as a member of a committee) was not responsible for the salary of a person employed by the committee (under a joint stock banking charter) prior to the time of his becoming a stockholder in the bank, and a member of the committee. *Mingaye* v. *Burton*, 10 C. P. 60.

Composition—*Deed.*]—Deed of composition executed by local manager "for Bank of Commerce, C. Nicholson" with ordinary seal:—Held, not binding on the bank. *Bank of Commerce* v. *Jenkins*, 16 O. R. 215.

Power of local manager to compound claim of the bank. *Ib.*

Director—*False Statements.*]—The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over estimating the assets and under estimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock:—Held, upon the evidence set out in the case, 1. That there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed. 2. That the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by defendant. 3. That if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information. *Parker* v. *McQuesten*, 32 U. C. R. 273.

Directors — *Loss Occasioned by Illegal Act.*]—The directors and managers of incorporated banks are quasi trustees for the general body of stockholders, and if any loss should accrue to the bank by their infringing the statute against usury, they would be liable individually to make it good. *Drake* v. *Bank of Toronto*, 9 Gr. 116.

Giving Guarantee.]—Liability of bank on guarantee of local agent. See *Dobell* v. *Ontario Bank*, 3 O. R. 269, 9 A. R. 484.

Indorsement of Note.] — Indorsement of note by bank manager—Sufficiency of. See *Small* v. *Riddel*, 31 C. P. 373.

Municipal Treasurer Acting as Bank Agent.]—One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and having misapplied the moneys of the council, overdrew that account, without the knowledge or authority of the bank, nearly £8,000, to pay debts due by the county for interest on debentures and other claims, which he ought to have paid out of the moneys received by him as treasurer. The coupons on some of these debentures were stamped by S. as paid by the Gore Bank. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use: —Held, that no portion of it could be recovered. *Gore Bank* v. *County of Middlesex*, 16 U. C. R. 595.

Municipal Treasurer Acting as Bank Agent.] — A treasurer of a municipality should not be permitted to act also as agent of a bank. *Town of Ingersoll* v. *Chadwick*, 19 U. C. R. 278.

President and Directors — *Corporate Seal.*]—A bond may be given up to be cancelled by the president and directors of a banking corporation, without their assent being signified under the corporate seal. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Sale.]—Sale of land by manager—Authority.—See *Dominion Bank* v. *Knowlton*, 25 Gr. 125.

Teller's Action for Shortage.]—Plaintiff was teller of a bank at which a note of defendant became due. Defendant paid in to plaintiff a sum afterwards discovered to be £25 short, and plaintiff was compelled to make it good to the bank:—Held, that he could recover it from defendant as money paid to his use. *Rivers* v. *Roe*, 4 C. P. 21.

II. Bank Notes, Cheques, and Negotiable Instruments.

Accommodation Indorsements.] — Remarks as to the practice in this country of taking notes for discount, not from the last indorser, but from the maker, who brings them indorsed, thus suggesting not a business transaction, but accommodation indorsements. *Bank of Montreal* v. *Reynolds*, 25 U. C. R. 352.

Accommodation Note.] — Discount by bank of note made and indorsed for accommodation of D., their solicitor—Fraud and neglect of D.—Liability of bank. See *Canadian Bank of Commerce* v. *Green*, 45 U. C. R. 81.

Alteration of Cheque—*Negligence.*]—The plaintiff, a merchant and customer of defendant bank, having a note payable there on the 28th January, 1873, made a cheque payable to himself or bearer, and left it with defendants to meet the note. The cheque, however, was not used for that purpose nor returned to the plaintiff, but the note was paid by defendants and charged to the plaintiff's account. The cheque was afterwards, on the 31st January, 1874, presented to the defendants by some one unknown, the year having been changed from 1873 to 1874, and it was paid by defendants without noticing the alteration, and charged to the plaintiff's account. How it got out of defendant bank was not ascertained:—Held, that the alteration avoided the cheque; that defendants therefore were not warranted in paying it; and that the plaintiff was entitled to recover back the money. Quære, whether, if the cheque had not been void, the defendants, on the ground of negligence, would, on the facts more fully stated in the case, have been liable to the plaintiff for paying it. Per Wilson, J., the cheque must be considered to have been paid when the note for which it was given was handed over by defendants to plaintiff, and on that ground defendants could not have been made liable upon it. *Beltz* v. *Molsons Bank*, 40 U. C. R. 253.

Application of Proceeds.]—The plaintiffs drew upon J. a bill for £200, payable to their order, which he indorsed to the Gore Bank, by whom it was sent to the agent of defendants, the Bank of Upper Canada, for collection. When it fell due, J., with the agent's consent, drew upon the plaintiffs to meet it, but the proceeds of the draft, contrary to J.'s directions, were placed to his credit with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received. *Riddell* v. *Bank of Upper Canada*, 18 U. C. R. 139.

Bill of Lading given up on Acceptance of Draft.]—A bill of exchange was sent by a banking institution in the United States, to a bank in Toronto, for "collection and remittance," &c., accompanying which was a bill of lading for 10,000 bushels of wheat, which, on the bill of exchange being accepted by the drawees, was delivered over to them, they being the consignees named in such bill of lading:—Held, that it was not the duty of the bank here, as the agent of such foreign bank, in the absence of special instructions, to retain the bill of lading until the bill of exchange was paid. *Wisconsin Marine and Fire Ins. Co. Bank* v. *Bank of British North America*, 21 U. C. R. 284; 2 E. & A. 282.

Evidence having been given as to the custom of merchants in such cases both in the United States and Canada:—Held, that the latter only could be material. *S. C.*, 21 U. C. R. 284.

Bill of Lading given up on Acceptance of Draft.]—A. having shipped grain to Oswego on behalf of one P., to the care of L. W. & Co., drew against it, and gave the draft and bill of lading to defendants, with the following indorsement on the latter, "Deliver to I. & J. Lewis, Oswego, subject to a draft drawn by me at 30 days from the 10th August, for $2,259.10." Signed, "per R. A. G., D. E. McL." The defendants discounted the draft, and upon acceptance thereof, handed over the

bill of lading to the acceptors, who failed to pay the draft at maturity:—Held, that the defendants, under the circumstances, were not responsible for the loss. *Goodenough* v. *City Bank*, 10 C. P. 51.

Bill of Lading given up on Acceptance of Draft.]—C. shipped flour to the order of a bank for account of L., and at the same time drew on L., discounted the bill at the bank, indorsed and delivered to the bank the carrier's receipt, and signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the bank to sell the flour, applying the proceeds to pay the draft, and to place the property in charge of any respectable broker or warehouseman, without prejudice to the bank's claim upon any party to the draft:—Held, that the bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retaining of possession until payment was optional with the bank. *Clark* v. *Bank of Montreal*, 13 Gr. 211.

Cheques—*Rights of Payee Indorsing for Collection.*] — The Dominion Government having a deposit account of public moneys with the Bank of Prince Edward Island upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000, which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at Ottawa, at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof indorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of Prince Edward Island for collection, but was not paid by the latter bank, which, subsequently to the presentment of the cheque, suspended payment generally:—Held, (1). That the Bank of Montreal were mere agents for the collection of this cheque, and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonour of the cheque to reverse the entry in their books and charge the amount thereof against the Government. Giles v. Perkins, 9 East 12; Ex parte Barkworth, 2 Deg. & J. 194, referred to. (2) That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. Heywood v. Pickering, L. R. 9 Q. B. 428; Prideaux v. Criddle, L. R. 4 Q. B. 455, referred to. (3) That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been indorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent indorsers for the purpose of giving notice of dishonour. Clode v. Bayley, 12 M. & W. 51; Brown v. London & N. W. R. W. Co., 4 B. & S. 326, referred to. (4) That the defendants, whether considered as mere agents for collection, or as holders of the cheque for value, were, as regards the drawer, only called upon to shew that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque. (5) In a letter from the manager of the Bank of Montreal, at Ottawa, to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonour of the cheque by the drawees—the Bank of Prince Edward Island, the fact of non-payment was stated as follows: "I am now advised that it has not yet been covered by Bank of Prince Edward Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department." Held, that the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonour. Bailey v. Porter, 14 M. & W. 44; Paul v. Joel, 27 L. J. Exch. 383, referred to. *The Queen* v. *Bank of Montreal*, 1 Ex. C. R. 154.

Clearing House.]—A customer having a deposit account with the plaintiff bank drew a cheque upon that bank payable to cash or bearer for five dollars and had it "marked" by the ledger-keeper. He then altered it so as to make it apparently a cheque for five hundred dollars, it being in such form as to enable this to be done readily, and then deposited it with the defendant bank, obtaining from them by his cheques upon them the sum of five hundred dollars. The following day the defendant bank sent the cheque to the Clearing House in the usual course of business, and there in adjusting the balances it was charged against the plaintiff bank as a cheque for five hundred dollars. On the next morning, when in the usual course of banking business at the place in question, the "marked" cheques received on the previous day from the Clearing House were being checked with the deposit ledger, the alteration was discovered, and the plaintiff bank at once gave notice to the defendant bank and demanded payment of four hundred and ninety-five dollars:—Held, that the alteration of the cheque by the drawer after it had been "marked" was forgery; that the plaintiff bank was not responsible on the ground of negligence for the subsequent fraud of the drawer; that even if the adjustment of the balances in the Clearing House constituted payment of the cheque, the notice given on the following day before the defendant bank altered its position or lost any recourse against other parties was in time, and that therefore the plaintiff bank was entitled to recover. London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7, considered. Judgment below, 31 O. R. 100, affirmed. *Bank of Hamilton* v. *Imperial Bank*, 27 A. R. 590.

Company—*Discount by President—Right to Debit Company's Account.*]—Where the president of an incorporated company made a promissory note in the company's name without authority and discounted it with the company's bankers, the proceeds being credited to the company's account, and paid out by cheques in the company's name to their creditors, whose claim should have been paid by him out of moneys which he had previously misappropriated, the bankers, who took in good faith, were held entitled to charge the amount of the note when it fell due,

against the company's account. *Bridgewater Cheese Factory Co.* v. *Murphy*, 23 O. R. 327; 23 A. R. 66; 26 S. C. R. 443.

Debiting Note to One Account and Crediting it to Another.]—Defendants were the bankers of both the plaintiff and one E., and E. having given a note payable to the plaintiff at the defendants' bank, the plaintiff, about two weeks before its maturity, left it with the defendants for collection, and to be protested if not paid. On 4th December, the day of its maturity, the ledger keeper debited E.'s account and credited the plaintiff's with the amount of the note, and on the plaintiff calling at the bank next morning he received his pass book with an entry crediting him with the amount of the note. Subsequently the manager, on the ground that the entry had been made by the clerk in mistake, and without authority—as E.'s account was then overdrawn—caused the entry to be reversed, and refused to pay the plaintiff the amount of it. E. stated that he always gave authority to pay each particular note, which he did not do here; and the manager stated that without such authority it was not the custom of the bank to pay any note:—Held, that the plaintiff was entitled to recover the amount of the note from the bank; that by the general law the plaintiff, by making the note payable at defendants' bank, authorized them to pay it; and that the act of the ledgerkeeper in charging it to E.'s account and crediting it to the plaintiff in his account and pass-book, amounted to a payment of the note, and was irrevocable. *Nightingale* v. *City Bank of Montreal*, 26 C. P. 74.

Delay in Presentment.]—The plaintiff having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of C. on another bank in the same place, for $350, payable to the plaintiff or bearer, and not indorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment, and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. Defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent:—Held, that he could not recover, for defendants were not guilty of laches; and semble, that they could have recovered back the amount from the plaintiff, even if they had paid it to him. *Owens* v. *Quebec Bank*, 30 U. C. R. 382.

Detinue for Cheque retained by Bank.]—Detinue for a cheque. Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn; that they did present it, but payment was refused by the bank manager, who retained and keeps the same, alleging that the names of the drawers thereto are forged:—Held, a good defence; for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank. *Brown* v. *Livingstone*, 21 U. C. R. 438.

Discount for Special Purpose.]—A. & H., a firm doing business in Hamilton, had a draft for $1,200, accepted by B. at Montreal for their accommodation, falling due on the 27th April. H., in order to obtain funds to meet it, on the 26th April procured a draft on B. for $900 to be discounted by the plaintiffs, telling them that it would be accepted, and the proceeds of it were placed to the general credit of the firm. This draft was sent to B. for acceptance and H. on the same day wrote to him enclosing the firm's cheque for $1,200 on the Bank of Montreal, to take up the $1,200 draft, and requesting him to accept that for $900. On the 27th B. duly paid the draft for $1,200. On the 28th A. and H. had a difference, and A. hearing from H. that the firm were in difficulties, and that he intended using their funds in paying B. and another person, A. thereupon on the 29th drew out on the cheque of the firm their balance in the plaintiff bank, consisting of the proceeds of the draft for $900, of which A. knew nothing, and of other moneys, and handed it to their solicitor, for the benefit of the creditors generally. Between the 25th and 29th, both the debtor and creditor side of the firm's account had been dealt with, and the balance increased in their favour. H., on the 29th, on hearing what A. had done, wrote to B., that in consequence the cheque sent him could not be paid, and B. then refused to accept the draft. On the 2nd May the firm became insolvent, and an assignee was appointed, to whom the solicitor handed over the moneys deposited with him. The plaintiffs, however, claimed the amount of the $900 draft, contending that it was only discounted on the faith of its being accepted, and that as one of the partners had caused its non-acceptance by his letter to the drawee, there was a failure of consideration, and that they were therefore entitled to follow the money in the assignee's hand; but held, that they were not so entitled; that the case was the ordinary one of the discount of a draft on the belief that it would be accepted; and that the money formed part of the firm's general assets and passed to the assignee. *Canadian Bank of Commerce* v. *Davidson*, 25 C. P. 537.

Dishonour of Cheque—*Charging Back —"Payable at par" at named Bank.*]—The plaintiffs were the holders for value of a cheque drawn by the Mahon Bank on the Bank of Montreal, at London, on the face of which appeared the words "payable at Bank of Montreal, Toronto, at par." The cheque was deposited by the plaintiffs to their own credit with their bank at T., and in the usual course of business was sent by that bank to the Bank of Montreal at T., and by the latter bank was credited to the former. It was then forwarded to L., where it was dishonoured, and in due course was charged back by the Bank of Montreal to the plaintiffs' bank, and again by the latter to the plaintiffs. It appeared that the above words were habitually used by the Mahon Bank on their cheques with the assent of the Bank of Montreal:—Held, that the whole effect of the words was, that the Bank of Montreal at T. would make no charge for cashing the cheque, and that they did not assume the risk of there being funds to meet it, and that they did not lose the right to charge it back on ascertaining there were no funds. *Rose-Belford Printing Co.* v. *Bank of Montreal*, 12 O. R. 544.

Exchange of Cheques.]—A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, and the holder called at A.'s office on the same day,

and a clerk in the ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment:—Held, that the holder could recover against B. on his cheque:—Held, also, that under a plea of not the holder, B. could not set up any supposed right in A.'s assignee, nor possibly under any pleading on these facts. *City Bank* v. *Smith*, 20 C. P. 93.

Failure of Bank—*Return of Bank Notes.*]—A person receiving bank notes in payment of property, or in exchange for cash, or on deposit to the credit of the payer, has the right, in case of failure of the bank, to return the notes, if he does so within a proper time after receipt. In this case the plaintiff deposited $1,000 of the notes of the Mechanics' Bank, which he believed to be good, to his credit with defendants, at Stratford, on the 28th May, about 11 a.m. About 4 p.m. defendants' agent at Stratford became aware that the Mechanics Bank had stopped payment. On the following day he sent these bills to defendants at Montreal, where the Mechanics Bank had their headquarters, and on the 31st he charged the amount to the plaintiff, having informed him on the evening of the 30th that he would do so:—Held, that defendants should have tendered back the notes to the plaintiff on the 28th or 29th; that for the want of such tender they had made them their own; and the plaintiff was therefore entitled to recover. Quære, whether, if the defendants had presented the notes for payment at the bank at Montreal on the 29th or 30th, and had given the plaintiff notice of dishonour on the 30th or 31st, it would have been sufficient, without tendering the notes back. *Conn* v. *Merchants Bank of Canada*, 30 C. P. 380.

Forged Cheques — *Acknowledgment of Monthly Balance — Fictitious Payee.*] — The plaintiffs' valuator, one H., filled in the blanks in an application for a loan on statements of one S., who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as a witness of the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the names of the payees, indorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgment of the correctness of the account was duly signed:—Held, affirming 45 U. C. R. 214, that the plaintiffs were not estopped from recovering the amount paid on the forged indorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss:—Held, also, that the acknowledgment of the plaintiffs of the correctness of the account at the end of the month, was at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties:—Held, also, that it could not be said that the cheques were made payable to fictitious payees, and were therefore payable to bearer. *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 A. R. 192.

Forged Note.]—A forged paper purporting to be a bank note is a note, and equally so if there is no such bank as that named. *Regina* v. *McDonald*, 12 U. C. R. 543.

Forgery.]—Action to recover back amount paid by acceptor on a forged bill.—Denial of signature of drawer and indorser. See *Ryan* v. *Bank of Montreal*, 12 O. R. 39; 14 A. R. 553.

Indorsement by Manager.] — Indorsement of note by bank manager—Sufficiency of. See *Small* v. *Riddel*, 31 C. P. 373, 383.

Indorsement of Cheque — *Course of Dealing.*]—A bank cashed a cheque payable to the order of a company upon the indorsation of the secretary alone, who had on several previous occasions cashed other cheques in the same way, and acted as general agent of the company:—Held, in an action by the company against the bank to recover the amount of the cheque, that the bank was justified in cashing the cheque, although the by-laws of the company required that the cheque should be countersigned by the president. *Thorold Manufacturing Co.* v. *Imperial Bank*, 13 O. R. 350.

Letter of Credit—*Forgery of Payee's Name.*]—The Bank of British North America in England received money there to be transmitted to A. in Upper Canada, and sent a letter of credit by post to A. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada, (A. having in the meantime died) and A.'s name forged on the letter of credit, and the money received by some person unknown:—Held, that A.'s executrix was entitled to recover the money from the branch at Toronto, as money had and received to A.'s use. *Gissing* v. *Hopper*, 6 O. S. 505.

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

Lien on Assets — *Priority of Note Holders.*]—Under s. 79 of the Bank Act, R. S. C. c. 120, the note holders have the first lien on the assets of an insolvent bank in priority to the Crown. *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, 20 S. C. R. 695.

Lost Cheque.]—Where the plaintiff's agent had paid into an agency of the Gore Bank at Simcoe a sum of money, partly in cash and partly by cheque on the Commercial Bank at Toronto, to be placed to the credit of the plaintiff with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank or credited to the plaintiff:—Held, that the plaintiff could not maintain an action against the Gore Bank for the amount of the cheque as money had and received to his use. *Todd* v. *Gore Bank*, 1 U. C. R. 40.

Marking Cheque—*Liability of Drawer.*]—The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked "good," the amount being charged to the drawer's account. They then took it away without demanding payment. The bank, on the evening of the same day, suspended payment, and on the following day, on presentation of the cheque payment was refused:—Held, that the drawer of the cheque was discharged from all liability thereon. *Boyd* v. *Nasmith*, 17 O. R. 40.

Non-presentment of Note.]—Held, under the evidence in this case, that the bank were liable to the plaintiffs for want of presentment of a note indorsed to them by the plaintiffs for collection, notwithstanding a notice issued by them, which the plaintiffs had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities, or mistakes, in respect of such notes. *Browne* v. *Commercial Bank*, 10 U. C. R. 129.

Notice of Dishonour.]—Negligence in not giving notice to indorser. See *Steinhoff* v. *Merchants Bank*, 46 U. C. R. 25.

Partner Indorsing.]—Power of partner to indorse his partners' names on cheques. See *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S. C. R. 692.

Partnership—*Fraud Against Partner.*]—E. was a member of the firm of S. C. & Co., and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners, and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority:—Held, that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140.

Post-dated Cheque—*Dishonour.*] — A cheque here may be post-dated, though in England it is prohibited by the Stamp Acts. Where such cheque is payable on demand, no days of grace are allowed. Where, on the same day that the cheque was dishonoured, defendant paid £150 to the holder on account of it:—Semble, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour:—Held, under the evidence, that the pleas setting up want of consideration, and denying plaintiff's property in the cheque, were not proved. *Wood* v. *Stephenson*, 16 U. C. R. 419.

Presentment of Cheque.]—On the 26th June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st July and it was alleged by P. but denied by M. that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 27th June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance, (the amount of the cheque being included). His cheque was never presented for payment nor was any notice of dishonour given. The cheque of P. was presented and paid:—Held, that even assuming there was no agreement to postpone presentment, P. had the whole of the 27th June to present M.'s cheque, and therefore had not been guilty of laches up to the time of the suspension of the bankers; that although the suspension would not in itself excuse non-presentment and want of notice of dishonour before action, yet this event and the bringing of the action by M., which operated as a countermand of payment, would do so. *Blackley* v. *McCabe*, 16 A. R. 295.

Principal and Agent—*Bills of Exchange—Payment—Set-off.*]—Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor. *Donogh* v. *Gillespie*, 21 A. R. 292.

Protest Improper—*Damages.*] — The declaration alleged that L. & Co. drew a bill of exchange for $69.72 on the plaintiff, payable to the order of themselves at defendant bank, and indorsed it to the defendants, and that it was duly presented by the defendants to plaintiff, and was duly accepted by the plaintiff; yet that defendants with full knowledge of the plaintiff having so accepted, negligently and without reasonable or probable cause afterwards caused the said bill to be protested for non-acceptance by the plaintiff, whereby the plaintiff was injured in his credit and business with the drawers and others; and his business was thereby impeded, &c.:—Held, on demurrer, that no cause of action was shewn, for there was no negligence shewn between plaintiff and defendants nor any privity on which a duty or contract might arise; and that the action, if maintainable at all, must be for a false representation knowingly made, which had injured the plaintiff in his business, and the declaration in this view was insufficient. *Irvine* v. *Canadian Bank of Commerce*, 23 C. P. 509.

Refusal to Pay Cheque — *Ledger Balance Incorrect.*]—If a bank refuse to pay a cheque having sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the fact of there being sufficient at the drawer's credit in the bank ledger when the cheque was presented, is immaterial, if the ledger did not shew the true state of the account. *Gore Bank* v. *Royal Canadian Bank*, 13 Gr. 425.

The Royal Canadian Bank held a draft payable in Buffalo, and accepted by a firm there, and for which they held in security certain flour. On the day before the draft matured, it being suggested by the drawer that the flour had not been sold, the bank agreed to discount

a renewal draft on the same parties and on the same security, and passed the proceeds of the renewal to the credit of the drawer, but neglected to charge him with the original draft. Before the letter from the bank to their Buffalo correspondents respecting the transaction reached Buffalo, the flour was sold and the original draft paid by the drawees, and they therefore did not accept the renewal:—Held, that the drawer was not entitled to demand from the bank the proceeds of renewal; and that the holder of the cheque was in no better situation than the drawer. *Ib.*

Unaccepted Cheque — *Action Against Bank.*]—The holder of a cheque by the mere fact of its being drawn in his favour, acquires no right of action in equity, as upon an equitable assignment, against the person upon whom it is drawn. *Caldwell* v. *Merchants Bank of Canada*, 26 C. P. 294.

To an action by plaintiff against defendants for their refusal to pay a cheque drawn by plaintiff and one W. on them, defendants pleaded, on equitable grounds, that before the drawing or presentment of the cheque in question the plaintiff and W. had drawn and delivered to various persons certain other cheques, amounting in all to the whole of their funds in defendants' hands, which were presented before this cheque; that neither at the time of the drawing or presentment of the first-drawn cheques or the cheque in question, had defendants more than sufficient funds in their hands to pay the first-drawn cheques, as the plaintiff and W. well knew; and that afterwards, and before the commencement of this action, defendants paid the holders of the first-drawn cheques the amounts thereof, and thereby paid and disbursed all the plaintiff's and W.'s moneys in their hands, and afterwards settled with the plaintiff and W. their banking account in full:—Held, plea bad, for the previous presentment and dishonour of the first-drawn cheques not creating any lien on the funds, and it being admitted that at the time of the presentment of the cheque in question there were sufficient funds to meet it, such funds were applicable to its payment; and, moreover, it was quite consistent with the plea that at the time of the presentment of the first-drawn cheques defendants had no funds to meet them, and that after their dishonour they were placed in funds, when the cheque in question was presented and dishonoured, and that the first-drawn cheques were then presented a second time and honoured. *Ib.*

Unpaid Acceptances—*Implied Right to Charge Indorser's Account.*] — The plaintiff opened an account with defendants, as bankers, by getting them to discount for him two acceptances for $500 each, payable to and indorsed by him, and to place the proceeds to his credit. He afterwards paid in a further sum, and had drawn out by cheques all except $403, when the two bills were returned dishonoured:—Held, that defendants were entitled to apply the balance in hand in part payment of the acceptances; and therefore, that, having done so, they were not liable for refusing to honour the plaintiff's cheque. *Jones* v. *Bank of Montreal*, 29 U. C. R. 448.

III. Collateral Security.

1. *In General.*

Bank Stock.] — The Exchange Bank in advancing money to F. on the security of Merchants Bank shares caused the shares to be assigned to their managing director, and an entry to be made in their books that the managing director held the shares in questlon on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. After this the managing director pledged these shares to another bank for his own personal debt and absconded:—Held, that upon repayment by F. of the loan made to him the Exchange Bank was bound to return the shares or pay their value. The prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applies to the bank and not to the borrower. Assuming that the subsequent amendment of the general Banking Act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, 35 Vict. c. 51 (D.), under which the Exchange Bank had power to take the shares in question in its corporate name as collateral security. To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanour and subject to a pecuniary penalty, but it was not ultra vires. Article 14 C. C., which declares that prohibitive laws import nullity, has no application to such a case. *Exchange Bank* v. *Fletcher*, 19 S. C. R. 278.

Contemporaneous Advance — *Renewal of Notes—Goods not in Specie.*]—T., a miller, gave warehouse receipts for wheat to the plaintiffs, attached to notes made by him, payable to their order, to take up his overdue notes which were secured by like receipts. The receipts were in the following form: "Received in store in my warehouse or mill from farmers, 2,000 bushels of wheat, to be delivered to the order of myself, to be indorsed hereon. This is to be regarded as a receipt under the provisions of statute 43 Vict. c. 22. The said wheat is separate from and will be kept separate and distinguishable from other grain." The receipts were indorsed in blank. T. did not keep the wheat covered by the receipts distinct, but ground some of it into flour and allowed the remainder to be mixed with wheat subsequently brought in by farmers and others. Before assigning in trust for creditors, he pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and admitted that the wheat and flour in his mill were covered by the receipts, and the next day the bank took possession. The evidence shewed that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt as there was in dispute in this interpleader. T. subsequently assigned, and the defendants afterwards recovered a judgment against him. In an interpleader action to try the right of the bank under their warehouse receipts as against the defendants under their execution:—Held, that a special indorsement of the receipts to the plaintiffs was not essential, and that the indorsement in blank of the receipts satisfied all the requirements of the Banking Act, that Act not specifying any particular mode in which the property in the receipt is to be transferred, and that the notes and receipts attached might be read together:—Held, also, that the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes by the surrender of the antecedent lien upon the wheat of T.; or at any rate there was a mere substitution or continu-

ation of securities according to the original understanding of the parties:—Held, also, that T., having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it became his duty to enable the plaintiffs to recover what the receipts called for or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and the plaintiffs were entitled to succeed against the execution creditors. *Bank of Hamilton* v. *John T. Noye Manufacturing Co.*, 9 O. R. 631.

Contemporaneous Advance — *Renewal of Notes.*]—The simple renewal of notes by a bank is not a "negotiation" within the meaning of s. 53, s.-s. 4, of the Bank Act, R. S. C. c. 120, so as to validate a warehouse receipt taken as collateral security therefor, no such new advance being made, and no such valuable consideration being given or surrendered contemporaneously by the bank as would represent the inception of a new transaction, and no change being wrought in the condition of the parties except the mere giving of time. *Dominion Bank* v. *Oliver*, 17 O. R. 402.

Contemporaneous Advance — *Renewal —Substitution of Securities.*]—A renewal of a note is not a negotiation of it within the meaning of s. 75 of the Bank Act, 53 Vict. c. 31 (D.), so as to support a security taken at the time of the renewal in substitution for a previously existing security. *Bank of Hamilton* v. *Shepherd*, 21 A. R. 156.

Contemporaneous Advance—"*Negotiation*"—*Invalidity — Assignee for Creditors.*] —A bill or note taken by a bank on acquiring a security in form C to the Bank Act, 53 Vict. c. 31, ss. 74-75 (D.), is not "negotiated" at the time of the acquisition thereof within the meaning of the latter section, when the person giving the security and to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions; and such security not being registered is void under the Chattel Mortgage Act against the assignee for creditors under R. S. O. 1887 c. 124. *Halsted* v. *Bank of Hamilton*, 27 O. R. 435, 24 A. R. 152, 28 S. C. R. 235.

Contemporaneous Advance — "*Invalid Against Creditors*" — *Warehouse Receipts— Exchange of Securities.*] — The plaintiff, a creditor of an insolvent, alleged that in regard to certain pledges made by the latter to a bank, there had been no contemporaneous advances, and that the pledges were invalid under s. 75 of the Bank Act, 53 Vict. c. 31 (D.), and claimed to be entitled to obtain moneys received through disposal of the pledges and to apply them in payment of creditors' claims, by virtue of the provisions of s. 1 of 58 Vict. c. 23 (O.):—Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors quâ creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors:—Held, also, that the last named Act did not apply, because the money had been received by the bank before it was passed, and it was not retrospective.—The insolvent had been in the habit of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held, there being no further advance made when the new securities were given:—Held, that this exchange of securities should be treated as authorized under s.-s. 2 of s. 75 of the Bank Act.—The plaintiff asked for a declaration that advances made by the bank upon a mortgage by the insolvent to a third person, and by him assigned to the bank, were contrary to the Bank Act, and that the property was free from the mortgage: —Held, that no such declaration should be made in the absence of the mortgagee, who was liable to the bank as indorser of a promissory note of the insolvent, collateral to the mortgage. *Conn* v. *Smith*, 28 O. R. 629.

Discount of Promissory Notes—*Accessory Securities.*]—A tradesman sold goods to customers, taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware, when the line of discount was opened, of the course of dealing, and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them. In an action to recover the securities, or their proceeds, from the assignee for creditors of the tradesman:—Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs. *Central Bank* v. *Garland*, 20 O. R. 142; 18 A. R. 438.

Insolvency—*Preference.*]—In May, 1874, A., a manufacturer, opened an account with a bank, representing himself as being in good circumstances with a capital of $20,000 over all his liabilities, which was believed by C., the bank agent, who thought him doing a flourishing business, and A. then promised to keep C. well supplied with collaterals for any accommodation afforded him. In December, 1875, A. applied to C. for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the bank for advances to be made to him; which proposal was acceded to by C. Advances were accordingly made, for which receipts were deposited with C. on the 19th January, 25th January, 1st February, and 7th February. On the 26th February, A., in compliance with a demand by one of his creditors, executed an assignment in insolvency. On a bill filed to impeach these transactions as an unjust preference, the court being satisfied that they all took place in good faith, and not in the contemplation of insolvency:—Held, that the bank were entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignment in insolvency; but in respect of such of them as were deposited within the thirty days the bank could not claim any lien or priority:—Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security. *Suter* v. *Merchants Bank*, 24 Gr. 365.

The promise, however, to keep C. well supplied with collaterals was of too vague and general a character to entitle the bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold (without specifying any quantity), and C. was to judge of the amount of the advance to be made:—Held, that this agreement was not so vague or uncertain as to prevent the bank obtaining security for advances. *Ib.*

The Dominion Act, 34 Vict. c. 5, s. 47, enables a party making advances to a manufacturer to stipulate for obtaining a lien on warehouse receipts to be subsequently granted to the manufacturer. *Ib.*

Pledge—*Right of Curator to Impugn.*]—L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, and on appeal the applicants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the Act relating to savings banks, R. S. C. c. 122, s. 20, and the bank's act in making said loan was ultra vires and illegal:—Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the applicants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities. Assuming that the act of the bank in lending the money on the pledge of such securities, was ultra vires, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and ipso facto, a radical nullity of public order of such a character as to disentitle the bank under Articles 989 and 990 C. C. from claiming back the money with interest. Bank of Toronto v. Perkins, 8 S. C. R. 903, distinguished. *Holland* v. *Caisse d'Economie Notre Dame de Quebec*, 24 S. C. R. 405.

Running Account.] — Where a bank, holding a mortgage as additional security for the payment of certain notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole of the notes and renewals are links in one and the same chain of liability, which is secured by the mortgage, although, as a matter of book-keeping, the bank may have treated the first notes, and the subsequent substituted notes, as paid by the application of the proceeds from time to time of the renewals. *Dominion Bank* v. *Oliver*, 17 O. R. 402.

Running Account—*Forged Renewals.*]—McK. gave a mortgage to the M. bank as security for the present indebtedness of, and future advances to, a customer of the bank. By the terms of the mortgage McK. was to be liable, amongst other things, for the promissory notes, &c., of the customer outstanding at the date of the mortgage, and all renewals, alterations, and substitutions thereof:—Held, that the bank having given up the said promissory notes, &c., and accepted as renewals thereof forged and worthless paper, McK. was to the extent of such worthless paper relieved from liability as such security. *Merchants Bank of Canada* v. *McKay*, 15 S. C. R. 672.

Suspense Account—*Security Realized by Creditor.*]—If a bank agrees to give a customer a line of credit accepting negotiable paper as collateral security it is not obliged, so long as the paper remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the customer's debt and must be credited to him. *Cooper* v. *Molsons Bank*, 26 S. C. R. 611; reversing 23 A. R. 146, which reversed 26 O. R. 575.

See S. C., in the Judicial Committee, 6 A. R. 571.

Timber Limits—*Sale at Undervalue.*]—The plaintiff, being indebted to the defendants as indorser in the sum of about $7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits, which he stated had cost him $25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the Crown Lands Department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff, for $6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim. In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, judgment was given in favour of the plaintiff, with $19,654.38 damages. *Prentice* v. *Consolidated Bank*, 13 A. R. 69.

Timber Limits—*Lien—Invalid Mortgage—Subsequent Valid Mortgage.*]—Section 28 of the revised regulations respecting the sale and management of timber on Crown lands in Quebec, provides that "limit holders, in order to enable them to obtain advances necessary for their operations, shall have a right to pledge their limits as security without a bonus becoming payable," and it further provides that "if the party giving such pledge shall fail to perform his obligations towards his creditors, the latter * * may obtain the next renewal in his or their own name subject to payment of the bonus, the transfer being then deemed complete." In 1875 and 1876 one F., who was now represented by the plaintiffs, procured for the purposes of his business operations as a lumberman, certain pecuniary advances from the defendants, the National Bank, through B., their local manager, and to secure repayment gave to the defendants certain promissory notes and valuable securities, and as collateral security also gave a written pledge, dated 21st September, 1876, of certain timber limits in Quebec, which pledge purported on its face to be "for advances made and to be made" to him. In 1877, with the consent of B., F. cancelled this supposed pledge, and gave what purported to be a new pledge of the licenses to the National Bank, which simply stated that he thereby pledged all his rights, titles, and interests in the licenses to the defendants, and which new pledge was indorsed on subsequent renewals of the licenses. The defendants did not at

any time bind themselves to make any further advances to F., but as a matter of fact in 1877, 1878, and 1879, F. continued to receive advances from the defendants. In 1882, F. being still indebted to them in a large sum, and the pledge of the timber limits still in force, the defendants, pursuant to the above section of the regulations, obtained an issue of the licenses directly to themselves. The plaintiffs now brought this action for discovery of the securities held by the defendants on account of F.'s indebtedness, and for redemption, and for a declaration that the defendants had no lien on the timber limits in question:—Held, that as to the advances made before the pledge was given the security was valid, but that as to the future advances, the pledge of the timber limits was invalid as being in contravention of 34 Vict. c. 5, s. 40 (D.):—Held, however, that inasmuch as the defendants, although they had obtained the issue of the licenses directly to themselves, and thus procured a complete title to the property, under the above section of the regulations, nevertheless voluntarily restricted their claim to a lien upon it for the whole amount of F.'s indebtedness, they were entitled to judgment declaring such lien, and that on payment of such indebtedness the defendants should convey the property to the plaintiffs:—Held, further, that it was open to the plaintiffs in this action to object to the transaction as contravening the Bank Act, and it was not necessary for the purpose of such objection that the proceedings should be by the Crown. *Grant* v. *Banque National*, 9 O. R. 411.

Semble, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Bank Act, and after the debt had been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid. *Ib.*

Valuing Security.]—Proving claims on insolvent's estate. See *Eastman* v. *Bank of Montreal*, 10 O. R. 79.

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2. *Bills of Lading.*

Equitable Title — *Agreement made in Province of Ontario.*]—A bank in this Province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this Province, which, under the agreement, when purchased were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading had been made out, a creditor of the customer attached the cattle under a writ of saisie-arret, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the Province of Quebec, against the steamship owners, which the latter, having paid, sought to prove for on the estate of the bank in winding-up proceedings:—Held, that apart from the Bank Act, R. S. C. c. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank. The agreement having been made, and the parties to it being domiciled in this Province, the rights of the parties to it must be determined by the laws of this Province and not those of Quebec, which, however, were not shewn to be different:—Held, also, that the rights of the parties were entirely governed by the provisions of the Bank Act, and following, though not altogether approving, Merchants Bank v. Suter, 24 Gr. 356, that under s. 53, s.-s. 4, of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment:—Held, lastly, that the bank "acquired" the bills of lading within the meaning of the Bank Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. *Re Central Bank, Canada Shipping Co.'s Case*, 21 O. R. 515.

Sale—*Warranty of Title.*]—The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received. The bank were never in actual possession of the goods, but a bill of lading was indorsed to them as security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs. The jury found that it was the bank which sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods:—Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. c. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration. Morley v. Attenborough, 3 Ex. 500, commented on and distinguished. *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

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3. *Mortgages.*

Additional Security.] — Held, that the mortgage of goods to the plaintiffs, taken under the circumstances stated in this case, was valid, having been taken by way of additional security for a debt contracted to the bank in the course of its business, and therefore within C. S. C. c. 54, s. 4. *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

Chattel Mortgage—*Antecedent Debt.*]—Held, that the bank had the right to take the chattel mortgage in question. Sections 45-48 of the Bank Act, R. S. C. c. 120, do not prohibit a bank from taking security upon real, or as in this case upon personal property, and making such arrangements for its sale and disposition as they may think proper. What is forbidden is, the investing the money of the bank in trading. The transaction in question in this case was not a buying and

selling of goods by investing the bank money therein, but was merely taking security for a debt already incurred, and the carrying out of an arrangement for the sale and realization of the property mortgaged for payment of the debt. *In re Rainy Lake Lumber Co., Stewart v. Union Bank of Lower Canada*, 15 A. R. 749.

Consideration — *Notes not Stamped.*] Notes not properly stamped taken by a bank are invalid if the bank does not attach double stamps and properly cancel the same when it first receives the notes, and will not support a chattel mortgage. *Ontario Bank* v. *Wilcox*, 45 U. C. R. 460.

Contemporaneous Loan.]—B., on the 19th January, 1876, transferred to the bank of T. (appellants) by notarial deed a hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C., to set aside a prior hypothec given by C. and to establish their priority:—Held, that the transfer of B. to the bank of T. was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being a contravention of the Bank Act, 34 Vict. c. 5, s. 40 (D.) *Bank of Toronto* v. *Perkins*, 8 S. C. R 603.

Equitable Mortgage—*Contest as to Indebtedness Secured.*]—The customer of a bank created a mortgage in favour of the institution by the deposit of title deeds. In a suit to realize the security the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the officer of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627.

Foreclosure.]—The chartered banks of this Province have a right to a decree of foreclosure upon a mortgage held by them as security. *Bank of Upper Canada* v. *Scott*, 6 Gr. 451.

Indorser—*Assignment by him to Bank of Mortgage Security.*]—A mortgage upon land given to secure indorsations upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the indorsements being made; and an assignment of such mortgage to a bank before the making of the indorsements is not a violation of s. 45 of the Bank Act, R. S. C. c. 120. *Re Essex Land and Timber Co., Trout's Case*, 21 O. R. 367.

Release of Security—*Rights of Surety.*]—The plaintiffs, who held a number of promissory notes of a customer, indorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as indorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant:—Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when the security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained. Decision below, 25 O. R. 503, modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

Running Account.]—M. & Co., being desirous of obtaining additional advances from a bank, executed a mortgage to secure a large sum for which they were liable on the 31st December, 1873, on commercial paper of the firm and its customers which had been discounted by the bank. The mortgage provided that it should continue a security for the said sum and all renewals or substitutions therefor, and all indebtedness of M. & Co. in respect thereof. After the mortgage was given M. & Co.'s line of discount was increased, but no separate account of the liabilities secured by the mortgage and these further advances was kept, the proceeds of the discounts and cash deposits being carried to M. & Co.'s credit in one open current account, against which they drew cheques to retire the notes secured by the mortgage as they matured. M. & Co. became insolvent on the 12th August, 1875, their indebtedness in the meantime never having been reduced:—Held, reversing 7 P. R. 265, that this mode of keeping the accounts had not operated as a discharge of the mortgage debt. *Cameron* v. *Kerr*, 3 A. R. 30.

Surety—*Independent Security—Mistaken Belief as to Indebtedness.*]—In May, 1873, H. & B. being indebted to plaintiffs' bank in $60,000, B. executed a mortgage for $40,000 as security therefor, reciting that it was for money lent on notes made by B. and indorsed by the firm, by defendant, and by Mrs. P. In October, the indebtedness having increased to $90,000, the bank required as further security a mortgage from the defendant for $25,000, and one from Mrs. P. for a like amount. The mortgages were similar in form, and recited that the firm's indebtedness, being for moneys previously advanced on promissory notes made and indorsed as before stated, exceeded $25,000, and that such mortgage was given as collateral security for that sum, part of said indebtedness, whether represented by the notes then under discount, or by renewals, or by substitutions therefor, and similarly made and indorsed. There was a covenant for the payment of the indebtedness represented by said notes when due, or by any renewals or substituted notes. B. had been signing defendant's and Mrs. P.'s names as indorsers to the notes with their consent, as he alleged, but which defendant denied; and to prevent the bank noticing any difference between the signatures to the notes and to the mortgage, B., with defendant's assent, signed defendant's and Mrs. P.'s names to the mortgages, which they subsequently acknowledged before a witness to be their signatures. Defendant alleged that he then believed the indebtedness to be only $60,000, being told so by B., but about three weeks afterwards he discovered it to be $90,000, and he then said nothing to the bank about it. After the mortgages were executed, the notes were renewed from time to time down to the insolvency of the firm in

1877, by B. writing defendant's and Mrs. P.'s names as indorsers, as he stated with their consent, but which defendant denied. The bank brought actions respectively against defendant personally, and as executor of Mrs. P., who had since died, on the covenant in the respective mortgages, and also on the indorsements. After action commenced, the bank realized $35,000 on B.'s mortgage, and $6,300 from the firm's estate. The jury found that the defendant did not authorize B. to indorse for him, and that defendant when he gave the mortgage supposed the debt to be only $60,000:—Held, affirming 28 C. P. 450, that the evidence shewed that each mortgage was intended to be an independent security for $25,000; and that the finding of the jury that the defendant supposed the debt to be $60,000 was wholly immaterial, as the mere fact that he thought it was only that amount could not, under the circumstances, relieve him from liability upon the mortgage either wholly or partially. *Merchants Bank* v. *Bostwick*, 3 A. R. 24.

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4. *Warehouse Receipts.*

Antecedent Advance — *Goods not in Possession at Time of Agreement.*]—34 Vict. c. 5, ss. 46 and 47 (D.), permits the transfer to a bank of a bill of lading, or warehouse receipt, to secure an antecedent debt, where the understanding at the time of contracting such debt was, that the bill of lading should be transferred as collateral security. In this case it appeared that the bank agreed to make advances to S. & Co. to purchase coal and stone, to be secured by bills of lading and warehouse receipts for such coal and stone when received. The transfer of such receipts to the bank, after the arrival of the goods, was held to be authorized; and it was held no objection that the agreement was to give a receipt for goods of which, at the time, the person was not possessed. Six months had elapsed after the giving of the receipt before the seizure of the goods by the creditors of S. & Co., but the bank had taken possession of these goods with the consent of S. & Co., and were selling them in order to repay their advances:—Held, under 34 Vict. c. 5, s. 50 (D.), that they were entitled to hold the goods notwithstanding the lapse of time. *Royal Canadian Bank* v. *Ross*, 40 U. C. R. 466.

Antecedent Debt—*Insolvency—Transfer of Receipt — Warehouseman.*] — The Canada Car Company had, for some years, been doing business with the Royal Canadian Bank, and with its successors, the Consolidated Bank, and had obtained discounts to the amount of $23,000 on security of warehouse receipts given by one C. on 14,000 car wheels and 350 tons of pig iron. When these receipts were given C. was not in possession of either the goods or the premises in which they were stored. A lease of the premises was subsequently made to him, but he refused to renew the receipts and gave up the property. At the instigation of the Consolidated Bank, to enable the plaintiff to give warehouse receipts, a lease of the premises at the rent of $5 per month was made to him for a year, and he gave a warehouse receipt to the company for 14,000 car wheels and 350 tons of pig iron, receiving an indemnity from the bank that the property would be forthcoming when required. This receipt was indorsed over to the Standard Bank by the Car Wheel Company, under signature of its manager and president, and an advance obtained thereon of $23,000, which went to pay the Consolidated Bank, who, as it was found, were aware of the company's insolvency. In February, 1877, an attachment in insolvency issued against the company, and the defendants, as their assignees in insolvency, took possession of the goods covered by the receipt, claiming them as part of the assets of the estate. The plaintiff then sued the defendants in trespass and trover for the taking:—Held, that defendants were entitled to the goods; that had the Consolidated Bank been assignees of the receipt they would have had no title to the goods, as upon the evidence the receipt would not have been given, as required by the Act, 34 Vict. c. 5 (D.), to secure a present advance or debt; and that the Standard Bank could be in no better position, for that the evidence, set out in the case, shewed that the advance by them was not made as an original and independent transaction with the Car Wheel Company, but at the request and for the benefit of the Consolidated Bank, and upon its express or implied guarantee of indemnity. Held, also, that the lease to the plaintiff was not open to objection as being merely a gratuitous one. Quære, whether M., as regarded the premises leased, could be considered a warehouseman, or a keeper of a yard within that title. Quære, also, whether there could be a valid legal transfer of the warehouse receipt, except under the corporate seal; but held, that this was immaterial as this objection would not in equity defeat the plaintiff's claim. Held, that if plaintiff had had a legal title to the goods, he would not be compelled to resort to the insolvent court under s. 125 of the Insolvent Act, but might maintain this action. *Milloy* v. *Kerr*, 43 U. C. R. 78.

On appeal it was—Held, affirming the above judgment, that the plaintiff was not entitled to recover; that he had neither possession of nor property in the goods in question; and that he was not a warehouseman of the goods within the meaning of 34 Vict. c. 5 (D.) Quære, if the receipt had been valid, as given by a warehouseman in the ordinary course of business, whether the transaction, as set out in the evidence, could be considered as fraudulent within the Insolvent Act. Semble, that to sustain this view certain inferences of fact must be drawn, which had not been found at the trial. Quære, also, whether, under the facts more fully set out in the report, the two banks were so identified that the transaction must be regarded as an attempt to secure an antecedent debt from the Consolidated Bank by means of a warehouse receipt. *S. C.*, 3 A. R. 350. An appeal to the supreme court was dismissed, there being an equal division of opinion: 8 S. C. R. 474.

Bills of Sale Act.]—The execution debtors, C. & Son, bought the oats in question from persons who shipped them to Toronto consigned to their (the sellers') own order, or to the order of some bank other than the plaintiffs, sending the shipping receipt with draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to the plaintiffs, who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words: "Received in trust from the Dominion Bank bill of lading for —— bushels oats, and I hereby undertake to sell the property specified for said bank and collect the proceeds of sale or sales there-

of, and deposit the same with the said bank, in Toronto, to the credit of same, I hereby acknowledging myself to be bailee of the said property for the said bank." C. & Son received the oats from the carriers and warehoused them, taking warehouse receipts in their own name, which they indorsed to the plaintiffs, who then gave up the bailee receipt:—Held, that no property in the oats had passed to C. & Son when the plaintiffs made the advance, and that the latter were therefore entitled, at least as equitable owners, as against execution creditors of C. & Son. The Chattel Mortgage Act could have no application, for when the oats first came into the possession of C. & Son, they came charged with or subject to the plaintiffs' title. *Dominion Bank* v. *Davidson*, 12 A. R. 90.

Extending Time.]—The consent required by s. 50 of 34 Vict. c. 5 (D.), to extend the time for which the transfer of a warehouse receipt in security to a bank shall remain valid, may be given at any time after incurring the debt or liability to the bank; and, semble, that such consent need not be in writing. *McCrae* v. *Molsons Bank*, 25 Gr. 519.

Following Proceeds.]—A miller gave a warehouse receipt to a bank on some wheat "and its product," stored in his mill, for advances made to him, and died insolvent about two months after. During this period wheat was constantly going out of, and fresh wheat coming into, the mill. Just before his death the bank took possession and found a large shortage in the wheat, which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time. In the administration of his estate it appeared that during the period of shortage some of the wheat had been converted into flour, which had been sold, and the proceeds, which were less than the value of the shortage, paid to the administrator:—Held, that the bank was entitled to the purchase money of the flour. *Re Goodfellow, Traders Bank* v. *Goodfellow*, 19 O. R. 299.

Foreigner — *Transaction Valid under Foreign Law.*]—C. & Co., carrying on business in Chicago, in the state of Illinois, for the manufacture of mill machinery, etc., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of $5,000 each, discounted by the plaintiffs, indorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co. not being able to retire them, in pursuance of an arrangement to that effect the warehouse receipts were cancelled and new ones, dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved:—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & Co. being residents of the state of Illinois, the transfer must be governed by the law of that state, according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when M. & T. gave the warehouse receipts direct to the bank they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustees rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago* v. *Corcoran*, 6 O. R. 527.

Owner Issuing Receipts.] — Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act, R. S. O. 1887 c. 122:—Held, that the Dominion Bank Act, R. S. C. c. 120, while it was in force, dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein. *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31; affirming 19 A. R. 1.

Pork Packers.] — Warehouse receipts — Who may give—Curers and packers of pork—Receipts for property wrongfully obtained—Confusion of property. *Great Western R. W. Co.* v. *Hodgson*, 44 U. C. R. 187.

Present Advance — *Form of Receipt — Indorsement.*]—M. & Co. being indebted to plaintiffs on certain overdue notes, it was agreed that plaintiffs should discount a further note for them, with the proceeds of which the overdue paper should be retired; and that M. & Co. should hand over to them certain warehouse receipts for wool stored in their warehouse as collateral security. This note was accordingly, on the 23rd January, 1868, discounted by plaintiffs, and the old notes duly retired, an agreement being signed by M. & Co., reciting that they had indorsed over the receipts as collateral security for the note, &c. The receipts, nearly all in the same form, were as follows:—"Warehouse Receipt. —Received in store in our warehouse, at * * from sundry parties, 17,900 pounds batting to be delivered pursuant to the order of the Bank of British North America, to be indorsed hereon, &c." Neither M. & Co. nor the bank indorsed the receipts:—Held, that they were not warehouse receipts under C. S. C. c. 54, 24 Vict. c. 23, and that the bank, therefore, could not claim the property covered by them. Semble, also, that the transaction of the 23rd January was not, in substance, though in form, a present advance to M. & Co., but merely a mode adopted of paying off an already existing debt. *Bank of British North America* v. *Clarkson*, 19 C. P. 182.

Present Advance—*Form of Receipt—Indorsement.*]—The plaintiffs on the 20th September, received a note for $5,800, payable to and indorsed by L., with L.'s warehouse receipt for wool attached, which they discounted on the 4th October, 1867. On the 21st October, $1,179 only remaining due, they took a note for this sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.'s previous receipt. It was not discounted, however, on that day, because M. did not pay the discount, and on the 5th December, M. made another note for the same sum, at ten days, in place of it, which was discounted with the same two warehouse receipts attached. It

was renewed on the 24th with the same receipts, and not being paid, the plaintiffs in April sold the wool, through a broker who was unable to get it; and they thereupon replevied on the 9th May:—Held, following Bank of British North America v. Clarkson, 19 C. P. 182, that the warehouse receipts, being taken directly to the bank, and not by indorsement, were not within C. S. C. c. 54, s. 8, and that the plaintiffs therefore could not recover. Held, also, that the transaction of the 5th December might be considered as a new one, and that the plaintiffs therefore had not held the wool more than six months, so as to defeat their title, under s. 9. If they had, defendants might shew that fact under a plea of not possessed. *Royal Canadian Bank* v. *Miller*, 28 U. C. R. 593; 29 U. C. R. 266.

Specific Sum Secured—*Excessive Sale.*]—The defendants, a bank, advanced to F. & McL. $2,250, on a warehouse receipt for 3,000 bushels of wheat, valued at 75 cents per bushel. F. & McL. subsequently paid in $1,920, which they had obtained from the plaintiffs, who were in reality the owners of the wheat, for whom F. & McL. were acting, leaving a balance due of $330. The plaintiffs notified the bank of their claim, but the bank in disregard thereof, contending that the warehouse receipt was a continuing security for F. & McL.'s general balance, which at that time exceeded $2,250, shipped it off for sale, incurring wharfage fees thereby, and the whole of the wheat was sold:—Held, that the evidence, set out in the report, shewed that the warehouse receipt was not a continuing security to $2,250, but only for the repayment of that specific sum. Held, also, that under the circumstances the claim for wharfage could not be entertained. Held, also, that the plaintiffs might maintain trover against defendants; for that the fact of there being some part of the $2,250 due at the time of the sale did not justify the sale of the whole of the wheat, it being capable of division, so that enough to satisfy the amount due need only have been sold. *Gibbs* v. *Dominion Bank*, 30 C. P. 36.

Surety—*Bank's Agreement to take Receipts from Primary Debtor.*]—Upon the evidence in this case it was held to have been rightly found at the trial that the defendant indorsed the notes sued on on the understanding and agreement with the plaintiffs, by whom they were to be discounted, that the proceeds should be applied in the purchase of pork, on which the plaintiffs were to take and hold security for the payment of the notes: that the plaintiffs had such security on pork which was of greater value than the amount of the notes; and that the plaintiffs through their negligence lost such security, the makers either having been allowed to sell the pork and receive the proceeds, or such proceeds having been received by the plaintiffs and applied to other liabilities of the makers:—Held, that the defendant was discharged. As between these parties it was held unnecessary to discuss the right of the makers to give valid warehouse receipts for such pork to the plaintiffs, there being enough shewn to create a valid pledge of the pork, for the special purpose of the agreement, and to provide a fund to which the defendant looked for protection. The alleged impracticability of the bank attending to the sale and disposition of such property in their ordinary course of business was held immaterial, there being an express agreement as above stated. *Molsons Bank* v. *Girdlestone*, 44 U. C. R. 54.

Surplus.]—The Molsons Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. & Co. H. & Co. having become insolvent, T., as one of the creditors, brought an action against the bank, claiming that the surplus must be distributed ratably among the general body of creditors. H. & Co. were not made parties to the suit:—Held, that the parol agreement was not contrary to the provisions of the Bank Act, R. S. C. c. 120, and that after the goods were lawfully sold the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. *Thompson* v. *Molsons Bank*, 16 S. C. R. 664.

Title by Indorsement—*Form of Receipt — Warehouseman — Constitutional Law.*]—The appellants discounted paper for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants Bank of Canada, at Toronto, fourteen hundred and fifty-eight (1,458) tons stove coal, and two hundred and sixty-one tons chestnut coal per schooners "Dundee," "Jessie Drummond," "Gold Hunter," and "Annie Mulvey," to be delivered to the order of the said Merchants Bank to be indorsed hereon. This is to be regarded as a receipt under the provisions of the statute 34 Vict. c. 5 (D.)—value $7,000. The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal. (Signed,) W. Snarr. Dated 10th August, 1878." The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt:—Held, reversing 8 A. R. 15, that it is not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger, and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vict. c. 5 (D.) 2. That the finding of fact at the trial, of W. S. being a person authorized by the statute to give the receipt in question, should not have been reversed, as there was evidence that W. S. was a wharfinger and warehouseman. 3. (Per Fournier, Henry, and Taschereau, JJ.,) that ss. 46, 47 and 48 of 34 Vict. c. 5 (D.) are intra vires the Dominion Parliament. *Merchants Bank of Canada* v. *Smith*, 8 S. C. R. 512.

Warehouseman — *Invalid Receipts — Effect of Taking Possession.*]—In proceedings taken in the master's office to administer the estate of M., which was insolvent, the M. and D. banks brought in their claims as creditors. Other creditors opposed these claims on the grounds that the banks had been paid large

sums in reduction of their debts by assets of the deceased, which they had taken after his death and before administration. The banks set up their right to the assets so taken under warehouse receipts therefor, signed by H. and held by them. It appeared that M., who was a provision merchant, in his lifetime had obtained advances from the banks on the faith of the receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured, M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the banks under their receipts, and as it was rapidly deteriorating was sold by them. At the time of the sale there was no personal representative to M.'s estate, nor was there any execution creditor. It appeared by the evidence of H. that he had signed the receipts at M.'s request and as a matter of form, but that he had not leased the cellar, nor had he any control over it nor the property contained in it: —Held, that the receipts were good between the parties and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H.'s part during the life of M., but in any event, there being no creditor who had any locus standi when the banks sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate. Per Boyd, C.—There are two classes of persons authorized to issue warehouse receipts by s. 7 of 43 Vict. c. 22 (D.), (substituted for 34 Vict. c. 5, s. 45 (D.),) viz., bailees of goods and keepers of a warehouse, &c., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly, and continuously in possession of them from first to last. Per Proudfoot, J.—That section authorizes persons who are not warehousemen alone, but who may have other business also, to give receipts, but these are comprised in the definition of "warehouse receipts," previously given in the statute, which requires the goods to be in the "actual, visible, and continued possession of the bailees." *Re Monteith, Merchants' Bank* v. *Monteith*, 10 O. R. 529.

IV. Deposits and Deposit Receipts.

Accepting Deposit After Decision to Suspend Payment.]—Where a deposit was made in a bank, and it was shewn that at a directors' meeting, held the previous day, the necessity of seeking outside assistance or suspending payment had been considered and a resolution passed to suspend payment if such assistance were refused, and that when the bank closed on the day the deposit was made, it did not open again, and notice of suspension of payment was given on the following morning:—Held, that the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, and the liquidators were ordered to pay the same with interest from the date of the deposit. Quære, whether motion by petition was the proper mode of procedure in a case like this. *Re Central Bank of Canada, Wells and MacMurchy's Case*, 15 O. R. 611.

Assignee in Insolvency — *Non-production of Receipt.*]—M. deposited a sum with the plaintiffs, and soon afterwards absconded. The bank had given him a receipt, stating that the money was payable on the production of that document. A writ of attachment issued against the depositor's property under the Insolvent Acts, and the defendant Little was appointed official assignee. He demanded the money without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of his appointment. He then sued the plaintiffs for the money. The action was restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant Little and another claimant of the money, whose claim accrued after the attachment, to interplead. The court, under the circumstances:—Held, that the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it, with the costs occasioned to the estate by their refusal. *Bank of Montreal* v. *Little*, 17 Gr. 313.

A condition, on a bank deposit receipt, that the receipt should, on payment, be given up to the bank, may not be void; but it does not entitle the bank to retain the money in case the receipt is not forthcoming; the depositor is entitled, on proof of loss and indemnity (if required), to relief in equity. *S. C.*, 17 Gr. 685.

Attachment of Deposits.]—*See County of Wentworth* v. *Smith*, 15 P. R. 372.

Crown's Priority.]—Priority of Crown over other creditors for payment of moneys deposited in a bank that has become insolvent. See *Regina* v. *Bank of Nova Scotia*, 11 S. C. R. 1; *Liquidators of Maritime Bank* v. *Regina*, 17 S. C. R. 657.

Deposit After Suspension.]—A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

Equitable Transfer — *Negotiability.*]—To an action on the common money counts and account stated, defendants pleaded, by way of equitable defence, setting out a deposit receipt for moneys from them to plaintiff, to be accounted for by them to plaintiff, and, in substance, that the plaintiff had, for good and valuable consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, which defendants had paid over to the transferee. Replication, on equitable grounds, in effect, that defendants did not bonâ fide pay the amount of the claim, to a person or persons to whom plaintiff had, for good consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, but that he parted with the security under circumstances which, at best, gave the transferees an equitable charge upon the fund, the extent of which had to be determined by certain acts to be done by them; and that they having taken no steps to ascertain the extent of the charge, the plaintiff, before the alleged

further transfer by them to certain parties (set up by the plea) and before payment by defendants, notified them that he disputed the validity of the equitable charge, and not to recognize it or pay any of the fund in respect of it, which defendants agreed not to do, but afterwards paid the same:—Held, a good replication. *Maunder* v. *Royal Canadian Bank*, 29 C. P. 125.

Deposit receipts for money, given by a bank, are not negotiable instruments in equity any more than at law, so as to entitle the holder to demand payment of the fund secured by them. *Ib.*

Plaintiff deposited with defendants a sum of money and received from them the usual deposit receipt, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen days' notice to be given of its withdrawal, on which notice interest was to cease. Subsequently plaintiff indorsed an order thereon to pay S. & Co. and delivered it to the indorsees. Before S. & Co. notified defendants of the transfer to them, the plaintiff gave them notice that he revoked and countermanded it, but defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon defendants for the money, which was not complied with. Quære, in an action by plaintiff against defendants, how far defendants were authorized to set up, in answer, as a payment good in equity, that the deposit receipt had been transferred by plaintiff to S. & Co., and that they had paid S. & Co. accordingly. *S. C.*, 21 C. P. 492.

Forgery—*Delay.*]—The plaintiff, a Norwegian by birth and almost totally ignorant of the English language, in September, 1884, deposited with the defendants at one of their branch offices a sum of money and received from the bank the usual deposit receipt, at the time signing his name on the stub or counterfoil of the receipt for the purpose of enabling the bank to identify him at any time the money might be demanded. For the purpose of safe-keeping, plaintiff, being about to proceed to work elsewhere, left the receipt with one S. S. About seven months afterwards plaintiff returned, when he was informed by S. S. that he had withdrawn the money from the bank but promised to return it. The plaintiff being ignorant of the manner in which the money had been paid out and of his rights as against the defendants took no steps whatever against them, and S. S. absconded from the country in August, 1885, heavily indebted. In the month of December following, the plaintiff having been informed as to his rights against the bank consulted a solicitor who undertook to attend to the matter, but omitted to take any steps, and in the month of April following (1886) the plaintiff through another solicitor made a demand on the bank for payment which was refused. The demand so made was the first notice the bank had of the fraud which had been practised on them:—Held, affirming 14 O. R. 568, 1, that the plaintiff in entrusting the receipt to S. S. was not guilty of any act of negligence; 2, that his delay in notifying the defendants of the fraud perpetrated on them was not a breach of any legal duty on his part so as to estop him from recovering the amount of his deposit. Merchants Bank v. Lucas, 13 O. R. 520, distinguished. *Saderquist* v. *Ontario Bank*, 15 A. R. 609.

Form of Receipt — *Negotiability.*]—An incorporated bank, by its cashier, issued deposit receipts in the following form: "Received from the sum of $, which this bank will repay to the said or order, with interest at four per cent. per annum, on receiving fifteen days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required:"—Held, that it was competent under the Bank Act, R. S. C. c. 120, to issue such deposit receipts, and that even if they did not possess all the incidents of promissory notes, yet being meant to be transferred by indorsement, they were so far negotiable as to pass a good title to a bonâ fide purchaser for value, taking without notice of any infirmity of title. *Re Central Bank, Morton and Block's Claims*, 17 O. R. 574.

Semble, that these deposit receipts were negotiable instruments under which the holders were entitled to recover as upon a promissory note made by the bank. Voyer v. Richer, 13 L. C. Jur. 213, 15 L. C. Jur. 122, L. R. 5 P. C. 461, specially referred to. *Ib.*

Payment After Depositor's Death—*Pleading.*]—Action by plaintiff as administratrix of one L., to recover the sum of $100 deposited by L. in his lifetime with defendants. Second plea: that the moneys were claimed under a deposit receipt, which, after L.'s death and before defendants had any notice or knowledge thereof, was duly presented to defendants properly indorsed by L., and defendants in due course of business, and in their usual mode of dealing with such receipts, paid the sum mentioned therein to the person presenting the same with L.'s indorsement thereon, and defendants took up and have ever since held the same, as they were entitled to do. Third plea: after stating that the moneys were claimed under the deposit receipt, alleged that L., in his lifetime, indorsed and delivered said receipt to B. L., his wife and afterwards his widow, who being possessed thereof by virtue of the indorsement presented it to defendants, who without any notice or knowledge of L.'s death, duly paid the same to her:—Held, second plea bad, for there was no allegation of the delivery of the receipt, or of any intention to pass the property therein, the expression "indorse," which in negotiable instruments imports a delivery and transfer to the indorsee so as to pass the title thereto, having no such effect in a non-negotiable instrument of this character; further that the allegation of payment in ignorance of L.'s death, and in due course of business, &c., could not help defendants, and the plea should have alleged a payment to L.'s personal representative or to some person shewing a right to the money:—Held, also, third plea bad: that it did not constitute a good legal defence, for, notwithstanding the alleged indorsement and delivery, the depositor still continued entitled to the money; neither did it constitute a defence in equity, for it alleged neither an equitable assignment of the receipt or of the money secured thereby, nor a donatio mortis causâ, nor a gift thereof. *Lee* v. *Bank of British North America*, 30 C. P. 255.

Set-off — *Depositor's Promissory Note—Ranking on Insolvent Estate of Deceased Maker.*]— A testator, having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured. The deposit remained with the bank until after the maturity

of the note, when the bank brought an action on it against the executors of his insolvent estate, who claimed that the bank should rank on the estate for the full amount of the note and give credit upon the dividend for the amount of the deposit:—Held, that the deposit not having been withdrawn or demanded before the maturity of the note, the bank was entitled to set off the debt on the note against the deposit, and to rank for the balance. *Ontario Bank* v. *Routhier*, 32 O. R. 67.

Special Deposit — *Wrongful Refusal to Pay—Damages.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money. Marzetti v. Williams, 1 B. & Ad. 415, and Rolin v. Steward, 14 C. B. 594, distinguished. A bank having received a deposit subject to certain notice of withdrawal, if required, cannot set up as a defence to an action for the deposit the absence of such notice, unless the refusal to pay was based on that ground. The defendants having paid into court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641. Appealed as to the question of costs and affirmed, 22 A. R. 414.

Stakeholder—*Interest.*] — The plaintiffs were sureties to a bank for a debt due by a company, and for which the bank held other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused so to apply them without an order of court:—Held, (1) that the bank was constituted a stakeholder of such moneys, and could not so apply them without the sanction of the court: (2) that the bank was not chargeable with interest on the moneys so deposited, even though it might have made a profit on such moneys. *Hutton* v. *Federal Bank*, 9 P. R. 568.

Succession Duty—*Foreign Domicile.*]—Succession duty is payable upon the amount held under deposit receipts issued by banks in this Province, payable here to a person whose domicile was in a foreign country at the time of his death. *Attorney-General of Ontario* v. *Newman*, 31 O. R. 340.

Transfer of Deposit by Husband to Wife.]—See *Sherratt* v. *Merchants Bank of Canada*, 21 A. R. 473.

Trust Funds.]—One McE., who was the assignee of an insolvent estate, kept the estate account as well as his private account, at the defendant bank. Certain notes of the estate were deposited by him with defendants for collection, and the proceeds placed to the credit of the estate, which McE., as assignee, drew out by cheque, and redeposited with defendants to his private account, and then used for his own purposes. It did not appear that the bank derived any benefit from the transfer, or that McE. was indebted to them:—Held, that defendants were not liable to repay the amount to the estate. *Clench* v. *Consolidated Bank of Canada*, 31 C. P. 169.

Trust Funds.]—S. G. acquired during the life of his first wife, M. A. B., certain immovable property which formed part of the communauté de biens existing between them. At his death, after his marriage with H. S., his second wife, he was greatly involved. His widow H. S., having accepted sous benefice d'inventaire the universal usufructuary legacy made in her favour by S. G., continued in possession of her estate as well as that of M. A. B., the first wife, and administered them both, employing one G. to collect, pay debts, &c. Shortly afterwards, at a meeting of the creditors of S. G., of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G., with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and the creditors resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among S. G.'s creditors pro ratâ. G. continued to collect the fruits and revenues and rents, and acted generally for H. S. and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G., and those derived from the estate of M. A. B., the first wife, with the respondents, under an account headed "Succession S. G." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame M. A. B.:—Held, by an equal division of opinion, affirming the judgment below, that as between the heirs B. and the bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G. belonging to the heirs of B. were so collected by him as the agent of H. S., and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of S. G., and as the representatives of H. S. were not parties to the action, the appellants could not recover the moneys sued for. *Giraldi* v. *Banque Jacques Cartier*, 9 S. C. R. 597.

Trust Funds—*Charging up Cheques.*]—The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a loan company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the loan company, amounting with interest to $6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for $3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff, and transmitted the same to the plaintiff on the 26th August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th September following:—Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. *Bailey* v. *Jellett*, 9 A. R. 187.

After the deposit of the plaintiff's money J. recovered a sum of $1,182.95 for the defendant S., as her solicitor, which he also deposit-

ed in the same account on the 24th August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum:—Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.; but as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. *Ib.*

The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this court and the court below, they were refused their costs. *Ib.*

Void Administration — *Place of Payment.*] — Payment to administrator acting under administration obtained by fraud:—Held, good. Receipt payable at Cobourg paid at head office at Montreal. See *Irwin* v. *Bank of Montreal*, 38 U. C. R. 375.

V. Shares and Shareholders.

Creditor's Right to Enforce Double Liability.]—A bill will lie in equity at the suit of a creditor to enforce the double liability of the shareholders of an insolvent bank. *Brooke* v. *Bank of Upper Canada*, 16 Gr. 249.

But such a bill must be on behalf of all the creditors. *Ib.*

The trustees of the bank were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *S. C.*, 17 Gr. 301.

Inspection of Books.]—A stockholder merely as such has no right to inspect the stock or other books of the bank, nor will the court grant a mandamus for that purpose, although they have the power, unless some special ground be disclosed sufficient to warrant it. *In re Bank of Upper Canada* v. *Baldwin*, Dra. 55.

Lien—*Understatement of Amount.*] — A bank agent being about to make advances on the security of certain stock of another bank, applied to the bank officers to ascertain what claims the bank held against such stock, when he was informed that there was overdue paper to the amount of $500: but before completing the transfer of the stock, another claim, which was then current in one of the agencies of the bank, was returned unpaid:—Held, that the bank had a right to retain its lien on the stock for the additional sum before allowing the transfer of the stock to be carried out in their books. *Cook* v. *Royal Canadian Bank*, 20 Gr. 1.

The owner of bank stock being about to assign the same, procured from one of the agents of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words: "No liability at Galt office:"—Held, that this was not such a representation, made to the intending transferee, as bound the bank: and that the bank was entitled to hold the stock for a draft of $500, which had been discounted at the Galt office, and then in the hands of an agency in Montreal. *Ib.*

Loan.]—Loans made on deposit of stock. See *Carnegie* v. *Federal Bank of Canada*, 5 O. R. 418.

Purchase of Share to Bring Action.]—The plaintiff in order to qualify himself to sue as a shareholder of a bank, purchased one share of the stock thereof, which he swore he paid for with his own money and bought of his own motion, for the purpose of testing the legality of a transaction into which the bank was about to enter:—Held, that this gave him a locus standi in court, although the circumstances were suspicious, the rule being that where in such a case the plaintiff is shewn to have a substantial interest the court will not refuse relief, although there may be room to suppose he may have other objects in view which could not be approved of. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Sale of Shares—*Execution.*] — Sale of shares in execution—Application for order under 34 Viet c. 5 (D.)—Execution of fi. fa. by bailiff. See *In re Bank of Ontario*, 44 U. C. R. 247.

Sale of Shares — *Double Liability—Indemnity.*]—The plaintiff sold and transferred his shares in a bank to C., a broker, who sold them on the stock exchange to the defendant, also a broker, in ignorance that the latter was acting for a customer. The transfer in the bank books from C. was effected by leaving the transferee's name blank, and marking the shares in the margin of the transfer as subject to the order of the defendant, who similarly marked them subject to the order of his principal, whose name was filled in as transferee, and who duly accepted the transfer. Within a month from the sale by the plaintiff, the bank was ordered to be wound up, and in the liquidation the plaintiff was compelled, as a contributory, to pay the double liability under ss. 70 and 77 of the Bank Act, R. S. C. c. 120. The plaintiff recovered judgment against C. for the amount he had paid, and afterwards took an assignment from C. of his right to indemnity against the defendant. In an action to enforce this right:—Held, that the obligation to indemnify arose from the purchase, and not from the transfer; that a broker acting in his own name, for an undisclosed principal, assumes the liability of the latter, and the fact that the transfer was executed in a form intended to enable the defendant to pass the shares to the ultimate purchaser did not relieve the defendant from his liability. That, although C. had not satisfied the judgment, he was entitled to indemnity from the defendant, and, after judgment, to assign his rights to the plaintiff, who could enforce them:—Held, also, that the mere existence of a liability to indemnify the plaintiff gave no right of action to C., and that the Statute of Limitations did not begin to run in favour of the defendant until the recovery of judgment against C. Sutherland v. Webster, 21 A. R. 228, and Eddowes v. Argentine Loan Co., 63 L. T. N. S. 364, followed:—Held, further, that the plaintiff's right against C. first accrued when the liquidators became entitled to immediate payment. Before this action, the plaintiff sued the defendant and C. on an assignment to him of C.'s claim against the defendant, made before the plaintiff's judgment against C., which action was dismissed against the defendant, on the ground that C. had not before judgment been damnified, and the defendant sought herein to set up that dismissal in bar of this action:—Held, no defence to this action. A by-law of the stock exchange, not authorized by their Act of incorporation, provided that all disputes between members, arising out of

transactions on the exchange, should be referred to arbitrators:—Held, that they had no right to pass such a by-law ousting members from their right to resort to the courts of the Province. Essery v. Court Pride of the Dominion, 2 O. R. 596, considered. *Boulthee* v. *Gzowski*, 28 O. R. 285; reversed, 24 A. R. 502; restored in the supreme court, 29 S. C. R. 54.

Transfer.]—Transfer of stock. See *Smith* v. *Bank of Nova Scotia*, 8 S. C. R. 558.

Trust.]—The curator to the substitution of W. Petry paid to the respondents the sum of $8,952, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P. one of the grevés and manager of the estate had pledged to respondents for advances made to him personally. J. H. P. et al., appellants, representing the substitution, by their action demanded to be refunded the money which they alleged H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to shew they formed part of the estate, and no acte d' emploi or remploi to shew that they were acquired with the assets of the estate:—Held, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover. Articles 1047, 1048 C. C. That bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Articles 931, 938, 939 C. C. *Petry* v. *Caisse d'Economie de Notre Dame de Quebec*, 19 S. C. R. 713.

Trust—*Transfer of Trustee.*]—Duty of transferee to inquire whether transfer is authorised. See *Bank of Montreal* v. *Sweeny*, 12 S. C. R. 661, 12 App. Cas. 617.

Trust—*Registration of Transfer of Shares—Notice.*]—Where the respondent bank (incorporated by 18 Vict. c. 202) registered an absolute transfer of its shares, which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:—Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to s. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts, express, implied, or constructive, to which any of its shares may be subject. Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors:—Held, to be insufficient to affect the bank with the knowledge of the particular trusts sought to be enforced. *Simpson* v. *Molsons Bank*, [1895] A. C. 270.

Winding-up—*Transfers.*]—After a winding-up order has been made, it is too late for holders of shares, entered as such in the books of the bank, to escape liability by shewing irregularities in transfers to more or less remote predecessors in title. A loan company which advances money on the security of shares, which are transferred to it, and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower. *In re Central Bank of Canada, Home Savings and Loan Company's Case*, 18 A. R. 489.

VI. Special Charters.

Bank of British North America.]—An action is not maintainable against the manager of this bank under 7 Will. IV. c. 34, in his individual character, for a cause of action accrued against him only as manager. *White* v. *Hunter*, E. T. 4 Vict.

This bank is entitled to sue in Upper Canada in its corporate name. *Bank of British North America* v. *Browne*, 6 U. C. R. 490.

There is nothing in their charter which prevents their becoming parties as creditors to an assignment for the benefit of creditors. *Patton* v. *Foy*, 9 C. P. 512.

The local agents of the bank cannot grant powers of attorney to third parties to receive money ordered to be paid to the bank by a decree of the court. *Bank of British North America* v. *Rattenbury*, 1 Ch. Ch. 65.

Bank of Upper Canada.]—The president, not being an officer of the bank, within s. 16 of 6 Vict. c. 27, may vote by proxy at the annual election of directors. *Regina* v. *Bank of Upper Canada*, 5 U. C. R. 338.

The bank under 6 Vict. c. 27, s. 19, could not hold vessels for any purpose as security. *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252.

And as a consequence no implied assumpsit can arise against them as ship owners, nor could any express promise be binding. *Lyman* v. *Bank of Upper Canada*, 8 U. C. R. 354.

Semble, they might take mortgages upon real estate to secure debts previously contracted. *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252.

Held, that under 6 Vict. c. 27, s. 19, the bank may take mortgages upon real estate as collateral security, for sums advanced bonâ fide in the way of their business, and that such debts need not have been contracted previously, but the advance and the security may be contemporaneous acts. *Commercial Bank* v. *Bank of Upper Canada*, 7 Gr. 250, 423.

And, held, that all chartered banks have the same power. *S. C., ib.* 423.

It would be a question of fact for a jury to determine whether the mortgage was in truth taken to secure the transaction on the bill or note discounted, or the bill created for the mere purpose of upholding and giving colour to the mortgage. *Ib.*

A mortgage was created as collateral security for £2,800, debts then past due to one of the chartered banks, and also £1,000 then advanced by the bank to the mortgagor, who afterwards created a second mortgage to the bank for £750, and interest; which instrument expressly provided, that it and everything therein contained should be subject to the payment by the mortgagor of the amounts mentioned in the former mortgage:—Held, that the first mortgage was void as to the £1,000, but valid to secure the £2,800, notwithstanding that the notes held by the bank at the date of the mortgage had been retired by the discount of other paper from time to time; and also that the second mortgage was an existing security as to the £1,000, though void as to the £750 advanced at its execution. *Ib.*

One P. having agreed to build certain cars for the Grand Trunk R. W. Co., it was stipulated in the contract that the payments were to be made to the satisfaction of the Bank of Upper Canada, who were to act as receivers. On the 24th September, 1860, the bank and the railway company entered into an agreement, reciting the contract, and that the bank had made large advances on account of it, and had agreed to advance the necessary sum to complete it and acquire the title to the cars. The company then assigned all their interest in the agreement and cars to the bank, and the bank leased them back to the company for three years at a rent named, with a proviso that on payment of their debt to the bank, the cars should revert to the company. After this P. received moneys from the bank on account of the contracts:—Held, that the bank were not precluded by their charter from taking security upon them; and that they were entitled therefore as against an execution creditor of P. *Bank of Upper Canada* v. *Killaly*, 21 U. C. R. 9.

Held, that under 19 & 20 Vict. c. 127, s. 21, the bank had a right to purchase goods at a sheriff's sale other than on an execution at their own suit, if in that way they wished to acquire an outstanding claim or charge on the property of a debtor of the bank. *Kingsmill* v. *Bank of Upper Canada*, 13 C. P. 600.

A debtor of the late pretended Bank of Upper Canada at Kingston having called upon the bank commissioners to arbitrate under 10 Geo. IV. c. 7, an award was made for £900, to be paid in notes and other securities of the bank:—Held, that the debtor had a right to pay in notes for which no certificates had been issued pursuant to the Act. *Dalton* v. *McNider*, 5 Gr. 501.

K. was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the bank for more than the value. The trustee agreed for the sale of these parcels to a purchaser; the bank, before becoming insolvent, assented to the sale, and received the first instalment of the purchase money. The purchaser went into possession, but made default; defendants were his assignees. By the trust deed which the bank executed on becoming insolvent (which deed was afterwards confirmed by statute), it was made the duty of the trustees to accept in payment of any debt due to the estate the notes or bills of the bank. On a bill by the trustees for payment, it was held that, as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par. *Trustees of the Bank of Upper Canada* v. *Canadian Navigation Co.*, 16 Gr. 479.

Imperial Bank of Canada.]—The Imperial Bank of Canada, by virtue of its Act of incorporation, 36 Vict. c. 74 (D.), and the provisions of the Bank Act, 34 Vict. c. 5 (D.), has a right to purchase debentures of municipalities. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Royal Canadian Bank.]—Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than seven per cent., were not entitled to avail themselves of the provisions of their Act of incorporation, 27 & 28 Vict. c. 85, s. 21, allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than seven per cent., which was held to be the meaning of the Act; and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than six per cent. from its maturity. *Royal Canadian Bank* v. *Shaw*, 21 C. P. 455.

VII. Winding-up.

Appointment of Liquidators—*Right to Appoint Another Bank.*]—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators, and the Judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the Judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank:—Held, affirming 22 N. S. Rep. 97, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the Judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case. *Forsythe* v. *Bank of Nova Scotia, In re Bank of Liverpool*, 18 S. C. R. 707.

Liquidators' Commission on Set-off.]—In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators; and in this case a commission of two and a quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set off was allowed. So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one. *In re Central Bank, Lye's Claim*, 22 O. R. 247.

Money Paid Out of Court—*Jurisdiction to Compel Repayment.*]—The liquidators of an insolvent bank passed their final accounts, and paid a balance remaining in their

hands into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the receiver general for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act. Held, affirming 24 A. R. 479, that the receiver general was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired:—Held, also, that even if he was not entitled to intervene, the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out. *Hogaboom v. Receiver General of Canada, In re Central Bank of Canada*, 28 S. C. R. 192.

The judgments of the court of appeal and of the supreme court in this case (24 A. R. 479, 28 S. C. R. 192), are conclusive on the point that the money repaid into court in this matter, pursuant to those judgments, was the property of the receiver general of Canada, under R. S. C. c. 129, s. 41, subject to the liability of paying it over to the persons entitled thereto. *In re Central Bank of Canada*, 30 O. R. 320.

VIII. Miscellaneous Cases.

Bubble Acts.]—The Bubble Acts, 6 Geo. I. c. 18, and 14 Geo. II. c. 37, are not in force in this Province, and banks chartered by Acts of the provincial parliament could not come within them. *Bank of Upper Canada* v. *Bethune*, 4 O. S. 165; *Bank of Montreal* v. *Bethune*, *ib.* 193.

Company — *Ultra Vires Borrowings.*] — Great Western R. W. Co.—Loan to Detroit and Milwaukee R. W. Co.—Money advanced by bankers for purposes beyond defendants' charter—Right to recover for overdrawn account — Evidence — Res gestæ. *Commercial Bank of Canada* v. *Great Western R. W. Co.*, 22 U. C. R. 292; 2 E. & A. 285; 3 Moo. P. C. N. S. 295.

Failure of Bank—*Service of Process.*]—Process was served upon A. as president of a bank; he having been elected in June, 1866, for one year. No election of president or directors had taken place since then, and A. in fact never resigned his office. In September, 1866, the bank suspended specie payments, and before sixty days thereafter assigned their property to trustees, and ceased to do business as a bank. It was provided by the charter that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeiture of the charter, &c.:—Held that the total annihilation of the bank was not contemplated by these provisions, and it did not follow from the loss of the charter that there must be a dissolution for all purposes: that some formal process was still necessary finally to determine and put an end to all the functions of the corporation: that the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts; and that A. must still be looked upon as president; and an application to set aside the service upon him was discharged with costs. *Brooke* v. *Bank of Upper Canada*, 4 P. R. 162.

Foreign Bank.]—A foreign corporation, such as a bank, cannot sue upon notes received by them in the conduct of banking business in this Province, although they may sue, for money had and received, the person for whom such notes were discounted, and to whom money was advanced on them. *Bank of Montreal* v. *Bethune*, 4 O. S. 341.

Insolvent Act.]—A banker is a trader within the Insolvent Acts. *Bagwell* v. *Hamilton*, 10 L. J. 305; *Smart* v. *Duncan*, 35 U. C. R. 532.

Mistake—*Over-credit by Bank — Repayment.*]—The plaintiffs, under telegraphic instructions from one of their branches, telephoned from the head office to one of their sub-agencies to credit the defendant with $2,000. The sub-agency, however, by some misunderstanding, credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank in the first instance by way of an advance on the shipping bills of certain cattle bought from the defendant for about $2,800, but of this the plaintiffs had no notice. The defendant, however, refused to repay the difference between the $2,000 and the price of the cattle, on the ground that in faith of the payment to him he had allowed them to be shipped abroad, which by his agreement for sale was not to be done till payment of the price in full:—Held, that the defendant was bound to repay the excess over the $2,000. *Bank of Toronto* v. *Hamilton*, 28 O. R. 51.

Proof of Foreign Law.]—The president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country as to what is money there. *Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

Sale—*Warranty.*]—By the Bank Act, 34 Vict. c. 5 (D.), banks are prohibited from buying and selling goods or merchandise:—Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford* v. *Merchants Bank*, 3 O. R. 529.

Savings Banks.]—Defendants associated themselves together to conduct a savings bank, but before they were organized under 4 & 5 Vict. c. 33, their treasurer received a deposit from B. of £75, which he swore was made by B. with the express understanding that any person producing his pass-book should receive it. B. died, and this sum was afterwards paid to a connection of his, who presented the pass-book. The payment, it appeared, was made in pursuance of certain rules adopted by defendants, but which were not filed according to the statute for some months after:—Held, that defendants were liable to B.'s administrator for the money. *Hunter* v. *Wallace*, 14 U. C. R. 205.

See Assessment and Taxes, II.—Constitutional Law, II. 6—Interest, IV. 2.

BARGAIN AND SALE.

See Deed, III. 1.

BARRISTER-AT-LAW.

Arrest.]—A barrister cannot be arrested on mesne process. *Adams* v. *Ackland*, 7 U. C. R. 211.

Coroner's Inquest.]—A barrister cannot insist upon being present at a coroner's inquest, and upon examining and cross-examining the witnesses, &c., and can maintain no action against the coroner for excluding him from the room. *Agnew* v. *Stewart*, 21 U. C. R. 396.

Counsel Fees.]—Counsel can sustain actions for such fees, to be paid to themselves by their clients, as are established according to the table of fees under the statute 2 Geo. IV. c. 2; but where the fees claimed are not such as come within the provisions of that Act, the general principle of the law in England applies equally to this Province, and counsel have no right of action for fees generally. *Baldwin* v. *Montgomery*, 1 U. C. R. 283.

Counsel Fees—*Suing in Person.*]—Attorneys suing in person are allowed in this court fees for the same services as are allowed in like cases in England; but an attorney who is also a barrister cannot tax a counsel fee to himself when he sues in person and conducts his own cause at nisi prius. *Smith* v. *Graham*, 2 U. C. R. 268.

Counsel Fees — *Suing in Person.*]—The rule that a person cannot tax a counsel fee in his own case against the opposite party, does not extend to partners. *Henderson* v. *Comer*, 3 L. J. 29.

Counsel Fees—*Solicitor.*]—Election petition—Receipt of costs by defendant as petitioner's attorney—Right of action by counsel for his fees. See *Miller* v. *McCarthy*, 27 C. P. 147.

Counsel Fees.]—Counsel in this Province have the right to maintain an action for their fees. *McDougall v. Campbell*, 41 U. C. R. 332.

Affirmed on appeal, 14 C. L. J. 213.

Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if the plaintiff would not insist on defendant so paying his fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proven, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application:—Held, 1. The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose; 2. if counsel fees could not be recovered by a counsel from his client, the plaintiff here could not recover upon this express contract; 3. the count upon such express agreement, set out in the report, sufficiently shewed a right of action in the plaintiff against the defendant. *S. C.*, 41 U. C. R. 332.

Counsel Fees.]—Note taken as security for counsel fees—Right of action on. See *Robertson* v. *Furness*, 43 U. C. R. 143.

Counsel Fees.] — Barrister employed in attorney's office at a salary—Right to counsel fees. See *Gordon* v. *Adams*, 43 U. C. R. 263.

Counsel Fees — *Crown.*]—The suppliant, an advocate of the Province of Quebec, and one of Her Majesty's counsel, was retained by the Government of Canada as one of the counsel for Great Britain before the Fishery Commission, which sat at Halifax pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned Judge in the exchequer court found "that each of the counsel engaged was to receive a refresher equal to the retaining fee of $1,000, that they were to be at liberty to draw on a bank at Halifax for $1,000 a month during the sittings of the Commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the commissioners was $5,500,000. The suppliant claimed $10,000 as his remuneration, in addition to $8,000 already received by him:—Held, per Fournier, Henry, and Taschereau, JJ., that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that $8,000 awarded him in the exchequer court was a reasonable sum. Per Fournier, Henry, Taschereau, and Gwynne, JJ.: By the law of the Province of Quebec, counsel and advocates can recover fees stipulated for by an express agreement. Per Fournier, and Henry, JJ.: By the law also of the Province of Ontario, counsel can recover such fees. Per Strong, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action, but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered: and the suppliant could therefore recover only his expenses in addition to the amount so paid. Per Ritchie, C.J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec: that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie. *Regina* v. *Doutre*, 6 S. C. R. 342.

Held, on appeal to the Privy Council, that in the absence of stipulation to the contrary, express or implied, the suppliant must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the lex loci contractus or the lex loci solutionis. *S. C.*, 9 App. Cas. 745.

Per Gwynne, J.: By the Petition of Right Act, s. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By

the laws in force there prior to 23 & 24 Vict. c. 34 (Imp.), counsel could not, at any time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover. *S. C.*, 6 S. C. R. 342.

Held, further, that the Petition of Right (Canada) Act, 1876, s. 19, s.-s. 3, does not in such case bar the remedy against the Crown by petition. Kennedy v. Brown, 13 C. B. N. S. commented upon. *S. C.*, 9 App. Cas. 745.

Counsel Fees — *Liability of Client to Counsel.*]—In this Province a counsel's right of action for his fees for services in the nature of advocacy, is against the client of the solicitor retaining him, and not against the solicitor, unless by special agreement, or when there is evidence of credit having been given to the solicitor alone, or of money in the solicitor's hands to answer the claim; and a solicitor so employing counsel has implied authority to pledge his client's credit for the payment of counsel fees. *Armour* v. *Kilmer*, 28 O. R. 618.

Court of Revision.]—Right of counsel to be heard before courts of revision and all other courts. *In re First Division Court of Elgin*, 6 C. L. J. 295.

Division Court.] — No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in the division courts. *In re Judge of County of York*, 31 U. C. R. 267.

Duty at Nisi Prius.]—Observations on the duty of counsel when dissatisfied with the ruling of a Judge at Nisi Prius. *Parsons* v. *Queen Ins. Co.*, 43 U. C. R. 271.

English Barrister.]—To entitle an English barrister to practise at the bar of Her Majesty's courts in Ontario, he must be admitted to practise through the Law Society of the Province. *In re De Sousa*, 9 O. R. 39.

Giving Evidence.]—An attorney cannot act at the trial of the cause both as an advocate and a witness. *Benedict* v. *Boulton*, 4 U. C. R. 96.

Giving Evidence.] — Where a counsel, upon stating to a jury the facts he himself could prove, was reminded by the Judge that he could not act both as an advocate and a witness, and then immediately sat down, ceased to act as counsel, and gave evidence in the cause, the court refused to set aside the verdict. *Cameron* v. *Forsyth*, 4 U. C. R. 189.

Giving Evidence.]—Right to give evidence when acting as counsel. See *Davis* v. *Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452.

Insolvent Act.] — Practising barrister dealing largely in land transactions, but not shewn to be dependent thereon for his living: —Held not a trader under the Insolvent Act. *Joseph* v. *Haffner*, 29 Gr. 421.

Law Society's Jurisdiction.]—Exercise of disciplinary jurisdiction by Law Society for professional misconduct. See *Hands* v. *Law Society of Upper Canada*, 16 O. R. 625, 17 O. R. 309, 17 A. R. 41.

Negligence.] — The plaintiff declared in contract against an attorney, for negligence in conducting a suit for him against one P., alleging the breaches to be, that although P. pleaded a set-off on a promissory note, yet defendant improperly denied the making of such note, whereas the plaintiff had paid it; and also, that although defendant had notice of this a reasonable time before the trial, and that the payment could be proved by two witnesses named, yet he neglected to subpœna them, and took the case to trial without instructions; and also, that defendant did not instruct counsel to act for the plaintiff at the trial and inform him of the facts above mentioned, but acted as counsel himself, and neither applied for an amendment of the replication, nor suggested to the court that he could prove payment of the note, which he could have done, as the said witnesses were then there attending to other duties—wherefore the set-off was allowed. Defendant pleaded, as to so much of the declaration as alleged that he did not instruct counsel, but acted as such himself, that he was a barrister in Upper Canada, and that the plaintiff never objected to his so acting; and he demurred to so much as alleged that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer:—Held, that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions. *Leslie* v. *Ball*, 22 U. C. R. 512.

Quære, whether, considering the union of the profession in this Province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities. *Ib.*

Queen's Counsel Presiding at Trial—*Malicious Prosecution.*]—Where, in an action on the case for a malicious prosecution, it was alleged in the declaration that the trial of the indictment took place before a court of oyer and terminer, and the indictment was at general gaol delivery:—Held, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Proudfoot*, E. T. 3 Vict.

Queen's Counsel—*Precedence.*]—A patent from the Crown appointing a barrister a Queen's counsel, directed that he should take precedence after another Queen's counsel, who was subsequently appointed attorney-general:—Held, that such patent did not then entitle him to precedence before the solicitor-general. *In re Boulton*, 1 U. C. R. 317.

Retaining Fee.]—No retaining fee will be allowed to a solicitor who is himself also counsel. *In re McBride, Farley* v. *Davis*, 2 Ch. Ch. 153.

Suspension — *Domestic Tribunal — Procedure.*]—In pursuance of statutory powers, the bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath during the inquiry, and no notes in writing of the evidence of the witnesses had

been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the general council of the bar of the Province of Quebec:—Held, affirming Q. R. 8 Q. B. 26, that the local council of the bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession notwithstanding the withdrawal of the charge by the private prosecutor, that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the council of the bar had complete jurisdiction; and further, that the omission to preserve a complete record of the proceedings upon the inquiry held by the council, or to take written notes of the evidence of witnesses adduced, constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. *Honan* v. *Bar of Montreal*, 30 S. C. R. 1.

Unfair Conduct at Trial.]—A., a counsel at nisi prius, represented to B., another counsel, that a cause was undefended; B. thereupon took a brief from the plaintiff, and A. afterwards appeared for the defence and obtained a verdict. The court set aside the verdict for the want of good faith in defendant's counsel, and made him pay the costs of the application and trial. *Hamilton* v. *Notman*, T. T. 3 & 4 Vict.

As to counsel's power to bind his client, *See* ARBITRATION AND AWARD, VII.—NEW TRIAL—TRIAL.

BASTARD.

Affidavit of Affiliation—*Form—Evidence of Filing.*]—In an action for the maintenance of an illegitimate child, under C. S. U. C. c. 77, s. 4, it appeared that the plaintiff was a married woman, and that the affidavit, filed by the mother, stated that the defendant was the father of such child, not "really the father," as required by the Act:—Held, 1. That the plaintiff could not sue, for it must be presumed that the necessaries furnished were her husband's; and that she must fail on never indebted, no plea in abatement being requisite. 2. That the omission in the affidavit was fatal. A nonsuit was therefore ordered. The affidavit was produced from the office of the city clerk, and purported to be sworn before the police magistrate of Toronto, where she resided:—Held, sufficient evidence to go to the jury that it was deposited by her in the proper office. It appeared probable from the statement of the mother that she was liable to the plaintiff for the demand sued for:—Held, that the jury should have been told that if she was so liable, her unsupported testimony would not sustain the action. *Jackson* v. *Kassel*, 26 U. C. R. 341.

Custody.]—A mother, some months before her death, consigned her illegitimate child, seven years of age, whose reputed father was dead, to the custody of a Protestant institution, she being a Roman Catholic. Immediately before her death she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution:—Held, that the court had not power to compel the delivery up of the child, and that the express wish of the mother was no ground for interference. *In re Smith*, 8 P. R. 23.

Custody.]—It is in the discretion of the court to decide who shall have the custody of an illegitimate child; and the putative father, the mother being dead, is primâ facie entitled to such custody as against the maternal grandfather, and where on application by the maternal grandfather against the putative father, it was sworn that the child had been entrusted to the grandfather's care by the mother before her death, and that it was taken from his custody by the father by improper means, but it appeared that the arrangement made by the father for the maintenance of the child was one for the best interests of the child, the court refused to interfere with it. *In re Brandon*, 7 P. R. 347.

Review of the law relating to the custody of illegitimate children. *Ib.*

Custody.]—On a writ of habeas corpus to bring up an illegitimate child, issued for the mother against the putative father, a Judge will not interfere where it is shewn that the father obtained the child by agreement with and by the assent of the mother, and not by force or fraud. *In re Regina* v. *Armstrong*, 1 P. R. 6.

Custody.]—The mother of an illegitimate child is not entitled to all the rights of guardian for nurture; the mother differs from a stranger only in this, that during the period of nurture (under seven) the child may not be separated from the mother by force or fraud. But when she has abandoned the child, and others have adopted it, or if she has placed it under the protection of others, and afterwards claims it as its mother or guardian for nurture, the court will not recognize such claim as a legal right, but will refuse to interfere if the interests of the infant will thereby be best protected. *In re Holcshed*, 5 P. R. 251.

Custody—*Necessaries.*]—The father of an illegitimate child has the right to the custody and care thereof, except as against the mother, who has the right against the father. *O'Rourke* v. *Campbell*, 13 O. R. 563.

To an action under R. S. O. 1877 c. 134, s. 1, by the plaintiff, the maternal grandmother of an illegitimate female child, for food, clothing, lodging, and other necessaries, supplied to the child at the mother's request, the defendant set up as a defence that he demanded the child from the plaintiff and from the mother, and informed them that he would support the child, and had always been ready and willing to do so, and to furnish her with food, etc., yet the plaintiff and the said mother have refused, and still refuse to deliver up the child or allow the defendant to support her:—Held, on demurrer, that this constituted no answer to the action. *Ib.*

Damages for Death.]—Right of mother to recover damages against a railway company for death of her illegitimate child occasioned by the construction of an overhead bridge. See *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658.

Devise.]—Devise to illegitimate child, who dies during lifetime of testator, leaving legitimate issue. See *Hargraft* v. *Keegan*, 10 O. R. 272.

Evidence of Illegitimacy.]—Whenever it is sought to bastardise a child, if it only appear that the child may be the offspring of the mother's husband, or of another man, the law presumes in favour of legitimacy, and does not sanction a discriminating inquiry upon the subject. The presumption in this case was sought to be negatived by proof of non-access. The facts adduced in evidence are fully given in the report:—Held, that evidence offered of general reputation of intercourse with some person other than the husband three months before marriage, was properly rejected. The husband committed suicide five months after the marriage:—Held, that proof of the report in the neighbourhood as to its cause was also properly rejected:—Held, also, that it was in the discretion of the Judge to refrain from committing the alleged father, who was examined as a witness, for contempt in not answering, because it was sought by questions put to him to elicit an admission of facts importing a scandal upon himself. Besides, the Judge thought him intoxicated, and unfit to give evidence at all. Evidence of the resemblance of the child to the alleged father, if relevant to the issue, is admissible, but can only become relevant after a sufficient foundation has been laid to raise suspicion; and held, that such foundation appeared to have been laid, and the evidence was therefore admissible. *Doe d. Marr* v. *Marr*, 3 C. P. 36.

Evidence of Illegitimacy.]—In an action for the seduction of the plaintiff's daughter it appeared by the evidence that defendant had had intercourse with her in January and up to June, 1869, but that she married one C. in October, 1869, and that the child was born on the 11th February, 1861. The plaintiff having obtained a verdict:—Held, that the child having been born in lawful wedlock the mother's evidence was inadmissible to prove it illegitimate, and a new trial was granted. *Ryan* v. *Miller*, 21 U. C. R. 202.

At a second trial the fact that defendant was father of the child was attempted to be proved by his admissions, and the jury again found for the plaintiff:—Held, that the verdict was not supported by the admissions stated in the case, and semble, no evidence could be received to rebut the presumption of legitimacy, the evidence being consistent with the fact of access by the husband before marriage. *S. C.*, 22 U. C. R. 87.

Evidence of Illegitimacy—*Declaration of Deceased.*]—In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune:—Held, sufficient evidence of illegitimacy to displace the claim of heirship. *In re Stavely, Attorney-General* v. *Brunsden*, 24 O. R. 324.

Maintenance.]—An action will lie against the representatives of a deceased father for the maintenance of his illegitimate child during his lifetime, under C. S. U. C. c. 77, s. 4. *Monohan* v. *Oke*, 1 A. R. 268.

Procuring Woman to Make False Affidavit of Affiliation.]—Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting but not proved to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried in York. *Regina* v. *Clement*, 26 U. C. R. 297.

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I. Actions Thereon.

1. *Amount Recoverable.*

Costs.]—If there be two indorsers, and the holder bring several actions against them, he will be entitled to his full costs in only one suit, and his disbursements in the others. *Shuter* v. *Dee*, 1 U. C. R. 292.

Where the plaintiff sued separately the acceptor and indorser, and the acceptor paid the claim against him, but without the costs, and judgment was entered and execution issued against him for their amount and the costs of the suit against the indorsers, the execution was restrained to the costs against the acceptor alone. *Gillespie* v. *Cameron*, 3 U. C. R. 45.

A., at the assizes in Toronto, sues B. as one of the indorsers on two notes—one for £27, and the other for £76. A. recovers on the note for £27, but having mislaid the note for £76, he enters a nolle prosequi as to that part of his claim. A. also brings another action in the district court of the Niagara district against C., the maker, and D., another of the indorsers, on the note for £27. On motion under 5 Will. IV. c. 1, to restrain plaintiff from recovering more than the full costs of one suit:—Held, that the Act did not apply. *Geddes* v. *Rogers*, 5 U. C. R. 1.

Nor does it apply where one of the parties to the note not sued with the other, is at the commencement of the suit out of the jurisdiction. *Bank of British North America* v. *Elliott*, 6 L. J. 16.

Where separate actions were brought against the maker and indorsers of a note, and upon a demurrer to the replication judgment was given for defendants, and the plaintiffs made one application to amend in the three cases:—Held, that defendant was only entitled to the costs as for one case, in attending to oppose it:—Held, also, that as to the ordinary fee disbursed to counsel, to argue the demurrer in the three cases, and the ordinary taxable costs occasioned to defendant by the demurrer in each case, that they might be allowed to defendant. *Bank of British North America* v. *Ainley*, 7 U. C. R. 521.

Currency of Place of Contract.]—A note made here payable at a place in the United States, but not "not otherwise or elsewhere," is payable generally, and the law and currency of the place of contract must govern. *Hooker* v. *Leslie*, 27 U. C. R. 295.

Damages and Exchange on Foreign Bills.]—A foreign bill may be referred to the master for computation. *Commercial Bank* v. *Allan*, 5 O. S. 574.

Ten per cent. damages under 51 Geo. III. c. 9, s. 2, cannot be recovered on a foreign bill returned for non-acceptance, nor can re-exchange, unless declared for specially; although postage may under a count for money paid. *O'Neill* v. *Perrin*, M. T. 3 Vict.

Under 51 Geo. III. c. 9, s. 2, the ten per cent. damages allowed on protested bills is not to be considered as a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill, which would always include exchange. *Nichols* v. *Raynes*, 6 U. C. R. 273.

Where a bill is drawn in Upper Canada addressed to a resident there, and payable in England, ten per cent. on it can be collected under 12 Vict. c. 76. *Ross* v. *Winans*, 5 C. P. 185.

Six per cent. damages held chargeable upon a protested bill drawn and accepted in Upper

Canada, payable in the United States, upon the authority of the above case. *American Exchange Bank* v. *McMicken*, 8 C. P. 59.

A note made in Upper Canada, payable in Glasgow, not adding, "and not otherwise or elsewhere," is payable generally: and the plaintiff cannot recover the difference of exchange on such note. *Wilson* v. *Aitkin*, 5 C. P. 376.

Under 12 Vict. c. 76, ten per cent. damages are recoverable on all bills drawn in Upper Canada on England, and protested for non-payment. *Royal Bank of Liverpool* v. *Whittemore*, 16 U. C. R. 429.

Action on a sterling bill drawn by plaintiffs in London upon defendants in Upper Canada, accepted by defendants in London, (one of them being at the time in London) payable in London:—Held, that the plaintiffs were entitled to recover the current rate of exchange. *Greatorex* v. *Score*, 6 L. J. 212.

A note made here, payable in New York, but not there only, is not within s. 3 of 12 Vict. c. 76, so as to entitle the holder to four per cent. damages on protest for non-payment. *Meyer* v. *Hutchinson*, 16 U. C. R. 476.

In an action on a sterling bill, drawn by the plaintiffs in London upon the defendant living in Upper Canada, accepted in this Province payable in London, and returned to England:—Held, that no damages could be recovered, as the bill could not be said to have been negotiated in Upper Canada, but only the value of the bill at 24s. 4d. to the pound sterling. *Foster* v. *Bowes*, 2 P. R. 256.

White v. Baker, 15 C. P. 292, followed as to the damages, in the shape of exchange, to which the holder of the bill is entitled against the acceptor. *Stephens* v. *Berry*, 15 C. P. 548.

Damages which may be claimed on non-payment of a bill cannot be so claimed on its non-acceptance. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Foreign Currency — *Value at Time of Maturity.*]—On a note made and payable in Ogdensburg, N.Y., which matured on the 9th August, 1861, the Act of Congress making United States treasury notes a legal tender in the United States not having there become law until the 25th July, 1862:—Held, that the plaintiff was entitled to the sum made payable by the note at the time it matured, without reference to the rate of exchange existing between this Province and the United States at the time of the trial. *Judson* v. *Griffin*, 13 C. P. 350.

Foreign Currency — *Value at Time of Maturity—Pleading.*]—To the first and second counts of a declaration on two notes, dated respectively 11th September and 29th November, 1869, for the respective sums of $560.24 and $388.85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid when due in United States currency, and alleged a tender by defendant before action of $606.12 of lawful money of Canada, which was at the time last aforesaid equal to plaintiff's claim, and a refusal by plaintiff to accept same:—Held, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiff's claim on the day of tender, before action brought, instead of at the time of the maturity of the notes sued upon, with subsequent interest, &c.: and, secondly, for alleging that the amount tendered was equal to plaintiff's claim, instead of "equal in value to a certain sum of the currency of the United States," &c.; though, semble, this might be only ground of special demurrer. *White* v. *Baker*, 15 C. P. 292.

Interest.]—Interest made payable by a note is part of the debt, not merely damages for detaining it. *Crouse* v. *Park*, 3 U. C. R. 458.

Interest is recoverable on a note at the rate specified in it till payment. *Howland* v. *Jennings*, 11 C. P. 272.

And the jury should be directed, as a matter of law, to allow such rate when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment. *Montgomery* v. *Boucher*, 14 C. P. 45.

The agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant it may be. *Young* v. *Fluke*, 15 C. P. 360.

A loan of money was made for two months at two per cent. a month, at the expiration of which time it was contemplated a new arrangement would be made. After the two months, no other arrangement having been effected, the court held the lender entitled to claim interest at the rate originally agreed upon, and to sell the notes held by him as security to repay himself the amount of his claim; subject only to the question whether he had sold the notes for the best price that could be obtained for them, and as to which the court directed an inquiry before the master. *O'Connor* v. *Clarke*, 18 Gr. 422.

Though interest does not usually run until demand made upon such a note, yet where payments have been made on account the jury should presume that they were made in consequence of a demand, and interest on the balance will then accrue. *Hard* v. *Palmer*, 21 U. C. R. 49.

Interest at the rate allowed by our law is chargeable upon a note dated and made payable in the United States. *Griffin* v. *Judson*, 12 C. P. 430.

Where a day is named for payment of a note with interest at a rate specified, a claim for interest after that day is a claim for damages for breach of the contract, not as upon an implied contract, and is in the discretion of the court or jury. *Dalby* v. *Humphrey*, 37 U. C. R. 514.

Where a note was made, in British Columbia, payable 150 days after date, with interest at two per cent. a month, the court, under the circumstances stated in the case, allowed only six per cent. after maturity. *Ib.*

Note made and payable in New York, discounted here:—Held, to be a Canada contract, and governed by our law as to interest. *Cloyes* v. *Chapman*, 27 C. P. 22.

Interest Post Diem.]—A note dated 11th January, 1862, payable to and indorsed by one S. H., was for $3,000, with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of $3,000 on the 11th July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John* v. *Rykert*, 26 Gr. 249, 4 A. R. 213, 10 S. C. R. 278.

A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice:—Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible. Semble, the indorsers would be liable to pay interest as damages for breach of their contract. *Re McDougall*, 12 A. R. 265.

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2. *Evidence and Onus of Proof.*

Absconding Debtor.]—In an undefended action against an absconding debtor (the maker of a note) the plaintiffs, A., P. & A., proved the handwriting of the defendant, but could not shew that J. W. P. & Co., the parties to whom the note was made payable, were the three plaintiffs in the suit. A verdict was taken subject to the opinion of the court as to this point:—Held, that in the absence of any cause shewn by defendant the debt was sufficiently proved to satisfy s. 7 of the Absconding Debtors' Act, 2 Will. IV. c. 5. *Appleton* v. *Dwyer*, 4 U. C. R. 247.

Admissions.]—The admissions of the holder of an overdue note are admissible, without calling him, against a person suing upon the note, to whom he has subsequently transferred it. *Myers* v. *Cornell*, 2 U. C. R. 279.

Admissions.]—Defendant, sued as maker of a note by the indorser, had before the indorsement admitted his making to the plaintiff, and induced the plaintiff to take it:—Held, that the subscribing witness need not be called, as defendant was estopped. *Perry* v. *Lawless*, 5 U. C. R. 514.

Admissions.]—Defendant made a note payable to T. or bearer. T. died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife to recover the assets. A bill was filed by defendant to restrain this action, and in his answer the plaintiff swore that in consequence of the difficulties with the administrator, he had returned the note to G. before this action: that he had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit, and the plaintiff had recognized it, saying that he was indemnified by G.:—Held, 1. That the plaintiff's answer in chancery, though very strong evidence, was not conclusive: 2. That admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought: 3. That upon the evidence the plaintiff should have been found to be the holder. Ancona v. Marks, 7 H. & N. 686, distinguished. *Coates* v. *Kelty*, 27 U. C. R. 284.

Bona Fides.]—Where the indorser indorsed the note while in blank, there being no maker's name attached to it, nor any sum nor payee expressed in it, and it appeared that the name of the maker was afterwards signed without authority:—Held, that the indorsee suing must shew himself a bonâ fide holder for value. *Hanscome* v. *Cotton*, 15 U. C. R. 42.

Bona Fides.]—In an action by indorsee against maker and indorser, a verdict was found in favour of the maker, on the ground that his name had been signed to the note without authority, and against the indorser; and a new trial was granted as to the indorser only:—Held, that the jury at such trial were rightly directed that the fact of the maker's name having been used without authority was a fact material for them to consider in connection with other evidence offered to shew that the plaintiff took the note with knowledge of the circumstances. *Hanscome* v. *Cotton*, 16 U. C. R. 98.

Cancellation of Signature.]—Where an indorsee suing the indorser upon a note produces it at the trial from his own custody, with defendant's indorsement thereon, cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given the jury for rejecting the inference that the note had been satisfied by defendant whose name is thus cancelled. *Peel* v. *Kingsmill*, 7 U. C. R. 364.

Cheque Not Evidence of Money Lent.]—The production of a cheque is not even primâ facie evidence of money lent by the drawer. *Foster* v. *Fraser*, M. T. 4 Vict.

Compounding Felony.]—To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry* v. *Little*, 11 U. C. R. 296.

Consideration.]—In an action on a note, where defendant pleads no consideration, upon which issue is joined, the defendant must impeach the consideration; the plaintiff need not prove it in the first instance. *Sutherland* v. *Patterson*, M. T. 6 Vict.

Consideration.]—Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay. *Davis* v. *McSherry*, 7 U. C. R. 490.

Consideration.]—Where in an action on a note payable to A., it was proved that B. indorsed it, and then brought it to A., who indorsed it merely for accommodation, never having received any value for it:—Held, that want of consideration could not on these facts, be inferred, as between the maker and B., and that the plaintiff was not obliged to prove the consideration. *Mair* v. *McLean*, 1 U. C. R. 455.

Consideration.]—Indorsee against maker and first and third indorsers of a note. The third indorser let judgment go by default. Plea, by maker and first indorser, that the note was made and indorsed by defendants, setting out the circumstances, owing to which, before the note was indorsed by the plaintiff, and before suit, the defendant, by agreement with R. G. and O. G. (the second and third indorsers), made, and indorsed, and delivered to them another note, which was accepted in full satisfaction and discharge of the note sued upon, but which note remained in the hands of the said R. G. and O. G. without the fault of the defendants—with an averment that there never was any value or consideration for the indorsement by the said R. G. and O. G. to the plaintiff. Replication, that the plaintiff took the note for a good and valid consideration, and became and is the holder thereof in good faith:—Held, that on this the introductory facts were admitted, and the proof of consideration lay on the plaintiff. *Haulson* v. *Arrol*, 11 U. C. R. 81.

Denial of Indorsement.]—Admissibility of evidence as to circumstances connected with the indorsement where the indorser denies his indorsement. See *Bank of Hamilton* v. *Isaacs*, 16 O. R. 459.

Discovery.]—Where several persons severally liable on a note or bill are jointly sued at law by the holder, one of the defendants in the action at law cannot obtain discovery against the plaintiff at law and the other defendants; the defendants as between themselves not being litigating parties, but witnesses; a bill filed for the purpose is demurrable. *Hamilton* v. *Phipps*, 7 Gr. 483.

Estoppel.]—Quære, as to how far an indorser is estopped from denying the maker's signature. *Hanscome* v. *Cotton*, 16 U. C. R. 98.

Estoppel.]—In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded from him he had asked for time, and had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was that he kept no memorandum of his indorsements, and supposed it was right:—Held, that the defendant had precluded himself by his conduct from disputing his liability, and the jury having found in his favour, a new trial was granted without costs. *Pratt* v. *Drake*, 17 U. C. R. 27.

Filing Note Before Verdict.]—In an action on a note, where the making of the note is admitted, for instance by a plea of payment, quære, whether the plaintiff must produce and file the note before having his verdict recorded. *Mulholland* v. *Morley*, 7 L. J. 323.

Filing and Serving Copy of Note.]—Where the holder of a note proceeds under 5 Wm. IV. c. 1, he must prove at the trial that copies of the note were annexed to the declarations filed and served. *Malloch* v. *Norton*, M. T. 2 Vict.

Joint Liability—*Evidence—Interest.*]—Plaintiffs sued W. upon two promissory notes signed by T. E. and W. The notes were dated at Halifax and were made payable to plaintiff's order in Boston, United States. The notes were unstamped, but before action brought double stamps were affixed, and no contract as to interest appeared on the face of them. W. pleaded, inter alia, that he had signed the notes upon an understanding and agreement that he should be liable as surety thereon only for T. E., and that plaintiffs, without his knowledge or consent, agreed to give and gave time to T. E., and forbore to enforce payment when they might have been paid. At the trial W. sought to cross-examine one of the plaintiffs on an affidavit made by the witness, and to which was annexed a letter written to plaintiffs from T. E. This evidence was rejected by the Judge, and a verdict was given for plaintiffs with interest. A rule nisi to set aside verdict was discharged by the supreme court of Nova Scotia, but they referred the rate of interest to a master of the court:—Held, that there was an improper rejection of evidence, and that the jury should have been directed as to interest. *Wallace* v. *Souther*, 2 S. C. R. 598.

Marksman.]—See *Hand* v. *Agnew*, 32 U. C. R. 559.

Mistake in Date.]—Where a note is declared on, an error in its date when given in a bill of particulars is immaterial. *Barney* v. *Simpson*, 6 O. S. 96.

Notice to Produce.]—Before parol or secondary evidence can be given of a note being received by the plaintiffs in satisfaction of claim for work done, defendant must prove notice to the plaintiff to produce the note. *Heward* v. *McDougall*, 3 O. S. 647.

Notice to Produce.]—The plaintiff, in opening the case, stated that the notes were left by plaintiff with defendant as security, and had been given up by him to the makers improperly, before any demand on defendant or refusal by him to return them:—Held, that no notice to defendant to produce was necessary: and that the plaintiff was entitled to prove the contents of the notes without laying any foundation for secondary evidence. *Tilly* v. *Fisher*, 10 U. C. R. 32.

Notice to Produce.]—Where to an action on a note against the makers, defendants pleaded fraud:—Held, that the note must be proved, and that, as defendants had given no notice to produce, and it was not shewn that the plaintiffs or their attorney had the note in court, the defence could not be gone into. *Bank of Montreal* v. *Snyder*, 18 U. C. R. 492.

Parol Agreement.]—The terms of a note cannot be varied by parol agreement. *Harper* v. *Paterson*, 14 C. P. 538.

Parties as Witnesses.]—The notes of cases relating to the competency of parties to bills and notes as witnesses in suits upon such instruments, are omitted, as by 33 Vict. c. 31, now contained in R. S. O. 1897 c. 73, no person is now excluded from giving evidence by reason of interest. The following cases may be referred to: *Ferrie* v. *Starkweather*, Dra. 433; *Dudley* v. *Moore*, 3 O. S. 71; *Phinney* v. *Smith*, 6 O. S. 488; *Bradburn* v. *Lancy*, M. T. 5 Vict., R. & H. Dig. p. 111; *McLaren* v. *Muirhead*, 3 U. C. R. 59; *Jordan* v. *Smith*, 17 U. C. R. 590; *Perley* v. *Loney*, 18 U. C. R. 429; *Commercial Bank* v. *Cuvillier*, 18 U. C. R. 378; *Moffat* v. *Robertson*, 19 U. C. R. 401, 1 E. & A. 459; *Adams* v. *Toland*, 12 C. P. 119; *Bank of Montreal* v. *Reynolds*, 25 U. C. R. 352; *Shannon* v. *Daly*, 27 U. C. R. 458; *Bank of Upper Canada* v. *Upton*, 10 C. P. 455.

Particulars.]—A note declared on need not be mentioned in a bill of particulars. *Street* v. *Cameron*, H. T. 2 Vict.

Pleading.]—In assumpsit for goods sold and delivered, the defendant pleaded that he made his note to the plaintiffs for part, and paid the note when due; and the plaintiffs replied, that when the note became due the defendant only paid part, to wit, £93, in money, and gave an acceptance on A. for the residue £50, which was dishonoured when due, of which due notice was given, concluding with a special traverse; and the defendant reiterated the defence in the plea:—Held, that he could not on the trial shew that the plaintiffs had made the £50 acceptance their own through laches, but was bound to shew actual payment. *Ross* v. *McKindsay*, 1 U. C. R. 507.

Pleading.]—Semble, that under the pleas in this case, given in the report, the cancellation of the first note, by the substitution of the second, could not be given in evidence. *Cuvillier* v. *Fraser*, 5 U. C. R. 152.

Pleading.]—Declaration by the holder of a note payable to A. B. or bearer, against the maker. Plea, that A. B. and others in collusion with him, obtained the note declared upon by fraud, &c.:—Held, that evidence was properly rejected that the original note for which the note sued upon had been substituted, had been fraudulently obtained from the testator, (the executor having given the note sued upon), by a party who had no connection with the note in suit. *Dougall* v. *Post*, 5 U. C. R. 554.

Pleading.]—Action upon a note made by defendant payable to one M., and indorsed by M. to the plaintiffs. Third plea, that the note was made for the accommodation of M., and before suit was paid by M. to the plaintiffs. At the trial it appeared that defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between the plaintiffs and M. to which defendant was not a party, and by which, if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and in the event of a loss, it was to be borne pro ratâ by the several indorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M. in his evidence stated that he had not got credit in the balance for some of his timber taken by plaintiffs. Defendant offered evidence to prove that under the accounts between M. and the plaintiffs there was a balance due to M., which under the agreement referred to would shew this note to be paid by M. Per Morrison, J.—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially. Per Wilson, J.—The evidence was admissible, and it was competent to defendant to open up the account between M. and the plaintiffs. *Roche* v. *Kempt*, 33 U. C. R. 387.

Proof of "No Funds."]—In an action upon an overdue promissory note payable at a particular place, it is not necessary to shew that there were not funds at the place named wherewith to retire the bill; all that is necessary in such case, even as against an indorser, is to shew presentment, non-payment, and notice of dishonour. *McDonald* v. *McArthur*, 8 A. R. 553.

Signature.]—In assumpsit to recover the amount of a note, the declaration contained the common money counts only. Judgment having gone by default, the plaintiffs, on assessing damages, proved that a copy of the note was attached to the declaration filed, and to the copy sent to the sheriff to be served, without proving defendants' signature:—Held, sufficient under 5 Wm. IV. c. 1. *Saxon* v. *McFarlane*, 5 O. S. 142.

Value of American Currency.]—It is not necessary in an action on a note, due and payable in the United States, to prove the value of dollars and cents in the States, we having a corresponding currency, and no par value for the American currency being fixed by law. *Griffin* v. *Judson*, 12 C. P. 430.

Weight of Evidence.]—Where in an action against the maker of a note, the plaintiff produced several witnesses who swore to the defendants' signature, which two of them said he had admitted, but the jury found for the defendant on his own evidence alone, the court granted a new trial, with costs to abide the event. Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties were admissible as witnesses. *Canadian Bank of Commerce* v. *McMillan*, 31 U. C. R. 596.

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3. *Loss of Instrument.*

Pleading.]—Payee against maker. Plea, loss of the note by plaintiff before suit, and that he hath been and is unable to produce the same. Replication, denying the loss only:—Held, good. *Campbell* v. *McCrea*, 11 U. C. R. 93.

Promise to Pay.]—Where the plaintiffs declared against the drawer of a lost bill payable to plaintiff's order, on a promise to pay it, but did not state any new consideration for the promise, nor allege that the bill was unindorsed at the time of the loss, the declaration

was held bad on general demurrer. *Russell* v. *McDonald*, 1 U. C. R. 296.

Secondary Evidence.] — Where a note had been indorsed to an attorney's clerk in the course of business, and mislaid:—Held, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called and swore to his belief of its loss. *Grove* v. *Clarke*, 5 O. S. 208.

Security—*Judgment by Default.*]—Where in a suit to enforce payment of promissory notes that had been lost, after maturity, the defendant allowed the bill to be taken pro confesso, and omitted to make any demand for security against the notes, the court made a decree for payment without requiring the plaintiff to give security. *Abell* v. *Morrison*, 23 Gr. 109.

Suing on the Original Consideration.]—The object of s. 292, C. L. P. Act, 1856, is to aid a bill holder and to prevent the loss of it being set up as a defence when the holder is prepared to give ample security; but when the plaintiff declares on the original consideration, and not on the bill, the case is not within the enactment. *J. H.* v. *G. B.*, 4 L. J. 285.

Tender of Indemnity.]—A person suing on a lost note should, before action, tender an indemnity to the maker. If he neglect this, it will be at the risk of costs to defendant. *Jacques Cartier Banque* v. *Strachan*, 5 P. R. 159.

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4. Pleading.

The statement in a declaration that a promissory note was duly presented and dishonoured, is a sufficient averment of non-payment as against the maker, and probably as against the indorser also. Sed quære. *Nimmo* v. *Flanigan*, 3 L. J. 8.

To an action on a note, defendant pleaded that it was given on agreement by plaintiff to pay one M. a certain sum, which he had not done:—Held, that such defence was not divisible, and that as the note was not given wholly on such consideration the plaintiff must fail altogether. *Matthewson* v. *Carman*, 1 U. C. R. 266.

Where the plaintiff declared against the drawer of a lost bill payable to plaintiff's order, on a promise to pay it, but did not state any new consideration for the promise, nor allege that the bill was unindorsed at the time of the loss, the declaration was held bad on general demurrer. *Russell* v. *McDonald*, 1 U. C. R. 296.

A replication to a plea stating that a bill of exchange had been taken "in full satisfaction and at all hazards" by the plaintiff, that the bill was dishonoured when due, is bad on general demurrer. *Goldie* v. *Maxwell*, 1 U. C. R. 425.

A declaration on a note payable to bearer, need not aver that the note was "assigned over" and delivered to the plaintiff. *Duggan* v. *Borland*, 5 O. S. 461.

Where in an action against the maker and indorser, under 5 Will. IV. c. 1, and 3 Vict. c. 8, the plaintiff declared in the form given by the later statute, but did not aver presentment and notice:—Held, that the plaintiff was entitled to judgment against the maker, and the indorser to judgment against him. *Small* v. *Rogers*, 3 O. S. 476.

Declaration against makers and indorsers of a note under 3 Vict. c. 8, with no allegation of time to the indorsement:—Held, insufficient. *Grant* v. *Eyre*, 2 U. C. R. 426.

See also *Wallace* v. *Henderson*, 7 U. C. R. 88; *Beaty* v. *Jarvis*, 12 U. C. R. 540; *Gooderham* v. *Garden*, 12 U. C. R. 521.

Due notice must be averred. *Commercial Bank* v. *Cameron*, 3 U.C. R. 363.

The rule making the plea of non-assumpsit to a bill or note bad, is confined to cases where the action is between the parties to the bill or note; it does not extend to executors, &c. *Masson* v. *Hill*, 5 U. C. R. 60.

The plaintiff sues the executors of the indorser of a note which had not become due till after the decease of the testator, averring due notice to the executors of dishonour, and then stating that by reason thereof they became liable to pay the note, and being so liable, they afterwards, as executors, promised to pay on request. Plea, as to so much of the declaration as alleges that they promised to pay the plaintiff, &c., that they did not promise, &c.:—Held, bad as raising an immaterial issue, their promise to pay being implied from the facts averred in the declaration, and not denied in the plea. *Ib.*

Declaration, payee against the maker of a note for £50, dated 24th December, 1844, payable three months after date. Plea, as to £24 parcel, &c., accord and satisfaction, by defendant accepting an order on the 6th March, 1847, in favour of J. C. S. as required by plaintiff; and as to the residue, a set-off:—Held, plea bad: 1. in leaving unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the two years and more which had elapsed between the maturity of the note and the time of giving the order; and, 2. in not giving at length the Christian names of J. C. S., or stating that he was so described in the order. *Playter* v. *Turner*, 5 U. C. R. 555.

Plea, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, the plaintiff agreed not to sue upon this note until the others should become due:—Held, upon general demurrer, plea bad. *Durand* v. *Stevenson*, 5 U. C. R. 336.

Declaration on a note for £100, claiming £200 damages for non-payment. Plea, as if to the whole cause of action, a defence applicable to the £100 and not to the £200 damages:—Held, bad. *Clapp* v. *Murdoff*, 5 U. C. R. 565.

Where in an action against maker and the indorsers, under the statute, the defences clash, or the facts set up are not equally a defence to all the parties, they should plead separately; therefore, a plea by all the defendants that there was no consideration for the making of the note, nor for the respective indorsements, nor either of them, and that plaintiff holds the note without any consideration or value, is bad. *Hawke* v. *Salt*, 3 C. P. 97.

Traverse by maker and indorser of due notice as alleged in two counts on separate notes:—Held, good on special demurrer, being distributive. *Tompkins* v. *Scott*, 9 U. C. R. 103.

In declaring upon a note made payable to and indorsed by a firm, it is necessary to aver that the maker promised to pay "to certain persons, using the name and style of," &c., and then that the said persons so using the name and style, &c., did by such name and style, &c., indorse. *Moffatt* v. *Vance*, 7 U. C. R. 142; *City Bank of Montreal* v. *Eccles*, 5 U. C. R. 508; *Gooderham* v. *Garden*, 12 U. C. R. 521.

Wherever, in pleading, one Christian name shall be given to a party in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described has anything more of a name than is given to him, and this without distinction between vowels and consonants. *Bank of Upper Canada* v. *Gwynne*, 7 U. C. R. 140; *Commercial Bank* v. *Roblin*, 5 U. C. R. 498; *Dougall* v. *Reafisch*, 6 U. C. R. 391; *Mair* v. *Jones*, 7 U. C. R. 139.

The form given in 3 Vict. c. 8, must be adopted as to the liability of the several parties. *Bank of Upper Canada* v. *Gwynne*, 4 U. C. R. 145.

The plaintiffs declare against drawer and acceptors of a bill under £100. The acceptors sign as parties jointly liable. An averment that the parties became jointly and severally liable:—Held, bad. *Ib.*

It is not necessary, after stating the defendant's promise, to aver his legal liability to pay the bill or note to the plaintiff. *Acheson* v. *McKenzie*, 4 U. C. R. 230.

A payee or indorsee declaring upon a note against the maker, need not aver any express promise in addition to that set forth as in the note itself, nor any liability to pay. *Whitney* v. *Woods*, 5 U. C. R. 572.

Declaration against maker and indorser of a note, under 3 Vict. c. 8, stating "whereby the defendants became liable," &c.:—Held, bad on special demurrer, in not alleging, according to the form in the Act, a joint and several liability. *Nordheimer* v. *O'Reilly*, 6 U. C. R. 413.

In an action by indorsees against indorsers, the declaration need not aver that defendants promised to pay. *Ib.* But see *Aitkin* v. *Leonard*, 11 U. C. R. 98.

If the party sued be the executor of the indorser, and the note has become due after the death of his testator, a promise to pay by the executor must be stated. *Bank of British North America* v. *Jones*, 7 U. C. R. 166.

Averment of liability—Joint and several makers and indorsers—Special demurrer—Declaration held sufficient. *Gibb* v. *Dempsey*, 3 C. P. 437.

In an action against maker and indorser of a note it is unnecessary to aver a joint liability. *Chapman* v. *Dubrey*, 21 U. C. R. 244.

In declaring on a note drawn in a foreign language, it is not necessary to declare in such language, and where a foreign word is used, its meaning in English may be averred without any introductory statement. *Gibb* v. *Morisette*, 4 U. C. R. 295.

The indorsee declares against the maker, "for that the defendant made his note and thereby promised to pay B. or order the sum of two hundred louis current money, meaning thereby the sum of two hundred pounds of lawful money of Canada:"—Held, on demurrer for unwarrantably extending the meaning of the word "louis," that the declaration was good. *Ib.*

It is no ground of demurrer that a declaration upon a bill or note does not conform to the new rules, if it be otherwise good in itself. *Acheson* v. *McKenzie*, 4 U. C. R. 230.

A. makes a note, payable to his own order—B. sues him as indorsee, claiming by indorsement of A. made subsequent to the note:—Held, bad on special demurrer. *Brown* v. *Shaver*, 5 U. C. R. 624.

Averment that note duly presented held to mean within a reasonable time. *Hall* v. *Francis*, 4 C. P. 210.

The declaration set out as inducement certain facts by which defendant, with C. and Y., became liable to pay plaintiff £60; and alleged that in consideration thereof defendant by an instrument in writing promised the plaintiffs to pay her the same:—Held, on demurrer, declaration good, for, 1. it was in effect a statement that defendant made his note, and if so, no averment of consideration was required; and, 2. if not a note, the consideration stated was sufficient. *Parsons* v. *Jones*, 16 U. C. R. 274.

In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, s. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute; but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but semble, that it is not essential. *McDonald* v. *McDonald*, 21 U. C. R. 52.

In averring the making or indorsement of a note it is sufficient to describe the party by the initials of his Christian names, without alleging that the making or indorsement was by such initials. *Andrews* v. *Talbot*, 13 U. C. R. 188.

Where a note not signed by any one was indorsed by defendant, and delivered by him to the plaintiff, upon condition that A. and B. should sign it as makers, and it was signed only by C.:—Held, that these facts might be shewn by defendant under a plea denying his indorsement. *Austin* v. *Farmer*, 30 U. C. R. 10.

Where plaintiff, the holder of a note made by one defendant and indorsed by the other,

sued both in one action, under C. S. U. C. c. 42, s. 23, and at the same time declared for money paid and on account stated, the latter counts on defendants' application were struck out. *Biggar* v. *Scott*, 3 P. R. 268.

Declaration on a note alleged to have been made by the defendants under the name of A. B. & Co. Plea by A. B., that he did not make. Demurrer, that defendants being sued as joint makers, it is no answer for one of them to say that he did not make the note:—Held, plea clearly good. *City Bank* v. *Kellar*, 2 C. P. 508.

A., the indorsee, sues B., the indorser, alleging that after the note became due, to wit, on, &c., B. indorsed to A. There was no averment of presentment or of notice. B. pleaded that he did not indorse as alleged:—Held, that under this plea the indorsement only, and not the time, was in issue;—Held, also, that the note being indorsed when overdue was no excuse for non-presentment, and so the declaration shewed no cause of action; but, nevertheless, as the plaintiff had been nonsuited for not proving the time of indorsement, the nonsuit must be set aside. The court, however, in such a case, may grant a new trial without costs, and allow the plaintiff to amend. *Davis* v. *Dunn*, 6 U. C. R. 327.

Declaration against maker, payee, and second indorser of a note. Plea by the payee and second indorser, that they did not indorse it in manner and form:—Held, bad, on special demurrer. *Rossin* v. *White*, 12 U. C. R. 634.

Declaration against L. and A. as indorsers of a note payable to the order of L., averring that defendants duly indorsed said note, and that A. delivered it so indorsed to plaintiff:—Held, on demurrer, that A. must be taken to be the immediate indorsee of L., and could not deny L.'s indorsement. *Griffin* v. *Latimer*, 13 U. C. R. 187.

Where on an assessment of damages on a note stated in the declaration to be for £40, a note for £42 was proved, an amendment was refused, but a verdict allowed for the note as set out. *Bank of Upper Canada* v. *Crawford*, 4 O. S. 301.

Where a foreign bill had been so declared upon as not to shew it to have been a foreign bill:—Held, not a variance upon which a nonsuit could be granted. *Boyes* v. *Joseph*, 7 U. C. R. 505.

Plaintiff declared against defendant as maker of a note, and produced at the trial a bill of exchange drawn by defendant, and indorsed to plaintiff:—Held, not amendable under 7 Will. IV. c. 3. *Vizard* v. *Gilchrist*, 13 U. C. R. 605.

To an action on a note against two defendants usury was set up, the plea being that plaintiff lent defendants £200, payable in a year, and that the note (for £250) was given therefor. The evidence shewed that the loan was to one defendant only, and that the other signed the note merely as his surety, and was no party to the usurious contract:—Held, a fatal variance. *Farley* v. *Gilbert*, 14 U. C. R. 147.

After motion to arrest judgment on a note, which as declared on was not negotiable, there having been no defence at the trial, the plaintiff was allowed to amend on payment of costs. *Martin* v. *Wilber*, 9 C. P. 75.

Declaration on a note payable to G. or order. Plea, non fecit. The note when produced was payable to G. or order, "for the use of M.:"—Held, no variance, for it was declared on according to its legal effect. *Munro* v. *Cox*, 30 U. C. R. 363.

To an action on a cheque by the bearer against the maker, defendant pleaded that the cheque was given to one B., who had always been the lawful holder thereof, and that the plaintiffs held the same as his agents; that it was given for bills of exchange drawn by B. on H. & Co., and since overdue and dishonoured, whereof B. had notice; that the cheque was held by plaintiffs as B.'s agents, and B. was liable to pay defendant, as drawer of said bills, the amount of said cheque, and defendant offered to set off the same:—Held, on demurrer, plea bad, for not alleging that the bills were dishonoured before the commencement of this suit. *Wood* v. *Stevenson*, 16 U. C. R. 527.

To an action on a bill of exchange by a remote indorsee, alleging the prior indorsements against the drawer and acceptor, the latter being under terms to plead issuably, pleaded that he was induced to accept by the fraud, covin, and misrepresentation of the drawer and indorsers, and without any consideration or value being given to him for his acceptance, and that the last indorser indorsed to the plaintiffs without any consideration or value being given by the plaintiffs to said indorser. The plaintiffs signed judgment, treating the plea as not issuable, and on application in chambers, which was supported by an affidavit of merits, the judgment was set aside for irregularity with costs, the learned Judge holding the plea to be issuable. The plaintiff then moved to rescind this order. The court refused to interfere, because, as merits had been sworn to in chambers, it was right at all events to relieve defendants from the judgment, and the only question was therefore one of costs. Quære, whether the plea was issuable or not. *Bank of Montreal* v. *Cameron*, 17 U. C. R. 46.

To displace a defence to a note by shewing the lex loci contractus is different from the law of our courts, such foreign law must be replied and set out on the record. *Hope* v. *Caldwell*, 21 C. P. 241.

Per Wilson, J., the plea in this case, setting up that the note sued on was given in Quebec for services to be rendered by the payees as attorneys, was bad for not alleging that the note, under the facts stated, was void by the law of Quebec, by which the validity of the note must be decided. *Robertson* v. *Caldwell*, 31 U. C. R. 402.

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5. Practice and Procedure Generally.

Action After Banking Hours on Last Day of Grace.]—An indorsee of a note payable at a bank, having taken it there on the last day of grace, arrested defendant at five o'clock on the same day:—Held, not too soon. Semble, that under 14 & 15 Vict. c. 94, s. 1, he would have been also entitled to sue at any time after three o'clock, had the note been payable generally. *Sinclair* v. *Robson*, 16 U. C. R. 211.

Action Before Expiration of Days of Grace.]—Declaration, that the defendant on the 9th March made his note payable to the plaintiffs, six months after date, which period had elapsed before this suit. In the commencement of the declaration the writ was stated to have been issued on the 10th September:—Held, on demurrer, declaration bad, for it appeared that the action had been commenced before the days of grace had expired. *Hill* v. *Lott*, 13 U. C. R. 463.

Counterclaim.] — Upon an application under Rule 127 (*b*), O. J. Act, a counterclaim for libel and slander against the plaintiffs in an action on a promissory note was struck out. *Central Bank of Canada* v. *Osborne*, 12 P. R. 169.

Foreign Note.]—A note made in Albany, U. S., may be declared on under the common counts, under the statute of Anne. *Kirk* v. *Tannahill*, Tay. 619.

Forum.]—A note payable in the United States, in American currency, and all the parties to which reside in this country, may be sued upon here. *Greenwood* v. *Foley*, 22 C. P. 352. Followed in *Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

Frivolous Demurrers.] — For instances of frivolous demurrers in actions on bills or notes, *see Bank of Montreal* v. *Hopkirk*, 1 U. C. R. 418; *Commercial Bank* v. *Dewicoodie*, 1 C. L. Ch. 32; *Bank of Montreal* v. *Dowe*, 1 C. L. Ch. 37; *Milburn* v. *Smith*, 1 C. L. Ch. 54; *Ward* v. *Street*, 1 C. L. Ch. 172; *Parker* v. *Clark*, 1 P. R. 133.

Holder Using Payee's Name.]—Where a person in possession of a note sued in the name of the payee, the court refused to set aside the proceedings after judgment, upon an affidavit by the supposed payee that he had never possessed such a note, the defendant at the same time not swearing that he had never given such a note. *Taylor* v. *Rawson*, Tay. 481.

Joinder of Parties.]—Quære, whether C. S. U. C. c. 42, ss. 23, 28, authorizes the drawer of a bill to be sued in the same action with the executors of the acceptor. *Commercial Bank* v. *Woodruff*, 21 U. C. R. 602.

Joint Contractors.]—The plaintiff proceeding upon a note against several defendants as joint contractors, chargeable on the same contract and in the same capacity, must prove a case against all of them. *Sifton* v. *McCabe*, 6 U. C. R. 394.

Joint Makers.]—3 Will. IV. c. 1, does not apply to parties signing notes as joint makers. *Sifton* v. *McCabe*, 6 U. C. R. 394.

Judgment by Default.]—Where the defendant neglects to appear to a specially indorsed writ in an action on a promissory note, the plaintiff is entitled to sign judgment without the production of the note; and a mandamus was granted to the county court to sign such judgment. *In re Oliver* v. *Fryer*, 7 P. R. 325.

New Trial.]—In an action against the makers and indorsers of a note, it is not necessary that all the defendants should concur in an application for a new trial. *Maulson* v. *Arrol*, 11 U. C. R. 81.

New Trial.]—In an action against the maker and indorser of a note, a new trial was granted as to one defendant, leaving the verdict to stand as to the other. *Hanscome* v. *Cotton*, 15 U. C. R. 42.

Note not Due.]—Where one of several notes was not due until near the end of the term in which process had been issued and returnable, but was due before filing the declaration, which was intituled generally of the term:—Held, that such note could not be recovered on in the action. *Kerr* v. *Jennings*, M. T. 4 Vict.

Partners.]—Where three or four partners declared on a bill as indorsees, and averred an indorsement to themselves "trading under" the partnership name, and the bill was indorsed in blank:—Held, that the non-joinder of the other partner was not a ground of nonsuit. *Anderson* v. *Macaulay*, 6 O. S. 557.

Set-off by one Defendant.]—Action on a note made by M. and indorsed by C. Pleas by M., general issue and set-off, and by C., general issue, set-off, and release. See *Robinson* v. *Moore*, 6 O. S. 646.

Special Indorsement.]—A writ of summons may be specially indorsed as for a balance due on a bill of exchange, even though some of the items forming part of the amount are unliquidated, there being a balance due on the bill itself. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Special Indorsement.]—A writ of summons was specially indorsed for interest on the balance of an account, and for protest charges on an unaccepted draft:—Held, that the indorsement was right as to the interest, but not as to protest charges. Bank of Montreal v. Harrison, 4 P. R. 331, explained. *Sinclair* v. *Chisholm*, 5 P. R. 270.

Striking out Defence.]—Upon a summary application under Rule 1322, to strike out defences on the ground that they disclose "no reasonable answer," the court is not to look upon the matter with the same strictness as upon demurrer; a party should not be lightly deprived of a ground of substantial defence by the summary process of a judgment in chambers. And in an action upon a promissory note, alleged by defendant to have been taken by plaintiffs after maturity, defences of payment, estoppel by conduct, and a claim for equitable protection arising out of agreement, were allowed to remain on the record. *Bank of Hamilton* v. *George*, 16 P. R. 418.

Striking out Pleas.]—The C. L. P. Act, R. S. O. 1877 c. 50, s. 120, empowers the court or a Judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence, already pleaded, and may thus be embarrassing or prejudice a fair trial. In this case, being an action on promissory notes, the defendant having pleaded total failure of consideration, added other pleas repeating that defence, and setting up besides another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as support ing the other defence:—Held, that such pleas were properly struck out. *Abell* v. *McLaren*, 31 C. P. 517.

Two Defendants—*Nonsuit.*]—Where in an action against the maker and indorser of a note under 5 Will. IV. c. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial the plaintiff was nonsuited as to both, no one being present in the court on his behalf:—Held, that the nonsuit might have been right as to the one pleading, and it was therefore set aside on payment of costs. *Small* v. *Powell*, 1 U. C. R. 427.

Two Makers— *Failure Against One.*]—Where an action is brought against the two makers of a joint and several note if it fail against one it must fail as to both. *Horner* v. *Kerr*, 6 A. R. 30.

Variance.]—In an action against the acceptor, on an averment that it was directed to and accepted by him, it was held no variance that the bill was directed to and accepted by a firm in which the defendant was a partner. *Stackweather* v. *Andrews*, 6 O. S. 135.

Variance.]—A promissory note made payable to John Souther & Son was sued on by John Souther & Co.:—Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover. *Wallace* v. *Souther*, 16 S. C. R. 717.

II. Contribution and Indemnity Between Parties to Bills and Notes.

Accommodation Acceptor Paying After Execution Against Primary Debtor.]—The holder of certain accommodation drafts, after having obtained judgment and execution against the payee thereof, was paid the amount of them by the accommodation acceptor, and thereupon expressed his intention of directing the sheriff to credit that sum on the execution in his hands, the amount of which he had made by sale under execution of the goods of the payee for whose accommodation the bills had been negotiated. The acceptor hearing of this gave the sheriff notice of his claim, and filed a bill to compel the payment of the amount which he had advanced:—Held, that as surety the acceptor had a right to receive the amount of his claim out of the proceeds of the execution, to the exclusion of the subsequent execution creditor. *Rigney* v. *Vanzandt*, 5 Gr. 494.

Agent's Negligence.]—Where the defendant drew two bills on England for the accommodation of the plaintiffs' bankers, who indorsed and sold them here, giving the defendant a draft payable in England, to meet them, which defendant transmitted to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, and the money placed by him with the public moneys left in his charge, from whence part of it was stolen; and in consequence, one of defendant's bills came back protested and was paid by plaintiffs:—Held, that although it was an accommodation transaction, the drawee was defendant's, not plaintiffs', agent, and the defendant was responsible to them for the amount of the bill. *Truscott* v. *Billings*, 5 O. S. 529.

Assignment of Judgment.]—G. made a note to S., who indorsed it. DeG., D., and W. also indorsed it. B. discounted the note, which was sued, and judgment and execution obtained against all the parties to it. W. satisfied the execution, whereupon G. and D. paid him (he having been a mere accommodation indorser) S. and DeG. contributing nothing towards the payment. G. and D. thereupon applied to B., under 26 Vict. c. 45, ss. 2, 3, for an assignment to them of the judgment so obtained by him, in order to levy from S. and DeG. their share of the liability. This B. refused. S. and DeG. having informed him that by agreement they were to be relieved of liability:—Held, on application by G. and D. for an order to compel B. to assign to them the judgment under 26 Vict. c. 45, ss. 2, 3, that the court had no power to grant the order. *Brown* v. *Gossage*, 15 C. P. 20.

Collateral Security—*Renewal in Part.*]—Where certain securities have been assigned as collateral for the payment of a promissory note for $1,000, which note has been partly paid and a new note given, such security may be held until the debt is discharged by payment. *Wiley* v. *Ledyard*, 10 P. R. 182.

Collateral Security — *Substitution of Notes.*]—The accommodation indorser of several bills and notes obtained from the maker and acceptor thereof a conveyance of certain lands by way of indemnity against such indorsations. Certain of these bills were subsequently indorsed by another, and were discounted; and such subsequent indorser, on the bills maturing, was obliged to retire them. On a bill by the second indorser claiming to have the benefit of the trust by having the estate administered, and the amount so paid by him to retire the notes refunded:—Held, that he was not entitled to such relief; and, quere, whether, under the circumstances, he had a right to claim such relief, subject to the grantee in the deed being relieved from all liabilities incurred on the faith of it. *Smith* v. *Fralick*, 5 Gr. 612.

Collateral Security — *Substitution of Notes.*]—Plaintiff indorsed notes for W. B., since deceased, which were discounted at two different banks. To indemnify plaintiff against these indorsements W. B. mortgaged certain real and personal property to him. The notes were subsequently paid when due, at these banks, with the proceeds of other notes of W. B., indorsed by plaintiff, and discounted at a third bank:—Held, that the indemnity secured plaintiff against his indorsements at W. B.'s request, on paper discounted at the third bank to keep outstanding the amounts of the former notes. *Burnham* v. *Burnham*, 10 Gr. 485.

Semble, that the indemnity given to an indorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker to keep the amounts of the notes outstanding. *Ib.*

Costs.]—Where the maker and indorser, being sued together under 5 Will. IV. c. 1, join in a defence, the second indorser may recover from the first the costs of such suit, without a special count or any further proof of an express request to defend. *Fox* v. *Soper*, 18 U. C. R. 258.

Defendants inter se.]—C. S. U. C. c. 42, which permits the holder of a note or bill to sue all parties liable upon it in one action, does not affect the rights and liabilities of defendants as between themselves, but

leaves them as if they had been sued separately. *Hamilton* v. *Phipps*, 7 Gr. 483.

Indemnity—*Pleading.*] — Defendant having been arrested, requested the plaintiff to join him as maker of a note to M., his creditor, for the debt, which he did, and the plaintiff was obliged to pay the same with costs, &c. The plaintiff then sued to recover this amount, alleging in his declaration that in consideration of the plaintiff joining the defendant in signing as maker, a note jointly and severally promising to pay M., or order, the sum of, &c., for defendant's use and benefit, defendant promised the plaintiff to indemnify him, and that he did join him accordingly:—Held, that the making of the note by plaintiff was not put in issue by the plea of non-assumpsit. *Blake v. Harvey*, 2 C. P. 319.

Indorser against Debtor.] — Rights of indorser against principal debtor. See *Harper* v. *Culbert*, 5 O. R. 152.

Indorsers inter se.]—A second accommodation indorser who has paid a note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation indorser, and may indorse it over after it is due. *Breeze* v. *Baldwin*, 5 O. S. 444.

Indorsers inter se.]—Action by one of several accommodation indorsers against another for contribution on special agreement—Statement of consideration, and cause of action—Special demurrer—Declaration held insufficient. *Dempsey* v. *Miller*, 3 C. P. 431.

Indorsers inter se.]—An indorser of a note cannot pay the amount of a judgment obtained thereon against a previous indorser, and enforce it for his own benefit. It was contended in this case that the judgment was not enforced for the benefit of the indorser, but of a person to whom it had been assigned, but held, that upon the affidavits and facts stated this was not made out. *Carr* v. *Coulter*, 2 P. R. 317.

Indorsers inter se.]—As between accommodation indorsers, the court will enforce the right of contribution, as in cases of other co-sureties. *Clipperton* v. *Spettigue*, 15 Gr. 269.

Where a firm of two or more indorse in the partnership name, the liability as sureties is a joint liability, and not the several liability of each partner. *Ib.*

Indorsers inter se.]—Where two persons indorse a note for the accommodation of the maker, and the second indorser knows when he indorses that the first indorser is, like himself, an accommodation indorser, he must share equally the loss occasioned by the maker's default. *Cockburn* v. *Johnston*, 15 Gr. 577.

Indorsers inter se.]—Accommodation indorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controlled by contract; but such a limitation, if stipulated for, is binding. *Mitchell* v. *English*, 17 Gr. 303.

Indorsers inter se.]—A note, indorsed by B. and C. for the accommodation of the maker, being overdue, the maker, to provide funds for taking it up, procured another person, D., to indorse for his accommodation a new note, and on applying to his former indorsers for their signatures, untruly stated that he had sold goods to D., who would be in funds to take up the note at maturity. The note was taken up by D., who was the first indorser:—Held, that he was entitled to contribution. *McKelvey* v. *Davis*, 17 Gr. 355.

D.'s suit for contribution was not brought for five years, nor until C. had become insolvent:—Held, that B. must share with D. the loss; that he might have had his liability ascertained, and might have paid the amount before D. sued. *Ib.*

Indorsers inter se.]—The successive indorsers of a note, merely on proof that it was made for the accommodation of the maker, are not necessarily to be regarded as co-sureties, and so liable to contribution; but in the absence of any agreement to the contrary, the parties on such proof may be considered as having entered into a contract of suretyship in the terms in which the note and the indorsement are known to create; and the first indorser having paid the note, can not recover contribution from the second. *Janson* v. *Paxton*, 23 C. P. 439, reversing 22 C. P. 505.

Indorsers inter se.]—A third person holding a note for the benefit of one joint indorser, cannot maintain a joint action against the co-indorsers under R. S. O. 1877 c. 116, ss. 2, 3, as indorsers for the full amount of the note, but must sue each separately in a special action for his share of the contribution. That Act does not refer to partnership transactions. *Small* v. *Riddel*, 31 C. P. 373.

Quære, whether the indorsement as made by the manager, was sufficient. *Ib.*

Indorsers inter se.]—Held, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order. Wilkinson v. Unwin, 7 Q. B. D. 636, followed. *Pegg* v. *Howlett*, 28 O. R. 473.

Mortgage to Indorser.]—Securing indorser by chattel mortgage. See *Barber* v. *Macpherson*, 13 A. R. 356.

Surety.]—Action on a note for $1,500, dated the 25th July, 1872, made by defendant payable to the order of S., and alleged to have been indorsed by S. to the plaintiffs. It appeared that one M., on the 17th January, 1872, had given his bond to the assignee in insolvency of S., conditioned, if S. should fail to pay forty-three cents in the $ by the 10th July, to pay to the assignee $500, or so much as should be required to make up the deficiency. S. got the defendant to make this note for his accommodation, and got E. to indorse it afterwards, in order to give it to M. as security against his bond, which he did. M. having been sued on this bond, compelled F. to pay him the amount of the note, and F. and his partner then sued defendant as maker:—Held, that the relationship of co-sureties between F. and defendant was not established, so as to prevent the plaintiffs from recovering from defendant more than half the amount of the note:—Held, also, that M. held the note on a

good consideration as between himself and the other parties thereto. *Fisken* v. *Meehan*, 40 U. C. R. 146.

Suretyship as Between Makers.]—The payee of a joint and several note, made by two, can only be treated as holding one as a surety for the other upon his express consent to do so at the time of taking the note. *Ball* v. *Gilson*, 7 C. P. 531.

Surety Compelling Maker to Pay.]—Accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter. The relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note. *Cunningham* v. *Lyster*, 13 Gr. 575.

Surety Paying.]—A. and B. gave a joint and several note to C., who indorsed it to D., B. signing as surety for A.: and an action was brought by the holder against A., B., and C., for the amount of the note, which was paid by B., together with the costs of suit:—Held, that B. was entitled to recover the amount paid by him, being a mere surety, and also a moiety of the costs as jointly liable. *Blake* v. *Harvey*, 1 C. P. 417.

III. FORM.

Agency.]—"A. & Co., by A. junr.," prima facie imports that A. signs the note for, and not as one of, the firm. *Dowling* v. *Eastwood*, 3 U. C. R. 376.

Agreement to Give Mortgage.]—"Ten days after date, we promise to pay to M. N. £85 15s., for value received," upon which, when given, was indorsed, "It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three months to run:"—Held, not a note as between the original parties, nor evidence of an account stated. *Newhorn* v. *Lawrence*, 5 U. C. R. 359.

Quære, would it be a note in the hands of an indorsee, who took it as a note for value? *Ib.*

Agreement to Give Security.]—Plaintiff declared on the common counts, and upon the two instruments following: "Frankfort, 26th November, 1861. Six months after date, I promise to pay P. Turley, or bearer, $125 for value received; and I also agree with said Turley to give him at any time he requires it any security he requires that is in my power to give at my cost and charges, for the payment of the above amount of $125; and should I not comply with his request, then the above mentioned amount to be due to him from the date of such refusal." "Frankfort, 27th November, 1861. One year after date, I promise to pay P. Turley, or bearer, $80, with interest for value received; and if said Turley should require any additional security for the payment of the above amount, I hereby agree to do so at my expense, and should I not comply with this request, then this note to be considered due from said date:"—Held, that if notes at all, the plaintiff could not recover upon them as such, as they would only become due as notes at the expiration of six and twelve months, which times had not expired; and that in the absence of a special count, stating the facts, with evidence to support it, the action must fail. *Turley* v. *Rosebush*, 12 C. P. 380.

Agreement to Pay in Lumber.]—"Toronto, 12th May, 1858. Six months after date, we promise to pay to J. B., or order, $400. —N. J., W. W. B., E. W. D. The above note is to be paid in merchantable lumber, to be delivered in Toronto at cash price, and an additional quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same is to be paid in cash." This memorandum was written on the face of the note when it was signed:—Held, not a note:—Held, also, that defendants were clearly not estopped from denying that it was a note by having, in addition to the plea of non fecerunt, denied in other pleas their liability to pay "the said promissory note." *Boulton* v. *Jones*, 19 U. C. R. 517.

Alternative Payee.] — "Three months after date we, or either of us, promise to pay E. S. R. (the plaintiff,) or J. F. his guardian, at the post office, Embro, £119 17s. cy., value received, in rent of farm," adding a count on an account stated. It was proved that the defendant had been in possession of the plaintiff's farm before and after the note was made, which was given for rent due; and that the plaintiff was abroad at the time of making the note:—Held, that the writing was not a note, but would support a recovery under the account stated. *Reed* v. *Reed*, 11 U. C. R. 26.

Alternative Time of Payment.]—"Seventeen months after date, I promise to pay to H. or order, £50, without interest, or three years and five months after date, with two years interest, for value received:"—Held, a valid note, being payable certainly at the latest day. *Hogg* v. *Marsh*, 5 U. C. R. 319.

American Currency.] — A note made here, promising to pay V. or order, at Chicago, $893, American currency:—Held, a good promissory note. *Third National Bank of Chicago* v. *Cosby*, 41 U. C. R. 402.

To an action on such note, alleging it to be for the payment of $893 "American currency, to wit, lawful money of the United States of America," defendants pleaded that American currency was and is certain paper notes or debentures issued by the government of the United States, which by their law passed current for certain purposes only and not universally; nor was the said American currency at the time of making said alleged note, nor is it, lawful money of the United States, nor of any fixed or certain value:—Held, a good plea, as denying the averments in the declaration that American currency was lawful money of the United States of America, and tendering a good issue as to matter of fact. *Ib.*

Held, that a promissory note made in Canada and payable in the United States, and in the currency thereof, without the words "and not otherwise or elsewhere," was a good promissory note, for that it was payable generally and might be sued on here. Bettis v. Weller, 30 U. C. R. 23, overruled, and Greenwood v. Foley, 22 C. P. 352, followed. *S. C.*, 43 U. C. R. 58.

American Currency.]—It is no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency," when the note is payable in the United States. *Wallace* v. *Souther*, 16 S. C. R. 717.

Canada Bills.]—"Due J. G., or bearer, $482 in Canada bills, payable fourteen days after date," &c.:—Held, not a note; for such bills (issued under 29 & 30 Vict. c. 10) though currency, are not specie or money. *Gray* v. *Worden*, 29 U. C. R. 535.

Cash or Mortgage.]—A promise to pay "in cash or mortgage upon real estate," is not a note, not being an absolute promise to pay money; and it does not become a note by the maker's election to pay in cash. *Going* v. *Barwick*, 16 U. C. R. 45.

Collateral Security.]—The plaintiff had signed notes for the accommodation of M., and declined to continue doing so, or to renew such paper, unless M. would give him a guarantee. Defendant, M.'s wife, had been in the habit of signing blank notes for M. when asked, and M. having a blank form of note signed by her, filled it up as follows, for the amount of the plaintiff's paper then falling due:—"April 3, 1871. Four months after date I promise to pay to William Hall, or order, $1,264, at the Bank of Toronto here. *This note to be held as collateral security.* Value received." The words in italics were inserted at the plaintiff's request. The defendant had no communication with the plaintiff:—Held, that the defendant was not liable, for the instrument was not a promissory note, not being for the payment of money absolutely; and if a guarantee, there was nothing to shew that she ever signed or intended to sign such a contract, or authorized the conversion of the note into it. *Hall* v. *Merrick*, 40 U. C. R. 566.

Collateral Security.]—Held, that the note in this case was not a negotiable promissory note, not being made payable absolutely and at all events, but only as collateral security for plaintiff's guarantee. *Sutherland* v. *Patterson*, 4 O. R. 565.

Condition Indorsed before Signature.]—An indorsement on a note of a condition, made before the note is signed, is part of such note. If made after the signing, it will be considered merely as a memorandum to identify the note. *McKinnon* v. *Campbell*, 6 L. J. 58.

Contingency.]—"In the Queen's Bench. The municipal council of the county of Perth, plaintiffs, v. Thomas Smith, defendant. Please pay E. R., attorney for the plaintiffs in this cause, the sum of £125, on account of plaintiffs' claim in this suit. Wm. Smith." addressed to and accepted by A. McG., county treasurer:—Held, not a bill of exchange, the amount payable being dependent upon the plaintiffs' claim in the suit, and therefore subject to a contingency:—Held, also, that if a bill, the attorney only could sue upon it as payee, not the plaintiffs in the suit named. *County of Perth* v. *McGregor*, 21 U. C. R. 459.

Current Funds.]—Quære, whether an instrument purporting to be a bill of exchange, payable in New York, "with current funds," if it mean other than lawful money of the United States, is a bill of exchange. *Stephens* v. *Berry*, 15 C. P. 548.

Current Funds of United States.]—Held, that a note made in this Province, payable in current funds of the United States of America, was not a promissory note. *Bettis* v. *Weller*, 30 U. C. R. 23.

The plaintiff having declared upon such note, defendants pleaded, setting it out in hæc verba, and alleging that it was made in this Province; that the current funds mentioned were paper notes issued by the United States government, and current there as money, but that the dollar named in them was not equal to the dollar of our money, nor of any fixed value; and that, except by indorsement of said notes by defendants, there was no contract between them and the plaintiff:—Held, that the plea was good, and not objectionable as varying the written contract by parol. *Ib.*

Debentures.]—Debentures or coupons cannot be considered promissory notes where the company which issues them have no authority to make notes. *Geddes* v. *Toronto Street R. W. Co.*, 14 C. P. 513.

Description of Payees.]—An indorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain. *Auldjo* v. *McDougall*, 3 O. S. 199.

Direction as to Application of Proceeds.]—A note payable to C. or bearer, adding the words, "which when paid is to be indorsed on the mortgage, bearing even date with this note:"—Held, a negotiable promissory note. *Chesney* v. *St. John*, 4 A. R. 150.

Direction as to Application of Proceeds.]—Declaration on a note payable to G. or order. Plea, non fecit. The note when produced was payable to G. or order "for the use of M.:"—Held, no variance, for it was declared on according to its legal effect. Equitable plea, setting out facts which, if true, shewed that M. was not entitled to the money, and alleging that the plaintiff, the indorsee of G., took it with notice:—Held, that the fact of the note being expressed to be for the use of M. was no evidence of such notice; for this shewed only M.'s right as against G., whereas the plea was in denial of his right. *Munro* v. *Cox*, 30 U. C. R. 363.

Due Bill.]—Held, that an instrument in this form, "Good to Mr. Palmer for $850 on demand," was not a promissory note, and so requiring a stamp; but that without any evidence of the circumstances under which it was given, it was primâ facie evidence to go to a jury of an account stated. *Palmer* v. *McLennan*, 22 C. P. 565; 23 C. P. 258.

Equitable Assignment.]—One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order on the defendant in the following form:—"Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. road, and charge to my account:"—Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable. *Hall* v. *Prittie*, 17 A. R. 306.

Exchange.]—A promise to pay a certain sum "with exchange on New York:"—Held, not a note, the amount being rendered uncertain by the uncertainty of exchange. *Palmer* v. *Fahnestock*, 9 C. P. 172.

Exchange.]—It was held, also, in an action on a note in the above form that there was no right of action against the indorser as upon a guarantee. *Fahnestock* v. *Palmer*, 20 U. C. R. 397.

Exchange.]—Held, following Palmer v. Fahnestock, 9 C. P. 172, that an instrument purporting to be a promissory note, with the words, "with exchange not to exceed one-half per cent." was not a note. *Saxton* v. *Stevenson*, 23 C. P. 503. See, also, *Wood* v. *Young*, 14 C. P. 250; *Grant* v. *Young*, 23 U. C. R. 387; *Cushman* v. *Reid*, 20 C. P. 147.

Husband or Wife.]—A note payable to A. "or to his wife, and to no other person," is the same as if payable to A. alone, and his executors may sue upon it. *Moodie* v. *Rowatt*, 14 U. C. R. 273.

Inland Note.]—A note made in Upper Canada payable at Montreal, is an inland note, being in effect payable generally, under 7 Will. IV. c. 5, and may be properly protested the day after the third day of grace. *Bradbury* v. *Doole*, 1 U. C. R. 442.

Instalments — *Agreement to Postpone Payment.*]—"For value received I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102 15s. cy., to be paid in yearly proportions:"—Held, that the effect of this was to give two years for payment; and that no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiff's father. *McQueen* v. *McQueen*, 9 U. C. R. 536.

Instalments.]—An action for the first instalment due on a promissory note for $400, payable in three annual instalments, is for an amount ascertained by the signature of the defendant, and may be brought in a division court before the maturity of the second instalment. "In three annual instalments" in such a note means equal instalments. *In re Babcock* v. *Ayers*, 27 O. R. 47.

Lien Note.]—An instrument in the form of a promissory note, given for part of the price of an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid" is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors. *Dominion Bank* v. *Wiggins*, 21 A. R. 275.

Particular Fund.]—"Mr. O.—Mr. B. want £25, twelve o'clock this day, *i.e.*, 15th of February, 1860. I want you to get it him immediately out of S.'s money." Signed by H. and accepted by defendant:—Held, not a bill, because payable out of a particular fund; and that the plaintiff could not recover upon it under the common counts. *Ockerman* v. *Blacklock*, 12 C. P. 362.

Patent Right.]—A promissory note, made before the coming into force of the Bills of Exchange Act, 1890, the consideration of which was the purchase money of a patent right, without having the words "given for a patent right" written or printed across its face when taken by the payee, or when transferred by him, as required by R. S. C. c. 125, ss. 12, 14, was held void in the hands of an indorsee for value, with notice of the consideration. *Johnson* v. *Martin*, 19 A. R. 592.

Patent Right.]—Where part of the consideration for the transfer of a patent right from one partner to another was the giving, at the plaintiffs' suggestion, of the notes of the firm for the individual debt of the transferor to the plaintiffs:—Held, that under s.-s. 4 of s. 30 of the Bills of Exchange Act, 53 Vict. c. 33 (D.), the words "given for a patent right" should have been written across the notes so given; and in the absence thereof the plaintiffs could not recover. *Samuel* v. *Fairgrieve*, 24 O. R. 486.

This decision was reversed by the court of appeal, 21 A. R. 418, but was restored by the supreme court, sub nom. *Craig* v. *Samuel*, 24 S. C. R. 278.

Patent Rights.]—The statute R. S. C. c. 123, ss. 12, 14, which requires notes given for the purchase of a patent right, before being issued to have the words "given for a patent right" written or printed thereon, provides that the indorsee or transferee of a note with such words thereon shall have the same defence as would have existed between the original parties, and subjects to indictment any one issuing, selling or transferring such notes without such words written thereon. One of the plaintiffs gave two notes to the defendant for the purchase money on the assignment of a patent right on which the required words were written. These notes were subsequently cancelled, and in lieu thereof the notes in question were given, made by both plaintiffs without having the said words thereon:—Held, that the notes were enforceable by defendant, these words not being required as between maker and payee, and, even if they were, the makers had the right to, and did, waive having the same thereon. *Girvin* v. *Burke*, 19 O. R. 204.

Payable to Order.]—A note made payable to a person or his order, or to the order of a person, means the same thing. *Myers* v. *Wilkins*, 6 U. C. R. 421.

Payee and Successor.]—Held, that an instrument promising to pay "to J. P., Esq., treasurer of the building committee of the congregation of St. John's church, in the town of Prescott, and his successor duly appointed," was a note, and might be sued upon by his administratrix. *Patton* v. *Melville*, 21 U. C. R. 263.

Payee or Successor in Office.]—"We, or either of us, promise to pay to A. B., treasurer of, &c., or to his successor or successors in office, or order, &c.:"—Held, a good note, the words, "or to his successor or successors in office," being void. *McGregor* v. *Daly*, 5 C. P. 126.

Promise Omitted.] — "Three months after date, pay to the order of W. T., at Port Hope, £228 7s. 6d., for value received:"—Held, not a note, for want of a promise to pay; nor a bill, for want of a drawee. *Forward* v. *Thompson*, 12 U. C. R. 103.

Seal.]—Assumpsit upon a note, alleged to have been made by the Wolf Island Railway and Canal Co., payable to defendants, and indorsed by them to plaintiffs. Plea, that the writing sued on is an instrument under the seal of the company, and not a promissory note, or negotiable as such:—Held, on demurrer, plea good:—Held, also, declaration good, as the court could not assume that this company were not authorized to make notes. *Merritt* v. *Maxwell*, 14 U. C. R. 50.

Seal.]—"For value received, we jointly and severally promise to pay to W. P. O. or bearer, the sum of £50 cy., in manner following," &c. "As witness our hands and seals, this 29th day of April, 1856.—M. M. Patman —[L.S.] E. H. Gates—[L.S.] Signed, sealed, and delivered, in presence of R. S.;"—Held, clearly not a note, but a specialty. *Wilson* v. *Gates*, 16 U. C. R. 278.

Signature by Holder under Maker's Name.]—Where a promissory note commencing "I promise to pay," and signed by two makers, was afterwards discounted by the plaintiff for the holder thereof, the money being paid to him on his agreeing to become responsible for the payment of the note, he signing his name under those of the makers:—Held, per Boyd, C., and Ferguson, J., that the liability of the person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed. Per Meredith, J.—He was liable as maker of a new note. *Kinnard* v. *Tewsley*, 27 O. R. 398.

Subscriptions to Church.]—Defendant with others signed the following, his subscription being $100:—"We the undersigned do hereby severally promise and agree to pay to F. W. T., Esq. (the plaintiff,) agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal church and rectory in the town of Goderich." The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums for the purpose, &c., and that plaintiff would pay $100 for the same purpose, defendant promised to pay plaintiff $100 therefor; that W. and others did promise and pay accordingly, and that plaintiff paid $100, yet defendant had not paid. At the trial the plaintiff's promise to contribute $100 was not proved:—Held, that on this ground defendant was entitled to succeed:—Held, also, that the instrument was the several promissory note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs. *Thomas* v. *Grace*, 15 C. P. 462.

Time not Defined.]—"Due to Mr. Robert Russell £500 for value received, by improvements, lumber, and servitude on Madawaska River, payable at the sale of the lumber marked P. A. in Quebec or elsewhere;"—Held, not a note, the payment being subject to a contingency. *Russell* v. *Wells*, 5 O. S. 725.

Time of Payment—*Equitable Assignment.*]—The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of (plaintiff) $400 value received and charge to account of" (contractor). And the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than $400 of the contract price had yet to be earned, and the defendant put an end to the contract and completed the building, the cost being more than the contract price:—Held, that the order was not a bill of exchange because the time of payment was indefinite, nor an equitable assignment because the fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor, or some one on his behalf, and that by reason of his default no liability arose. Brice v. Bannister, 3 Q. B. D. 569, distinguished. *Thomson* v. *Huggins*, 23 A. R. 391.

Two Makers—"*I promise.*"]—"I promise to pay," signed by two, is joint and several. *Creighton* v. *Fretz*, 26 U. C. R. 627.

Undertaking.]—Judgment was recovered in a division court for $108.63 being $100 balance due and $8.63 interest on a document signed by defendants, namely: "To G. T. we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property Streetsville, thereby reducing the amount to $2,000:"—Held, that the document, even if a note, under s. 82 of the Bills of Exchange Act, 53 Vict. c. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore the action being merely for breach of contract, the judgment was in excess of the jurisdiction, which is limited to $100, but that prohibition would only go for the excess. *Trimble* v. *Miller*, 22 O. R. 500.

Work.]—An agreement to pay a certain sum in carpenter's or joiner's work, such as might be required, cannot be declared on as a note. *Downs* v. *McNamara*, 3 U. C. R. 276.

IV. Notice of Dishonour.

1. *Form and Requisites.*

Cheques—*Presentation by Post—Sufficiency of Notice of Dishonour.*]—The Dominion Government having a deposit account of public moneys with the Bank of Prince Edward Island upon which they were entitled to draw at any time, the deputy minister drew an official cheque thereon for $30,000, which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof indorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail to the head office of his bank at Montreal, to the Bank of Prince Edward Island for collection, but was not paid by the latter bank, which, subsequently to the presentment of the cheque, suspended payment generally:—Held, (1.) That the Bank of Montreal were mere

agents for the collection of this cheque and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonour of the cheque to reverse the entry in their books and charge the amount against the Government. Giles v. Perkins, 9 East 12; Ex parte Barkworth, 2 De G. & J. 194, referred to. (2.) That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. Heywood v. Pickering, L. R. 9 Q. B. 428; Prideaux v. Criddle, L. R. 4 Q. B. 455, referred to. (3.) That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been indorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent indorsers for the purpose of giving notice of dishonour. Clode v. Bayley, 12 M. & W. 51; Brown v. London & N. W. R. W. Co., 4 B. & S. 326, referred to. (4.) That the defendants, whether considered as mere agents for the collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to shew that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque. (5.) In a letter from the manager of the Bank of Montreal, at Ottawa, to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonour of the cheque by the drawees—the Bank of Prince Edward Island, the fact of non-payment was stated as follows:—"I am now advised that it has not yet been covered by the Bank of Prince Edward Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the department:"—Held, that the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonour. Bailey v. Porter, 14 M. & W. 44; Paul v. Joel, 27 L. J. Ex. 383, referred to. *The Queen* v. *Bank of Montreal*, 1 Ex. C. R. 154.

Foreign Bill—*Copy of Protest.*]—A notice that a foreign bill has been returned protested, is a sufficient notice of non-acceptance, without sending a copy of the protest with the notice. *O'Neil* v. *Perrin*, M. T. 3 Vict.

Implication of Non-payment—*Notice Dated on Sunday.*]—Held, that the following notice of non-payment:—"London, November 22, 1846. Sir,—The promissory note of Peter Bowen for twenty pounds, at three months from the 19th of August, 1846, on which you are indorser, is due this day, unpaid. I therefore give you notice that as the holder of the said note I look to you for payment thereof. W. B."—given by the indorsee to the indorser, was sufficient, without stating that the note had been presented for payment, the note being payable at the plaintiff's office in London:—Held, also, that the notice being dated on Sunday—the note falling due on the Saturday, and the notice being delivered on the Monday—was no objection. *Blinn* v. *Dixon*, 5 U. C. R. 580.

Informal Notice.]—The following notice held sufficient: — "Strathroy, 13th of October, 1857. John Ham Perry, Esq., Whitby, C. W. Sir,—A certain note for £350, and interest, given on the 10th day of April last, in favour of John Ham Perry, and indorsed by you, and signed B. F. Perry, in favour of Hiram Dell, of Strathroy, fell due on 10-13th instant; you will, in consequence of non-payment, be held responsible for all costs or damages for non-payment." *Harris* v. *Perry*, 8 C. P. 407.

Mistake in Amount.]—A notice of non-payment received by defendant, the first of four indorsers, stated the date and parties correctly, but described it as for £28, instead of £25. It was shewn that after the notice defendant had promised to pay. The jury was directed that the notice was insufficient, and that the subsequent promise could not avail, as it was not averred in the declaration:—Held, a misdirection on both points. *Thompson* v. *Cotterell*, 11 U. C. R. 185.

Mistake in Date.]—Where the notice stated the amount accurately, but stated incorrectly the day when the note became due:—Held, sufficient, defendant not having been misled. *Thorn* v. *Sandford*, 6 C. P. 462.

Mistake in Date.]—Where a note was properly presented and protested, but the notice being dated 20th November, stated the note to have been on that day presented and protested, whereas in fact it was on the 19th:—Held, not sufficient to mislead the indorser, who was therefore not released. *Low* v. *Owen*, 12 C. P. 101.

Mistake in Date.]—Where a note fell due on the 25th July, 1873, on which day it was duly presented for payment and protested, but the notice of protest, dated on the 26th, incorrectly stated that the note was this day presented and protested:—Held, that the notice was sufficient, as it did not appear that the indorser was misled by the mistake. *Cassidy* v. *Mansfield*, 20 C. P. 383.

Place—*Holders.*]—The following held sufficient, the note being payable at the bank:—"Sir: The note of A. B. for £50, at ninety days from the 20th January, 1841, indorsed by you and due this day, remains unpaid. You are therefore hereby notified that the bank looks to you for payment." *Bank of Upper Canada* v. *Street*, 3 U. C. R. 29.

Presentment and Non-Payment to be Averred.]—A notice to the indorser must, either in express terms or by necessary intendment, shew that the note has been presented for payment, and that payment has been refused. *Bank of Upper Canada* v. *Street*, M. T. 5 Vict.

Presentment not Averred.]—A notice to an indorser stated that the note was duly protested for non-payment, not saying that it was presented:—Held, sufficient. *Blain* v. *Oliphant*, 8 U. C. R. 473.

Question of Law.]—What is a sufficient notice of dishonour, when the facts are undisputed, is a question of law. *Bank of Upper Canada* v. *Smith*, 4 U. C. R. 483.

2. How and To Whom Given.

Accommodation Indorser—*No Effects.*]—Defendant C. had drawn on one S. C. in England, who had no effects, and did not accept, and the bill was protested for non-acceptance and non-payment. Defendant B. was an indorser for C.'s accommodation. Notices of non-acceptance and non-payment were duly given to the drawer, but of non-payment only to the indorser B.:—Held, that B. was discharged by the want of notice of non-acceptance, and that the facts of there having been no effects in the hands of the drawee, and of B. having indorsed for accommodation, made no difference. *Gore Bank* v. *Craig*, 7 C. P. 344.

Cheque of Third Person — *Delay.*]—Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment, and if it is dishonoured notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor will be taken to have accepted the cheque in payment of the debt and the debtor is discharged. *Sawyer* v. *Thomas*, 18 A. R. 129.

Death—*Knowledge of Subsequent Holder.*]—The appellants discounted a note, made by P. and indorsed by S., in the Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated, under 37 Vict. c. 47, s. 1 (D.). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonour given by the bank, sued the defendant:—Held, reversing 5 A. R. 458, and 45 U. C. R. 32, that the holders of the note sued upon, when it matured not knowing of S.'s death, and having sent him a notice in pursuance of 37 Vict. c. 47, s. 1, gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants. *Cosgrave* v. *Boyle*, 6 S. C. R. 165.

Death.]—The indorser, a married woman, died intestate during the currency of a note which she had indorsed as surety for her husband, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient. *Merchants Bank* v. *Bell*, 29 Gr. 413.

Death — *No Representative.*] — The first count against an administrator stated that defendant's intestate indorsed a note (which was set out, payable at a particular place,) and died before it became payable. The count shewed a due presentment, and averred that "at the time the said note became due, no letters of administration to the estate and effects of the intestate had been granted to any person, nor had any person administered thereto." There were other counts, and the declaration concluded with an averment that afterwards, &c., "the defendant, as administrator as aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said several moneys on request:"—Held, on demurrer, that assuming the excuse for the omission of notice to be insufficient, (and semble, that it was so,) the promise alleged must be taken to be an express promise, and was supported by a sufficient consideration. *Brown* v. *Marsh*, 1 C. P. 438.

Death—*No Representative.*]—In a similar case the count, after averring due presentment and non-payment, continued, "of all which due notice was given by placing a notice of non-payment in the post office of the city of Toronto, (being the place mentioned in the said promissory note, where the same was payable,) directed to 'the intestate' at Richmond Hill, being the place where, before and until his death, he resided, and being his last place of residence." The count also shewed that administration was afterwards granted to the defendant, and stated a resulting legal liability on defendant's part as administrator, concluding with an averment that the defendant, "in consideration thereof, then promised the plaintiffs to pay them the amount of the said note on request:"—Held, that even if the averments as to notice were insufficient, the promise bound defendant as administrator. Remarks as to notice requisite in such cases. *Gillespie* v. *Marsh*, 1 C. P. 453.

Delay—*Delivery by Private Hand.*]—It is sufficient if the indorser receive notice when he would have received it by post, although it was sent to him by private hand, and might have been delivered a day sooner. *Nassau* v. *O'Reilly*, H. T. 2 Vict.

Delay—*Misdirection.*]—A letter giving notice of the dishonour of a bill, though from misdirection it has been delayed, is nevertheless sufficient if, being posted sooner than was necessary, it has in fact been received within the period allowed by law. *Bank of British North America* v. *Ross*, 1 U. C. R. 190.

Delay — *Holder in Foreign Country.*] — Held, that a notice to the drawer from the holder living in Illinois, through his agent living in this Province, of the bill being unpaid, by the latter calling upon him with the bill on the 24th December, the bill having been presented in New York on the 19th November, could not be considered, under the facts of this case given in the report, as laches on the part of the holder. *Boyes* v. *Joseph*, 7 U. C. R. 505.

Delivering to Servant.]—Delivering notice to an indorser by leaving it with an outdoor servant cutting fire-wood, not known and proved to have been an inmate in the family, is insufficient. It will be a question, however, for the jury, whether the subsequent conduct of the indorser shews him to have received the notice in due time; and where they find for the plaintiff, though rather against the Judge's charge, the court will not set aside the verdict if the indorser file no affidavit denying notice. *Commercial Bank* v. *Weller*, 5 U. C. R. 543.

Designating Place.]—Where it is intended to designate under the provisions of R. S. C. c. 123, s. 5, a place to which notice of dis-

honour may be sent other than the place at which the bill or note is dated it is sufficient if the name of a place is written under or beneath the signature of the party. "Under his signature" does not mean that the name of the place must be written by the party's own hand: it may be written by another person if that other person had in any manner any kind of authority from the party to write it. *Hay* v. *Burke*, 16 A. R. 463.

Where a place has been so designated by any party, the holder of the instrument may send notice to that place, even if he has reason to think or even knows that such place is not the party's place of residence or place of business. Cosgrave v. Boyle, 6 S. C. R. 165, considered and applied. *Ib.*

Executor.]—A notice of non-payment addressed merely "to the executrix or executor of the late Mr. Jones, Toronto," is bad. *Bank of British North America* v. *Jones*, 8 U. C. R. 86.

Executor—*Receipt of Notice.*]—In an action against the executors of a deceased indorser of a note, it appeared that some of the notices of dishonour were addressed, "Administrator of William Stinson's estate, Belleville, Ont.," while others were similarly addressed, "Canifton," the latter having been testator's place of residence. It was proved that the notices were posted in due time; and as to the receipt of them, one of the executors stated that he had received two, one several weeks after the maturity of the note, from testator's widow, who got it at Canifton, the other from his co-executor, but whether a day or a fortnight after the protest he could not say; while his co-executor stated that he had never received any notice at all, but was shewn one by the other as having been received by him:—Held, that the reasonable inference to be drawn was that the notice had been received in due course. *McKenzie* v. *Northrop*, 22 C. P. 383.

Guarantor.]—Where defendant had guaranteed certain advances of goods and money, to be made to A. by the plaintiff, and the plaintiff took the note of A., payable at a particular place, for the amount:—Held, that he could maintain no action against defendant without proving presentment there, and notice of non-payment to the defendant. *Driggs* v. *Waite*, 6 O. S. 310.

Guarantor.] — The defendant owing the plaintiff, delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee: "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note:"—Held, that the guarantee was sufficient within s. 4 of the Statute of Frauds; for although no promisee was named in it, yet the reference to "the within note," made it a promise enuring to the benefit of the bearer. Semble, that the guarantee created an absolute promise to pay in all events, and that defendant was not entitled to notice of dishonour: but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 392.

Holder for Collection.]—Where a note payable at a bank is sent there for collection, the protest and notice may properly be given by them. *Wilson* v. *Pringle*, 14 U. C. R. 230.

Illegible Signature—*Imitation.*]—A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was indorser. The notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville, P. O.," i.e., Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville post-office. There was proved to be a Belleville in New Brunswick. Other notes with defendant's indorsement thereon had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his letters from the post-office, were not called. The notice to another indorser, addressed to "Belleville, P. O.," was received by him:—Held, that if the imitation of the defendant's signature put upon the notice addressed to Belleville, was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But, held, that upon the facts in evidence, there should be a new trial. Upon a new trial judgment was given discharging the indorser, which judgment was upheld in the court of appeal. *Baillie v. Dickson*, 46 U. C. R. 167; 7 A. R. 759, 765.

Instalments.] — A promissory note was payable in eighteen months after date, with interest at seven per cent. per annum, payable half yearly:—Held, that in order to bind the indorser, it was necessary to present the note for each instalment of interest and give him notice of dishonour. *Jennings* v. *Napanee Brush Co.*, 4 C. L. T. 595.

Lower Canada Law.]—Where a bill is drawn and indorsed in Upper Canada, but payable in Lower Canada, the law of Lower Canada governs the time within which notices may be sent. *Matthewson* v. *Carman*, 1 U. C. R. 259.

In an action on a note drawn and payable in Lower Canada, the law of Lower Canada must govern as to the sufficiency of the notice of non-payment. *City Bank* v. *Ley*, 1 U. C. R. 192.

The law of Lower Canada, with respect to giving notice, is to govern where the note is made payable and presented there, though the indorser reside in Upper Canada. *Smith* v. *Hall*, 3 U. C. R. 315.

Mailing Notice.]—A notice deposited in the post-office of the city of Toronto, for any indorser residing there, is as good as if left at his residence. *Commercial Bank* v. *Eccles*, 4 U. C. R. 336.

Mailing Notice.]—The Merchants Bank of Halifax as holders of promissory notes indorsed by McN., brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchants Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonour were given to defendant by posting such notices,

addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from the post-office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonour, nor was any evidence given by the plaintiffs that the defendant had received them:—Held, that since the passing of 37 Vict. c. 47, s. 1 (D.), the notices given in the manner above set forth were sufficient. *Merchants Bank of Halifax* v. *McNutt*, 11 S. C. R. 126.

Partner Indorsing—*Notice to Firm.*]—The following notice held insufficient, the note having been indorsed by defendant in his own name only, although he was one of the firm: "Messrs P. M. Grover & Co. Gentlemen:—Take notice that the promissory note," &c., "on which you are indorsers, due this day, remains unpaid. Therefore the holders look to you for payment thereof as such indorsers." *Bank of Montreal* v. *Grover*, 3 U. C. R. 27.

Posting—*Adjoining Post-office.*]—In order to charge the indorser, the holder need not prove the notice to have been absolutely received. Due diligence in putting a letter into the post-office though the post miscarry, is sufficient. Though there is a post-office in the township in which the indorser resides, the holder need not direct his notice to that office, if there be a nearer office in the adjoining township to which the indorser's letters are generally sent. *Bank of Upper Canada* v. *Smith*, 3 U. C. R. 358.

Prior Indorsers.]—Where the holder is suing the drawer of a bill upon which there have been several intermediate indorsers, he need not in the first instance shew notice from each indorser to the other within the regular period, but only to the defendant. *Boyes* v. *Joseph*, 7 U. C. R. 550.

Several Payees.]—Where a note is payable to and indorsed by several persons not partners, notice to one is notice to all. *Bank of Michigan* v. *Gray*, 1 U. C. R. 422.

Sureties Joining as Makers.]—The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff:—Held, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent. *Wilson* v. *Brown*, 6 A. R. 87.

Time—*No Daily Mail.*]—Plaintiff and defendant resided about three miles apart; the mail ran between both places, and closed where plaintiff resided on Monday, Wednesday, and Friday in each week; the bill was presented for payment on Monday the 4th, being the last day of grace, and not paid; there being no mail on the 5th, notice was served on defendant by a special messenger on the 6th, before it could have reached him had it been mailed on that day:—Held, in good time. *Chapman* v. *Bishop*, 1 C. P. 432.

Time.]—Notice of non-payment mailed in the proper post-office between eight and nine in the evening of the day after protest:—Held, sufficient, though the post-mark upon it was of the following day. *Wilson* v. *Pringle*, 14 U. C. R. 230.

Time—*Place of Mailing.*]—A note was presented for payment on the 9th March, at G., where the indorser lived, and the notice was mailed on the following day at M., a village five miles distant, but not received at G. until the 13th:—Held, sufficient. *Taylor* v. *Grier*, 17 U. C. R. 222.

Township.]—Held, that a notice of non-payment sent to an indorser through the post-office, addressed to him in "York township," in which he resided, was sufficient, there being no evidence as to whether there was one or more post-offices in that township, nor any proof that a letter for any other person would have been usually addressed in a different manner, or ought in the common course to have been directed to any certain post-office in the township, or in any other township near him. *Bank of Upper Canada* v. *Bloor*, 5 U. C. R. 619.

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3. *Proof of.*

Denial of Receipt — *Summary Judgment.*]—In an action against the maker and indorsers of a promissory note, in answer to a motion under Rule 80, O. J. Act, for judgment, the defendants, the indorsers of the note, who it was said were accommodation indorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion:—Held, that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should be refused. *Ontario Bank* v. *Burke*, 10 P. R. 561.

The protest having been produced after an enlargement:—Held, that being only presumptive evidence of the posting of the notice, it was not sufficient, in the face of the denial. *Ib.*

The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the indorsers C. C. B. resided at Bowmanville:—Held, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered. *Ib.*

Entries in Office Register.]—To prove notice of dishonour to defendant, an indorser of a note, the receipt of which he denied, the notary's clerk stated that he had no independent recollection of the matter, but that he had no doubt of having mailed the notice to the address given by the defendant, from the statement to that effect in the protest which was in his hand writing, and from the entries in the notarial register kept in the office, which was produced, and which contained the particulars of the entry, and the day and hour

of mailing the notices. His practice, he said, was to make the entry just before mailing, when he would look at his watch, note the time, and go to the post-office:—Held, sufficient evidence of the mailing of such notice, and the jury having found for the defendant a new trial was ordered. *Merchants Bank* v. *McDougall*, 30 C. P. 236.

Foreign Protest.]—Notice of dishonour of a foreign bill is not proved by producing the protest of the bill in which the notary certifies that he has given the parties notice. *Ewing* v. *Cameron*, 6 O. S. 541.

Lower Canadian Protest.]—The certificate of a notary in Lower Canada, at the foot of the protest, that he had put a notice into the post addressed to the indorser, is evidence of that fact under 7 Vict. c. 4, s. 2. *Smith* v. *Hall*, 3 U. C. R. 315.

New York Protest.]—In an action on a note, dated and payable at Ogdensburg, in the State of New York:—Held, that a protest of a notary of that state was no evidence of the facts therein stated; our statute, under which a protest is made primâ facie evidence of those facts, only applying to protests made by notaries of Upper and Lower Canada. *Griffin* v. *Judson*, 12 C. P. 430.

Notary Uncertain.]—Where a notary (who had protested the note sued upon) under a plea of no notice, stated first that notice had been given, but upon referring to his book of notarial entries, and finding no notarials charged, stated that he felt "rather staggered, as to his having sent the notice:"—Held, that the jury were warranted in finding for the defendant. *McDougall* v. *Wordsworth*, 8 C. P. 400.

Partners—*Judgment by Default Against One.*]—One of two indorsers, who at the time of indorsing were partners, pleaded that neither he nor his partner had due notice of non-payment:—Held, that the fact of the partner of the party pleading having suffered judgment by default, did not operate as an admission of notice as against the defendant pleading. *Pengnet* v. *McKenzie*, 6 C. P. 308.

Postmark.]—A foreign postmark on a letter is primâ facie evidence of the time when the letter was mailed. *O'Neill* v. *Perrin*, M. T. 3 Vict.

Protest.]—Assumpsit on two notes against the indorsers. Plea by one defendant, "no notice of non-payment." A separate protest of each note was produced. One protest was dated on the day when the note fell due, and the other on the day after. They both certified that the indorsers had been notified, but did not state when:—Held, notice sufficiently proved as to both notes. *Wood* v. *Hatt*, 9 U. C. R. 344.

Protest.]—The defendant, a married woman, was entitled to dower in the lands of a former husband who died in 1866, but dower had not been assigned to her. After the death of her said husband she continued to reside on the lands till 1882, when she indorsed a note for the accommodation of her son, and to an action thereon she set up that she had no separate estate, but even if she had, being an accommodation indorser only, she was not liable. A judgment having been rendered against her, she moved for a new trial, alleging in addition to her former defence, want of notice of dishonour. That application having been refused she appealed to this court, when the ruling of the learned Judge below was affirmed, as the production of the protest for non-payment was sufficient evidence of the notice of dishonour, and there was not any merit in the other defence sought to be raised. *Southam* v. *Ranton*, 9 A. R. 530.

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4. *Waiver of Notice and Excuse for not Giving.*

Collection—*Negligence of Bank.*]—The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to, and indorsed by, T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the indorsement of T. C. a special indorsement to themselves, but the Chatham manager, without indorsing the note, sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the indorser, who, however, was well known in Detroit. The manager of the Windsor branch indorsed it to the cashier of the First National Bank, their agent there, and sent it to him for collection. Payment having been refused upon presentation they handed it to a notary, who duly protested it but inclosed the notice for T. C., the indorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch; which was duly posted at Windsor, but was never received from the Chatham post-office, and T. C., the indorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it, in time to rectify the mistake, that the notice for T. C. had been addressed to the Windsor agent. The indorser having been sued in Detroit escaped on the ground of want of notice, and, the maker being worthless, the payee sued defendants for neglect with regard to such notice. It appeared that in Detroit it was the custom for the notary to send notices for the indorsers to the bank from which the note was received. It was contended for defendants that the branches were for this purpose distinct; that the notice was properly sent to Windsor, and thence to the Chatham branch, whence the note came; and that but for the neglect of the post-office the notice would have been duly received at Chatham and sent to the indorser. But held, that the defendants were liable: that on sending the note to their Windsor agent they should have given proper information as to the residence of the indorser for the guidance of the notary: and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the indorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done in time. *Steinhoff* v. *Merchants Bank*, 46 U. C. R. 25.

Collection—*Notary's Negligence.*]—Contract with express company to carry and pre-

sent notes for payment—Delivery to notary—Failure by notary to notify indorser of non-payment—Company not liable. *McQuarrie* v. *Fargo*, 21 C. P. 478.

Evidence.]—A statement by the indorser of a dishonoured note to the holder that he would see the maker about it, and his subsequent statement that he had seen the maker who promised to pay as soon as he could, with a request not to "crowd the note," are not in themselves sufficient evidence of waiver of notice of dishonour. What is sufficient evidence of such waiver discussed. *Britton* v. *Milsom*, 19 A. R. 96.

Fraud of Notary.]—Defendants were maker and indorser respectively of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts. On the maturity of the note plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note. In an action against defendants on the note they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount:—Held, a good defence, and that the defendants were discharged. *Canadian Bank of Commerce* v. *Green*, 45 U. C. R. 81.

Indorser Stating that Maker is Insolvent.]—Whenever the indorser writes to the holder to make him believe it unnecessary to give him notice of non-payment, especially where he states the maker to be insolvent, such a letter, though written before the note has matured, will be construed as a dispensation of notice. *Beckett* v. *Cornish*, 4 U. C. R. 138.

Part Payment—*Cheque—Post-dating.*]—A cheque in this country may be post-dated, though in England that is prohibited by the Stamp Acts. Where such cheque is payable on demand no days of grace are allowed. Where on the same day that the cheque was dishonoured, defendant paid £150 to the holder on account of it:—Semble, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour. In this case, however, no notice was necessary, the banker being solvent:—Held, under the evidence, that the pleas setting up want of consideration, and denying plaintiffs' property in the cheque, were not proved. *Wood* v. *Stephenson*, 16 U. C. R. 419.

Pleading—*No Effects.*]—In a declaration against the drawer of a bill, notice of dishonour must be averred, and if to excuse such notice want of effects be averred, it must be shewn that there were no effects from the time of drawing the bill; and notice must also be averred where the defendant is only a guarantor of the bill. *Goldie* v. *Maxwell*, 1 U. C. R. 425.

Promise to Pay.]—A promise to pay made after action is as available as if made before. A conditional promise by an indorser to pay in land, or see that the plaintiff should lose nothing, waives any objection as to notice. *Burke* v. *Elliott*, 15 U. C. R. 610.

Promise to Pay.]—Where there has been a subsequent unconditional promise to pay, with a knowledge of a default on the part of the holder, the evidence of notice is dispensed with; and such promise supports the averment in the declaration that due notice of dishonour has been given. *Bank of British North America* v. *Ross*, 1 U. C. R. 199.

Promise to Pay.]—Where defendant, an indorser, knowing that notice had not been given, promised to pay:—Held, that the plaintiff was entitled to a verdict on a plea denying notice. Semble, that it is only necessary to plead that notice was dispensed with, when an agreement to that effect had been made before the time for giving it. *Shaw* v. *Salmon*, 19 U. C. R. 512.

Promise to Pay.]—Upon a plea denying notice of non-payment, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week after, and there was some slight proof of his having applied to the plaintiff for further time for payment. The jury were directed that the evidence was insufficient, but they found for the plaintiff; and the court, though agreeing with the direction, refused to interfere. *Leith* v. *O'Neill*, 19 U. C. R. 233.

Promise to Pay.]—In an action by indorsee against indorser of a note, an averment of presentment and notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice. So held, in accordance with Kilby v. Rochussen, 13 C. B. N. S. 357. *McCarthy* v. *Phelps*, 30 U. C. R. 57.

Promise to Pay—*Jury's Finding.*]—The plaintiff in this case having to shew an agreement to waive presentment and notice, or a promise to pay, the jury, upon the evidence offered, which is set out in the case, found for defendant, and the court refused to interfere. *Reed* v. *Mercer*, 16 C. P. 279.

Request for Time.]—Where no notice of dishonour was proved, but it was sworn that defendant, the indorser, had asked for time, and promised to pay, although he said he had received no notice, the court refused to disturb a verdict for defendant. *Bank of Upper Canada* v. *Cooley*, 4 O. S. 17.

Request for Time.]—The plaintiffs sued the drawer of a bill for $1,000, upon it and two notes, for $1,000 and $500 respectively. No notice of dishonour of the bill had been given, but the plaintiffs' agent swore that after its maturity, in conversations with him respecting the whole liability, defendant appeared willing to pay if time were given, and said that if he and his brother (the acceptor) got time it would be all right. He said, however, that this bill was never particularly mentioned, and no promise made relating to it specifically:—Held, not sufficient to warrant a verdict for the plaintiffs, and a new trial was granted unless the plaintiffs would consent to a stet processus on the count upon the bill. *Bank of Montreal* v. *Scott*, 24 U. C. R. 115.

Wrong Address Given by Agent of Indorser.]—G. R. indorsed a note in blank. His agent being asked by plaintiff's agent where he, G. R., resided, gave an erroneous direction, which plaintiff's agent wrote in pencil under the indorser's name. Notice of non-payment sent to such place held sufficient. *Vaughan* v. *Ross*, 8 U. C. R. 506.

Wrong Address Given by Agent of Indorser.]—A. proposed to give his note, indorsed by defendant, in payment for goods, stating that defendant lived at Lindsay, and he subsequently transmitted such note to his creditor at Toronto:—Held, that he must be considered as the agent of the indorser; that his statement rendered further inquiry unnecessary; and therefore that a notice mailed to Lindsay was sufficient:—Held, also, that the above facts supported an allegation of due notice. *McMurrich* v. *Powers*, 10 U. C. R. 481.

V. PRESENTMENT.

1. *How made and To Whom.*

Acceptance After Date—*Place.*]—It is not necessary to present a bill drawn payable after date, for acceptance before it be due; and where a bill is made payable at a particular place, presentment there for payment on the day it falls due is sufficient to charge the drawer, or to enable the person who took the bill to sue on his original cause of action. *Richardson* v. *Daniels*, 5 O. S. 671.

Change of Residence—*Diligence.*]—The plaintiffs sued on a note made by one C., payable at no particular place, and indorsed by defendant. The note was left at the bank in Cobourg, where C. then resided, for collection; and the clerk who was to present it, stated that before the note became due he heard that the maker had left Cobourg: that on its becoming due he went to the house in which C. had resided, but could get no information respecting him. He inquired of more than one person who had known C. well, but their answers as to where he had gone were conflicting. Witnesses for the defence, of whom C.'s partner was one, stated that no secret was made of his intended departure; that his furniture was advertised; and that they could at any time have given correct information as to his place of residence:—Held, that at least application should have been made at the places to which C. was said to have gone; that due diligence had not been used to discover his residence; and that the plaintiffs could not recover. And semble, that the question of diligence is not wholly a question for the jury. *Browne* v. *Boulton*, 9 U. C. R. 64.

Change of Residence — *Bank's Liability.*]—Held, that under the evidence, the bank were liable to the plaintiffs for want of presentment of the note mentioned in the last case, which had been indorsed to them by the plaintiffs for collection, notwithstanding a notice issued by them, and which the plaintiffs had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities or mistakes, in respect of such notes. *Browne* v. *Commercial Bank*, 10 U. C. R. 129.

Cheque—*Suspension of Bank.*]—Non-presentment of cheque before suspension of bankers. See *Blackley* v. *McCabe*, 16 A. R. 295.

Delay.]—A bill drawn in Toronto, on the 6th August, 1849, by a party dealing in bills, upon a party living in New York, payable at sight, in favour of a party living in Illinois, to be sent there as a remittance and for circulation, was presented in New York on the 10th November following:—Held, that the delay could not, under the circumstances, be held to be laches on the part of the holder. *Boyes* v. *Joseph*, 7 U. C. R. 505.

Foreign Country.] — Where a bill is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by our law. *Buffalo Bank* v. *Truscott*, M. T. 2 Vict.

Holiday—*Former Law.*]—See *Holmes* v. *Ward*, T. T. 1 & 2 Vict.

Lower Canadian Law — *Delay.*] — The law of Lower Canada is the same as the law here and in England, that as between the holder and indorsers a note must be presented, so as to bind them, on the day the statute makes it payable, and at the place where it is payable; but, as between holder and maker, it is enough to present it any time within the period fixed by the Statute of Limitations, and before action. *McLellan* v. *McLellan*, 17 C. P. 109.

In this case, between holder and maker, the note was made in Upper Canada, payable at the Bank of Montreal, in Montreal, and was not presented until five years after maturity, though before action:—Held, sufficient. *Ib.*

Non-presentment to Accommodation Maker.]—A. made his note payable to B., or order, who indorsed to defendants, and defendants to plaintiff, who averred in his declaration a presentment of the note to B. instead of to A. The note was made solely for the accommodation of the defendants, without any consideration to A., the maker. The plaintiff compromised with A. for a portion of the note, discharging him, and striking his name out of the note. The jury gave a verdict against defendants for the balance of the note:—Held, verdict right. *Sifton* v. *Anderson*, 5 U. C. R. 305.

Particular Place.]—A note payable at a particular place must be presented there on the day it falls due, or the holder cannot recover against the indorser. *Truscott* v. *Lagourge*, 5 O. S. 134.

Particular Place.]—On a note payable at a particular place, without the words "and not elsewhere," it is sufficient to present it either at the place named, or to the maker himself. *Commercial Bank* v. *Johnston*, 2 U. C. R. 126.

Particular Place.] — Semble, that even for the purpose of evidence, it is not necessary, in order to charge the indorser, since 7 Will. IV. c. 5, to shew presentment at the

particular place. *Bank of Upper Canada* v. *Parsons*, 3 U. C. R. 383.

Particular Place.]—A promissory note payable at a particular place need not be presented there at maturity in order to charge the maker, although there are funds to meet it, and the Bills of Exchange Act, 1890, has made no difference in this respect. The duty of the maker of such a note is not only to have sufficient funds at the place of payment at maturity, but also to keep them there until presentment:—Semble: The only effect of non-presentation before action, when sufficient funds have been kept at the place of payment, is to disentitle the plaintiff to costs. *Merchants Bank of Canada* v. *Henderson*, 28 O. R. 360.

Payable at "Residence."]—Held, that a note made payable at the residence of D., at Strathroy, "only and not otherwise or elsewhere," did not require any special form of presentment, it being proved to have been on the day it matured at that place with D. *Harris* v. *Perry*, 8 C. P. 407.

Pleading.]—In an action on a note, the declaration must aver presentment where it is payable. *Ferrie* v. *Rykman*, Dra. 61.

Pleading.]—An averment that the note was "duly presented" for payment to the maker, without specially stating either time or place, is sufficient to charge an indorser. *Bank of Upper Canada* v. *Parsons*, 3 U. C. R. 383; *Commercial Bank* v. *Cameron*, 3 U. C. R. 363.

Pleading.] — Indorsees sued defendants separately as payees and indorsers of a note payable at a particular place. The declaration averred a joint indorsement by the defendants, and a due presentment, "of all which defendant had notice," and the liability of the defendant. Demurrer, because a joint liability with another indorser is shewn on the face of the declaration, and no excuse alleged for omitting him; and because due notice is not alleged:—Held, declaration good upon the first, but bad on the second ground. *Commercial Bank* v. *Cameron*; *Commercial Bank* v. *Culver*, 3 U. C. R. 363.

Representative of Maker — *Temporary Office.*]—Held, that the evidence set out in this case warranted the jury in finding that there had been a sufficient presentment of the note in question, for that the person who, on the day when it fell due, was at the place where defendant had carried on business, and to whom it was presented, was there as representing the maker, and the place was the maker's office for the day. *Fitch* v. *Kelly*, 44 U. C. R. 578.

Special Act.]—12 Vict. c. 22, as to presentment of notes, does not apply to Upper Canada. *Ridout* v. *Manning*, 7 U. C. R. 35.

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2. *Proof of.*

Division Court.]—Semble, that recovery should not be allowed in a division court against an indorser of a note without proving either presentment or notice. *Siddall* v. *Gibson*, 17 U. C. R. 98.

Letter Refusing to Accept.]—In assumpsit by indorsees of a note against the maker, defendant pleaded that the only consideration for the note was a bill drawn by J. H. & Sons on one R. S. in Bacup, Lancashire, England, payable in London, which bill J. H. & Sons knew they had no right to draw, but imposed on defendant; and that the plaintiffs took the note with full knowledge of the facts; and that the bill was duly presented to R. S., who refused to accept, and was duly protested for non-acceptance. At the trial, to prove the presentment, R. S., defendant, put in a protest, which set out the bill, and a letter from the son of R. S., stating that his father was disappointed in not receiving funds from J. H. & Sons, in consequence of which he declined to accept. The notary stated in this protest, that B. H. & Co., producing the bill, together with a certain original letter of which a copy was given, requested him to protest the said bill for non-acceptance, declaring that they had forwarded the said bill to R. S., Esq., Bacup, Lancashire, upon whom it was drawn, but had received it back unaccepted as by said copy of letter appeared, wherefore, &c., signed and sealed by the notary:—Held, that the presentment was not sufficiently proved. *Goodcrham* v. *Hutchison*, 6 C. P. 231.

Pleading.]—Where a note is made payable by A. B. at a bank, a plea denying presentment to A. B. is good. *Bank of Upper Canada* v. *Sherwood*, 8 U. C. R. 116.

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3. *Waiver of, and Excuse for Non-Presentment.*

Absence from the Country.]—Assumpsit against maker and indorser of a note. The first count alleged that the maker had absconded, and was absent from Canada when the note fell due. The second count averred as an excuse for presentment the absence of the maker and the plaintiffs' inability to find him. Pleas to first count, 1. That the note was not duly presented for payment: 2. That it was not duly presented at the maker's last place of abode. To second count, that the maker's last place of abode was well known to the plaintiffs when the note fell due:—Held, pleas bad. *Forward* v. *Thompson*, 12 U. C. R. 194.

Indorser's Waiver.] — Immediately before the note fell due, the payee and first indorser wrote to the plaintiff requesting him to waive protest, and agreeing to hold himself liable just as if the note had been presented:—Held, that though the indorser was precluded by this from setting up want of presentment, the maker was not. *McLellan* v. *McLellan*, 17 C. P. 109.

No Funds.]—A note must be presented, although the maker had no funds at the particular place, but as between the payee and maker presentment there at any time before action will be sufficient, if there were no funds at the day. *Henry* v. *McDonell*, H. T. 3 Vict.

Pleading.] — A., the indorsee, sues B., the indorser, alleging that after the note became due, to wit, &c., B. indorsed to A. There was no averment of presentment or of notice.

R. pleaded that he did not indorse as alleged:—Held, that under this plea the indorsement only, and not the time, was in issue:—Held also, that the note being indorsed when overdue was no excuse for non-presentment, and so the declaration shewed no cause of action; but nevertheless, as the plaintiff had been nonsuited for not proving the time of indorsement, the nonsuit must be set aside. The court, however, in such a case, may grant a new trial without costs, and then allow plaintiff to amend. *Davis* v. *Dunn*, 6 U. C. R. 327.

Request for Time.]—Where defendant, an absconding debtor, on the day a note became due, wrote to plaintiffs stating his inability to pay, and requesting further time:—Held, to render presentment unnecessary, although the note was payable at a particular place. *McDonnell* v. *Lowry*, 3 O. S. 302.

Subsequent Promise to Pay.]—Where a joint note was made payable at a particular place, and it was not shewn that it was presented there when due, but one of the makers afterwards promised to pay it:—Held, sufficient evidence of presentment to go to the jury. *Macaulay* v. *McFarlane*, T. T. 3 & 4 Vict.

Subsequent Promise to Pay.]—Where a note was made payable at a particular place, although no averment of its being presented there for payment appeared upon the record, the court, after verdict for the plaintiff, and proof at the trial of a subsequent promise, refused a nonsuit. *McIver* v. *McFarlane*, Tay. 113.

Subsequent Promise to Pay.]—Upon the issues of non-presentment and non-payment, the holder of a note will be entitled to recover against the indorser by proving his subsequent express or implied promise to pay, even though the promise be made after the action brought and after issue joined. *McCunniffe* v. *Allen*, 6 U. C. R. 377.

VI. Protest.

Certificate on Adjoining Half Sheet.]—The certificate of a notary on the adjoining half sheet of the protest, that he had served on the indorser a notice of non-payment is sufficient evidence of such notice. *Russell* v. *Crofton*, 1 C. P. 428.

Certificate Indorsed.]—Such certificate indorsed on the protest instead of being written at the foot of or embodied in it, sufficiently complies with 7 Vict. c. 4. *Lyman* v. *Boulton*, 8 U. C. R. 323.

Copy of Note.]—The annexing of a copy of the note to the protest, or affixing it to the notarial act, is sufficient. *Lyman* v. *Boulton*, 8 U. C. R. 323.

Damages for Wrongful Protest.] — The declaration alleged that L. & Co. drew a bill of exchange for $69.72 on the plaintiff, payable to the order of themselves at defendant bank, and indorsed it to defendants, and that it was duly presented by defendants to plaintiff, and was duly accepted by the plaintiff; that the defendants, with full knowledge of the plaintiff having so accepted, negligently, and without reasonable or probable cause, afterwards caused the said bill to be protested for non-acceptance by the plaintiff, whereby the plaintiff was injured in his credit and business with the drawers and others, and his business was thereby impeded, &c.:—Held, on demurrer, that no cause of action was shewn; for there was no negligence shewn as between plaintiff and defendants, nor any privity on which a duty or contract might arise; and that the action, if maintainable at all, must be as for a false representation knowingly made, which had injured the plaintiff in his business, and the declaration in this view was insufficient. *Irvine* v. *Canadian Bank of Commerce*, 23 C. P. 509.

Evidence.]—7 Vict. c. 4, s. 2, makes a certificate of a notary primâ facie evidence of the protest; and s. 3 makes the protest primâ facie evidence of presentment. *Codd* v. *Lewis*, 8 U. C. R. 242.

Protest.]—See *Ross* v. *McKindsay*, 1 U. C. R. 507; *Commercial Bank of Canada* v. *Brega*, 17 C. P. 473.

Seal.]—Semble, a seal is not necessary to a protest. *Goldie* v. *Maxwell*, 1 U. C. R. 424.

Seal.]—A protest without seal is admissible as evidence of the facts therein contained, under 13 & 14 Vict. c. 23, s. 6. *Russell* v. *Crofton*, 1 C. P. 428.

Time.]—A note made in Upper Canada payable at Montreal, is an inland note, being in effect payable generally under 7 Will. IV. c. 5, and may be properly protested the day after the third day of grace. *Bradbury* v. *Doole*, 1 U. C. R. 442.

VII. Special Defences.

1. *Alteration and Forgery.*

Additional Maker.]—A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person:—Held, on the evidence, that this third person signed as an additional maker and not as an indorser and that there was, therefore, a material alteration of the note discharging the accommodation maker. *Carrique* v. *Beaty*, 24 A. R. 302, reversing 28 O. R. 175.

Addition of Maker's Name — *Non-apparent Alteration—Holder in Due Course.*]—In an action on a promissory note against several parties as makers it appeared that the name of one of the alleged makers was not signed by him or with his authority, but was added to the note after some and before others of the makers had signed it before the note came to the hands of the plaintiff, a holder for value:—Held, that the plaintiff being the holder of the note in due course and the alteration not being apparent he could avail himself of it as if it had not been altered under the proviso to s. 63 of the Bills of Exchange Act 1890, 53 Vict. c. 33 (D.). Reid v. Humphrey, 6 A. R. 403, distinguished. *Cunnington* v. *Peterson*, 20 O. R. 346.

Amount Filled in.]—Where the defendant signed, as maker, a printed form of note,

and handed it to A., by whom it was filled up for $855, and plaintiff afterwards became indorsee of it for value without notice:—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or indorsed. *McInnes* v. *Milton*, 30 U. C. R. 489.

Cheque—*Marking by Bank—Alteration—Forgery — Clearing House.*] — A customer having a deposit account with the plaintiff bank drew a cheque upon that bank payable to cash or bearer for five dollars and had it "marked" by the ledger-keeper. He then altered it so as to make it apparently a cheque for five hundred dollars, it being in such form as to enable this to be done readily, and then deposited it with the defendant bank, obtaining from them by his cheques upon them the sum of five hundred dollars. The following day the defendant bank sent the cheque to the clearing house in the usual course of business, and there in adjusting the balances it was charged against the plaintiff bank as a cheque for five hundred dollars. On the next morning, when in the usual course of banking business at the place in question, the "marked" cheques received on the previous day from the clearing house were being checked with the deposit ledger, the alteration was discovered, and the plaintiff bank at once gave notice to the defendant bank and demanded payment of four hundred and ninety-five dollars:—Held, that the alteration of the cheque by the drawer after it had been "marked" was forgery; that the plaintiff bank was not responsible on the ground of negligence for the subsequent fraud of the drawer; that even if the adjustment of the balances in the clearing house constituted payment of the cheque, the notice given on the following day before the defendant bank altered its position or lost any recourse against other parties was in time; and that therefore the plaintiff bank was entitled to recover. London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7, considered. Judgment below, 31 O. R. 100, affirmed. *Bank of Hamilton* v. *Imperial Bank*, 27 A. R. 590.

Cheque.]—See *Beltz* v. *Molsons Bank*, 40 U. C. R. 253.

Conditions Erased.]—Action on a note made by defendant, payable to H. or bearer, and by him delivered to plaintiffs. Pleas, 1. That the note was made to secure the last instalment of purchase money of land sold by said H. and others to defendant, and when made was subject to a condition written thereon, that if the persons named should convey to the defendant said land, according to a certain bond given by them, then the note should be valid, but otherwise should be void; that they did not convey, and that said note was altered by H. by erasing the condition so as to obtain for it currency, and not to correct any mistake; 2. That at the delivery of said note to defendant there was written or indorsed thereon, with defendant's consent, a condition, &c., (as in the first plea); that the land was not conveyed; that H. afterwards fraudulently obliterated said condition, so as to render the note negotiable; and that plaintiff received the same with notice of the premises—Held, both pleas good; and that the agreement must be looked upon as part of the instrument. *Campbell* v. *McKinnon*, 18 U. C. R. 612.

Date.]—Held, that the alteration of a note by the holder (by placing the figure 1 before the figure 4 in the date), after it had become due, vitiated the same, and that the amount could not be recovered from either the makers or indorsers. *Gladstone* v. *Dew*, 9 C. P. 439.

Date.]—The changing by the payee of the date of a demand note, payable with interest, to a later date, is a material alteration and makes it void, though the effect of the alteration may be to benefit the maker by reducing the amount of interest chargeable against him. *Boulton* v. *Langmuir*, 24 A. R. 618.

Date and Amount Filled in.]—Where the payee and indorser of a note indorsed it for the accommodation of the maker, leaving the date and sum blank, which was afterwards filled up by the maker, and the note dated of a time later than the blank was indorsed, but prior to the time when the note was actually filled up:—Held, that the note was good against the indorser, notwithstanding the alteration. *Sanford* v. *Ross*, 6 O. S. 104.

Date and Time.] — A., the holder, sued B., the acceptor, and C., the indorser, as upon a bill dated "1st June, 1847, payable three months after date," which, when produced, appeared to have been in fact dated "November, 1841," and "payable four months after date," and to have been altered by erasure to read as declared upon:—Held, that the alteration was fatal to the holder's recovery, though an indorsee for value, and not in any way privy to it:—Held, also that the alteration as to time of payment was properly given in evidence under the pleas "did not accept," and "did not indorse." But, quære, as to the alteration in the date. *Meredith* v. *Culver*, 5 U. C. R. 218.

Destroying Restrictive Indorsement—*Bona Fides.*]—D. gave C. two promissory notes, payable to C. or bearer, but having indorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words "the within notes not to be sold," which indorsement the evidence shewed formed part of the contract between the parties. The notes were transferred to S., with the word "not" in the above indorsement, in the case of one of them erased, and the whole of the said indorsement in the case of the other, in which it was written along the edge torn off, but without destroying any part of the face of the note:—Held, that whether the words of the above indorsement were underwritten or indorsed was immaterial, they being part of the original contract, and the effect of it was to prevent C. disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him, thus qualifying their negotiability. *Swaisland* v. *Davidson*, 3 O. R. 329.

Held, that the notes having been altered in a material part, D. was discharged, and S. could not be protected on the ground of any negligence on D.'s part in respect to the note in which the indorsement was written along the edge of the paper, inasmuch as the notes were issued in a perfected shape, and the doctrine of negligence does not apply to such perfected instruments. *Ib.*

It appeared that S. was a private banker; that he had been informed before taking the

notes that they were given in purchase of patent rights; that he noticed the erasure in the one of them first purchased, and that he paid much less than the commercial value of them, while they both bore marks of infirmity and indeed of knavery:—Held, S. could not be considered an innocent holder of the notes. *Ib.*

Forgery.]—Forging indorser's name to a promissory note, no maker's name being thereto at the time. See *Regina* v. *Fee*, 13 O. R. 8.

Forgery—*Estoppel.*]—Forgery of name of defendants to bill of exchange—Estoppel from denying liability by conduct of defendants prejudicial to the plaintiffs. See *Merchants Bank* v. *Lucas*, 13 O. R. 520, 15 A. R. 573, 18 S. C. R. 704.

Forgery—*Estoppel.*]—The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for $4,989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y. in the company's name, on plaintiff payable on demand to their own order, for $4,800, dated 23rd July, 1883. This draft was taken by Y. to defendants' banking house at H., and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to the plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for $4,800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for $4,800, which was refused by defendants. Plaintiff paid the first mentioned draft at maturity: — Held, that although the plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as indorsers, even though it was on the bill at the time of acceptance and payment:—Held, also that defendants, having no title to the bill, the indorsement being a forgery, were not entitled to receive payment, and having been paid plaintiff was entitled to recover back the amount so paid:—Held, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan* v. *Bank of Montreal*, 12 O. R. 39, 14 A. R. 533.

Forgery of Prior Indorsements.]—In an action by the last indorsee against the last indorser of a promissory note, it is no defence that the names of the prior indorsers are forged. *Eastwood* v. *Westley*, 6 O. S. 55.

Interest Added.] — A printed form of note, with all the blanks filled in and complete in every respect, except that it had not been signed by the intended makers, was handed by them to defendant, indorsed by defendant for their accommodation, and handed back to them, when they, without defendant's knowledge, added, after the words "value received," the words "with interest at ten per cent. per annum," then signed it, and transferred it for value to plaintiff:—Held, that defendant was discharged. *Halcrow* v. *Kelly*, 28 C. P. 551.

Interest Added—*Assent.*] — Held, that even if the note sued on—given for a composition agreed upon with the creditors of an insolvent, of whom the plaintiff was one—was altered after the indorsers had signed it, by adding the words "with interest at seven per cent," there was ample evidence (set out in the report of the case) to shew that it was so altered while in the hands of the assignee, to conform to the original intention and agreement of the parties, and that the indorsers subsequently assented to it. *Fitch* v. *Kelly*, 44 U. C. R. 578.

Joint Made Joint and Several.] — Where a note originally joint was altered to joint and several without the consent of one of the makers, who was afterwards sued alone by an indorsee: — Held, that the plaintiff could not recover on the note on account of the alteration, nor on the money counts, as there was no privity between the maker and him. *Samson* v. *Yager*, 4 O. S. 3.

Payee's Name Added as Maker.] — After a promissory note, made by three persons, in these words: "We, either three of us, promise to pay D. P. or bearer," had been transferred to the plaintiff's testator, the payees name was added to the foot of the note, apparently as maker. It did not appear how it came there, but it was not his signature: — Held, that it was such a material alteration as to vitiate the note; and that this would have been so even if the name had been placed there by the payee or by his authority:—Held, also, that primâ facie the name was placed there improperly; that it would have lain upon the testator, if alive, to account for the alteration, and his death did not dispense with this requirement. *Reid* v. *Humphrey*, 6 A. R. 403.

Place of Making and Payment Changed.]—A note when made by defendant was dated at Watford, and payable "at the Thomas Fawcitt's Bank, Watford;" and without defendant's knowledge or consent it was altered, by dating it at Alvinston and making it payable "at my" (defendant's) "place of business, Alvinston:"—Held, such a material alteration as to avoid the note. *McQueen* v. *McIntyre*, 30 C. P. 426.

Pleading.]—The plaintiff declared upon a note as made by the defendants jointly and severally. Quære, whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under non fecit, or whether a special plea was requisite. *Leslie* v. *Emmons*, 25 U. C. R. 243.

Signature after Indorsement.]—It is no objection to the validity of a note, that when indorsed to the plaintiffs it was not signed by the maker; the subsequent filling up of the maker's name, or of the amount, or of a payee's name, will be treated as if made before the indorsement. *Rossin* v. *McCarty*, 7 U. C. R. 100.

Time of Payment Changed—*Ratification.*]—After the making of a promissory note,

it was altered by the maker as to the time of payment, without the consent of the indorser, who, however, but without knowledge of the alteration, promised to pay it:—Held, in an action against the indorser, that the alteration having been made without his authority rendered the note void, and that no subsequent promise by him to pay could have the effect of ratifying it. Held, also, that without actual knowledge of the alteration the promise to pay amounted to nothing, the means of knowledge alone being insufficient. *Westloh* v. *Brown*, 43 U. C. R. 402.

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2. *Consideration.*

(a) *Accommodation and Failure of Consideration.*

Accommodation.]—See *Bank of Nova Scotia* v. *Fish*, 24 S. C. R. 709; *St. Stephen's Bank* v. *Bonness*, 24 S. C. R. 710.

Acts to be Done.]—Assumpsit on a note for £50 by payee against makers. Plea, that defendants were in partnership, and it was agreed that they should admit the plaintiff into their firm on his advancing £1,000; that defendants in part performance caused alterations to be made in their store, and the plaintiff afterwards became proprietor of the same, and advanced £50 on account thereof; and to assist defendants in making such alterations, and for securing the same to the plaintiff, defendants, on the understanding that said note was to form part of the consideration money for accepting plaintiff as a partner, signed said note for the accommodation of the plaintiff, and have always been ready to receive plaintiff as a partner on his paying the balance of said money; but plaintiff has always refused to pay such balance, or become a partner, or pay for the alterations made in consequence of the agreement:—Held, plea clearly bad, as setting up three defences repugnant to each other, and a parol agreement at variance with the note. *Adams* v. *Forde*, 13 U. C. R. 485.

Advance of Less Than Amount of Note.] — Indorsee against maker: Plea, as to part of the sum, that defendant made the note only for the accommodation of the payee, and that the indorsee gave only a certain sum for it, to secure which it was transferred to him. The plaintiff replied that that sum was to be paid at a particular time, but if not so paid, the plaintiff was to hold the note for the whole sum secured by it: — Held, replication bad in substance, as the defendant being only an accommodation maker, could not be charged with more than the plaintiff gave for the note. *Strathy* v. *Nicholls*, 1 U. C. R. 32.

Antecedent Debt and Advance.] — Defendant indorsed a note for $1,230, for the purpose of enabling the maker to obtain, as an additional advance from an estate of which the plaintiff was receiver, the difference between that sum and a loan of $918, advanced to him before the making of the note, which additional advance was, however, not made:—Held, that defendant was not liable as indorser for the $918 originally loaned, and that a plea setting up the above facts was good. *Greenwood* v. *Perry*, 19 C. P. 403.

Benefit of Value Given by Prior Holder.]—An indorsee without value is entitled to recover on a bill or note if any intermediate party is a holder for value. *Wood* v. *Ross*, 8 C. P. 299.

Collateral Security — *Renewals.*]—The defendants made a note for $200, to one M. to assist M. in retiring paper in which defendants were interested. M. discounted his own note for $200 with the plaintiffs, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, he paid $25 and gave a renewal for $175, leaving defendants' note with the plaintiffs. Per Wilson, C.J.—Defendants' note was not an accommodation note; but assuming it to be so:—Held, that the proper inference from the evidence was that it was transferred to the plaintiffs as security for the debt represented by M.'s note, not for the note specially; and that defendants remained liable. *Canadian Bank of Commerce* v. *Woodward*, 8 A. R. 347.

Collateral Security.]—One M. made a note on the 17th November, 1868, payable to T. or order, at three months, at the Quebec Bank, for $4,000, which was indorsed by T. and the plaintiff, and discounted by the bank for T. On the 24th November, 1868, a note for $1,500 made by W. payable to T., and indorsed by M. for T.'s accommodation, was handed by the bank to T. as collateral security for the $4,000 note, and the bank also advanced on it $1,000 to T. This note, when it fell due on the 27th January, 1869, was retired by the note sued on, which was for $1,500, at two months, made by W., payable to T. and indorsed by T. and by M. to the bank, and was given, as the bank manager swore, for the same purpose as the previous $1,500 note. The bank received $1,200 from T. on account of the $4,000 note, and the plaintiff paid the balance on the understanding that the bank would hold the $1,500 note for his benefit, and they afterwards, at his request, gave it to their solicitor to sue. In an action on this note by the plaintiff against W. and M.:—Held, that he was entitled to recover; for, 1. he was the holder of the note; 2. the note being deposited with the bank as collateral security for the $4,000 note, and not merely for the $1,000 advanced on it, the bank held it for the full amount; 3. if the note could not be said, when taken on the 27th January, 1869, to be a security for value because the $4,000 note had not then matured, it became so when the latter note fell due on the 20th February, 1869, and value arising at any time during the currency of a note is sufficient. *Blake* v. *Walsh*, 29 U. C. R. 541.

Collateral Security — *Subsequent Holder.*]—The M. manufacturing company, in the usual course of their business, took from their agents, notes for machines supplied to them, which were transferred by the M. company as collateral security to a bank where they had a line of credit. The agreement with the agents was that upon their substituting their customers' notes for their own, they were entitled to the delivery up of the latter. The defendant, who was the agent, had given notes for machines supplied to him, which were handed to the bank by the company. He afterwards transferred to the company a large number of the customers' notes. The bank manager finding some of the defendants' notes overdue, demanded that they should be replaced by fresh paper, and the company then applied to the defendant, who gave the notes

sued on without getting an adjustment of accounts between them, though there was but a small balance due to the company; and these notes were transferred to the bank and the old notes given up. The M. company got into difficulties, and the bank sued B., their president, and another who, jointly with the M. company, had guaranteed the company's account to the extent of $50,000. B., in order to protect himself, resigned the presidency, and undertook to pay off the company's indebtedness to the bank, and take all their securities. A resolution of the board was passed approving of this, and the M. company directed the bank to transfer to B. the company's securities on payment. B. applied to the plaintiff for the money, and he advanced the requisite amount, having obtained the same by pledging stock and other securities to a loan company, and took all the notes held by the bank to hold for collection to pay expenses, repay the advances, pay their indebtedness to the loan company, and to account to B. The notes sued on were amongst those transferred to the plaintiff, who took them without notice of their character, or the state of the account between the defendant and the M. company:—Held, that he stood in the place of the bank, and succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands. *Cowan* v. *Doolittle*, 46 U. C. R. 398.

Conditional Sale of Goods—*Loss of Goods by Fire.*]—The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes:—Held, that the defendant had the possession and use of the machinery and an interest in it; that there was not a total failure of consideration for the note or a partial failure which was ascertained, and that the plaintiffs were entitled to recover. *Goldie and McCulloch Co. (Ltd.)* v. *Harper*, 31 O. R. 284.

Conditional Satisfaction.]—Assumpsit against the indorser of two notes made by B. Plea, that the plaintiff held a judgment and execution against B., and it was agreed that on the indorsement of said notes by the defendant he should discharge B. from all liability upon said judgment and execution, &c., which he did not do, &c. On a special case stated, it was admitted that B. arranged with the plaintiff that upon these notes being given the execution should be withdrawn: that defendant indorsed the notes and enclosed them to the plaintiff with a letter, stating that he was informed by B. that the plaintiff held an execution against him which the plaintiff had agreed "to discharge by his giving you the notes," that he indorsed them on that understanding, and if not so, his indorsements must be erased. The plaintiff answered, acknowledging the receipt of the notes "on account of an execution against B." and stating that further proceedings against him would be suspended during their currency, but in default of payment he should feel himself in a position to enforce execution. No further communication took place between them. These notes having been protested, the plaintiff issued an alias fi. fa. upon his judgment:—Held, that the plea was not proved. *Wightman* v. *Daniels*, 13 U. C. R. 487.

Debt Due to Estate.]—A debt due to a bankrupt estate, is a good consideration for notes given to the trustees and assignees of the estate. *Gates* v. *Crooks*, Dra. 459.

Debt of Third Person.]—A note given by A. to B. for a debt due by C., upon no consideration of forbearance, and upon no privity shewn between A. and C., cannot be enforced. *McGillivray* v. *Keefer*, 4 U. C. R. 456.

Debt of Third Person.]—Semble, that a debt due by a third party, but not yet payable, may form a valid consideration for a note. *Dickenson* v. *Clemow*, 7 U. C. R. 421.

Debt of Third Person.] — Where the debtor died owing more than he had the means of paying, and a month afterwards his mother, who wished to pay all his debts, was induced to give a note to one of the creditors for an amount which was less than one-eighth the value of her property, it was held, that in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity. *Campbell* v. *Belfour*, 16 Gr. 108.

Discounting.]—Remarks as to the practice in this country of taking notes for discount, not from the last indorser, but from the maker, who brings them indorsed—thus suggesting not a business transaction, but accommodation indorsements. *Bank of Montreal* v. *Reynolds*, 25 U. C. R. 352.

Evidence.]—Held, that upon the evidence set out in this case, those pleas were supported which set up as a defence that the note was made and indorsed for plaintiffs' accommodation. *Bowes* v. *Holland*, 14 U. C. R. 316.

Exchange of Cheques—*Pleading.*]—A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, and the holder called at A.'s office on the same day and a clerk in the ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment:—Held, that the holder could recover against B. on his cheque:—Held, also, that under the plea of not the holder, B. could not set up any supposed right in A.'s assignee, nor possibly under any pleading on these facts. *City Bank* v. *Smith*, 20 C. P. 93.

Exchange of Horses—*Breach of Warranty*]—A. and B. exchanged horses, and B. gave A. a note for difference in the exchange. A. sold the horse he got from B. almost immediately, and after two years, during which nothing appeared to be done by either party, B. was sued upon the note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

Failure to Plead—*Relief in Equity.*]—Where the maker of a note was sued thereon, and instead of raising the defence at law, that the note had been given without consideration, save as to part, pleaded that the plaintiff in the action was not the holder of the note, and a verdict was rendered against the defendant

for the full amount thereof, for which execution against lands was sued out and placed in the sheriff's hands, whereupon the defendant in the action filed a bill to restrain proceedings at law. A demurrer for want of equity was allowed. *Leitch* v. *Leitch*, 11 Gr. 81.

Giving Time — *Pleading.*] — Declaration upon a promissory note. Third plea—" That the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs by the said W. C. alone, and the said note was drawn payable on demand, with interest at 10 per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant." Fourth plea—On equitable grounds. That the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiff gave W. C. an extension of time for the payment of the note: — Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration; and that the fourth was not an equitable plea and must be amended by striking out the words, " upon equitable grounds," and the jury notice served with it allowed to stand. *Merchants Bank* v. *Robinson*, 8 P. R. 117.

Guarantee of Price of Goods—*Indorsement of Bill for Larger Amount.*]—The defendant agreed with the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who in addition to the goods ordered, sent others, and the whole consignment was invoiced at prices higher than those quoted by the plaintiff and than those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but in perfect good faith, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who signed the same supposing that it was for the price of the goods ordered. P. accepted the bill and kept the goods:—Held, reversing 45 U. C. R. 386, that the defendant was liable to the extent of the goods ordered, and that the consideration for the bill failed as to the excess only. *Barber* v. *Morton*, 7 A. R. 114.

Infancy.]—To an action on four promissory notes made by the defendant and one H. payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant surety; that under the laws of Michigan only persons of 21 years of age could homestead lands; and that the plaintiff was under that age. There was no representation that plaintiff was of age, and H. obtained from plaintiff a surrender of his interest in the land whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age:—Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore held entitled to recover. *Fletcher* v. *Noble*, 8 O. R. 122.

Insurance Loss.]—A note was given by defendant, secretary of an insurance company, for a loss, the policy having been marked "cancelled," and left in the possession of the company, and the note was not payable until three days after the loss would be payable by the policy. Semble, that this shewed a sufficient consideration; but there was other evidence of plaintiff being a holder for value. *Armour* v. *Gates*, 8 C. P. 548.

Lease—*Death of Lessor.*]—A. being seized in fee of lands, made jointly with B. a lease of those lands to C., taking notes from C. for the rent, payable as it would become due. The day after the execution of the lease A. died intestate, and then B. died, and B.'s executors sued C. on the notes:—Held, that they could not recover, the consideration for which the notes were given having failed. *Merwin* v. *Gates*, E. T. 7 Will. IV.

Loan From Joint Fund.]—A member of a joint stock company, not incorporated, lending, with the assent of the company, a sum of money out of the joint fund to another member, and taking from him a note payable to himself, individually, for re-payment, can recover on the note, notwithstanding that the funds were advanced from the common stock. *Comer* v. *Thompson*, 4 O. S. 256.

Partial Failure.]—Partial failure of consideration is no defence to a note. *Dixon* v. *Paul*, 4 O. S. 327; *Hill* v. *Ryan*, 8 U. C. R. 443.

Partial Failure.]—Nor that the consideration proved less beneficial than was represented. *Dalton* v. *Lake*, 4 O. S. 15.

Partial Failure.]—To an action on a promissory note for $498, made by the defendant to the plaintiff, the defendant pleaded, on equitable grounds, that by an agreement between the parties a partnership which had existed between them was dissolved, and the defendant was to give the plaintiff the promissory note in question, and to pay certain debts and liabilities of the firm, and in consideration therefor to become the sole owner of certain property of the firm, and to have assigned to him by the plaintiff all the plaintiff's interest in certain debts and accounts due to the firm as well as certain debts and accounts due to the plaintiff personally; that the defendant had performed his part of the agreement by giving the note and paying such debts and liabilities, but the plaintiff, although requested so to do, had neglected to perform his part by giving the defendant such a power of attorney or assignment as would enable him to sue for the said debts and accounts, whereby he was prevented from obtaining payment of the same: that, except as aforesaid, there was no consideration for the making of the said note; and that such debts and accounts were equal to the plaintiff's claim on the said note:—Held, plea bad, as shewing only a partial failure of consideration; and that defendant's remedy was by cross action. *Kilroy* v. *Simkins*, 26 C. P. 281.

Pleading.]—Plea of accommodation and no consideration. Replication, traversing no consideration, but not the accommodation:—Held, bad on special demurrer. *Gilmore* v. *Edmunds*, 2 U. C. R. 419; *Brown* v. *Wheeler*, 6 U. C. R. 393; *Allen* v. *Skead*, 9 U. C. R. 217.

Indorsee against maker. Plea, that the note was made and delivered to plaintiff in payment of 200 hats and caps, to be delivered by plaintiff to defendant, and that they remained undelivered, but not averring any request for their delivery:—Held, bad on demurrer. *Anderson* v. *Jennings*, 2 U. C. R. 422.

A plea that defendant indorsed without consideration from the maker or the plaintiff, is bad. *Bank of British North America* v. *Sherwood*, 6 U. C. R. 213.

A plea that defendant made the note to the plaintiff as a gratuity, and that defendant never received any consideration therefor, is good. *Poulton* v. *Dolmage*, 6 U. C. R. 277.

Where the plaintiff sets out the consideration on which defendant's promise was made, a plea that there was never any consideration for the promise is bad. *Bradford* v. *O'Brien*, 6 U. C. R. 417.

Defendant pleaded that he made the note on account of payment of a piece of land, which the plaintiff then agreed to sell and convey to him, and to which the plaintiff then professed to have a title; whereas the plaintiff never had any right in or to the said land, and could not, and did not, convey the same to defendant pursuant to the agreement; and that there never was any consideration for making said note, except as aforesaid:—Held, on demurrer, plea bad, for not shewing when a title was to be made, or what the agreement was. *Blanchfield* v. *Birdsall*, 7 U. C. R. 141.

Payee against maker. Plea, note made for plaintiff's accommodation without consideration. Replication need not shew what the consideration was. *Gravely* v. *Jones*, 8 U. C. R. 606.

Payee against maker. Plea, that the note was given for plaintiff's title to land, and that he had no title at the time of making the note or since, and so there was no consideration for the note:—Held, on demurrer, plea bad, for for all that appeared the plaintiff might have got all he expected, and it might be assumed that plaintiff had conveyed by deed with covenants, in which case, there would not be an entire failure of consideration. *Lundy* v. *Carr*, 7 C. P. 371.

It is no defence by the maker that the plaintiff, indorsee, gave no value to the indorser for his indorsement, or that he took the note knowing that it was indorsed for accommodation of the maker, without denying that he is a holder for value. *Miller* v. *Ferrier*, 7 U. C. R. 540.

Declaration against maker of a note payable to bearer, and delivered by defendant to plaintiffs. Plea, that the note was made for the accommodation of A. and C.; that there never was any consideration or value for the payment of it by defendant; and that the plaintiffs held and hold the same without value or consideration:—Held, bad. *Muir* v. *Cameron*, 10 U. C. R. 356.

In an action on a note by payee against maker, plea that there was never any value or consideration for the making the said note or paying the same, is bad on demurrer; it should state the circumstances under which the note was given, and deny that there was any other consideration than alleged. *Osborne* v. *Pierson*, 36 U. C. R. 457.

Pre-existing Debt.]—A pre-existing debt is a good consideration in whole or in part for a note or bill. *Gooderham* v. *Hutchison*, 5 C. P. 241; *Hillis* v. *Templeton*, 7 L. J. 301.

Pre-existing Debt.]—And not the less so from a mortgage on real estate having been taken to secure the same debt. *Bank of Upper Canada* v. *Bartlett*, 12 C. P. 238.

Pre-existing Debt.]—Semble, that there is no distinction as regards consideration, between a note given for a pre-existing debt and for a new consideration. *Evans* v. *Morley*, 21 U. C. R. 547.

Presumption of Value—*Onus of Proof.*]—In an action upon a promissory note the only fact shewn by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not shew that the plaintiffs were not holders for value in due course without notice; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business; and it was admitted that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar, which the undoubted creditors were accepting:—Held, upon a motion for summary judgment under Rule 739, that the defence alleged was not founded upon any known facts, but was mere guess work, and unless the defendants paid into court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted. The presumption that value has been given may be done away with in the case of notes, which have had their origin in actual fraud, but not in the case of notes made for the accommodation of others; and even where accommodation notes are made by an incorporated company, the onus of shewing value is not shifted over to the plaintiffs. Re Peruvian Railways Co., L. R. 2 Ch. 617, followed. Millard v. Baddeley, [1884] W. N. 98, and Fuller v. Alexander, 47 L. T. N. S. 443, distinguished. *Merchants National Bank* v. *Ontario Coal Co.*, 16 P. R. 87.

Prior Payment.]—Assumpsit on a bill drawn by one defendant on the other two, and accepted. Fourth plea, that the bill was delivered by the acceptors to Messrs. H., who transferred it to one G. as security for flour to be sold by him to them; that G. refused to deliver said flour, and in consequence Messrs. H. were entitled to receive back the bill, and G. held it without consideration, and as their agent; that while he so held it the acceptors made their note payable to the drawer, or order, which was duly indorsed, and delivered by the acceptors to Messrs. H. in satisfaction of the bill; that H. afterwards, in fraud of defendants, directed G. to deliver the bill to the plaintiff, and that he thereupon, and without consideration from the plaintiff, and as the agent of H., delivered said bill to the plaintiff, who received it without consideration, and after it was due. The fifth plea was, that the bill was indorsed

to G. in part payment for the flour; that after G.'s refusal to deliver he held without consideration, and while it was so in his hands defendants paid it, as alleged in the last plea: that the acceptors were then entitled to receive it from G., and that he thereafter held as agent for them, and that it was overdue when it came into the plaintiff's hands:—Held, upon the evidence set out in the case, that the plaintiff must recover; that the defendants had acted negligently in paying as they did, and that neither of the pleas was proved; for, as to the fourth, G. did not receive the bill as security, but rather in part payment for the flour, nor did he deliver the bill to the plaintiff by Messrs. H.'s directions: and as to both pleas, he could not be said to hold the bill after refusal to deliver the flour as the agent of Messrs. H., and without consideration, because they had not treated the contract for the sale of the flour as rescinded, but had assumed to hold him liable upon it by making over his flour acceptance; and, as he was a bonâ fide holder for value, it was of no consequence whether the plaintiff taking from him knew that the bill had been paid by Messrs. H. or not. *Clarkson* v. *Lawson*, 14 U. C. R. 67.

Purchase Money of Machine—*Alleged Defects.*]—See *Esson* v. *McGregor*, 20 S. C. R. 176.

Renewal of Barred Note.]—Action on a promissory note. Plea, no consideration, as it was given in renewal of another note on which plaintiff's remedy was barred by the Statute of Limitations:—Held, no defence. *Wright* v. *Wright*, 6 P. R. 295.

Sale of Goods—*Inferiority.*]—Defendant proved that the note had been given by him to the plaintiff for the balance of purchase money on a sale of some hams warranted good by the plaintiff, and that many of the hams were bad. The jury found for defendant on the ground that the hams were not worth more than the money paid:—Held, that the partial failure was no defence, without evidence of fraud. *Kellogg* v. *Hyatt*, 1 U. C. R. 445.

Sale of Goods — *Definite Decrease in Value.*]—K., acting as agent for the plaintiff company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods manufactured by himself, possessed curative or medicinal qualities and were saleable, and thereby induced the defendant to buy a quantity and to give his promissory note therefor. In an action on the note by the plaintiff company, the defendant counterclaimed for part of the amount of the note, which he had been obliged to pay to an innocent holder. The jury found that the articles sold were valueless; that the defendant had been induced to purchase by the misrepresentations; and that he had received no consideration for the note, except as to some of the pads, which he had sold:—Held, that the plaintiff could not recover, for the partial failure of consideration, being for an amount capable of definite computation, could be set up as an answer pro tanto, and the consideration received had been more than covered by the sum paid:—Held, also, that the defendant was entitled to recover against the plaintiff company the damages sustained, without having previously offered to return the goods. *Star Kidney Pad Co.* v. *Greenwood*, 5 O. R. 28.

Sale of Goods — *Definite Decrease in Value.*]—The defendants purchased the stock-in-trade of one C. for $5,500, and an agreement under seal was executed by the parties whereby defendants covenanted to pay the said sum. The agreement also provided that a portion of the consideration should be secured by four promissory notes of $1,100 each. After the last note became due, C. indorsed it "without recourse" to the plaintiff. To an action on the note the defendants pleaded that the value of the goods had been misrepresented to them by C. and that before said note became due, C. agreed to allow a reduction of $500 from its face value, and that plaintiff took the note after it had become due. They paid $626.50 into court, being the balance due on the note with interest. At the trial the plaintiff, in his evidence, admitted that he did not claim to occupy any different position from C. The defendants' evidence shewed a verbal agreement to make the reduction of $500, but C. swore he had never made the agreement. The Judge at the trial found that C. had promised to make the reduction, and that the plaintiff stood in the same position as C., and he dismissed the action with costs:—Held, that the defendants had a right to enforce the agreement for the allowance of $500, there being a partial failure of consideration for an ascertained and liquidated amount. *McGregor* v. *Bishop*, 14 O. R. 7.

Sale of Land.]—To an action on two notes, defendant pleaded that they were given for the assignment to him of the plaintiff's right to two lots of Crown land, of which the plaintiff falsely and fraudulently represented that he was locatee: that the plaintiff had no claim to said land, and the notes were obtained from defendant by fraud: — Held, that on shewing the plaintiff's title to one of the lots to have been bad, without proving fraud, the defendant was entitled to succeed as to that part of the claim for which the consideration had failed. Such a defence, however, should properly be pleaded only to that part of the demand covered by it. *O'Brien* v. *Ficht*, 18 U. C. R. 241.

Sale of Land—*Defective Title.*]—One W., as agent for J., sold to defendant two lots of land for $1,000, receiving $100 down and taking defendant's notes for the balance. This land had been purchased from the Crown in 1854, by one W., who had assigned his right to C., and C. to J. The instalments had all been paid to government, and W. told defendant that when he did the settlement duties he could get the patent. He also handed to defendant the assignments and receipts, with an assignment from J. to defendant. The lots were then vacant, and defendant soon after went into possession and performed the settlement duties, but when he applied to the Crown lands department for his patent, he was informed that the original sale to W. had been cancelled, as having been obtained in fraud of their regulations; and to avoid losing the land he again purchased it from government for $550. In an action brought by J.'s agent upon the notes, W. swore that he believed what he told the defendant to be true, and had no doubt J. also believed it, and there was no proof to the contrary:—Held, that there was no evidence to sustain a defence on the

ground of fraud; that there was not a total failure of consideration; and that the plaintiff therefore was entitled to recover. *Walker* v. *Douglas*, 23 U. C. R. 9.

Sale of Land.]—To a declaration on a note, the defendant pleaded as to £157 10s., part, &c., that the plaintiff represented that he owned certain lands, and was the equitable owner of lot 14, &c., through one R., who held it as trustee for him; and that defendant was induced by his false and fraudulent representations to buy the same from plaintiff, whereupon the plaintiff conveyed all his interest in said lands to the defendant; that defendant paid part down, and gave his two notes for the balance, one of which is the note declared upon; that the plaintiff had no interest in said lot, and that R. refused to assign his interest in said lot to the defendant:—Held, no answer to the action, the contract being entire, and the failure of consideration not being definite as to this note. *Coulter* v. *Lee*, 5 C. P. 201.

Sale of Land — *Rescission.*] — C. having purchased Y.'s interest in certain lands which were in the city of Montreal, and upon which there was a mortgage of $80,000, gave his promissory notes to Y. for the balance of the purchase price. Subsequently C. failed, and Y. being liable for the mortgage, C. agreed to take the necessary steps to obtain Y.'s discharge from the mortgagees on a payment of one thousand dollars, and Y. signed a document sous seign privé, dated 18th February, 1879, agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action taken by Y. against C. on his promissory note:—Held, that there was no consideration given for the notes, and that C. was discharged from all liability under the document of the 18th February, 1879. *Yon* v. *Cassidy*, 18 S. C. R. 713.

Sale of Ship.]—Assumpsit on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety: that the plaintiff, on such sale guaranteed the vessel to be sound, but she was not sound but unsafe and rotten, as the plaintiff well knew, and the said A. and B., immediately after the sale, discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her:—Semble, that the facts did not shew a total failure of consideration, and therefore formed no defence. *Henderson* v. *Cotter*, 15 U. C. R. 345.

Sale of Ship.]—Where an action was brought for breach of contract in refusing to sign certain notes, the sale and delivery to defendants of shares in a schooner being alleged as the consideration for the promise; and it appeared that the plaintiff had surrendered his interest to the defendants; and that they had continued in exclusive possession of the vessel; but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted; the court ordered a nonsuit. But if the defendants had given their notes, they could not have resisted payment on the ground that they had not received a valid title, for there would only have been a partial failure of consideration. *Orser* v. *Mounteny*, 9 U. C. R. 382.

Sale of Timber.]—Declaration by payees against makers of a note for $1,000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a Crown license on certain lands of which they gave defendants a list; that defendants, wishing to purchase such right, had all the lots examined, and thereupon, relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for $2,800, of which $1,800 was paid down, and this note given for the balance; that defendants relying, &c., cut and made timber on the lots; that the plaintiffs had no such right in respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement, were worth less by more than $1,000 than the plaintiffs represented they were possessed of and pretended to sell: that defendants first became aware of the fraud after they had paid the money and given the note, and expended a large sum, and they are likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them: and defendants prayed that it might be declared they were not liable to pay the note: and that the plaintiffs might be required to pay them a fair compensation for their loss by reason of such representations:—Held, on demurrer, plea bad: that it shewed only a partial failure of consideration, and not of any definite sum: that it was not a case of either legal or equitable set-off; and that the defendants could not prevent the plaintiffs' recovery until their right to damages or compensation, and the amount of it, had been ascertained; and, semble, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs, the timber cut by them on the lots to which plaintiffs had no right; and perhaps, that since discovering the fraud they had cut no timber on such lots. *Georgian Bay Lumber Co. of Ontario* v. *Thompson*, 35 U. C. R. 64.

Special Agreement as to Part.]—The plaintiff sued upon a bill drawn by A. upon B. for £30, payable to his own order, accepted by B., by A. indorsed to C., and by C. to the plaintiff. A. pleaded as to £15, part, that the plaintiff accepted the bill from him on an undertaking that he was to collect it and apply £15 out of the proceeds to pay that amount due to the plaintiff, wherefore, except as to £15, there was no consideration for the bill:—Held, plea bad. *Brown* v. *Garrett*, 5 U. C. R. 243.

Special Agreement.] — Indorsee of an overdue note against maker. Plea, setting out the special circumstances under which the note was originally given, and denying thereupon the right of the payees to negotiate the note:—Held, plea no defence as to a certain portion of the note, but a good defence as to the balance. *Rennie* v. *Jarvis*, 6 U. C. R. 329.

Subscription to Diocesan Fund.]—A note promising to pay the Church Society of the diocese of Toronto or bearer, £50, with interest, towards providing a fund for the support of a Bishop of the western diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity:—Held, to be founded upon a sufficient consideration, and recoverable in the hands of a bonâ fide holder. *Hammond* v. *Small*, 16 U. C. R. 371.

Substitution of Notes.]—The payee of a note given for goods sold by C. to the maker, and indorsed by the payee and C. for the maker's accommodation, and discounted by C. at a bank, may sue the maker on non-payment of the note, although he has himself paid it only by giving new notes (to which the maker is not a party) in satisfaction, which are unpaid, and no consideration ever passed between the maker and him. *Latham* v. *Norton*, 6 O. S. 82.

(b) *Fraud and Illegal Consideration.*

Agreement Not to Prosecute.] — An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a promissory note. *Dwight* v. *Ellsworth*, 9 U. C. R. 539.

Antecedent Debt.]—Held, that an antecedent debt is a good consideration for a note transferred as collateral security for the debt, so as to enable a bonâ fide holder without notice to enforce it, though void for illegality as between the maker and payee. *Canadian Bank of Commerce* v. *Gurley*, 30 C. P. 583.

Bad Faith of Holder—*Conspiracy.*]—P. indorsed a note for the accommodation of the maker, who did not pay it at maturity, but having been sued with P. he procured the latter's indorsement to another note, agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M. a solicitor, between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note, and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnish it. This was carried out; the broker received the proceeds of the discounted note, and while pretending to pay it over was served with the garnishee process, and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note, which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself:—Held, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note, and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker, and M. could only take it subject to the conditions under which the broker held it; that the broker, not being the holder of the note, there was no debt due from him to the maker, and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith, and P. was entitled to recover it back. *Millar* v. *Plummer*, 22 S. C. R. 253.

Compounding Felony.]—To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry* v. *Little*, 11 U. C. R. 286.

Compounding Felony.] — Action on notes—Plea that they were given to compromise a charge of felony committed in a foreign country—Evidence of such agreement and of the foreign law—Obligation to prosecute. See *Toponce* v. *Martin*, 38 U. C. R. 411.

Compounding Felony.]—In an action on two promissory notes, it appeared that the defendant's son had committed forgery, and it was found by the jury that the consideration for which defendant gave the notes was to prevent the scandal of forgery becoming public:—Held, that the plaintiff could not recover. *Doyle* v. *Carroll*, 28 C. P. 218.

Compromise of Criminal Charge.]—The defendant R. having been charged with misapplying fines paid into his hands as a justice of the peace, and proceedings instituted against him in respect thereof, the plaintiff, pending an investigation of the charge, volunteered his aid to assist R. in effecting a settlement of the amount claimed by the municipality, which he undertook to discharge upon the defendant R. giving his promissory note for the amount, indorsed by his wife. The plaintiff thereupon settled the amount claimed by giving his note therefor, which he alleged he had subsequently paid, and the defendants joined in a promissory note in the manner proposed by the plaintiff:—Held, affirming 2 O. R. 25, that the transaction in effect amounted to a compromise of a criminal charge, and therefore that plaintiff was not entitled to recover on the note given by the defendant. *Bell* v. *Riddell*, 10 A. R. 544.

Conspiracy to Defraud.]—Action on a bill drawn by K. upon and accepted by defendant C., indorsed by K. to E., by E. to D., and by D. to plaintiffs. Plea, by C., that he was induced to accept by the fraud and misrepresentation of said K., E., and D., and without any consideration, and that D. indorsed to the plaintiff without any consideration or value given by them to him:—Held, good, without averring that the plaintiffs were holders without value. *Bank of Montreal* v. *Cameron*, 17 U. C. R. 635.

Counterclaim.] — Counterclaim alleging fraud in obtaining note. See *Morrison* v. *Earls*, 5 O. R. 434; *Garland* v. *Thompson*, 9 O. R. 376.

Debt to Municipality.]—A note made payable to the treasurer of, and indorsed by him to, a municipal corporation, to secure a balance due the corporation on a past transaction, is not void under the Municipal Acts. *Town of Belleville* v. *Fahey*, 5 C. L. J. 73.

Discount of Bill Without Reason to Believe it Would be Accepted.]—J. H. & Sons in Toronto had been in the habit of

drawing on their correspondent in England, and of covering such bills by shipments of flour and remittances. They had largely overdrawn, and their correspondent had repeatedly requested them to desist from drawing. In December, 1854, they drew several bills, which they sold or exchanged for notes, and amongst others the note sued upon; this note they gave with several others in payment of their account to G. H. & Co., and a few days afterwards failed. The bill for which the note was given was returned dishonoured, and T. H., the maker of the note, set up that it was procured from him by fraud without consideration:—Held, that there was evidence that the note had been procured by fraud: that if J. H. & Sons drew the bill for which the note was given, having no expectation or right to expect that it would be honoured, they practised fraud in procuring the note, *Gooderham* v. *Hutchison*, 5 C. P. 241.

Election Law.] — S. (appellant's husband) brought an action against St. L. Bros. on a promissory note for $4,000, a renewal of a note for the same amount made by S., indorsed by him and handed to St. L. Bros., alleging that the original note had been made and discounted for the accommodation of St. L. The evidence shewed that the proceeds of the note were paid over to one D., as agent for S., to be used as a portion of a provincial election fund controlled by S.:—Held, that the plaintiff could not recover, even assuming a promise to pay on the part of St. L. Bros., the transaction being illegal under 38 Vict. c. 7, s. 295 (Q.), R. S. Q. Art. 425, which makes void any contract, promise or undertaking, in any way relating to an election under the said Act. *Dansereau* v. *St. Louis*, 18 S. C. R. 587.

Filling in Amount.] — Where the defendant signed as maker a printed form of a note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became indorsees of it for value without notice:—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or indorsed. *McInnes* v. *Milton*, 30 U. C. R. 489.

Foreign Law.]—Action on a bill of exchange drawn by McC. & McK., and accepted by defendant, payable to the plaintiffs. Fifth plea: that the said bill was drawn and accepted for the purpose of carrying on gambling contracts or speculations on the rise and fall of the price of pork in the city of Chicago, in the State of Illinois, which said contracts are, by the laws of the said state, illegal and void; and, except as aforesaid, there never was any consideration for the drawing or acceptance of the said bill, of all of which the said McC. & McK. and the plaintiffs had notice. Sixth plea, repeating the allegations in the fifth plea, down to the averment of notice, and alleging that McC. & McK. paid and satisfied the said bill, &c., and the plaintiffs are suing for their benefit, and not otherwise:—Held, both pleas bad, for that the contract which was made in this country, was legal therein, and it was no defence that the purpose for which the money advanced was to be used was illegal by the laws of a foreign country. *Bank of Toronto* v. *McDougall*, 28 C. P. 345.

Fraud.]—Discount by bank of note made and indorsed for the accommodation of D., their solicitor — Fraud and neglect of D.— Liability of bank. See *Canadian Bank of Commerce* v. *Green*, 45 U. C. R. 1.

Fraudulent Preference.] — A promissory note to secure the amount of a fraudulent preference given by an insolvent to a particular creditor is wholly void. *Brigham* v. *Banque Jacques Cartier*, 30 S. C. R. 429.

Gambling.] — In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff, for value also after it was due, it is no defence that the note was assigned to the plaintiff's transferor in payment of a gambling debt and through fraud. *Burr* v. *Marsh*, M. T. 4 Vict.

Gambling.]—Assumpsit on a note made by A. payable to B., indorsed by B. to C., and by C. to plaintiff. A. pleaded—5. That he gave the note to the payee as part of the consideration for the purchase of a lottery ticket, contrary to the statute; and, 6. The same defence, with the averment that the plaintiff became indorsee with full knowledge:—Held, both pleas bad. Held, also, that under the facts and pleadings there was no defence under the statutes against gambling. *Wallbridge* v. *Becket*, 13 U. C. R. 395.

Gambling.] — Declaration on a note for £15, payable to G., or bearer. Pleas: 1. That G. corruptly and against the statute held a lottery of land, and disposed of the tickets for £15 each, and defendant purchased one, for which this note was given. 2. The same facts, adding, that the plaintiffs took the note with knowledge of the premises, and after it fell due, without consideration. 3. That the note was given for land, which was won by unlawfully gaming and playing, contrary to the statute. 4. That defendant was induced to make the note by the fraud of said G. and others, and that plaintiffs took it after it became due, without consideration, and with full knowledge of the premises:—Held, on demurrer, first and third pleas bad, second and fourth pleas good. *Evans* v. *Morley*, 20 U. C. R. 236.

Held, affirming the last case, that under 12 Geo. II. c. 28, securities given for the price of tickets are not void in the hands of a bonâ fide holder for value. *S. C.* 21 U. C. R. 547.

Where the jury found that the plaintiffs had no notice of the illegality, the court refused a new trial, holding the defence not one to be favoured. *Ib.*

Gambling — *Bonâ Fide Holder.*] — A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within s. 53, s.-s. 3, R. S. O. 1877 c. 47, and such a security is void under 9 Anne c. 14, even in the hands of a bonâ fide holder for value. *In re Summerfeldt* v. *Worts*, 12 O. R. 48.

Gambling—*Lex Loci.*]—Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicil of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange,

and that, as such, it was, under the law of New York, an illegal contract and invalid:—Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario, for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicil of the drawer did not affect the rule as stated. *Story* v. *McKay*, 15 O. R. 169.

Improper Application of Accommodation Note.]—Defendant B. indorsed a promissory note made by defendant C., for the purpose of renewing a former note also indorsed by him for C.'s accommodation. C., instead of retiring the former note, parted with the renewal to plaintiff, a creditor of his, who was at the time aware that B. had been assisting C. in money matters. After the note had been indorsed by C. to plaintiff, C. procured B.'s indorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note:—Held, that C. had B.'s authority to indorse the note to the plaintiff, and that the only notice the law would impute to plaintiff taking the note from C., the maker, was that B. was surety for him, and perhaps, an indorser without value for his accommodation; and therefore, held, that plaintiff was entitled to recover against B. *Cross* v. *Currie*, 43 U. C. R. 599, 5 A. R. 31.

Misrepresentation as to Share in Company.]—In an action against the maker of a note, evidence was given to shew that defendant was induced to give the note upon misrepresentations, on the part of the payee and indorser, as to the formation of a company for the sale of a patent right controlled by the payee, the note being given in consideration of a share which defendant was to have in such company, of which plaintiff's testator was alleged to be one; but it was doubtful whether any such company existed at all, or if so, whether defendant was ever placed in the position of becoming a shareholder:—Held, that the defendant not having repudiated and rescinded the contract under which the note was given, did not preclude him from setting up the defence that it had been obtained from him by the fraud of the payee, with notice; and that the latter had indorsed it without value to the testator; for that from the nature of the transaction there was nothing on defendant's part to be repudiated or rescinded. *Waddell* v. *Jaynes*, 22 C. P. 212.

Note Not Used for Intended Purpose.]—A note intended as the renewal of another note, but not so used, having been left in the maker's hands with an indorser's name upon it, was received by the plaintiff from the maker for value before it became due. The indorser was held liable. *Larkin* v. *Ward*, 5 O. S. 661.

Renewal Note Fraudulently Discounted.]—B. indorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously indorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry, respecting C.'s title to the note or his authority so to deal with it:—Held, affirming 43 U. C. R. 599, that the plaintiff was entitled to recover against B. *Cross* v. *Currie*, 5 A. R. 31.

Sale on Sunday.]—Under 8 Vict. c. 45, s. 2, a note made on Sunday in payment of goods sold on that day, is void, as between the original parties, but not as against an indorsee for value and without notice. *Houliston* v. *Parsons*, 9 U. C. R. 681; *Crombie* v. *Overholtzer*, 11 U. C. R. 55.

Settlement of Prosecution for Assault.]—The defendant C. being in prison in due course of law on a charge of assaulting the plaintiff, for which an indictment was laid against him charging him with an assault occasioning actual bodily harm, and with common assault, and a civil action for the assault having also been brought against him, a settlement was effected by defendant C. giving a note indorsed by defendant B., for $1,000 for the damages sustained by plaintiff, which was held not to be disproportionate to the injury sustained, and a fine was inflicted for common assault merely, the former charge in the indictment being withdrawn. The settlement was made and the note accepted by plaintiff at defendant's instance, and under the sanction and advice of his counsel, without plaintiff having urged it or taken advantage of the imprisonment to procure it; and the Judge, in sentencing defendant, forebore to imprison because defendant had made compensation to the plaintiff. To an action on the note, the defendant set up fraud, duress, and illegality of consideration:—Held, that the plaintiff was entitled to recover: that there was no evidence of fraud; nor under the circumstances could there be deemed to be duress; and further, that there was no illegality of consideration, for the settlement was merely for the plaintiff's private damage, and in no way affected the public interest, the law having been vindicated by the imposition of substantial punishment. *Kneeshaw* v. *Collier*, 30 C. P. 265.

Substitution of Forged Note.]—A. gave B. and C. a note signed by himself, which they discounted. When it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on that faith accepted, and delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person of the same name, unknown to the holder, and resident in a foreign country:—Held, that A. could not take advantage of this fraud; that his liability in respect of the note still existed in equity; and that the holder could sue within six years from the discovery of the fraud. *Irwin* v. *Freeman*, 13 Gr. 465.

Threats of Prosecution.]—Quære, as to the effect upon the validity of the note, of the threats to prosecute defendant, to avoid which the note was given, if it had been shewn that the plaintiffs were entitled to recover the money for which it was given. *Canada Farmers Mutual Ins. Co.* v. *Watson*, 25 C. P. 1.

Threats of Prosecution—*Suspension of Civil Remedy.*]—To an action on five promis-

sory notes the defence was that the plaintiff, in Utah Territory in the United States, had charged defendant with felony, (receiving cattle stolen from the plaintiff) and that in consideration of the plaintiff consenting to withdraw and abstain from prosecuting the charge, defendant agreed to make the notes; and that in pursuance of such agreement the notes were made, and the plaintiff abstained from prosecuting the charge. Upon the evidence set out in the report of the case, the court, differing from the learned Judge before whom the case was tried without a jury:—Held, that an agreement was made that, in consideration of the notes being given, the criminal proceedings which the plaintiff had threatened to take against the defendant should not be prosecuted; and that the plaintiff therefore could not recover on the notes. Semble, that a mere threat to prosecute for a criminal offence unless a note be given for money the debtor actually owes, will not avoid the note. It is of no consequence whether a charge has been formally preferred or not; it is equally an offence to compound in either case. Held, also, no difference between our own law and that of Utah having been shewn, that the effect of compounding a felony must be presumed to be the same in both countries. *Toponce* v. *Martin*, 37 U. C. R. 411.

Ultra Vires Demise of Tolls.]—Commissioners of a turnpike trust, appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, make a demise beyond the scope of these powers; the tenant is put into possession and enjoys his term; the commissioners, at the expiration of the term, take a promissory note from the tenant for the rent, giving time for payment:—Held, that the commissioners, by their clerk, could not sustain an action upon such note, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise. *Ireland* v. *Guess*, 3 U. C. R. 220.

Held, also, that the commissioners by their clerk, could not sustain an action upon such note, because they had no power, though the demise were legal, to give time for payment of rent already due. *Ib.*

Usurious Transaction Between Payee and Holder — *Drawer Liable to Payee.*] — Where the payee of a note indorsed the same to A. upon an usurious consideration, and A. afterwards failed in an action against the maker upon the ground of usury:—Held, that such payee might still recover against the drawer: and, semble, that the ground of the failure, in the former action, might be proved by any person present at the trial: and it was not necessary to prove a re-indorsement by the usurer to the payee. *Bidwell* v. *Stanton*, Tay. 396.

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3. *Contemporaneous Agreement and Qualifying Indorsement.*

Dispute as to Time of Payment.]—E., holding B.'s note, agreed to take collateral security by mortgage on road stock, and give one year's time on the note. B. mortgaged the stock and assigned it to E., but for two years instead of one. E. refused to carry out this arrangement, and sued on the note, at the same time holding the security, and refusing to transfer it:—Held, that it was for the jury to say whether E., by retaining the security, did not consent for two years. *Evans* v. *Bell*, 8 C. P. 378.

Mistake in Form—*Transfer to Plaintiff for Benefit of Defendant.*]—Indorsee against the indorser. Plea, that the note was intended to have been made to the plaintiff or order, and indorsed by him to the defendant, to secure a debt due to the defendant by the maker, but by mistake it was made payable to the defendant or order; and he thereupon indorsed it to the plaintiff, in order to enable him to sue the maker, and on the understanding that the plaintiff should have no recourse against him as indorser:—Held, a good defence. *Blain* v. *Oliphant*, 9 U. C. R. 473.

Not Indebted to Full Amount.]—Payee against maker on a note for $101.50. Plea, that when defendant gave said note he owed plaintiff $75, and plaintiff then requested him to make this note, and agreed to pay him the difference, and plaintiff then accepted the note on that condition, but did not pay the said money, or any part thereof; and defendant says that plaintiff is not entitled to recover upon that count of the declaration a greater sum than $75:—Held, on demurrer, a bad plea, as shewing no defence. *Kelly* v. *Lisk*, 18 U. C. R. 418.

Not to be Enforced.]—Where in assumpsit by the holder of a note payable to A. or bearer on demand, the maker pleaded an agreement with A. when the note was made, that it should be held by A. as a security for the settlement of their future accounts, and that it was retained by A. after it was due, and then transferred to the plaintiff, and that on settlement A. was largely indebted to the defendant:—Held, bad on general demurrer, as shewing an agreement contrary to the note; and because no demand of payment was alleged, so as to shew the note overdue. *Harvey* v. *Geary*, 1 U. C. R. 483.

Not to be Enforced Pending Ascertainment of Rights.]—A. being the owner of a schooner, mortgaged it to different persons, including the plaintiff and defendant respectively. A. failed, and B. was appointed his assignee; and a suit was commenced in chancery to ascertain the rights of the parties. During the pendency of the suit, all the parties thereto agreed to sell the schooner to one C., without prejudice to the issues raised, for the sum of £1,350, for which sum C.'s notes were taken. The defendant, desirous of participating in C.'s securities to the amount of £400, was allowed by the other mortgagees to take C.'s notes to that amount, on condition that he substituted notes of his own, indorsed in blank by D., for the same amount, which he did. These notes, it was agreed, should abide the result of the chancery suit. The result of the chancery decree was the rejection of all the mortgagees except the plaintiff; the plaintiff then sued the defendant on his notes. The defendant, after plea pleaded, but, before trial, appealed from the chancery decree. He did not plead the appeal puis darrein continuance:—Held, on the agreement and other evidence produced, that the plaintiff was entitled to recover against the defendant on his notes. *Coleman* v. *Sherwood*, 3 C. P. 372, 381.

Not to be Enforced.]—To an action upon two notes against the maker by the indorsee of the payee, K., the defendant pleaded

that the notes were given when he and the plaintiff and K. were in partnership, and in respect of transactions between defendant and K. as partners and of matters involved in the said partnership, and with the understanding and agreement between defendant and K. and the plaintiff, that the notes were to be held by K. and the plaintiff merely as evidence of such transactions, &c., and as security for any sums which might be found due to K. or the plaintiff, on accounts being taken and settlement made between them and defendant as partners, and upon the terms and condition of such an account being taken at or after the dissolution of the partnership; but that the partnership had since been dissolved, and no such account taken or settlement made:—Held, on demurrer, plea bad, for it admitted a good consideration for the notes, and did not allege expressly that they were not to be sued upon. Semble, that it was also defective in not negativing any other consideration than that appearing on its face. *Stultzman* v. *Yeagley*, 32 U. C. R. 630.

Not to be Liable.]—A plea setting up a parol agreement that defendant should not be liable, inconsistent with the indorsement on the note, is bad. *Hart* v. *Dacy*, 1 U. C. R. 218.

Not to be Liable.]—Where a man draws a bill to pay a debt, he cannot set up against the indorsee that the bill was given upon a prior verbal understanding between himself and the plaintiff, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer. *Adams* v. *Thomas*, 7 U. C. R. 249.

Not to be Liable.]—The jury having found for defendant, on evidence improperly received, of an alleged understanding that defendant should be called upon for the interest only, a new trial was granted. It was objected that the Church Society had no power to hold or transfer notes; but held, immaterial, the note being payable to bearer. *Hammond* v. *Small*, 16 U. C. R. 371.

Not to be Liable.]—Declaration upon a note payable to defendant or order, and indorsed by defendant to plaintiff after it became payable. Plea, setting up a collateral agreement that defendant should not be liable, not alleging it to have been in writing:—Held, bad. *Hall* v. *Francis*, 4 C. P. 210.

Not to be Liable—*Acting for Company.*] To an action upon a note by an indorsee against the maker, who signed the note in his private capacity, a plea that the defendant made the note as president, &c., of a company, to be binding only upon the company, and on the understanding with the payee that there was to be no recourse upon the defendant:—Held, bad as setting up a verbal understanding contrary to what the maker's signature to the note would import. *Ewart* v. *Weller*, 2 U. C. R. 610.

Not to be Liable—*Acting for Company.*]—A plea that the note was taken for a liability of the company, as secretary of which the defendant signed, and with the understanding that they were to pay the same:—Held, bad, as setting up a contemporaneous verbal agreement. *Armour* v. *Gates*, 8 C. P. 548.

Not to be Liable—*Evidence of Advances.*]—To an action by the executors of V., on a note made by defendant payable to V. or bearer, defendant set up as defence, that by his last will V. devised to each of his children, of whom defendant's wife was one, £250, to be paid by his executors as soon as possible; and declared that in case he should advance money during his life-time to any of his children on account of such legacies, a receipt therefor should be sufficient as payment of so much on account of the sum bequeathed; that on the 4th of April, 1856, the testator advanced to defendant £100 on account of the sum devised to his wife, and defendant then delivered to him the note sued on as evidence of such advance, it being agreed between them that defendant should not be called upon to pay said note, but that it should be held as a receipt for so much of the legacy; and defendant alleged that he had always been willing, and had offered to sign a receipt for that sum. The will when produced was in the terms alleged, but a codicil was added, made after the note, directing that none of the legacies should be paid until the completion of payments on certain lands due by his son:—Held, that the plaintiff must recover, for verbal evidence could not be received of such an agreement as alleged, and the statement of the will in defendant's plea was incorrect. *Street* v. *Beckwith*, 20 U. C. R. 9.

Not to be Liable.]—Declaration on a note by payee against maker. Plea, that the note was made under an agreement with the plaintiff that he should get the same discounted, but should never call upon defendant to pay it; and further, that after it became due it was agreed that defendant should sell to plaintiff certain lands at their cash value, in full satisfaction of all demands by plaintiff against defendant, and the plaintiff accepted said agreement in full satisfaction of the note:—Held, on demurrer, plea bad, for the first defence set up was a verbal agreement inconsistent with the note; and, as to the second, the agreement to sell the land was not alleged to be in writing. *Moore* v. *Sullivan*, 21 U. C. R. 445.

Not to be Liable to Full Amount.]—To an action on a note for $800, defendant pleaded, in substance, that D. & Co. had contracted with defendant for delivery to him of plaster to the value of $1,000, for which defendant agreed, on delivery, to pay by accepting D. & Co.'s draft at three months, payable to their own order; that D. & Co., after having delivered but $200 worth of plaster, requested defendant to accept, and he agreed to accept and did accept their draft, upon their agreement that defendant should, upon its maturity, pay no more of it than he had received value in plaster; that, thereupon D. & Co., being indebted to plaintiffs in $50,000, indorsed and delivered the draft so accepted to plaintiffs, who received it as security for and on account of said debt, with the full knowledge and notice of the facts hereinbefore stated; that when said draft matured, D. & Co. had delivered to defendant no more plaster then the said value of $200, and plaintiffs and D. & Co. agreed that defendant should only pay $200, and that defendant should make and deliver to D. & Co. or order, and D. & Co. should indorse and deliver to plaintiffs, said note for $800, and that said note should be taken and received by D. & Co. and plain-

tiffs upon the same agreement and terms, as to delivery of plaster, as the draft for $1,000 had been made and delivered upon:—Held, on demurrer, a bad plea. *Royal Canadian Bank* v. *Mmaker*, 19 C. P. 219.

Parol Evidence — *Satisfaction of Liability.*]—It is a good defence to an action by the personal representatives of the payee against the maker of a promissory note for value received, that at the time of the making of the note an oral agreement was entered into between the payee and the maker which has been fully performed, that if the latter would pay interest on the note, and, although not liable to do so, would support for life a relative of the former, the note should be considered paid; and evidence to the above effect was held admissible in an action on the note brought after the complete performance of the agreement by the defendant. *McQuarrie* v. *Brand*, 28 O. R. 69.

Payment Out of Special Fund.]—Action by payee against the maker of a note. Plea, on equitable grounds that the plaintiff was captain of a rifle company organized according to law; that defendant being a member of it and a tailor, was employed to make the uniforms, which it was agreed between plaintiff and defendant should be paid for out of the moneys coming to the said company for their drills according to the statute; that in order to raise the necessary sum at once, it was also agreed that a note should be discounted, to be reduced from time to time by the moneys so received, and renewed until paid off; that in pursuance of such agreement a note was made by defendant payable to plaintiff, which was discounted, and reduced by payment of the money derived from the first ten days' drill, and renewed by the note declared upon, which it was understood should be in the same way reduced, and renewed, or paid off by the proceeds of the second drill; that before said drill the plaintiff wrongfully disbanded the company, so that they were unable to draw any more pay, whereby, owing to the plaintiff's wrongful act, it became impossible to perform said agreement and retire said note:—Held, that the plea afforded no defence. *Vidal* v. *Ford*, 19 U. C. R. 88.

Postponing Payment.]—Parol evidence cannot be received to shew that a bill of exchange accepted payable three days after sight, was not to be paid till a further time had elapsed. *Bradbury* v. *Oliver*, 5 O. S. 703.

Postponing Payment.]—Plea, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, the plaintiff agreed not to sue upon this note until the others should become due:—Held, upon general demurrer, plea bad. *Durand* v. *Stevenson*, 5 U. C. R. 339.

Postponing Payment.] — The plaintiff declared on the following, as a note: "Three months after date, we, or either of us, promise to pay to Elias S. Reed (the plaintiff) or John Fraser, his guardian, at the post office, Embro, £119 17s. cy., value received in rent of farm;" adding a count on an account stated. It was proved that the defendant had been in possession of plaintiff's farm before and after the note was made, which was given for rent due, and that the plaintiff was abroad at the time of making the note:—Held, that evidence was inadmissible of a verbal understanding that the note was not to be enforced until the plaintiff's return, or until he could send a power of attorney to some one to collect it. *Reed* v. *Reed*, 11 U. C. R. 26.

Postponing Time for Payment.]—Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. *Porteous* v. *Muir*, 8 O. R. 127.

Postponing Time for Payment — *Renewals.*]—On the 29th August, 1877, defendant R. made a note of that date for $700, at eighteen months, in favour of D., and for his accommodation, which R. gave to D. without any restriction as to its use. D. indorsed the same and handed it to the plaintiff; and at the same time gave the plaintiff his, D.'s, own note of the same date at three months, taking from plaintiff the following receipt: "Received from R. a note indorsed by D., payable eighteen months after date, for $700, which note is given me only as collateral security for the payment of certain note indorsed by me for D., and when said note is fully paid, I agree to return same." On the 24th September, a statement of account took place between the plaintiff and D., when D. took up the note of the 29th August, by giving plaintiff another note for the like amount at three months:—Held, that the true construction of the agreement was, that D. should have eighteen months, or so much thereof as the plaintiff chose to give him, in which to pay off the $700; and that D.'s note might be renewed from time to time, so long as payment was not extended beyond the eighteen months; and that under the circumstances the note of the 24th September could not be deemed to have been taken as a payment of the note of 29th August. Devanney v. Brownlee, 8 A. R. 355, distinguished. *Healey* v. *Dolson*, 8 O. R. 691.

Qualified Indorsement.] — D. indorsed two promissory notes, pour aval, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sale to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm:—Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Robertson* v. *Davis*, 27 S. C. R. 571.

Renewal.]—The maker cannot set up an alleged parol agreement by the holder to renew the note upon being paid half the amount. *Hayes* v. *Davis*, 6 U. C. R. 396.

Renewal.]—Action on a note. Plea, an agreement that when it became due plaintiffs would renew it for one-half, and give three months for the other half; but that they claimed the whole instead of half, which the defendants were ready to pay:- Semble, no defence. *Bank of Upper Canada* v. *Jones*, 1 P. R. 185.

Renewal.]—Action on a note, to which defendants pleaded, in substance, that the plaintiff, who at the time held a note for the same amount, agreed on certain conditions to renew it from time to time for three years: and it was repeatedly renewed as agreed; and that when the note sued on became due, a renewal note and the interest were then tendered and refused, though the three years had not expired. At the trial it was shewn that previous renewals had been made by leaving the renewal note at the agency of the Bank of Montreal in Cobourg, paying the interest and taking up the old note, and when the note now sued upon became due, a renewal note and the interest were tendered to M., the agent of the bank, who refused to accept the same alleging he had no instructions. All the renewals except one, which was made with the testator personally, were made at said bank: —Held, that the tender of the renewal note and the interest to M., the agent of the Bank of Montreal, where the note was payable, was a sufficient tender, as all the other renewals were made there; and that defendant was not bound to tender another renewal and the interest, at the expiration of the three months from the last tender, as the plaintiff had, by his refusal to accept the former tender, repudiated the agreement, and defendant was not informed that he would accept such renewal:—Held, also, on demurrer, that the pleas were bad, as varying the note by parol agreement prior to it. *Harper* v. *Paterson*, 14 C. P. 538.

Set-off.]—Evidence of a verbal agreement to allow the price of land sold by verbal agreement, to be set off against a note:—Held, inadmissible. *McCollum* v. *Jones*, Tay. 442.

Special Purpose.]—Payee against maker. Plea, that defendant made and plaintiff received the note from him, and thence hitherto held the same, on certain terms and for a special purpose only, to wit, that the plaintiff should take care of it for him, and should not negotiate or part with it to any other person, and that there never was any value or consideration for the note except as aforesaid:—Held, a good defence. *Wismer* v. *Wismer*, 22 U. C. R. 446.

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4. *Merger.*

Cognovit.]—A cognovit payable immediately, given by the maker of a note before it fell due, and judgment entered upon it and registered, forms no defence for the indorser. *Bank of Montreal* v. *Douglas*, 17 U. C. R. 208.

Judgment by Prior Holder.]—Declaration by a note made by A., payable to B., (defendant) indorsed by him to C., who indorsed to D., who indorsed to plaintiff; and on the common counts. Pleas, that said note before it became payable was indorsed by plaintiff to one J. H. C., who indorsed to S. B. H., who indorsed it to the Commercial Bank, who were the holders when it matured, and until the recovery by defendant of a judgment in an action brought by the said bank; and that the notice of dishonour alleged to have been given by plaintiff to defendant is an alleged notice said to have been given by the Commercial Bank to defendants in their suit, and no other notice; and that defendant in the suit between the bank and himself recovered a judgment against the bank, and that plaintiff had notice of the action between the bank and defendant, before he became holder of the note:—Held, on demurrer, bad, the action between the bank, the original holder, and the defendant being no answer to an action by any other party on the note who was a subsequent holder to the defendant. *Smith* v. *Burton*, 11 C. P. 273.

Judgment by Prior Holder.]—It is no defence to an action by indorsee against the maker of a note, that a prior indorsee, while the holder and before the plaintiff took it, recovered judgment against defendant and the payee. *McLennan* v. *McMonies*, 23 U. C. R. 114.

Judgment by Prior Holder.]—Indorsee against indorser. Plea, that the payee had before sued defendant and the maker, and obtained a verdict against the maker, and that by a rule of court it was declared that the payee was not entitled to recover against defendant. The evidence shewed that the payee having sued the maker and defendant, the Judge ruled that he could not recover against defendant, whereupon defendant's name was ordered to be struck out of the record:—Held, that neither the payee nor the plaintiff, who sued on his behalf, was barred from prosecuting this action. *Smith* v. *Richardson*, 16 C. P. 210.

Judgment—*Partners.*]—Action on a note and bill against two of the special partners of a partnership formed under the Limited Liability Act, 12 Vict. c. 75, who had jointly made the note, and accepted the bill for the accommodation of the general partner. Defendant pleaded a prior judgment recovered upon and taken in full satisfaction of all the causes of action in the declaration mentioned, against the general partner alone:—Held, that the recovery against one of several joint contractors operated as a merger at law of the inferior remedy of action for the same debt. *Hollowell* v. *Macdonell*, 8 C. P. 21.

Judgment for Note and Legal Interest — *Further Action for Higher Rate.*]—Plaintiff sued defendant as maker and A. as indorser of two notes, adding a count for interest; and at the trial, to support this count, he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent. until payment, in consideration of the plaintiff allowing three months time. The learned Judge ruled that, the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this and satisfied, he sued defendant on his undertaking, to recover twenty-four per cent., the balance of interest agreed to be paid by him:—Held, that the judgment recovered was a bar to any further

claim for interest upon the same notes. *McKay* v. *Fee*, 20 U. C. R. 268.

Judgment.]—Upon an action by the indorsee against the third indorser of a bill:—Held, that final judgment in a previous action on the same bill, in which all parties thereon were sued and served, (and judgment of non pros. not signed, or a discontinuance entered as to any,) but in which the special indorsement and judgment only shewed a cause of action against the drawer and acceptor, did not prevent a separate action against the indorser. *Bank of Upper Canada* v. *Lizars*, 11 C. P. 176.

Mortgage.]—Where a person, having a note of a third party indorsed by the debtor as security for a portion of his debt, takes a mortgage from his debtor for the whole sum due, not referring to, and payable after, the note, and with the usual covenant to pay the money:—Held, that the remedy against the debtor on the note is extinguished. *Matthewson* v. *Brouse*, 1 U. C. R. 272.

Mortgage.]—Indorsee against the maker of a note. Plea, that with the note a mortgage was taken by the payee, with a proviso for its payment according to the tenor of certain notes bearing even date therewith, payable to the payee, of which this was one, and was indorsed to the plaintiff after it was due:—Held, bad, as by the terms of the mortgage, it was evidently taken as collateral security only. *Murray* v. *Miller*, 1 U. C. R. 353.

Mortgage.]—Held, on the facts stated in this case, that the mortgage was clearly no merger, the right to sue on the note being expressly reserved. *Commercial Bank* v. *Cuvillier*, 18 U. C. R. 378.

Mortgage.]—Defendant indorsed to the plaintiffs a note, made by one P., due on the 13th May, 1857. On the 13th April P. executed to the plaintiffs a mortgage, payable on the 1st November, 1857, for a sum including the note; but it was expressly agreed in the mortgage that it should operate as a collateral security only:—Held, that the plaintiffs might sue upon the note when due, although the mortgage was not yet payable. *Shaw* v. *Crawford*, 16 U. C. R. 101.

Mortgage.]—Defendant owing plaintiff a large sum on bills, some overdue, some maturing, gave him a mortgage on land, reciting the debt on the bills, and the plaintiff's agreement to accept further security by way of mortgage, and containing a proviso that it should be void on payment of the bills, and that on default of payment for twelve months the plaintiff might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant, with counts upon the bills:—Held, that there was clearly no merger of the claim upon the bills. *Gore Bank* v. *Eaton*, 27 U. C. R. 332.

Mortgage.]—Held, that the mortgage in this case being expressed to have been given as further security, and providing that it should stand as security for any renewal of the bills sued on, was collateral only, not a merger. *Gore Bank* v. *McWhirter*, 18 C. P. 293.

Held, also, that the remedy on the specialty and simple contract not being co-extensive or between the same parties, the doctrine of merger did not apply. *Ib.*

Mortgage.]—Held, upon the deeds, pleadings, and facts, as given at length in the statement of the case, that the defendants, indorsers, were discharged from the notes sued upon, (though not so intended by the plaintiffs,) by the plaintiffs having taken from the maker a mortgage of certain steamboats, with a power of sale in case of default in the payment of the notes, and upon which the plaintiffs had sold the boats to third parties for the amount of the defendants' liabilities on the notes, giving credit to the purchasers for the purchase money, and taking their notes and a mortgage on the same boats as security. *Bank of British North America* v. *Jones*, 8 U. C. R. 86.

Mortgage—*Equitable Effect.*]—The effect in equity of the instruments which came in question in the last case considered, and held by the Chancellor to be the same as that case decided it to be at law. Per Esten, V. C.—The effect in equity is a mere transfer of the rights of the bank as mortgagees. Per Spragge, V. C.—The effect in equity is prima facie an absolute sale of the notes and steamboat, not subject to redemption: and the plaintiffs to do away with this effect must impeach the deed, which was not done by the bill in this case. *Sherwood* v. *Bank of British North America*, 3 Gr. 457.

Mortgage.]—The holder of a mortgage security may take in addition a note from the mortgagor with an indorser; and the fact that the time mentioned for the defeasance of the mortgage is a period beyond the maturity of the note is, in the absence of fraud, no defence to the indorser. *Bank of Upper Canada* v. *Sherwood*, 8 U. C. R. 116.

Mortgage.]—To a declaration on five bills by indorsee against the drawer and acceptor, the drawer, W., pleaded that after one of the bills became payable, and while the others were running, it was agreed that W. should mortgage certain lands to secure all the bills, and that twelve months from the date of the said debenture should be given to defendant for payment of the same, and all interest, damages, &c., by reason of the non-payment. The plea then set out the mortgage, whereby, —after reciting that the defendant W. had drawn bills upon, which were accepted by, defendant P., and of which a portion was overdue, which bills were indorsed by W. to the plaintiffs; and that the defendant, being unable to pay said bills, had agreed to make this security to M. (one of the plaintiffs) to secure them against the non-payment of the said bills,—in consideration of the premises and of 5s. W. conveyed to M. (one of the plaintiffs) certain leasehold property, subject to a proviso that if said W. should retire the said bills, and pay unto the said firm of the plaintiffs, or the parties legally entitled, all sums of money, damages, &c., by reason of said bills, within twelve months from the date of the said indenture, and if he should then indemnify the plaintiffs of and from all payments, &c., by reason of the premises, then the mortgage should be void, &c.; containing also a covenant by W. to perform the covenants in the said proviso, and a proviso for

possession until default:—Held, that such mortgage was only a collateral security for the bills; that there was no merger; and that the plaintiffs might sue upon this bill before the expiration of the twelve months. *Ross* v. *Winans*, 5 C. P. 185.

Mortgage.]—A debtor gave to his creditor a mortgage and notes for the same debt, the latter payable at the same times as the instalments of the mortgage and no allusion was made in either instrument to the other. The creditor subsequently passed both instruments to separate parties, as collateral securities for debts. Upon ejectment for an instalment on the mortgage, the defendant proved the facts, and that he had paid the note given for the instalment:—Held, that the plaintiff was entitled to recover. Semble, that the note merged in the higher security. *Fairman* v. *Maybee*, 7 C. P. 467.

Mortgage—*Reservation of Rights.*]—B., to the plaintiff's knowledge when he became the holder thereof, indorsed a promissory note for $1,400, dated 7th November, 1876, payable four months after date, as surety for H., the maker. On 3rd February, 1877, before the maturity of the note, the plaintiff, without B.'s knowledge, accepted a chattel mortgage for the amount secured by the note and for some additional items, with a proviso for redemption on 3rd February, 1878, with interest at ten per cent., and with the usual covenants for payment. The mortgage did not on its face refer to the note, but it was proved that it was the understanding between the plaintiff and H. that it was to be received as collateral security only, and not to affect the plaintiff's remedy on the note:—Held, that B., the surety, was not discharged; that the mortgage did not operate as a merger of the note, not being by the same parties and for the same debt as the note; and that the reservation of the remedy on the note, notwithstanding the giving of time by the mortgage, might be shewn by parol evidence, without appearing on the face of the mortgage. Quære, whether the taking of a specialty security from one of two joint debtors on a simple contract will operate as a merger; and whether Loomis v. Ballard, 7 U. C. R. 366, can be followed since Sharpe v. Gibbs, 16 C. B. N. S. 527, and Boaler v. Mayor, 19 C. B. N. S. 76. *Curric* v. *Hodgins*, 42 U. C. R. 601.

Mortgage.]—The plaintiffs took a mortgage from one M., to secure the payment of certain promissory notes made by him and indorsed to them by the defendant. The mortgage was subject to a proviso to be void on payment of $4,300 with interest in one year, "the said sum of $4,300 being represented by certain promissory notes now under discount, and held by the said mortgagees, and any renewals or substitutions therefor that may hereafter be given for the same. All to be paid within one year from this date:"—Held, affirming 40 U. C. R. 529, that there was no merger, and the mortgage was merely collateral security, and did not suspend any right of action on the notes. *Molsons Bank* v. *McDonald*, 2 A. R. 102.

Mortgage.]—The plaintiff holding defendant's note, takes a chattel mortgage, intending it as a collateral security:—Held, that the right to sue on the note was extinguished. *Parker* v. *McCrea*, 7 C. P. 124.

Mortgage.]—The plaintiffs sued defendants, H. M. and S., as joint makers of a note. H. and M. did not appear and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded: 1. A mortgage given for the same money by M., M. and S. being sureties for H.:—Held, that the giving a mortgage by M., one of the two sureties, did not of itself discharge S., the other surety. *Kerr* v. *Hereford*, 17 U. C. R. 158.

Mortgage.]—H. & Co. holding several notes of F., all overdue except one, take a mortgage for the total amount thereof:—Held, that the remedy on the notes was extinguished. *Fraser* v. *Armstrong*, 10 C. P. 506.

Mortgage.]—Held, that in taking a mortgage for $1,300, and subsequently a note for $1,353.75, there could be no merger. *Bank of Upper Canada* v. *Bartlett*, 12 C. P. 238.

Mortgage — *Collateral Security* — *Discharge.*]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—Held, affirming 29 A. R. 695, that the note having been given for the mortgage debt C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands, which he had incapacitated himself from doing:—Held, also, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from the liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Mortgage.]—Action on a note for $350. Plea, that the note had been taken as collateral to a mortgage, in satisfaction of which defendant and plaintiff had come to a settlement, and defendant had given a new mortgage for what he owed the plaintiff, in which the note had thus become merged:—Held, that the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover; and that from the evidence stated in the case it appeared that the note was given for a sum quite distinct from the mortgage debt. *Boulton* v. *McNab*, 14 C. P. 598.

Mortgage.]—Defendant owing the plaintiff on bills and notes, executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land, but on searching at once he found a prior incumbrance, and told defendant he would not accept the mortgage:—Held, that plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a re-conveyance. *Adams* v. *Nelson*, 22 U. C. R. 199.

Proceedings in Insolvency.]—Declaration on a note by defendant payable to plain-

tiff. Plea on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against the defendant, under the Insolvent Act of 1864, for the same cause of action, subsequently to the declaration in this cause:—Held, on demurrer, plea bad. *Baldwin* v. *Peterman*, 16 C. P. 310.

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5. Payment and Satisfaction.

Bond.]—Declaration on three notes given by testator in his lifetime. Plea, that after testator died and the notes fell due, the plaintiff and defendants accounted together and struck a balance, for which defendants gave their bond, to pay out of the first moneys they should receive from the estate within eighteen months:—Held, bad, as not shewn to be given in satisfaction of the notes or of cross demands, and therefore only a payment pro tanto for the amount of it. *Muir* v. *Lawrie*, 11 C. P. 252.

Charging Up in Bank Account.]—Note given by E., payable to the plaintiff at the bank of defendants, who were bankers for both E. and the plaintiff—Note charged to E.'s account and credited to the plaintiff:—Held, a payment and irrevocable. See *Nightingale* v. *City Bank of Montreal*, 26 C. P. 74.

Conditional Payment—*Summary Judgment.*]—At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit to the amount of the cheque:—Held, refusing a motion for judgment under Rule 80, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn:—Held, on appeal, that on the state of facts presented the plaintiffs were not entitled to the indulgence of a speedy judgment and execution. *Lowden* v. *Martin*, 12 P. R. 496.

Covenant.]—To an action on a joint note made by M. and K., each pleaded separately, that after the note fell due, M. by indenture covenanted with the plaintiff to pay him $319, (a sum less by $2.80 than the amount of the note,) with interest at fifteen per cent., in one year, and delivered said indenture to the plaintiff, who accepted it; and that the money mentioned in the declaration and in the indenture was the same:—Held, pleas good, though the indenture was not alleged to have been accepted in satisfaction, and the sum secured by it was less than the note. *McLeod* v. *McKay*, 20 U. C. R. 258.

Dishonour of Bill Taken in Satisfaction.]—A replication to a plea stating that a bill had been taken in full satisfaction and at all hazards by the plaintiff, that the bill was dishonoured when due, is bad on general demurrer. *Goldie* v. *Maxwell*, H. T. 4 Vict.

Evidence.]—Action by indorsees on a note made by L. payable to defendant G. W., and indorsed by him to defendant F. W. The pleas were, in substance, that the plaintiffs accepted from G. W. another note in satisfaction of the note sued on:—Held, on the evidence stated in the case, that this defence was not proved. *Whittemore* v. *Lines*, 7 C. P. 403.

Evidence.]—To an action on certain notes and bills of exchange, and on the common counts, against the defendant as jointly liable with one H., defendant pleaded satisfaction and discharge of plaintiff's claim before action, by executing with H. an assignment of their joint effects to plaintiff and another for the benefit of creditors, and that plaintiff accepted this in full satisfaction and discharge of the causes of action in question. At the trial parol testimony was admitted of the agreement to accept the assignment in satisfaction and discharge:—Held, that it had been properly received, the effect of it being not to vary the terms of the writing, but merely to prove a collateral fact. *Whitney* v. *Wall*, 17 C. P. 474.

Evidence — *Stamps.*]—In an action by plaintiff as administratrix of Mrs. T., widow of T., deceased, against defendants, T.'s administrators, on two promissory notes alleged to have been made by T. to Mrs. T., there was no evidence of the wife having given any value for the notes, or of being possessed of or claiming any interest in them in her lifetime, nor that they came to the plaintiff among papers in Mrs. T.'s possession at the time of her decease, while the reasonable presumption from the evidence was that if Mrs. T. ever had any claim on them it had been paid. It also appeared that prior to the commencement of this action, on the payment by the defendants, as administrators of T., to the plaintiff of a sum of money owing to her as said administratrix, she executed a release of all claims against the estate:—Held, that under these circumstances the plaintiff clearly could not recover. One of the notes had no stamps affixed to it, while the other was insufficiently stamped, and both were in this condition during Mrs. T.'s lifetime and for nearly six years after they became due:—Held, that the invalidity of the notes would also prevent the plaintiff from recovering; and that the privilege of affixing double duty should not on the facts be allowed to the plaintiff as such administratrix. *Denham* v. *Brewster*, 28 C. P. 607.

Garnishee.]—Plea of payment to garnishee. See *Roblee* v. *Rankin*, 11 S. C. R. 137.

Intention — *Partners.*] — A promissory note for $6,200, made by the president and secretary of a syndicate formed for completing the Hamilton and Dundas street railway, in favour of O., S., and the defendants, was indorsed by them to the Bank of Commerce or order. On the day the note fell due O. and S. respectively paid the same, O. paying $2,000 and S. $4,200, the remaining sum due thereon, S. at the time directing the bank agent to indorse it to the plaintiff, who it ap-

peared gave no value for it. The agent indorsed it as follows: "Pay to J. S.," the plaintiff "or order. D. Hughes Charles, manager." The plaintiff thereupon sued the defendants as indorsers:—Held, that the plaintiff could not recover, for the evidence shewed that S. by his payment intended to satisfy the note, which being made for a purpose directly relating to and not collateral to the partnership of which S. and defendants were partners, S. could not recover against defendants thereon, and as the plaintiff was found to have only the same right as S., neither could he recover. *Small* v. *Riddel*, 31 C. P. 373.

Judgment and Execution Against Other Makers.]—The plaintiff sued defendants, H., M. and S., as joint makers of a note. H. and M. did not appear and judgment was signed by mistake against all but afterwards set aside as against S., who pleaded, that a judgment had been obtained in this suit against all three defendants, and set aside as against S, but under the fi. fa. sued out upon it the sheriff had seized goods of H. and M. more than sufficient to satisfy the judgment and costs, and that he had made thereout £50, and still held the rest of the goods, out of which he could make the residue:—Held, that an application to strike out the names of H. and M. from the record, so that they might be called as witnesses for S., was properly refused. That the second plea was not supported, the evidence being that all the goods seized brought only £9 at the sale. Quere, whether the plea formed a good defence. That if by taking judgment against the defendants not appearing, the plaintiffs under C. L. P. Act, s. 96, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. Semble, however, that the plaintiff had not elected within the meaning of that clause to proceed against the others separately, the judgment against S. having been set aside. *Kerr* v. *Hereford*, 17 U. C. R. 158.

Judgment against Indorser.]—To a declaration on a judgment recovered against defendant in the court of Queen's bench for damages and costs, defendant pleaded that the judgment was recovered upon a note made by defendant, payable to the order of one Scott, who indorsed to one Scanlon, who indorsed and delivered to plaintiffs, who became and were the holders at the time of the recovery of said judgment; that defendant made the note and Scanlon indorsed for Scott's accommodation, and as his surety, to secure a debt due from him to plaintiffs, and that when the note was made, indorsed, and delivered, it was agreed between defendant, Scott, Scanlon, and plaintiffs, that defendant and Scanlon should be liable thereon to plaintiffs as sureties for Scott, and that except as aforesaid there was no value or consideration for the making, indorsing, or payment of the note by defendant or Scanlon; that Scott having made default in payment of his debt, plaintiffs sued Scanlon as indorser, and recovered judgment against him, being the same debt for which the judgment declared upon in this action was recovered, and Scanlon afterwards and before action satisfied the amount of the said judgment and costs by payment to plaintiffs, and therewith and thereby paid and satisfied plaintiffs' claim in respect of the cause of action in the introductory part of the plea mentioned:—Held, on demurrer, a bad plea. *Bank of Upper Canada* v. *Mercer*, 18 C. P. 390.

Notes Given Back to Maker.]—Where in a deed of separation the husband covenanted to pay his wife £150, and appointed trustees, who, being indebted to the husband in the amount, gave him their separate notes for payment to his order, which he indorsed in blank, and returned to them for the benefit of his wife, and one of the trustees then gave to the wife the notes signed by him, with an indorsement that they were not to be sold by her, and she assigned them to the plaintiff:—Held, that he could not recover against the trustee on the notes, as they having been returned by the husband to the trustee were cancelled; and that the wife had, at any rate, no power to transfer them. *Wilson* v. *McQueen*, E. T. 3 Vict.

Order in Favour of Third Person.]—Declaration, payee against the maker of a note for £50, dated 24th December, 1844, payable three months after date. Plea, as to £24 parcel, &c., accord and satisfaction, by defendant accepting an order on the 6th March, 1847, in favour of J. C. Spragge, as required by plaintiff; and as to the residue, a set-off:—Held, plea bad; 1. in leaving unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the two years or more which had elapsed between the maturity of the note, and the time of giving the order; and, 2. in not giving at length the Christian names of J. C. Spragge, or stating that he was so described in the order. *Playter* v. *Turner*, 5 U. C. R. 555.

Payment by Drawer.]—In an action by the indorsee against the acceptor of a bill not appearing to have been accepted for the accommodation of the drawer, a plea of payment by the drawer is no defence, unless shewn to have been made on the acceptor's account and adopted by him at the time of payment or subsequently. *Bank of Montreal* v. *Armour*, 9 C. P. 401.

Payment to Prior Holder.]—Declaration on a note made by defendant payable to the order of S. T. & Co., and indorsed by them to plaintiff. Pleas: 4. that the note was made by defendant for the accommodation of the payees, to raise money thereon, and indorse the same to their own use before its maturity, and not otherwise; and that there never was any value or consideration to defendant except as aforesaid; that the payees indorsed and negotiated it with the Commercial Bank for their own use according to said terms; that it was afterwards protested, and S. T. & Co., on behalf of defendant, subsequently paid it to said bank, and it was then returned to S. T. & Co., by the bank for and on account of defendant; that S. T. & Co. afterwards and in fraud of defendant first indorsed it to plaintiff. The fifth plea was similar to the fourth only that it concluded thus: "And S. T. & Co., without defendant's authority, first indorsed the note to plaintiff after the payment and discharge:"—Held, on demurrer, pleas good. *Pyper* v. *McKay*, 16 C. P. 67.

Prior Indorser Becoming Holder.]—A. makes a note payable to B. or order; B.

indorses to C., who indorses to D.; D., the holder, dies, leaving B. one of his executors; the executors of D. sue C.:—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against the subsequent indorser. *Jenkins* v. *McKenzie*, 6 U. C. R. 544.

Purchase of Stock — *Forfeiture.*] — Where a stockholder in a joint stock company had given notes for his stock, which he afterwards forfeited by not complying with the conditions of the association:—Held, that he could not set up such forfeiture as a defence to an action on the notes for the benefit of the company. *Glassford* v. *McFaul*, T. T. 3 & 4 Vict.

Renewal Note Substituted.]—Where a note overdue has been retired and settled by a renewal note, it is cancelled, and cannot be put in circulation again even by the payee who has taken up the renewal note out of his own funds. *Cuvillier* v. *Fraser*, 5 U. C. R. 152.

Renewals.]—Payment by giving renewals. See *Dominion Bank* v. *Oliver*, 17 O. R. 402; *Blackley* v. *Kenney*, 19 O. R. 169.

Running Account.]—Where A., the indorsee of a note, sued B. the payee, and it was proved by C., the maker, that the note was made an item in the current account between A. and C. (the maker); that it was long before charged to the maker as a debt due by him, and that when it was so charged the balance was in the maker's favour:—Held, that the note must be taken to have been paid by the maker, and that it must be so taken as soon as subsequent credits are admitted by A. sufficient to cover the note, though when the note was charged the balance was not in C.'s favour. *McGillivray* v. *Keefer*, 4 U. C. R. 342.

Set-off Against one Holder.]—A., being sued upon a note by the executors of W., as bearer, pleaded that F., the acting executor, being the holder, accepted an order drawn by one D. on him, in favour of M., for £50, and that M. being the defendant's agent, it was agreed between F. & M. that the note should be paid out of the £50, and F. thereupon cancelled said note. The evidence shewed that defendant went with the order to F., which F. said he would accept, and pay the note out of it, but there was no acceptance in writing, the note was not given up, and the order was obtained again some months after by M.'s executor:—Held, that the plaintiffs were entitled to recover. *Williams* v. *Marshall*, 20 U. C. R. 230.

Substitution of Liability.] — Assumpsit on common counts. Pleas, as to £227, parcel, &c., that the plaintiffs in payment of that sum drew on intestate in favour of M. or order, which defendant as administratrix accepted; and that after such acceptance, and while M. was the holder, he, M., cancelled the said bill and returned it to defendant. Replication, that M. received such bill as plaintiff's agent; that while he held it, defendant being entitled to certain insurance moneys for the loss of the goods for which said bill was drawn, and it being customary for plaintiffs in such cases to receive the insurance moneys, and apply them in the payment of the goods, and M. being aware of such custom, and presuming that the insurance moneys would be received by the plaintiffs, returned the said bill to the defendant as cancelled, without intending to discharge defendant unless such insurance moneys should be paid; that said insurance moneys were not paid to plaintiffs; and the price of said goods and the bill still remain unpaid: — Held, replication bad. *Waters* v. *Lyon*, 15 U. C. R. 134.

Substitution of Notes.] — Defendants made the note sued on, payable to D. or bearer, for $348.40, with interest at 15 per cent. The note was made to D., and delivered to him as reeve of the township, for money loaned by the latter, and was left with S., the treasurer, for plaintiffs. Subsequently the defendant Moore gave his own note for $278, payable to S. (but not to order), S., without authority from plaintiffs, giving up to him the former, the difference between the two notes being a loan to S. himself, though included in defendants' note. S. having died, his accounts with plaintiffs were adjusted by plaintiffs with his surety, who was charged with the note sued on, which he arranged by giving the note for $278 and his own note for $70; and a balance of $183 was, as agreed to by plaintiffs, paid by and a receipt therefor given to him in full of plaintiffs' claim against S. After this settlement, plaintiffs, by a resolution in council, recognized this note for $278 as amongst their existing securities, thus shewing that they were aware of its having been received in substitution of the note sued on:—Held, that, taking the whole transaction together, there was such a ratification of the acts of S. by plaintiffs in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for $278 with other notes and money in full satisfaction of all claims on the note sued upon, it was evidence to go to the jury of the payment of this note under a plea of payment. Held, also, that the plaintiffs could enforce payment of the note for $278 in the names of the representatives of S. *Township of North Gwillimbury* v. *Moore*, 15 C. P. 445.

Substitution of Notes.]—Plaintiff holding defendant's note, (not negotiable,) payable on demand, for £500, in transactions with one R., (a partner of defendant) gave it to R., taking in return his note for £1,000, for this and other transactions. In dissolving partnership, it was arranged that this £1,000, or note of R.'s, should be paid by the defendant. R. being subsequently called upon for payment, obtained defendant's cheque for £500, and returned defendant's original note for £500 to plaintiff in payment of the note for £1,000. Upon an action brought for the amount of the note of £500, defendant pleaded satisfaction thereof by the taking of R.'s note for £1,000:—Held, that the facts did not amount to a payment, and that defendant was liable. *Booth* v. *Ridley*, 8 C. P. 464.

Surrender of Property.] — Where defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed that if default were made in the payment he would give up the property, and plaintiff should sell it to pay himself, and give the overplus, if any, to defendant, and at the same time defendant gave the plaintiff his notes for the purchase money, which were not to be acted

on if the property were given up; on default having been made the property was given up and sold by the plaintiff for less than the mortgage money, and an action was then brought on one of the notes to recover the difference:—Held, that it would not lie, the notes having been satisfied by the surrender of the property according to agreement. *Smith* v. *Judson*, 4 C. S. 134.

Transfer of Notes after Agreement to Give Them Up.]—Where, in trover for notes against the maker, it appeared that the notes had been given by him on a purchase of land: that the payee afterwards agreed to deliver them up to him on a good consideration: that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party; and that the defendant afterwards received them, having first had notice of the assignment; and, no fraud having been shewn, the jury found for the defendant:—Held, on motion for a new trial, that as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right in the absence of proof of fraud. A new trial was therefore refused. *Small* v. *Bennett*, T. T. 3 & 4 Vict.

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6. Plaintiff not the Bonâ Fide Holder.

Collateral Security — *Indemnity.*] — Held, on demurrer to the equitable plea set out in the report of this case, that apart from the objection as to a perpetual injunction not being obtainable, the holder of notes, transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before the liability arises, and that the payee cannot enlarge or vary the maker's liability to pay them:—Held, also, that the plaintiff, who held the notes, indorsed to him in blank, as his father's agent, could, as such agent, sue upon them in his own name. *Ross* v. *Tyson*, 19 C. P. 294.

Coroner.]—The plaintiff, as coroner, sued upon a note made by defendant payable to B. or order, alleging that while it remained unpaid one M. recovered a judgment against B., C., and D., and issued a fi. fa. directed to the plaintiff, under which he seized the note. Defendant pleaded, that after the making of the note, and before this suit, B., being the owner and holder of said note, delivered it to C. to receive the amount thereof, and pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the Judge of the county court as to the debts due them, &c., and the note was then filed in the court of common pleas; that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others in collusion with him, and the plaintiff, at the commencement of this suit was the holder of the said note by fraud:—Held, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vict. c. 57, s. 22; plea bad, as shewing no defence. *Brown* v. *Gordon*, 16 U. C. R. 342.

Division Courts Act—*Pleading.*]—In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, s. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute; but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but semble, that it is not essential. *McDonald* v. *McDonald*, 21 U. C. R. 52.

Finder of Note.]—To an action on a note by plaintiff as bearer against the makers, defendants pleaded that after the making of the note, and before it became due, the plaintiff, for a valuable consideration, delivered it to certain persons to defendants unknown, who lost the said note, and the same came into the hands of the plaintiff by finding, and not by assignment or delivery for consideration; and that the said persons unknown were and still are entitled to said note, and the money due thereon:—Held, a good defence. *Wanzer* v. *Stoutenburgh*, 13 U. C. R. 184.

Indorser—*Estoppel.*]—In an action by indorsee against maker and indorser, a verdict was found in favour of the maker, on the ground that his name had been signed to the note without authority, and against the indorser; and a new trial was granted as to the indorser only:—Held, that the jury at such trial were rightly directed that the use of the maker's name without authority was a fact material for them to consider in connection with other evidence offered, to shew that the plaintiff took the note with knowledge of the circumstances. *Hanscome* v. *Cotton*, 16 U. C. R. 98.

Quære, as to how far an indorser is estopped from denying the maker's signature. *Ib.*

Nominal Plaintiff—*Solicitor's Clerk.*]—A firm of solicitors, in whose hands a note had been placed for suit, got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit:—Held, that he was the lawful holder. *Shepley* v. *Hurd*, 3 A. R. 549.

Pleading.]—Replications to pleas setting up defence that plaintiff not the holder—Form of. See *Morton* v. *Thompson*, 1 U. C. R. 178; *Bank of British North America* v. *Ainley*, 7 U. C. R. 33.

Pleading.]—Plea, that before the note became due, plaintiff indorsed it to a person unknown, who is the holder. Replication, that plaintiff was when suit brought, and is the holder, without this, &c.:—Held, bad, on special demurrer. *Brunskill* v. *McGuire*, 3 C. P. 408.

Pleading.]—Payee of a bill against the drawer. Plea, that the plaintiff at the commencement of this suit, was not the holder,

without averring specifically an indorsement to some one else:—Held, bad. *Boyes* v. *Joseph*, 8 U. C. R. 273.

Title through Undischarged Insolvent.]—Note made to an undischarged insolvent.—Right of indorsee for value to recover, though aware of the insolvency, and grounds on which the maker is liable. See *Perkins* v. *Beckett*, 20 C. P. 395.

Wife's Legacy—*Reduction into Possession.*]—Defendant delivered to the wife, since deceased, of the plaintiff, a note in payment of a legacy bequeathed to her, and she died before payment:—Held, that a plea that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action on the note. *Robinson* v. *Cripps*, 6 C. P. 381.

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7. *Release.*

Accommodation Acceptor.]—The holder of a bill for value, though having subsequently became aware of its being an accommodation bill, may release the drawer without releasing the acceptor. *City of Glasgow Bank* v. *Murdock*, 11 C. P. 138.

Accommodation Maker—*Time Given to Indorser.*]—Indorsee against maker. Special plea on equitable grounds, held good on demurrer, on the authority of Bailey v. Edwards, 9 L. T. N. S. 646, as averring that the plaintiffs gave time to an indorser, knowing that defendant was only an accommodation maker. *Bank of Upper Canada* v. *Ockerman*, 15 C. P. 363.

Accommodation Maker—*Time Given to Primary Debtor.*]—A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for $1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands:—Held, that the married woman was a surety in respect of the note for her son; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge; and that she had been discharged by the extension of the time of payment. *Devaney* v. *Brownlee*, 8 A. R. 355.

Accommodation Maker — *Time to Indorser.*]—Declaration on a note made by defendant and indorsed by one M. to plaintiffs. Plea, on equitable grounds, that the defendant was surety for M., and made the note for his benefit without value, of which the plaintiffs became aware after they became the holders thereof, and after notice thereof gave time to M., and thereby released defendant. On demurrer, held, bad. *Bank of Upper Canada* v. *Thomas*, 11 C. P. 515.

Assignment to Plaintiff by Acceptor.]—Declaration upon four bills of exchange for £500 each, drawn by R., H. & Co., upon one J. C., payable to and indorsed by defendant. Defendant pleaded, 1, payment; 2, an assignment made by J. C. to one T. P., for the benefit of his creditors, with plaintiffs' assent and concurrence, and that T. P., with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied, on equitable grounds, that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a nolle prosequi as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500. Upon demurrer, held, that the executing of an assignment by the holder of a bill, without a special reservation of rights as to sureties, discharges them; and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C. in their hands to be applied upon the bills declared on, and until they had done that, no cause of action accrued against the defendant. For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bills sued upon, and therefore the replication was bad. *Commercial Bank of Canada* v. *Wilson*, 11 C. P. 581.

Discharge of some Defendants.]—Held, affirming Hamilton v. Holcomb, 12 C. P. 38, that where the holder of a bill or note sues, under the statute, the drawers, acceptors, and indorsers, in one action, he may discharge the drawers or indorsers (or accommodation acceptors) after an arrest under a ca. sa., without losing his remedies against the other defendants liable in priority to those discharged. *Holcomb* v. *Hamilton*, 2 E. & A. 230.

See, also, *Hamilton* v. *Holcomb*, 11 C. P. 93, to same effect.

Evidence.]—The appellant claimed that he was only a surety for his co-defendants, and that he was discharged by time being given to the principal to pay the note:—Held, that the fact of time being so given being negatived by the evidence, it was immaterial whether appellant was principal or surety. Judgment below, 20 N. S. Rep. 509, affirmed. *Wallace* v. *Souther*, 16 S. C. R. 717.

Indorser—*Time Given to Maker.*]—A plea by indorser of time given to the maker must shew that the plaintiff was then the holder. *Commercial Bank* v. *Johnston*, 2 U. C. R. 126.

Indorser—*Time Given to Maker.*]—One A., holding a note indorsed by defendant, agreed with the maker that upon payment of an extra amount of interest he would take another note at a longer date; all the extra interest except $3 was paid. The note being then sent, was refused, on account of the non-payment of the balance of interest. The maker of the note afterwards declined giving the note. Upon an action brought by the holder against the indorser of the original note, held, that he was released. *Arthur* v. *Lier*, 8 C. P. 180.

Indorser — *Time Given to Maker.*]—Declaration against the Oshawa Manufacturing Company as makers, and G. as an indorser

of a note. Plea by indorser, that it was agreed between plaintiff and the makers, by their president, without the consent or knowledge of the indorser, that the payment should give the makers time for payment of the note, in consideration of interest at £14 per cent. which the makers, by their president, agreed to pay for the extension:—Held, a good defence. *Farrell* v. *Oshawa Manufacturing Co.*, 9 C. P. 239.

Indorser Released by Release of Maker.]—The holder of a note recovered judgment thereon against the makers and indorsers, which was duly registered so as to create a lien on the real estate of the makers; subsequently he accepted from the makers of the note a composition of fifty per cent., and discharged their lands from further liability, expressly retaining the right to go against their personal assets, and he proceeded to execution against the goods of the indorser:—Held, a discharge of the indorsers from further liability; and a perpetual injunction was granted restraining further proceedings in such action. *Mellish* v. *Green*, 5 Gr. 655.

Interest Accepted Beyond Due Date.]—An indorsement on the back of a note of the payment of interest up to a future date beyond the maturity of the note, in the absence of evidence of mistake, is to be deemed an extension of time for the payment of the note to such date, so as to discharge a party thereto who is merely a surety for the payment thereof. *Ryan* v. *McKerrall*, 15 O. R. 460.

Joint Acceptors—*Time to One.*]—A joint acceptor of a bill cannot be heard to say that he was surety for the other acceptor and is on that account discharged by time given to his principal. *Nafis* v. *Soules*, 2 C. P. 412.

Joint Makers—*Time to One.*]—One of two joint makers of a note cannot plead that he made the note with the knowledge of the plaintiff, the indorsee, only as surety for the other maker; that the plaintiff gave time to the other maker without his knowledge or consent; and that he was thereby discharged. *Davidson* v. *Bartlett*, 1 U. C. R. 50.

Joint Makers—*Time to One.*]—Action on a note made by defendants payable to T. or bearer, and by her delivered to plaintiffs. Plea, on equitable grounds, by one of the defendants, M., that he made the note as a surety for the others; that after it became due, T., in consideration of a certain sum paid to her, gave time to them without his, M.'s, consent; and that plaintiff took the note after it became due, with knowledge of the premises:—Held, good. *Perley* v. *Loney*, 17 U. C. R. 279.

Joint Makers—*Pleading.*]—Plea, setting up a similar defence:—Held, bad, as shewing only a mere forbearance to principal debtor, not a binding agreement to give time. *Thompson* v. *McDonald*, 17 U. C. R. 304.

Payment by Indorser.]—In an action by a second indorser against the maker and prior indorser on a note, the maker suffered judgment by default, and the indorser pleaded that the note was given by the maker to one H., to whom the maker was indebted, and indorsed by himself and plaintiff as sureties for the debt, and that upon action brought by H. against all the parties thereto, the plaintiff paid the same, and thereby released all the other parties from their common liability. Upon demurrer:—Held, no defence, for the facts shewed no release. The question of contribution between plaintiff and defendant as co-sureties did not arise upon the pleadings. *Niblock* v. *McGregor*, 12 C. P. 596.

Pleading.]—In an action by indorsees for value, against the firm of M. & C., on a bill drawn by S. & Co., in their own favour, accepted by the defendants and indorsed by S. & Co. to plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. in the name of the firm as an accommodation for S. & Co., and without his, C.'s, authority, and was not within the scope and objects of the partnership business, and that the plaintiffs took it with notice. Also, equitably, that the plaintiffs after the bill had matured, having notice of the accommodation acceptance, agreed with S. & Co., the drawers, without the consent of defendants to accept a composition from S. & Co., which composition was paid to plaintiffs, who thereupon discharged S. & Co. from liability; and that defendants were discharged in equity thereby. On demurrer:—Held, 1. That the first plea was insufficient in not stating that the acceptance had no reference to any dealing between S. and the firm of M. & C. 2. That the equitable plea was bad, for the plaintiffs, having notice only after the bill matured, might release the drawers without releasing the accommodation acceptors. *City of Glasgow Bank* v. *Murdock*, 11 C. P. 138.

Reservation of Rights.]—The acceptance by a creditor of part of his demand against his debtor, and agreeing not to sue him, with a reservation of the creditor's rights against a surety of such debtor, will not discharge the surety. Where, therefore, the holders of a bill received from the acceptor a composition of the debt, and executed a deed to that effect, but expressly reserved their rights against the drawer:—Held, that the drawer was not discharged. *Wood* v. *Brett*, 9 Gr. 452.

Reservation of Rights.]—The payee of a note indorsed for the accommodation of the maker, having obtained judgment against the maker and indorser, released the maker, reserving all his rights against the indorser:—Held, that he was entitled to do so, and might still enforce the judgment against the indorser. *Bell* v. *Manning*, 11 Gr. 142.

Reservation of Rights.]—A replication that when the time complained of was given it was expressly understood and agreed that the plaintiffs should reserve all their rights against the acceptor:—Held, good on demurrer. *Bank of Upper Canada* v. *Jardine*, 9 C. P. 332.

Reservation of Rights.]—Declaration on a note made by defendants P., W., and D., jointly and severally, payable to plaintiffs. Equitable pleas. 1. By defendant D., that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due, the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W., that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.; that it was delivered to and accepted by the plaintiff from

the defendants upon an express agreement that W. and D. should be liable only as sureties, and that the plaintiff without W.'s consent, by deed released P. Equitable replications: 1. That the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in $250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the $250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "$250, not any sureties on this;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed. 2. That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties:—Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient:—Held, also, that the second replication was bad. *Fowler* v. *Perrin*, 25 U. C. R. 227.

Reservation of Rights.]—After the maturity of a note for $300, and after an action had been commenced against the defendant, one of the indorsers thereof, alleged to be a surety, the principal debtor executed a document whereby he acknowledged his liability on the note, notwithstanding that defendant had been sued solely thereon, the Statute of Limitations or any legal or equitable defence that might be set up; and he covenanted to pay the note and interest by half-yearly payments of $50 each. There was contradictory evidence as to the acceptance of the document by the plaintiff:—Quære, whether the document, if accepted by plaintiff, constituted a discharge of the surety by the giving of time; and whether the statement of the pendency of the action against defendant could be looked upon as a reservation of plaintiff's rights against him. *Pirie* v. *Wyld*, 11 O. R. 422.

Reservation of Rights.]—The holders of certain promissory notes agreed with the maker thereof, and certain of the indorsers, to extend the time for payment. The agreement expressly reserved all rights and remedies against persons other than parties to the agreement:—Held, that under these circumstances a subsequent indorser, not privy to the said agreement, was nevertheless not released thereby, for that his rights against the maker and prior indorsers were not prejudiced, inasmuch as the reservation of the rights of the holder against him, involved the reservation of his rights against the others. *Canadian Bank of Commerce* v. *Northwood*, 14 O. R. 207.

Held, also, that the fact that the agreement between the holders of certain notes with the maker thereof, and certain of the indorsers, provided that upon payment and satisfaction of the holders certain collateral securities were to be assigned to one of the other parties to the agreement, did not discharge the subsequent indorser, for the arrangement was not absolute but limited to those who were parties to it as between themselves only, and did not affect the subsequent indorser's claim to the possession of the securities if he paid the holders. *Ib.*

Surety—*Giving Time.*]—The holder of a note, to which one of the defendants was a surety, accepted a new note from the principals without his knowledge or consent, payable after the maturity of the old note, on the understanding that he would not proceed on the original note, which he retained, unless the fresh note was not paid at maturity:—Held, that the surety was discharged, and that there was no reservation of the remedy against him. *Shepley* v. *Hurd*, 3 A. R. 549.

The fact that a party joins in a note as a surety to enable the principals to raise money to apply towards the discharge of certain obligations to him does not prevent his being a surety. *Ib.*

Surety—*Discharge of Maker.*]—Where the holder of a promissory note had agreed to accept a third party as his debtor in lieu of the maker:—Held, affirming 20 A. R. 298, sub nom. Holliday v. Hogan, that as, according to the evidence, there was a complete novation of the maker's debt secured by the note, and a release of the maker in respect thereof, the indorsers on the note were also released. *Holliday* v. *Jackson*, 22 S. C. R. 479.

Time Given to Maker After Judgment Against Maker and Indorser.]—The holder of a note sued maker and indorser, and after execution placed in the sheriff's hands against both, the plaintiff, upon the application of the maker, extended the time for payment of the amount, without the consent of the indorser:—Held, a discharge of the indorser. *VanKoughnet* v. *Mills*, 5 Gr. 653.

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8. *Set-off.*

Accommodation.]—Held—1. That set-off by indorsees against the holder, was no defence at law or equity, upon a note given for the accommodation of the indorser. 2. That the indorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the indorser to the maker, or indorsee to payee. *Wood* v. *Ross*, 8 C. P. 299.

Bank—*Action Against Shareholder.*]—An action was brought by a bank against the appellant on a promissory note, to which he pleaded set-off of a draft made by the plaintiffs and indorsed to him; to this there was a replication that the defendant was a contributory on the stock-book of the bank, and knew that the bank was insolvent when the draft was purchased; the defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory:—Held, that the replication was bad in law. *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265.

Collateral Security.]—When the plaintiff proved his claim against the insolvent's estate he held, as collateral security, certain overdue notes, which he did not mention and he afterwards received certain payments on them:—Held, that such payments could not be allowed as a set-off in this action under R. S. O. 1877 c. 50, s. 142. *Fitch* v. *Kelly*, 44 U. C. R. 578.

Collateral Transactions.]—In an action against the maker and indorser:—Held, that

neither could plead separately a set-off not arising out of or connected with the note. *Hughes* v. *Snure*, 22 U. C. R. 597.

Damages.]—Held, that an equitable plea to an action upon a note, that the plaintiff had covenanted to pay defendant's debts, which covenant he had broken, whereby defendant was damnified to an amount equal to the amount of the note, is bad, and will be struck out as embarrassing. *Griffith* v. *Griffith*, 6 P. R. 172.

Damages—*Counterclaim.*]—A promissory note made by the defendant had been held by a bank, and after its maturity, the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour, and after the timber limits transaction, and brought this action upon the note. A counterclaim against the plaintiffs and the bank by the defendant, setting up that the bank had sold the timber limits without authority and for an insufficient price, and were thereby guilty of a breach of trust, and claiming that the defendant should be permitted to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note, was held bad, and struck out, as not being properly a counterclaim. *Canadian Securities Co.* v. *Prentice*, 9 P. R. 324.

Damages—*Counterclaim.*]—In an action by the plaintiffs as indorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counterclaim against the plaintiffs, and H. & G. as defendants by counterclaim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming $10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction. Upon the application of H. & G. the master in chambers struck out the counterclaim, and the names of H. & G. as defendants:—Semble, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill. *Torrance* v. *Livingstone*, 10 P. R. 29.

Different Capacities.]—Action against executors on a note by testator payable to S. or bearer, and by him transferred to plaintiff. Plea, that the note was transferred to the plaintiff after the death of testator, and that S. at the commencement of the suit was and still is indebted to defendants as executors in an amount equal to the note, for, &c.:—Held, plea bad. *Smith* v. *Nicholson*, 19 U. C. R. 27.

Fees Payable to Maker.]—Where a note of a Judge of a district court was placed in the hands of an attorney for collection, and he agreed to give the Judge credit on the note for fees payable by him for business done in the court, and did indorse part on the note as payment, and subsequently the whole amount was paid by such fees, but the attorney refused to credit more than the sum first indorsed, and afterwards absconded:—Held, in an action by the owner of the note, that the Judge could not give the payment by fees in evidence against the plaintiff. *Ketchum* v. *Powell*, 3 O. S. 157.

Joint and Separate Debts.] — If the holder of a note sue the maker and indorser in a joint action, under 5 Will. IV. c. 1, the separate debt of the plaintiff to the maker or indorser cannot be set off under a joint plea of set-off. *Paterson* v. *Hodgson*, 2 U. C. R. 139.

Judgment Against Plaintiff and Others.] — Upon action by A. against M. on a note for $340, in the county court, the defendant pleaded, on equitable grounds, a joint and several note made by the plaintiff and three others, payable to defendant for $1,000, averring a suit brought against the makers thereof, and offering to set off and allow so much of A.'s liability upon this instrument as would cover his claim. Upon demurrer:—Held, that the maxim "Nemo debet bis vexari pro uná et eádem causâ," did not apply against the plea, and that it was good. *Moore* v. *Andrews*, 13 C. P. 405.

Note Due After Writ.]—A note made by the plaintiff to the defendant, falling due after the service of the plaintiff's writ, but before declaration filed, may be set off in the action. *Thorne* v. *Haight*, H. T. 6 Vict.

Note for Purchase Money—*Damages.*]—On a sale of lands the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to re-sell the land in consequence of the mortgage:—Held, not allowable. *Stevenson* v. *Hodder*, 15 Gr. 570.

Partial Failure of Consideration.]—A. sold to B. certain goods, and a claim on one C. of £25, taking a horse in payment for the goods, and B.'s note for the claim. B. took from A. an order for the goods on the warehouseman in whose charge they were, but on presenting the order he was unable to obtain them:—Held, in an action by A. against B. on the note, that the defendant might set off the value of the horse. *Wright* v. *Cook*, 9 U. C. R. 605.

Plaintiff Colluding with Third Person.]—In an action by indorsee against maker and indorsers, a plea that the note was made and indorsed to third parties, who sent it to plaintiffs for collection; that such third parties before it fell due, were and are indebted to defendants in more than the amount of the note, and became insolvent, and plaintiffs are suing for and in collusion with them to deprive defendants of their set-off:—Held, bad, on the authority of Ould v. Harrison, 10 Ex. 572. *Metropolitan Bank* v. *Snure*, 10 C. P. 24.

Pleading.]—Action on a joint and several note. Set-off by agreement of a separate demand. Demurrer. Equitable pleading. *Holmes* v. *McLean*, 9 L. J. 216.

Pleading.]—To a plea of set-off on a note:—Held, that the plaintiff, under a replication of nunquam indebitatus, might shew that the note was given by him to the defendant while they were in partnership, to raise

money to pay off a debt of the firm. *Miller* v. *Thompson*, 10 U. C. R. 391.

Set-off Between Indorser and Holder.]—Held, 1. That set-off by indorsees against the holder, was no defence at law or equity, upon a note given for the accommodation of the indorser; 2. That the indorsee of an overdue bill or note, is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the indorser to the maker, or indorsee to payee. *Wood* v. *Ross*, 8 C. P. 299.

Set-off More Than Claim.]—Held, that in this action against maker and indorsers of a note, upon a plea of set-off by two of the indorsers, the jury, under the evidence set out in the case, could only give them a verdict, but could not find for them any sum beyond the note. *Nowlan* v. *Spawn*, 16 U. C. R. 334.

Special Agreement.]—To an action on a note the defendant pleaded a set-off for goods sold and delivered, but the evidence shewed that the set-off claimed was for goods sold to plaintiff by defendant on a special agreement that the plaintiff should pay a third party for them, and not the defendant:—Held, that the goods so delivered could not form the subject matter of a set-off, but that the plaintiff ought to have been sued on the special undertaking. *Matthewson* v. *Carman*, 1 U. C. R. 266.

Work.]—To an action on notes against maker and indorser, the latter pleaded a set-off in the common form for work done by him for the plaintiffs,—a plea held bad on demurrer in Hughes v. Snure, 22 U. C. R. 597. The plaintiffs, however, did not demur, but took issue, and on the trial the jury found the plea proved. A verdict having been directed for the plaintiffs, with leave to move to reduce it by the amount of set-off proved, a rule was obtained by the defendants on this leave, and a cross rule by the plaintiffs for a new trial on the evidence. This court made the latter rule absolute, but on payment of costs by the plaintiffs, as the whole difficulty had been caused by their going to trial on an insufficient plea:—Semble, that if the evidence had supported the plea, the rule to reduce would have been made absolute, and the plaintiffs allowed to move for judgment, non obstante,—following Lumby v. Allday, 1 C. & J. 301. *Commercial Bank of Canada* v. *Harris*, 27 U. C. R. 526.

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9. *Statute of Limitations.*

Account Stated.]—It was proved that, in 1872, when the note sued on was given, an account was stated between plaintiff and defendant, the sum found due being $4,000, the amount of the note, which was made up of the principal sums advanced from time to time, and of the interest on those sums, which it was then agreed should be converted into principal:—Held, sufficient to take the case out of the Statute of Limitations, as an acknowledgment of a new debt, and to enable the plaintiff to recover upon an account stated:—Held, also, however, that the statute never applied at all, as it was proved that in 1866, before the lapse of six years, the plaintiff and defendant met together and stated an account in writing, at $1,923, and that when the second accounting took place in 1872, being within six years of the former accounting, it was agreed that in the new account the former account should constitute an item, the written acknowledgment of which was given up to the defendant and burned. *House* v. *House*, 24 C. P. 526.

Acknowledgment.]—Held, that the following expressions of the defendant, "The notes are genuine; that is, I made them; but I am under the impression that they were paid through Messrs. A. and B., and I don't think I am called upon to have any further conversation with you about them," were not sufficient to take the case out of the statute. *Grantham* v. *Powell*, 6 U. C. R. 494.

Acknowledgment.]—In assumpsit on a note, defendant pleaded the Statute of Limitations. At the trial, the plaintiff proved the following acknowledgment by the defendant: "I received your letter dated January 31. I am sorry to say I cannot do anything for you at present but shall remember you as soon as possible:"—Held, not sufficient to import a promise to pay on request. *Gemmell* v. *Colton*, 6 C. P. 57.

Acknowledgment to Payee — *Subsequent Holder.*]—Held, that a memorandum in writing signed by the maker of a note, admitting the amount to be due to the payee, which in the opinion of the court was sufficient in an action by the payee to prevent the operation of the statute, enured to the benefit of a subsequent holder of the note. *Marshall* v. *Smith*, 20 C. P. 356.

Bearer.]—The right of action on a note payable to A. or bearer, does not accrue to a third person as bearer till an actual delivery to him; and when C., being in the United States, purchased a note payable to bearer, and on his coming into this Province got possession of it:—Held, that the cause of action accrued to him when he received the note, and not when he made the purchase. *Shaw* v. *Matthison*, 3 O. S. 74.

Due Date—*Time When Statute Begins to Run.*]—The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on 1st December, 1881:—Held, that the statute began to run on 2nd December, 1875, and therefore this action was commenced in time. Sinclair v. Robson, 16 U. C. R. 211, remarked upon. *Edgar* v. *Magee*, 1 O. R. 287.

Held, that the plaintiff, under the facts stated in the report of this case, had established his right to sue upon the bill. *Ib.*

Lower Canada Limitation.] — Held, that the parties being residents in Upper Canada when the notes payable in Lower Canada were made, when they became due, and when they were dishonoured, 12 Vict. c. 22, s. 31, did not bar the plaintiffs' recovery; and that that statute applies to the remedy, and not to the contract itself. *Hervey* v. *Pridham*, 11 C. P. 329.

Lower Canada Limitation.] — An indorser of a note, made, indorsed and payable in Lower Canada, who was resident in Upper Canada, was sued there as such indorser, after a lapse of five years from the maturing of the note; the period prescribed as that within which an action must be instituted upon a

note or bill of exchange in Lower Canada:—Held, that the plaintiff was not entitled to recover; the lapse of time under the statute operating as an extinguishment of the debt, without suit, not as a bar to the remedy only. *Sheriff* v. *Holcombe*, 13 C. P. 590, 2 E. & A. 516.

Lower Canada Limitation.]—To an action on a note made by defendant payable to A. H., and by him indorsed to the plaintiffs, defendant pleaded that it was made in Lower Canada where he resided, payable in Montreal, and that the suit was not brought within five years after it fell due. The plaintiffs replied that when the note was made and indorsed to them, A. H. lived in Upper Canada, and at the time of said indorsement one plaintiff lived in Upper Canada, and the other in the United States. Defendant rejoined that after the note fell due, while A. H held it, and more than five years before suit, A. H. carried on business in Lower Canada, that he and defendant met at Montreal, and A. H. might then have sued him:—Held, on demurrer, that by 12 Vict, c. 22, the note, owing to the lapse of time, must be taken to be absolutely paid and discharged; and that the plaintiffs could not recover. *Hervey* v. *Jacques*, 20 U. C. R. 366.

Lower Canada Limitation.]—A., residing in Upper Canada, made a note there payable to B., also a resident of Upper Canada, at the Bank of British North America in Montreal, and B. indorsed it to the plaintiffs, who carried on business in Montreal. Neither A. nor B. had ever resided in Lower Canada. 12 Vict, c. 22, s. 31, enacts that all notes payable in Lower Canada shall be held and taken to be absolutely paid and discharged, unless sued upon within five years after they become due:—Held, reversing the decision below, founded upon Hervey v. Jacques, 20 U. C. R. 366, that the plaintiff, suing here after the lapse of five years, was not barred. *Darling* v. *Hitchcock*, 28 U. C. R. 439.

See also *S. C.*, 25 U. C. R. 463.

Payment by One of Two Makers.]—After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was also the sole executor of the deceased co-maker:—Held, that such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter. *Paxton* v. *Smith*, 18 O. R. 178.

Payment by Third Person.]—Action on a note made by defendant and L., payable to C., and by him indorsed to plaintiff, due in July, 1859. Plea, Statute of Limitations. To take the case out of the statute, the plaintiff proved that one T. C., owing the defendant $30, got an order with defendant's assent from C., who then held the note, on L., requesting L. to pay defendant $30, which he, C., would credit on the note; and this sum was accordingly so paid, and credited:—Held, clearly a payment by L. on his own account, and not by or for defendant, so as to take the case out of the statute as against defendant. *Cowing* v. *Vincent*, 29 U. C. R. 427.

Payment—*Joint and Several Makers.*]—Payments made by one of two joint and several makers will not take the case out of the statute as against the other, unless made expressly as his agent and by his authority, and such agency must be proved by the plaintiff apart from the fact of payment. In this case, there being no such proof, a nonsuit was ordered as to one of the two joint makers, and the verdict allowed to stand as against the other. *Creighton* v. *Allen*, 26 U. C. R. 627.

Pendency of Administration Proceedings — *Champerty.*]—O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed. O. thereupon redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had exoired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations:—Held, also, that H. & Co. might now assert their title to the notes, and prove on them, notwithstanding the former champertous agreement with O. *Re Cannon, Oates* v. *Cannon* (2), 13 O. R. 705.

Pleading.]—The limitation provided by 12 Vict. c. 22, s. 31, as to debts due in Lower Canada, must be specially pleaded, and cannot be proved under a plea of payment. *King* v. *Glassford*, 11 C. P. 490.

Promise to Pay—*Identity of Note.*]—Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties:—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity of the note was to be presumed. *Reynolds* v. *O'Brien*, 4 U. C. R. 221.

Promise to Pay—*Joint and Several.*]—A promise to pay by one of several joint and several makers of a note, will take the case out of the Statute of Limitations. *Sifton* v. *McCabe*, 6 U. C. R. 394.

Set-off — *Pleading.*] — See *Parsons* v. *Crabb*, 31 U. C. R. 435, 34 U. C. R. 136.

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10. *Technical Objections as to Parties.*

Acceptance after Acceptance by Drawee.]—A defendant cannot be charged as an acceptor of a bill that has already been accepted, though conditionally, by the drawee; and to make him liable for money received for the payee's use, it must be shewn that he did receive money which he could and ought to have applied by paying the acceptance. *Spalding* v. *McKay*, 5 O. S. 656.

Fictitious Payee.]—Where a note is payable to a fictitious payee, and not to his order or bearer, a person receiving it from a third party for value cannot declare against the maker as on a note payable to bearer. *Williams* v. *Noxon*, 10 U. C. R. 259.

Guarantee.]—"I guarantee the payment of the within," indorsed on a note, over the signature of the payee, treated as an indorsement of the note, and not as a guarantee or collateral engagement for its payment. *Walker* v. *O'Reilly*, 7 L. J. 300.

Indorsement Before Delivery to Payee.]—A. made his note payable to B. or bearer; before delivery to B., D. indorsed it; B. sued both A. and D., averring that A. made the note, &c., and a delivery to D., who became the lawful bearer thereof, who then, as such, indorsed and delivered to B.:—Held, that D., the indorser, was liable to B. as the holder of the note. *Vanleuven* v. *Vandusen*, 7 U. C. R. 176.

Indorsement Before Delivery to Payee.]—A note made by A., payable to B., or order, and indorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him, the plaintiff. *Wilcocks* v. *Tinning*, 7 U. C. R. 372.

Indorsement Before Indorsement by Payee.]—Where A. made a note payable to B. or order, and C. wrote his name on the back, without B.'s first indorsement:—Held, that C. could not be considered as a new maker; and that the note would not support a recovery against him by B. on the common counts. *Steer* v. *Adams*, 6 O. S. 60.

Indorsement of Note Payable to Bearer.]—A. makes a note payable to B. or bearer, and delivers it to B. B. indorses to C. The holder sues B. on his indorsement:—Held, that the action would lie. *Booth* v. *Barclay*, 6 U. C. R. 215; *Scott* v. *Douglass*, 5 O. S. 207.

Indorsement of Note Payable to Bearer.]—A party indorsing a note payable to A. or bearer, may be sued as indorser. He may also be sued jointly with the maker, under 3 Vict. c. 8. *Ramsdell* v. *Telfer*, 5 U. C. R. 508.

Indorsement by Stranger.]—Declaration, that S. & R., being indebted to plaintiffs, on, &c., by their note now overdue, promised to pay to the order of the plaintiffs £150, three months after date; and for the better and more perfect securing and guaranteeing the payment thereof to the plaintiffs, delivered the said note to defendant, who indorsed the same to the plaintiffs, averring presentment, dishonour, and notice:—Held, bad, as shewing no cause of action. *Moffatt* v. *Rees*, 15 U. C. R. 592.

Indorsement by Stranger.]—Where a promissory note payable to a named payee is indorsed by another person before delivery of the note to the payee, the former is liable as indorser to a holder in due course by virtue of ss. 56 and 88 of the Bills of Exchange Act, 53 Vict. c. 33 (D.). *Duthie* v. *Essery*, 22 A. R. 191.

Indorsement before Payee.] — The defendant put his name on the back of a promissory note before it was indorsed by the plaintiffs, the payees; who then indorsed it "without recourse," and sued him on it:—Held, that he was not liable either as indorser or as surety or otherwise. *Canadian Bank of Commerce* v. *Perram*, 31 O. R. 116.

Indorsement before Payee.] — The notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been indorsed by the insolvent before they were handed to the creditor:—Held, that the insolvent was not liable as indorser and that the creditor could not rank on his estate. *Small* v. *Henderson*, 27 A. R. 492.

Indorsement of Non-negotiable Note.]—An indorser of a note not negotiable, or if negotiable not indorsed by payee, cannot be sued as indorser by the payee. *West* v. *Bown*, 3 U. C. R. 290.

Indorsement of Non-negotiable Note.]—W. made a note payable to plaintiffs, but not negotiable, which defendants indorsed. It was proved to have been given for money lent to W. by the plaintiffs in defendants' presence, and for which they agreed to become security: that one of them had paid interest on it, and that both had promised to pay the note, when spoken to:—Held, that defendants could not be held liable as upon a note, nor as on an account stated. Quære, whether plaintiffs could have recovered as upon a guarantee. *Skilbeck* v. *Porter*, 14 U. C. R. 430.

Indorsement of Non-negotiable Note.] Defendant having indorsed in blank, as surety for the maker, a note payable to plaintiff, but not negotiable:—Held, that he was not liable as maker. *McMurray* v. *Talbot*, 5 C. P. 157.

Indorser—*Non-acceptance—Estoppel.*] — The indorser, like the drawer of a bill, is liable to the holder the moment the drawee has refused acceptance. *Ross* v. *Dixie*, 7 U. C. R. 414.

The indorser is estopped from denying either the signature of the drawer or her competence, (being a feme covert in this case,) to draw the bill. *Ib.*

Maker Indorsing.]—A note payable to the maker's own order, and indorsed by the maker cannot be declared upon as payable to the plaintiff or bearer. *Burns* v. *Harper*, 6 U. C. R. 509; *Wallace* v. *Henderson*, 7 U. C. R. 88.

Maker Indorsing.]—Semble, that a note in this form when indorsed by the maker becomes a note payable generally to bearer, but not to any particular person. *Burns* v. *Harper*, 6 U. C. R. 509.

Maker Indorsing.]—But to declare upon such a note that he (the maker) made an instrument in writing promising to pay to his own order, would be bad. *Wallace* v. *Henderson*, 7 U. C. R. 88.

Maker or Indorser—*Intention.*] — A promissory note, for value received, at three months, was made by one of the defendants to the order of the testator of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on a verbal understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any indorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as indorser. Subsequently he made a payment on account to the payee. In an action against

father and son:—Held, that no liability attached to the son, either as indorser or guarantor, or as trustee of the property conveyed to him. *Robertson* v. *Lonsdale*, 21 O. R. 600.

Maker or Indorser — *Intention.*] — W. having agreed to become security for a debt, wrote his name upon the back of a promissory note drawn in favour of the creditors and signed by the debtor. The note was not indorsed by the payees, and no notice of the dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial of which a nonsuit was entered with leave reserved to plaintiffs to move for judgment in their favour, if there was any evidence to go to the jury as to W.'s liability. Held, that there was no evidence to go to the jury that W. intended to be liable as a maker of the note, and plaintiffs were rightly nonsuited. *Ayr American Plough Co.* v. *Wallace*, 21 S. C. R. 256.

Named Payee.]—Two trustees, desiring to purchase a new school site, petitioned the township council for a loan of $400, which was granted and secured by two instruments, as follows:—"We, the undersigned trustees of school section No. 11, do hereby promise to pay the treasurer of the corporation of Toronto township on." &c., signed M. & D., trustees, with the corporate seal affixed. The money was expended for the purpose mentioned:—Held, 1. That the township corporation could not recover on the notes, for they were payable to the treasurer, not to the plaintiffs, and were not negotiable; 2. That the defendants were not personally liable upon them. *Township of Toronto* v. *McBride*, 29 U. C. R. 13.

Order of Liability.]—Parties to notes are now held liable, contrary to the older cases, in the order on which they stand on the note; and the last holder may so treat them, notwithstanding any agreement among themselves, and although some one of the later parties may be the person for whose accommodation it was made, and who, therefore, is ultimately liable upon it; and this even when the holder is aware of the facts. *Elder* v. *Kelly*, 8 U. C. R. 240.

Order of Names.]—Plaintiff declared on a note as made by K. to M., and indorsed by M. to defendant, who indorsed to plaintiff. Plea, that defendant did not indorse to plaintiff as alleged. The name of defendant appeared as indorser on the note before that of M.:—Held, however, that on the pleadings this was immaterial, for M.'s indorsement to defendant was not denied, and his name appearing before defendant's could not affect the right of recovery. *Brightly* v. *Rankin*, 25 U. C. R. 257.

Payee Indorsing.]—A note payable to the order of the plaintiff, need not be indorsed by the plaintiff to himself to give it the effect of a note payable to him. *Meyers* v. *Williams*, 6 U. C. R. 421.

Payee Indorsing.]—The payee of a note indorsed in blank cannot, by merely writing his name above that of the indorser, maintain an action as indorsee against the latter, unless he shew authority from the indorser so to do, with the express object of creating between them the relationship and consequent liability of indorser and indorsee. *Robertson* v. *Hueback*, 15 C. P. 298.

Plaintiff Liable Over.]—Where in an action by the payee against the maker and indorser of a note, it appeared that the indorser put his name on it as a surety for the maker:—Held, that the plaintiff could not recover against him, as he was a party to the note subsequent to the plaintiff himself. *Jones* v. *Ashcroft*, 6 O. S. 154.

Plaintiff Liable Over.]—Semble, that though, under Bishop v. Hayward, 4 T. R. 470, where a plaintiff suing is liable over to the defendant by reason of a prior indorsement, he cannot recover; yet if he sue with others as an executor he may. *Jenkins* v. *McKenzie*, 6 U. C. R. 544.

Plaintiff Prior Indorser.] — Declaration on a note made by P. payable to F. & F. or order, indorsed by them to defendant, and by defendant to the plaintiffs. Plea, that F. & F. are the plaintiffs, and no other persons. Replication, that at the time of making said note and indorsement by defendant, the maker was indebted to the plaintiffs, and it was thereupon agreed between them, that in consideration that the maker would procure defendant to indorse said note and become surety thereof to the plaintiffs, the plaintiffs would give time to the maker until the note matured; that the note was made in pursuance of such agreement, and defendant for the accommodation of the maker indorsed it to the plaintiffs, with the intention of thereby becoming surety to them as indorser; that the maker delivered the note so indorsed to the plaintiffs, who thereupon gave time to him as agreed on, and that the debt is unpaid:—Held, replication good. *Foster* v. *Farewell*, 13 U. C. R. 449.

Plaintiff Prior Indorser.] — Declaration, by G. M. & Co., on a note made by S. & R. payable to G. M. & Co., or order, indorsed by them to defendant and by defendant to plaintiffs. Plea, that G. M. & Co. are the plaintiffs, and payees of the note, and the same persons who indorsed it to defendant, and are liable to defendant as such indorsers, if he should be made to pay. Replication, that the plaintiffs' names were used as payees for form only; and it was understood by all parties to the note, that, although nominally made payable to the plaintiffs, it was substantially to be paid to defendant, because, by a special agreement between plaintiffs and defendant, notwithstanding the form of the note, the plaintiffs were not to become liable to defendant by indorsing to him. The evidence shewed that the note was given to enable the makers to get goods on credit from the plaintiffs, and that defendant knew he was indorsing for that purpose:—Held, that the plaintiffs could recover. *Moffatt* v. *Rees*, 15 U. C. R. 527.

Plaintiff Prior Indorser.] — W., the first indorser of a note, sued M., the second indorser, and proved that the note had been given by the maker, one C. R., upon the dissolution of a partnership between himself and the plaintiff, as security to the plaintiff for the amount of the note due to him upon such settlement, and with the understanding that an indorsement would be given. M. indorsed the note after the plaintiff, with notice of these facts:—Held, that he was liable to the prior indorser. *Wordsworth* v. *Macdougall*, 8 C. P. 403.

Plaintiff Prior Indorser.]—Declaration by G. against M. & W. on a note for $100, made by M., payable to G. or order, by G. indorsed to W., and by W. to the plaintiff. Plea, by W., that G., the payee and indorsee, and the plaintiff is the same person, and as such payee indorsed to defendant W. Replication, that before the making of said note the plaintiff agreed to lend to defendant M. $100, provided he would procure W. to indorse said note as surety for the payment thereof to the plaintiff: that in pursuance of such agreement M. made, and W., for his accommodation, indorsed, and M. delivered said note to the plaintiff so indorsed, and plaintiff lent M. the $100, which has not been paid:—Held, replication good. *Gunn* v. *McPherson*, 18 U. C. R. 244.

Plaintiff Prior Indorser.]—Plaintiff, payee and first indorser of a note, sues a subsequent indorser, and calls him to prove the replication that he indorsed with the intention to become liable to plaintiff as indorser and surety for maker, &c. Defendant expressly denies this. There being no other evidence,—Held, that there was nothing to go to the jury to warrant a finding for plaintiff. *Mickle* v. *Oliver*, 11 C. P. 363.

Plaintiff Prior Indorser.]—Indorsee against indorser. Plea, that the note was indorsed by payee without consideration by defendant to him: that defendant, for the accommodation of maker and payee, indorsed in blank and delivered it to payee, and there never was any consideration for the indorsement of the note to defendant: and that payee, in fraud of defendant, delivered the note to plaintiff without value or consideration, and solely for the purpose of endeavouring, through plaintiff's agency, to recover against defendant. The evidence shewed that the maker, being indebted to the payee, procured defendant to indorse it as surety to the payee, who had previously indorsed it in blank, and afterwards "without recourse." It further appeared that plaintiff held the note without valuable consideration, the payee being in fact beneficially entitled, and the note being sued on his behalf:—Held, that the evidence did not sustain the pleas, and that plaintiff was entitled to recover, within the principle of Morris v. Walker, 15 Q. B. 588, and the cases in this Province from Peck v. Phippon, 9 U. C. R. 73. *Smith* v. *Richardson*, 16 C. P. 210.

Possession by Indorser — *Indorsement Struck Out.*]—The possession of bills of exchange by the indorser after he has specially indorsed them, is prima facie evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no re-indorsement: so that by the possession he is remitted to his original rights. *Black* v. *Strickland*, 3 O. R. 217.

In July, 1877, W. drew a bill of exchange on the defendants, payable to his own order, and the latter accepted it. The bill was first specially indorsed to the Bank of O., which specially indorsed it for collection, to the Bank of C. It was dishonoured and protested, and came again into the hands of the Bank of O., which returned it to W. on or before December, 1877. Afterwards, but how did not appear, it got back into the hands of the Bank of O. In 1881 the plaintiff, who was W.'s agent, got it from the Bank of O., along with other papers of W., and W., in November, 1881, indorsed it to the order of the plaintiff, who now sued the acceptors. When produced the bill appeared with all the special indorsements struck out, leaving only the signature of W., to the first special indorsement, and with the last indorsement to the order of the plaintiff. There was no re-indorsement from the Bank of O. to W. or to the plaintiff:—Held, that in the absence of other evidence it was to be inferred that W. had satisfied any claim of the Bank of O., and had thereby procured or had the right to make the cancellation of previous special indorsements. Callow v. Lawrence, 3 M. & S. 95, followed. *Ib.*

Re-indorsement.]—A. being indebted to the plaintiffs, offered them a note with an indorser. The plaintiffs agreed to accept one, and A. made a note payable to the plaintiffs, procured the defendant to indorse it in blank, and delivered it to the plaintiffs. The plaintiffs discounted the note, having indorsed it under the defendant's indorsement. The note having been dishonoured, the plaintiffs took it up, struck out their indorsement, and again indorsed it above defendant's name, adding to their own name "without recourse," and then sued the defendant:—Held, that though the plaintiffs had not indorsed the note when the defendant indorsed it, and though their indorsement, making them stand as first indorsers on the note, was not written on it until after action brought, yet that such indorsement was sufficient. Semble, also, that the defendant was estopped from denying that the plaintiffs' name was indorsed when it ought to have been. *Peck* v. *Phippon*, 9 U. C. R. 73.

Signature by Holder under Maker's Name.]—Where a promissory note commencing "I promise to pay," and signed by two makers, was afterwards discounted by the plaintiff for the holder thereof, the money being paid to him on his agreeing to become responsible for the payment of the note, he signing his name under those of the makers:—Held, that the liability of the person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed. *Kinnard* v. *Tewsley*, 27 O. R. 398.

Third Person Signing.]—Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time of payment, such third person is not liable thereon. Crofts v. Beale, 11 C. B. 172, followed: and Currie v. Misa, L. R. 10 Ex. 153, 1 App. Cas. 554, and McLean v. Clydesdale Banking Co., 3 App. Cas. 95, distinguished. *Ryan* v. *McKerral*, 15 O. R. 460.

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11. *Transfer after Maturity.*

Agent.]—Where an agent of the holder disposes of a note over due, without authority, though for good consideration, the person taking from him obtains no title as against the principal. *West* v. *MacInnes*, 23 U. C. R. 357.

Agreement to Give Time.]—A valid agreement to give time is an equity which

attaches to a bill as against a person taking it after maturity. *Britton* v. *Fisher*, 26 U. C. R. 338.

Agreement not to Negotiate.]—To an action against the maker and indorser of a note, the maker pleaded, on equitable grounds, that there was an agreement not to negotiate the note after maturity; and that the note was first indorsed to the plaintiff, as in the declaration alleged, after maturity, with notice of its being an accommodation note:—Held, plea good, the agreement alleged being an equity attaching to such note after maturity. *Grant* v. *Winstanley*, 21 C. P. 257.

Defendant also pleaded that the note was indorsed by the payee during its currency to one R., who had notice of its being an accommodation note, and that defendant was only security for the payee: that R. held it till at and after maturity, but did not notify the payee as indorser, who never received notice of dishonour, and defendant was thereby discharged: and that the note was indorsed to plaintiff after maturity, with notice that it was an accommodation note:—Held, on demurrer, plea bad, for the want of notice could not prejudice defendant. *Ib.*

Agreement not Part of Original Consideration.]—The plaintiffs sued as bearer of a note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL. being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL. then held by said McD., which said note McD. transferred and delivered to the plaintiffs, and deposited the note in the declaration mentioned with the plaintiffs, after it became due, as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plaintiffs as collateral security, and is the lawful holder of said note:—Held, on demurrer, plea bad, for, 1. the terms upon which the note was transferred to McD., which formed no part of the original consideration for which it was given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and, 2. that even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant. *Canadian Bank of Commerce* v. *Ross*, 22 C. P. 497.

Collateral Security.] — Action by indorsee against maker of a note. A plea on equitable grounds that a note was given as collateral security for a mortgage for the same amount, and was indorsed over after it became due by the original holder and mortgagee, who was proceeding to foreclose the mortgage in fraud of the defendant, with full knowledge:—Held, no defence either in law or equity. *Shaw* v. *Boomer*, 9 C. P. 458.

Discount After Maturity for Improper Purpose.]—Where a note indorsed generally was put into the hands of A. to get it discounted for the maker, B., and, instead of this B. owing him (A.), a debt, he discounted it for his own benefit, and, as found by the jury, after the note had matured:—Held, in an action by indorsee against maker and indorser, that the plaintiff could not recover. *Kerr* v. *Straat*, 8 U. C. R. 82.

Existing Equities.]—A transferee of an overdue note takes subject to then existing equities affecting the note itself; but his right to sue is not subject to be defeated by any after act of the person who had the joint right to sue, and no notice of transfer is necessary to perfect the title of a transferee. *Ferguson* v. *Stewart*, 2 L. J. 116.

Failure to Carry out Bargain.]—In assumpsit upon a note, transferred by the payee to plaintiff after it became due, on non assumpsit the defence set up was that the defendant and payee had a settlement, when defendant agreed to convey a lot of land within six months, to give over certain stock, and to give this note, the payee agreeing to deliver to the plaintiff certain notes, according to a schedule: that the defendant delivered the stock, gave his note, and mutual receipts were exchanged; and that it then appeared the payee had only part of the notes in the schedule, which the defendant refused to accept. It did not appear that the land had since been conveyed, nor which of the notes were wanting; but the jury found that the payee at the settlement concealed from defendant that he had not all the notes:—Held, a defence to this action on his note. *McCollum* v. *Church*, 3 O. S. 356.

Fraudulent Conversion—*Innocent Holder for Value.*]—A bonâ fide holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein. In re European Bank, Ex parte Oriental Commercial Bank, L. R. 5 Ch. 358, followed. *Young* v. *MacNider*, 25 S. C. R. 272.

Particular Purpose.] — An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose, constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a bonâ fide holder for value who takes it after dishonour. *MacArthur* v. *MacDowall*, 23 S. C. R. 571.

Postponing Payment.]—Action by indorsees against the maker of a note payable to J. W., by him indorsed to G. W., and by G. W. to plaintiffs. Plea, that J. W. indorsed the note to G. W. for safe-keeping only, and not to be negotiated, and G. W. so received it; but after it fell due, and without J. W.'s authority, he indorsed it to the plaintiffs, who then had notice of the premises; and that while J. W. held it, and after it fell due, he, for value, gave time to defendant for payment until a day after the commencement of the suit:—Held, after verdict, a good plea. *Britton* v. *Fisher*, 26 U. C. R. 338.

Set-off.]—Where the plaintiff, indorsee of a note payable on demand, had taken it two years after its date, and was cognizant of an agreement between the holder, from whom he took it, and the defendant, (the maker), that the same should be set off against a bond, of which the defendant was obligee, and the holder obligor:—Held, that a plea stating these facts was good upon general demurrer. *Brooke* v. *Arnold*, Tay. 25.

Set-off.]—In an action on a promissory note it was shewn that after maturity, and while the payee continued to be the holder, the maker supplied the payee and others with board, etc., the value of which it was agreed should be applied in payment or reduction of the note:—Held, that a subsequent transfer of the note could only be made subject to the claim of the maker for such board, etc.: and that such claim was an equity which attached to the note in the plaintiff's hands. *Ching* v. *Jeffery*, 12 A. R. 432.

Trover for Notes—*Transfer After Agreement to Give Them Up.*]—Where, in trover for notes against the maker, it appeared that the notes had been given by him on a purchase of land: that the payee afterwards agreed to deliver them up to him on a good consideration: that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party: that the defendant afterwards received them, having first had notice of the assignment, and no fraud having been shewn, the jury found for the defendant:—Held, on motion for a new trial, that as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right in the absence of proof of fraud; a new trial was therefore refused. *Small* v. *Bennett*, T. T. 3 & 4 Vict.

VIII. Special Persons.

1. *Agents.*

Adding Word "Agents."]—McC. & Bros., acting as agents for L. T. & P., purchased a load of coal, without stating to the vendor that they were acting as agents, and upon receipt of the coal sent in payment a draft drawn by them, and accepted by their principals, to which they signed their own names as drawers, adding the word "Agts:"—Held, that they were personally liable as drawers. *Reid* v. *McChesney*, 8 C. P. 50.

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

Authority.]—It was proved that one D. was clerk or agent for the defendant keeping a store at L., and that defendant had sanctioned his purchasing certain goods:—Held, that the circumstances gave no implied authority to D. to sign the defendant's name to negotiable paper, and that the jury were warranted in finding that the defendant had given D. no authority to purchase goods of the plaintiff. *Heathfield* v. *Van Allan*, 7 U. C. R. 346.

General Power of Attorney.]—A general power to an agent to sign bills, notes, &c., and to superintend, manage, and direct all the affairs of the principal, gives him a power to indorse notes. *Auldjo* v. *McDougall*, 3 O. S. 199.

Indorsement "Per Pro."]—Where an agent accepts or indorses "per pro," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority, and where an agent has such authority, his abuse of it does not affect a bonâ fide holder for value. *Bryant* v. *Banque du Peuple; Bryant* v. *Quebec Bank*, [1893] A. C. 170.

Principal's Name not on Bill.]—No action lies upon a bill except against those who are in some shape parties to it. Where, therefore, A. drew upon B. in his own favour, and indorsed it to C., who in her own name indorsed to the plaintiffs; and it appeared that C. was a lady residing in Toronto, who had a brother, D., residing in Buffalo, for whom, though not a partner, or in any way transacting business in his name, she had negotiated bills at banks and with merchants: it was held, in an action against D., upon an averment "that A. indorsed the said bill to one C., the agent of this defendant, or her order, and delivered it so indorsed to her as such agent, and that the said C., then being the agent of the defendant in that behalf authorized for and on behalf of the defendant, then indorsed and delivered the same to the plaintiffs;" that the action could not be sustained, D.'s name not appearing upon the bill in any shape. *Ross* v. *Codd*, 7 U. C. R. 64.

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2. *Companies and their Officers.*

Beneficial Interest.]—The plaintiffs declared against the acceptor on a bill as drawn in their favour, but which was payable to the order of Thomas G. Ridout, Esq., cashier. It was indorsed, "Pay to John Smart, Esq., cashier, or order. Thomas G. Ridout, cashier," but the name of Thomas G. Ridout had been struck out. At the trial the plaintiffs were allowed to amend by alleging that the bill was payable to the order of Ridout, who indorsed to Smart, and that they, R. & S., being the plaintiffs' agents and cashiers, received the bill for them, and as their property:—Held, that the plaintiffs could not recover, for the beneficial interest which they were alleged to have in the bill would not entitle them to sue on it in their own name. *Bank of Upper Canada* v. *Ruttan*, 22 U. C. R. 451.

Building Society.] — Declaration on a note made by defendants, a building society, incorporated under C. S. U. C. c. 53:—Held, good on demurrer, for they might legally make notes under certain circumstances. *Snarr* v. *Toronto Permanent Building & Savings Society*, 29 U. C. R. 317.

Countersigning.] — Held, that a bill drawn by one defendant as secretary on, and accepted by the other defendant as president of, a railway company, did not come within s. 13 of 18 Vict. c. 182, as being accepted by the president and countersigned by the secretary; and that they were personally responsible. *Bank of Montreal* v. *Smart*, 10 C. P. 15.

Descriptive Words—*Liability of Members.*]—The manager of an incorporated company, in payment for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay" and signed "R., manager O. L. Co." In an action against the individual members of the company the defence was that R. alone was liable on the note and that the words "manager," &c., were merely descriptive of his business:—Held, that as the evidence established that both R. and the payees of the note intended to make the company liable; and as R. had authority as manager to make a note on which the company would be liable; and as the form of the note was sufficient to effect that purpose; the defence could not prevail and the holders of the note were entitled to recover. *Fairchild* v. *Ferguson*, 21 S. C. R. 484.

Discount of Non-negotiable Note.]—H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the bank who discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the bank against H.:—Held, affirming 9 O. R. 655, that although, in fact, the note was not negotiable, the bank, in equity, was entitled to recover, it being shewn that the note was intended by the makers to have been made negotiable, and was issued by them as such, but by mistake or inadvertence, it was not expressed to be payable to the order of the payee. *Harvey* v. *Bank of Hamilton*, 16 S. C. R. 714.

Discount—*Company's Benefit.*]—One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, on behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached (but made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, and the proceeds were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account with the consent of S. but without the authority of the directors, who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president, depositing therein the proceeds of sales of cheese and drawing upon it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted:—Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it. *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O. R. 327, 23 A. R. 66, 26 S. C. R. 443.

Effect of Acceptance.]—Where a bill is drawn by a person signing as agent of a company, the acceptance admits the signature and authority of the agent, and precludes any technical objections as to the company, or their ability to draw the bill. *Bank of Montreal* v. *DeLatre*, 5 U. C. R. 362.

Indorser—*Estopped.*]—Held, that the indorser of a promissory note, purporting to be made by a corporation, is estopped from alleging that the note was ultra vires the makers. Held, also, that the instrument in question in this case having been declared on as a promissory note, and not stated to have been under seal, it could not be assumed, in favour of the indorser, that it had been so executed as to deprive it of its negotiable character, but that if under seal the point should have been raised by plea. *Merchants Bank* v. *United Empire Club*, 44 U. C. R. 468.

Informal Authority.]—A company incorporated by C. S. C. c. 65, were empowered to borrow money for purposes specified, and through their president to make notes, &c. The president, acting upon a resolution of the directors, signed the note in question, but it appeared that the directors had not been appointed as required by the Act:—Held, that the resolution sufficiently complied with the Act; and that, as the statute empowered the directors to authorize the president to sign notes, and the plaintiff had accepted such notes in good faith, and the proceeds had been applied for the benefit and purposes of the company, it might be presumed that the proper authority had been given. *Currier* v. *Ottawa Gas Co.*, 18 C. P. 202.

Inspector.]—The defendant, the inspector of an insurance company, having arranged with the plaintiff as to the amount of the plaintiff's claim for a loss, gave the plaintiff the following bill:—"$875. To the Beaver and Toronto Fire Insurance Company. Toronto, 6th November, 1876. Three months after date pay to the order of John Hagarty, at the Ontario Bank here, $875, being payment in full of his claim under policy No. 71,514, for loss and damage by fire on the 27th of October last. (Signed). A. Squier, Inspector." It was found as a fact that the plaintiff did not suppose that defendant would be, nor did defendant intend to make himself, liable: that the actual bargain was, that the plaintiff should get a bill on which the company would be, but that there was no express agreement or understanding that defendant should not be, liable:—Held, that defendant was personally liable. *Hagarty* v. *Squier*, 42 U. C. R. 165.

Mining Company — *Seal.*] — A mining company incorporated under C. S. C. c. 63, s. 57, has not, as a necessary incident, the right to draw, accept, or indorse, bills of exchange for the purposes of their business; and the power of "selling or otherwise disposing of their ores as the company may see fit," in their articles of association, will not give such right by implication. Bills directed to the secretary of the company, and so describing him, are in effect drawn on the company, and authorize him to accept on their behalf, if he has authority to bind them; and it is un-

necessary to put the seal of the company to the acceptance. His authority, and the power of the company to accept, are put in issue by a traverse of acceptance by the company. Where there is no mention in the bills or acceptances of the amount of the capital stock the trustees, under C. S. C. c. 63, s. 57, are personally liable; but only where but for such omission the company would have been liable, which here they would not have been. *Gilbert* v. *McAnnany*, 28 U. C. R. 384.

Name of Real Makers Omitted.]—Action against the defendant as the maker of a promissory note. Before the defendant's signature was, as alleged, the word "per," and underneath was the name "William Stockdale, manager." The alleged note was given in renewal of a note made by the Toronto Patent Wheel and Waggon Company, limited, and was brought to the defendant by plaintiff for the purpose of having it executed by the company, when defendant, who was the secretary of the company, signed it, the intention being that the company's name should be filled in over defendant's by the company's manager, by stamping it with defendant's stamp, but which was not done. After the note became due, the plaintiff proved on it against the company who had gone into insolvency, and obtained a dividend:—Held, that the defendant was not liable:—Held, also, that the provisions of s. 79 of 40 Vict. c. 43 (D.), did not apply to this note, as it did not purport to be a note signed by or on behalf of the company. *Brown* v. *Howland*, 9 O. R. 48. Affirmed, on the ground that the instrument had never been perfected or delivered as a promissory note, 15 A. R. 750.

President.]—Upon a bill drawn "C. P. DeLatre, Esq., President Niagara Dock and Harbour Company, Niagara, C. W.," and accepted thus,—"Accepted, payable at the office of the Bank of Upper Canada, Niagara.—Signed, P. C. DeLatre, Pres't N. H. & D. Co.":—Held, in an action by the payees, that the acceptor was personally liable. *Bank of Montreal* v. *DeLatre*, 5 U. C. R. 362.

President.]—The charter of the Midland Railway Company, 16 Vict. c. 241, s. 5, gives them power to become parties to bills and notes, and enacts that any bill accepted by the president, with the counter-signature of the secretary, or any two of the directors, and under the authority of a majority of a quorum of the directors, shall be binding on the company, and every bill accepted by the president as such, with such counter-signature, shall be presumed to have been properly accepted for the company, until the contrary be shewn: that the seal shall be unnecessary, nor shall the president, &c., so accepting any bill, be individually liable. A bill of exchange addressed, "To the president, Midland Railway," was accepted in these words, "For the Midland Railway of Canada, accepted, H. Read, secretary; Geo. A. Cox, president":—Held, that defendant C. (who was admitted to be the president), was personally liable, the bill not being drawn upon the company. *Madden* v. *Cox*, 44 U. C. R. 542. Affirmed in appeal, upon an equal division of opinion: 5 A. R. 473.

President—*Secretary*—*Seal.*] —Upon a note signed "Geo. H. Cheney, Pres't Gr. Trunk Telegraph Co. F. C. A. Whitney, Secretary C. Grand Trunk Telegraph Co.," with the seal of the company affixed:—Held, that the makers were not personally liable. *City Bank* v. *Cheney*, 15 U. C. R. 400.

The charter of the company enacted that all evidences of debt issued by them, shall be issued and signed by the president and treasurer:—Semble, per Robinson, C. J., that this is directory merely. Per Burns, J., that the seal dispensed with the signatures. *Ib.*

President of Club.]—The plaintiffs sued defendant in the first three counts of the declaration as maker of three several promissory notes in the following form: Two months after date, the Carleton Club promise to pay to the order of B. $497.66, for value received. Signed by defendant, president of the club, and by the secretary. The fourth count alleged that defendant promised the plaintiffs that he had authority from the members of the club to make the said notes, and that if the plaintiffs would discount them, they should be paid by said members; that the members never authorized defendant to make the said notes; and that they had refused to pay or be held responsible therefor. There was no evidence of any promise except what might be inferred from defendant's signature as president, and it was not shewn that the club had ever repudiated their liability:—Held, that defendant was not liable on the fourth count, for even if, as the plaintiffs contended, 37 Vict. c. 34 (O.), under which the club was incorporated, did not authorize the making of notes, this was a matter of law known to the plaintiffs as well as to defendant, and upon which they could exercise their judgment. *Bank of Ottawa* v. *Harrington*, 28 C. P. 488.

Secretary.]—G., being the secretary of an insurance company, gave this note for a loss:—"£1000 currency.—Sixty days after date I promise to pay to the order of W. £1000, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton." Signed "C. Horatio Gates, Secretary O. F. Company":—Held, that he was personally liable thereon. *Armour* v. *Gates*, 8 C. P. 548.

Secretary.]—In an action against defendant as acceptor on the following bill of exchange:—"$800.—Montreal, 19th Feb., 1869. —Two months after date pay to the order of myself at the Jacques Cartier Bank in Montreal, eight hundred dollars, value received, and charge the same to account of E. E. Gilbert. James Glass, secretary, Richardson Gold Mining Company, Belleville, Ontario," and accepted "The Richardson Gold Mining Co., per James Glass, Secretary":—Held, on demurrer, not to be the acceptance of defendant, and that he was not personally liable. *Robertson* v. *Glass*, 20 C. P. 250.

Treasurer—*Seal.*]—Defendant accepted a bill drawn upon him as treasurer of the Wolf Island Railway and Canal Co., thus—"Accepted, W. A. Geddes, Treas. W. I. R. W. & C. Co.," adding the company's seal:—Held, that he was personally liable. *Foster* v. *Geddes*, 14 U. C. R. 239.

Treasurer.]—The Canada Southern Railway Company being indebted to one H. for cordwood supplied to them, H. agreed to accept for a portion of the price thereof the bill of the company. To effect this intention the defendant, who was the company's trea-

surer, filled in one of the printed forms of bills used by him as such treasurer for the company's acceptances, the bill being stated to be drawn on defendant as, "M. H. Taylor, Tr. C. S. Ry. Co., St. Thomas," and it was accepted by him as "M. H. Taylor, Tr." The bill was received by H. as the company's acceptance, and he signed the company's ordinary voucher. H. afterwards indorsed it for value to the plaintiffs, who also took it believing it to be the company's acceptance:—Held, that defendant was personally liable as acceptor, the bill being drawn on and accepted by him personally, and not by or for the company, and that the indorsement of the bill to the plaintiffs did not constitute an equitable assignment to the plaintiffs of the chose in action on which it was founded, so as to entitle the plaintiffs to sue thereon:—Held, also, that even if in equity the original parties would be bound by the actual bargain between them, which was the acceptance of the company, and not of the defendant, the plaintiffs, as bonâ fide holders for value of a negotiable instrument, were entitled to look to the defendant, the only person liable upon it. *Laing* v. *Taylor*, 26 C. P. 416.

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3. *Executors and Administrators.*

Authority.]—Plaintiffs sued defendant, who was an executor of E., as indorser of three notes payable to "the executors of the late E.," two being indorsed "J. M. B., agent of the executors of the late E.," and the third "the executors late E., per pro. B." B. held a power of attorney from the executors, by which they as executrix and executors authorized him (among other things) for them as such executrix and executors to make and indorse all such promissory notes as might be requisite in the conduct and management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, indorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no inquiries as to the extent of B.'s authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The court being left to draw inferences of fact, and the question being the personal liability of the defendant:—Held, 1. That the indorsements were sufficient in form; but, 2. that not being for the purposes of the estate they were not within the authority given to B., the extent of which it was the plaintiffs' duty to ascertain; and a nonsuit was ordered. *Gore Bank* v. *Crooks*, 26 U. C. R. 251.

Collateral Attack.]—It is no ground for impeaching the indorsement of an administrator, that the debtor at the time of the intestate's death resided out of the jurisdiction of the surrogate court, by which the letters of administration had been granted. *Wright* v. *Meriam*, 6 O. S. 463.

Foreign Grant.]—Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in New York with the note in his possession:—Held, that his administrators appointed in that state might indorse the note so as to enable the indorsee to sue upon it in this country, without their having administered here. *Hard* v. *Palmer*, 20 U. C. R. 208.

Promise to Pay.]—Where in an action on a note against defendant as administrator of the maker, who died before the note fell due, it was left to the jury to say on the whole evidence whether defendant at any time after the note was due, promised without condition, or only in reference to the assets of the estate, to pay the note; and the jury found for the defendant, the court refused to disturb such finding. *Adams* v. *Capner*, 6 C. P. 277.

Purchase of Goods.]—The defendants as executors purchased goods of the plaintiffs, and gave notes, "——months after date we, as executrix and executors of the late B. P., promise," &c., signed by defendants, "executrix and executors of B. P., deceased:"—Held, that they were personally responsible. *Kerr* v. *Parsons*, 11 C. P. 513.

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4. *Husband and Wife.*

Attorney.]—Where by a document indorsed "procuration générale et spéciale," a wife being sole owner constituted her husband "son procureur général et spécial," to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—Held, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by Article 181 of the Civil Code to such notes as were required for the purposes of the administration. *Banque D'Hochelaga* v. *Jodoin*, [1895] A. C. 612.

Authority.]—Power of husband to sign notes. Evidence of authority from wife. See *Cooper* v. *Blacklock*, 5 A. R. 535.

Husband's Liability on Wife's Indorsement.]—Semble, that a defendant's indorsement made by his wife, though in her own name, but afterwards recognized by defendant, would make him liable to an action on the bill. *Ross* v. *Codd*, 7 U. C. R. 64.

Husband's Liability on Note by Him to Wife.]—Declaration on a note made by defendant, payable to D. or order, and by D. indorsed to plaintiffs. Plea, that D. when the note was made was, and still is, defendant's wife. Replication, that defendant made the note with the intent that D. should indorse it away, and that she indorsed it to the plaintiffs by his authority:—Held, bad on demurrer. *McIver* v. *Dennison*, 18 U. C. R. 619.

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5. *Partners.*

Admissions.]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed: and when a company is formed for purposes which do not render the drawing and accepting of bills of exchange and notes necessary, it will be sufficient to establish the liability of a partner, on bills

and notes drawn or accepted in the name of the company by their secretary, that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee* v. *McDonald*, 6 O. S. 130.

Company's Suppressed Notes.] — A partner in a joint stock company, the notes of which are suppressed by 7 Will. IV. c. 13, having retired their notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership. *Hall* v. *Buck*, T. T. 2 & 3 Vict.

Indorsement of Cheque — *Acquiescence.*]—Power of partner to indorse cheque in absence of express authority—Estoppel by acquiescence in bank account. See *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S. C. R. 622.

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

Limited Partnership.] — Quære, whether under a plea of non fecit to a note signed by the firm, defendant was entitled to shew a limited partnership; but where he was allowed to do so:—Held, that the plaintiff might, in answer, object to the description of the business; and, semble, that he might also object that the special partner had not paid in his share. *Benedict* v. *Van Allen*, 17 U. C. R. 234.

One Partner Making and Other Indorsing.]—Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and indorsed by the other, the character in which the indorsement is made will be implied from the purposes for which the note is given, and the indorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor. *McPhee* v. *McPhee*, 19 O. R. 603.

Use of Firm Name.]—E. was a member of the firm of S. C. & Co., and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E., with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners, and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority:—Held, that the note was made by E. in fraud of his partners, and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140.

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6. *Miscellaneous.*

Advance of Money—*Privity.*]—On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it, telegraphed him that if unable to pay it he should draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers, with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so re-drawn:—Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal* v. *Thomas*, 16 O. R. 503.

Bail.]—The bail of any one sued upon a bill or note, or any persons who pay it on account of any of the parties, become on payment holders; and they hold as upon a transfer from the person for whom they pay, not as from the person they have paid; and they stand with respect to other parties to the bill or note in the situation of the party for whom they pay; and, consequently, unless he could have sued upon the bill or note, they cannot. *Hutchinson* v. *Munro*, 8 U. C. R. 103.

Buffalo, &c., R. W. Co.]—The Buffalo, Brantford, and Goderich R. W. Co. have no power under their charter or under the general Railway Act, to make notes. *Topping* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 6 C. P. 141.

Foreign Bank.]—A foreign corporation, to wit, a bank, cannot maintain an action upon notes discounted and received by them in the course of conducting banking business in this Province, although they may maintain an action for money had and received to their use against the party for whom such note was discounted, and to whom money was advanced upon it. *Bank of Montreal* v. *Bethune*, 4 O. S. 341.

Kingston Marine R. W. Co.]—Under 1 Vict. c. 30, the Kingston Marine R. W. Co. may give and receive notes in transacting their legitimate business. *Kingston Marine R. W. Co.* v. *Gunn*, 3 U. C. R. 368.

Municipal Corporation — *Discount.*]—Where a corporation having a debt to pay, which it was to their advantage to discharge immediately, raised money upon an accommo-

dation note of an individual, and applied the money to the payment of the debt, promising to protect the note or to repay; relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. *Burnham* v. *Peterborough*, 8 Gr. 366.

Mutual Insurance.] — Held, that a promissory note made in 1871, payable to the order of a mutual insurance company, or its officers, in respect of a policy, was negotiable. Gore District Mutual Ins. Co. v. Simon, 13 U. C. R. 556, commented upon. *McArthur* v. *Smith*, 1 A. R. 276.

IX. Stamps.

Amount not Filled In—*Mode of Cancellation.*]—*Banque Nationale* v. *Sparks*, 27 C. P. 320, 2 A. R. 112.

Cancellation.]—*Lowe* v. *Hall*, 20 C. P. 244; *Young* v. *Waggoner*, 29 U. C. R. 35.

Initials—*Bank.*]—*Imperial Bank of Canada* v. *Beatty*, 4 A. R. 228.

Initials—*Foreign Bank.*]—*Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

Knowledge of Holder.]—*Trout* v. *Moulton*, 5 A. R. 654; *Bank of Ottawa* v. *McMorrow*, 4 O. R. 345; *Chapman* v. *Tufts*, 8 S. C. R. 543; *Wallace* v. *Souther*, 16 S. C. R. 717; *Roberts* v. *Vaughan*, 11 S. C. R. 273.

Mistake—*Amount.*]—*Boyd* v. *Muir*, 26 C. P. 21; *House* v. *House*, 24 C. P. 526.

Onus of Proof.] — *Waterous* v. *Montgomery*, 36 U. C. R. 1.

Penalty—*Pleading.*]—*Mason q. t.* v. *Mossop*, 29 U. C. R. 509; *Edmonds q. t.* v. *Hoey*, 35 U. C. R. 495.

Penalty—*Void Note.*]—*Taylor* v. *Golding*, 28 U. C. R. 198.

Pleading—*Unstamped Note as Evidence —Repeal of Act.*]—*Caughill* v. *Clarke*, 9 P. R. 471, 3 O. R. 269.

Pleading.]—*Baxter* v. *Baynes*, 15 C. P. 237; *McCalla* v. *Robinson*, 19 C. P. 113; *Young* v. *Waggoner*, 29 U. C. R. 35; *Escott* v. *Escott*, 22 C. P. 305; *Kirby* v. *Hall*, 21 C. P. 377; *Kilborn* v. *Russ*, 28 C. P. 222; *Boustead* v. *Jeffs*, 44 U. C. R. 255; *Imperial Bank of Canada* v. *Beatty*, 4 A. R. 228; *Stephens* v. *Berry*, 15 C. P. 548; *Woolley* v. *Hunton*, 33 U. C. R. 152; *Joseph Hall Manufacturing Co.* v. *Harnden*, 34 U. C. R. 8.

Removal of Stamp by Third Party.] —*Stephens* v. *Berry*, 15 C. P. 548.

Repeal of Act.] — *Bank of Ottawa* v. *McMorrow*, 4 O. R. 345; *Card* v. *Cooley*, 6 O. R. 229.

Subsequent Party.]—*Escott* v. *Escott*, 22 C. P. 305; *Woolley* v. *Hunton*, 33 U. C. R. 152; *Joseph Hall Manufacturing Co.* v. *Harnden*, 34 U. C. R. 8.

Taking Advantage of One's Own Failure to Stamp.]—*Watts* v. *Robinson*, 32 U. C. R. 362.

Time.]—*Stephens* v. *Berry*, 15 C. P. 548; *Ritchie* v. *Prout*, 16 C. P. 426; *Henderson* v. *Gesner*, 25 U. C. R. 184; *Hoffman* v. *Ringler*, 29 U. C. R. 531; *Bank of Ottawa* v. *McLaughlin*, 8 A. R. 543; *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

Unstamped Note — *Acknowledgment.*]—*McKay* v. *Grinley*, 30 U. C. R. 54.

Unstamped Note — *Equitable Assignment.*]—*Robertson* v. *Grant*, 3 Ch. Ch. 331.

Unstamped Note Taken in Substitution.]—*Baillie* v. *Dickson*, 7 A. R. 759.

X. Miscellaneous Cases.

Absconding Debtor.]—The payee of two notes for £25 each, having absconded, is not thereby disabled from suing the maker upon them on his return to the Province, because in his absence an attachment had been taken out against him for £21, by a creditor. *Slattery* v. *Turney*, 7 U. C. R. 578.

Agent — *Action for Money Received by Him on Note.*]—Plaintiff, as executor, sued to recover money received by defendant for his testator on a note payable to the testator. The maker swore that he had paid defendant, who handed him the note, which was still in his possession, though with the name torn off: —Held, not necessary to produce the note. *Van Allan* v. *Frymere*, 14 U. C. R. 579.

Agreement to Take Note—*Tender.*]—Where a plaintiff contracts to receive for work done at its completion, a certain sum of money, and then agrees to accept from the defendant the note of B. for the sum, he may sue for the money, if the note be not tendered at the time specified; a subsequent tender of the note refused, will be no defence to such action. *Fisher* v. *Ferris*, 6 U. C. R. 534.

Collateral Security—*Conversion.*]—Action for converting certain notes, with a special count, alleging in substance that defendants held the notes as collateral security for certain paper in their hands to which the plaintiff was a party, and after they had collected part of them, and the paper had been retired, they collected and applied to their own use the remaining notes, to which they had ceased to have any claim. Defendants pleaded, on equitable grounds, that after receiving the notes they were applied to by the plaintiff to accept in payment of a debt due by him to them, the note of one A. D., for $1,147, which they refused to do unless one J. D. would indorse it; that J. D. would not indorse without security, and the plaintiff thereupon got defendant's agent to write to J. D., agreeing to hold the notes in question, to apply when collected on the note for $1,147; that J. D. on the faith of this, indorsed said note, which defendants accepted in payment, and which was renewed from time to time by the proceeds of the notes collected, and reduced in July, 1862, to a note for $477, which note J. D. took up, and defendants thereupon transferred to him such of the notes in ques-

tion as remained, as they lawfully might, and were bound to do:—Held, on demurrer, that the plea was good, as shewing a legal defence. *Maybee* v. *Bank of Toronto*, 29 U. C. R. 566.

Collateral Security—*Negligence in Collecting.*]—Where promissory notes of third persons were transferred by the defendant without indorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes, and that he had not notified the defendant of their non-payment:—Held, that if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be exonerated from payment, but not otherwise; and that the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact it was a conclusion of law that detriment had followed to the defendant. *Ryan* v. *McConnell*, 18 O. R. 409.

Discount for Special Purpose.]—The plaintiffs drew upon J. a bill for £200, payable to their order, which they indorsed to the Gore Bank, by whom it was sent to the agent of defendants, the Bank of Upper Canada, for collection. When it fell due, J., with the agent's assent, drew upon the plaintiffs to meet it, but the proceeds of this draft, contrary to J.'s direction, were placed to his credit with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received. *Riddell* v. *Bank of Upper Canada*, 18 U. C. R. 139.

Foreign Note.]—A note made and indorsed in a foreign country, is negotiable here, within the statute of Anne. *Thompson* v. *Sloan*, M. T. 2 Vict.

Forged Note.]—A forged paper purporting to be a bank note is a note, and equally so, if there is no such bank as that named. *Regina* v. *McDonald*, 12 U. C. R. 542.

Guarantee.]—A guarantee indorsed on a note at the time of its execution in the following words, "We guarantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds. *Lock* v. *Reid*, 6 O. S. 295.

Guarantee.]—The defendant owing the plaintiff delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee: "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note:"—Held, that the guarantee was sufficient within s. 4 of the Statute of Frauds; for although no promisee was named in it, yet the reference to "the within note," made it a promise enuring to the benefit of the bearer:—Semble, that the guarantee created an absolute promise to pay at all events, and that defendant was not entitled to notice of dishonour; but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 502.

Holder Taking up Note.]—Where a plaintiff takes up a note which defendant had given him, and which he was bound to pay at maturity, he may recover against the defendant as for money paid. *McNab* v. *Wagstaff*, 5 U. C. R. 588.

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

Mental Incapacity.]—J., an infant, gave to M. a promissory note for the purchase money of a buggy, indorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition:—Held, that the father's estate was not liable. *Re James*, 9 P. R. 88.

Payment in "Good Notes."]—Payment in "good notes" does not necessarily mean "good negotiable notes." *McArthur* v. *Winslow*, 6 U. C. R. 144.

Purchase of Note—*Agreement to Renew—Indorsement.*]—In an action on an agreement by which, in consideration of the plaintiff giving defendant his note for $438, payable four months after date, as the purchase money for a note for $730, made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note: and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said $730 note, by giving their seven notes for equal amounts payable to my order, and payable in one, two, and three months," &c.:—Held, that the words "payable to my order," did not necessarily import an unconditional indorsement by defendant of the seven notes, but might mean only such an indorsement as would pass the property in them to the plaintiff; that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for $730, also payable to defendant's order, was indorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional indorsement as to the others:—Held, that he could claim only that these notes should be indorsed as the first one was. *McCarthy* v. *Vine*, 22 C. P. 458.

Res Judicata.]—Declaration, that in consideration that the plaintiff, for the accommodation of the defendant, would sign a certain note made by C., payable to the defendant, for £100, defendant promised to obtain and deliver to the plaintiff accounts due to C. by different persons to that amount, as security; that the plaintiff signed the note, but the defendant did not obtain the accounts; by reason whereof the plaintiff was obliged to pay the note, with interest, and the costs of a suit brought by the defendant thereon. Defendant pleaded, by way of estoppel, that in

the suit by him on the note this plaintiff pleaded as a defence the same agreement now declared upon: that issue having been taken thereon the jury found that no such agreement was made, and that the judgment entered on that verdict still remained in force:—Held, on demurrer, a good defence. *Campbell v. Holmes*, 21 U. C. R. 465.

Sale of Land — *Notes for Purchase Money.*]—The vendor on the sale of land took notes for the purchase money, indorsed and sold some of them, and was liable on these in case of non-payment by the makers:—Held, that on the sale of the property these were entitled to priority of payment over the notes retained by the vendor. *O'Donoghue* v. *Hembroff*, 19 Gr. 95.

In such a case notes indorsed without recourse are payable pari passu with the retained notes. *Ib.*

Satisfaction of Indebtedness by Note —*Pleading.*] — Declaration, that on an accounting between them, defendant's indebtedness to plaintiff was fixed at a certain sum, to be paid off in a stipulated manner and at a stipulated time, one of which payments defendant undertook to make to A. & Co., to whom plaintiff was liable to that amount, it being also agreed that the plaintiff should towards that liability provide an additional sum by a day named, to be repaid by defendant to him; that it was further agreed that any error in the said accounting should be corrected, and plaintiff should give up to defendant all notes and securities belonging to defendant which plaintiff before and at the time of the accounting held, except, &c. Breach, that although a reasonable time had elapsed, &c., defendant had not paid A. & Co. Plea,—after alleging errors in the said accounting, specifying them; that after said accounting, and before action, plaintiff indorsed said notes to A. & Co. in settlement of their claim of which A & Co. had given defendant notice:—Held, on demurrer, plea bad, as not shewing that the notes, which had been indorsed away, had been given for the cause of action stated in the declaration. *Jones* v. *Cameron*, 16 C. P. 271.

Telegraphing Acceptor to Draw Cross-bill—*Advance by Bank on Faith of This.*]—On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it, telegraphed him, that if unable to pay it he was to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so redrawn:—Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal* v. *Thomas*, 16 O. R. 503.

See ACCORD AND SATISFACTION, III.—ESTOPPEL, III. 2 — PARTNERSHIP, VI. — PAYMENT, III. 3—PRINCIPAL AND AGENT, VI. 2.

BILLS OF LADING.

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BILLS OF SALE.

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X. MISCELLANEOUS CASES, 848.

I. APPLICATION OF THE ACTS.

Advances to Get Out Stone—*Lien.*]—One R. agreed with defendants to quarry and get out for them a quantity of stone for works in progress. To carry out the agreement defendants advanced money, and by the contract between them it was stipulated, "that upon all materials upon which the parties of the second part (defendants) shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all moneys advanced upon the same, or under this contract, and the same shall become, from the time of their preliminary construction, the absolute property of the parties of the second part, subject to the right of the parties of the second part to reject the same, should the same be rejected as hereinbefore mentioned; nor shall the same, unless afterwards rejected, be removed by the said party of the first part, R., or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as tools, instruments, and other things, shall be in the charge and at the risk of the party of the first part:"—Held, that this clause must operate in defendants' favour, if at all, as a mortgage or bill of sale; and as it had not been registered, and the facts, stated in the case, shewed no sufficient change of possession, that the defendants claiming stone quarried under it as against a subsequent bonâ fide purchaser, could not succeed. *Howitt* v. *Gzowski*, 5 Gr. 555.

Assignment for Creditors.] — Assignments for the general benefit of creditors

must be registered unless there is a sufficient change of possession. *Carscallen* v. *Moodie*, 15 U. C. R. 92; *Maulson* v. *Joseph*, 8 C. P. 15; *Howard* v. *Mitchell*, 10 U. C. R. 535, 11 U. C. R. 625; *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Assignment for Creditors.]—Held, overruling Robertson v. Thomas, 8 O. R. 20, that assignments for the benefit of creditors were until 48 Vict. c. 26 (O.), within the Act relating to Chattel Mortgages and Bills of Sale, R. S. O. 1877 c. 119. *Whiting* v. *Hovey*, 13 A. R. 7.
See S. C., 14 S. C. R. 515.

Assignment for Creditors.]—An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within s. 4 of the Nova Scotia Bills of Sale Act, R. S. N. S. 5th ser. c. 92, it not being an assignment for the general benefit of creditors and so excepted from the operation of the Act by s. 10. *Archibald* v. *Hubley*, 18 S. C. R. 116.

Assignment for Creditors.]—Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under s. 10 of the Nova Scotia Bills of Sale Act, R. S. N. S. c. 92, and does not require an affidavit of bona fides. Durkee v. Flint, 19 N. S. Rep. 487, approved and followed; Archibald v. Hubley, 18 S. C. R. 116, distinguished.—A provision in an assignment for the security and indemnity of makers and indorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under s. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it. *Kirk* v. *Chisholm*, 26 S. C. R. 111.

Book Debts.]—K. having become security for repayment by H. of $600, an agreement in writing was entered into that in consideration thereof H. did assign to K. "all his right and claim to the goods and stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of the said stock, shall be made up of the book debts then on the books of H." This agreement was not registered. H. subsequently made an assignment for the benefit of his creditors to C., at which time only about $20 worth of the stock was the same as had been in the store at the time of the said agreement, and K.'s administratrix now brought this action against H. for payment, and in default, for payment by C. out of the proceeds of the stock and book debts of H., (C. as well as H. F. & Co., creditors of H. who had executed the assignment to C., being made parties defendant with H.):—Held, that so far as the book debts were concerned, as to which registration was unnecessary, the agreement was valid and binding as against the creditors as well as H. Taylor v. Whittemore, 10 U. C. R. 440, cited and approved of. Short v. Ruttan, 12 U. C. R. 79, not followed. *Kitching* v. *Hicks*, 6 O. R. 759.

Book Debts.]—Book debts are not within the Chattel Mortgage Act, R. S. O. 1887 c. 125, and amending Act, 55 Vict. c. 26, and a transfer of them does not require registration. *Thibaudeau* v. *Paul*, 26 O. R. 385.

Conditional Sale.]—On sale of goods upon credit to a trader, the purchaser covenanted by deed with one E. F., a clerk of the vendors, to buy all his goods from them, and that E. F. should be at liberty, at any time while such business was carried on, to enter into the place of business and take possession of the goods and premises, and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount under the agreement:—Held, that the covenant not to purchase elsewhere was not binding on the purchaser; but that as he had received goods under the agreement, there was a sufficient consideration for the covenant, so as to entitle the vendors to the remedies given by the deed; and that this was not such an agreement as required to be registered under the Chattel Mortgage Act, to enable the vendors to hold as against subsequent purchasers with notice. *Fisken* v. *Rutherford*, 8 Gr. 9.

Conditional Sale—*After Acquired Property.*]—J. R. by an instrument in writing, agreed to sell his business and stock-in-trade to his sons, and by it provided that all the existing stock was to remain his property until it was paid for; that all after-acquired property brought in by way of substitution for existing stock, was to become his property by way of security for the purchase money, and that on default he should have the right to re-enter and take possession. Some seven years afterwards, default having been made, he took possession and began selling off by auction. The sons then made an assignment for the benefit of creditors. In an action brought by the assignee and some creditors of the sons to restrain J. R. from selling, it was held, that the legal operation of the instrument of sale was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made, and possession taken before the rights of the assignee or of any execution creditor arose, that act clothed J. R. with the legal title in the after acquired goods, which was not affected by the assignment for creditors subsequently executed:—Held, also, that the instrument did not need to be registered to make it operative, against subsequent creditors, the Bills of Sale and Chattel Mortgage Act, R. S. O. 1887 c. 125, not covering the case of agreements creating equitable interests in non-existing and future-acquired property. The effect of the transaction in this case and the advisability of making provision for giving publicity by registration commented on. *Banks* v. *Robinson*, 15 O. R. 618.

Crops.]—The mortgage covered growing crops:—Held, that such crops being incapable of delivery or change of possession without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act. *Hamilton* v. *Harrison*, 46 U. C. R. 127.

Crops.]—A mortgagor after default is, as far as crops growing upon the mortgaged land

are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested. Laing v. Ontario Loan and Savings Co., 46 U. C. R. 114, explained. *Bloomfield* v. *Hellyer*, 22 A. R. 232.

Crops.]—As to growing crops comprised in chattel mortgages. See, also, *Laing* v. *Ontario Loan and Savings Co.*, 46 U. C. R. 114; *Grass* v. *Austin*, 7 A. R. 511; *Cameron* v. *Gibson*, 17 O. R. 233.

Foreign Contract.] — Held, following River Stave Co. v. Sill, 12 O. R. 557, that goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to the provisions of R. S. O. 1887 c. 125, although the parties thereto were at the time domiciled in a foreign country. *Marthinson* v. *Patterson*, 20 O. R. 720; 19 A. R. 188.

Future Liabilities.]—A mortgage under C. S. U. C. c. 45, s. 5, may be given as security against past or concurrent, but not against future, indorsements or liabilities. If it did not apply to past liabilities, then a mortgage to secure against them would not be avoided by the Act for want of compliance with its provisions. *Mathers* v. *Lynch*, 28 U. C. R. 354.

Goods in Bond.]—Where the goods forming the subject of a chattel mortgage are in bond, it is not necessary that the mortgage should be registered. *May* v. *Security Loan and Savings Co.*, 45 U. C. R. 106.

Goods in Customs Warehouse.] — As to certain goods belonging to the assignor, but lying in the customs warehouse subject to duties, no change of possession having taken place, and no compliance being shewn with the formalities of the Customs Act, 10 & 11 Vict. c. 31:—Held, that such goods did not pass by the assignment. Per Robinson, C. J.—The statute requiring registration does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the Customs Act had been followed. *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Goods in Course of Manufacture.]—On an interpleader to try the title to two locomotives, it appeared that when they were half finished, plaintiff verbally agreed to buy them from the manufacturer for a certain sum, for which he was to finish them:—Held, that the Chattel Mortgage Act did not apply, a change of possession being impossible under the circumstances. *Burton* v. *Bellhouse*, 20 U. C. R. 60.

Indorsement.] — A mortgage to secure the mortgagee against indorsement or contingent liabilities, unless there is a delivery and change of possession, must be registered; and the liability for which it is given must accrue due within one year from its date. *Turner* v. *Mills*, 11 C. P. 366.

Indorsement.] — A mortgage, given to secure the mortgagee against liabllity on notes to be indorsed by him, is valid at common law, and not being provided for by the Chattel Mortgage Act, C. S. U. C. c. 45, is excluded from its operation, and not avoided by it. *Paterson* v. *Maughan*, 39 U. C. R. 371.

Landlord and Tenant.]—The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bonâ fide purpose of further securing the debt without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co.* v. *Lawrason*, 6 A. R. 286; 10 S. C. R. 679.

Leaseholds.]—Held, that 32 Vict. c. 74, applies only to mortgages of movable goods, and that there was therefore no necessity to register a mortgage of a term for years. *Frazer* v. *Lazier*, 9 U. C. R. 679.

Mare Held by Joint Owners — *Increase.*]—A. having purchased from B. a half interest in a celebrated brood mare, paid in his purchase money $50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was, that they were to keep her for breeding purposes and share the profits equally. During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was in gremio at the time of the sale. In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. 1877 c. 119, avoided the plaintiff's title as against the execution, it was:—Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed in specie, and did not apply to an indivisible chattel like that in the present case; that A. and B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C. by his purchase became a co-owner with A.; and that the property in the colt followed that of its dam, and that A was an owner of an undivided moiety in both. *Gunn* v. *Burgess*, 5 O. R. 685.

Marriage Settlement.] — By an antenuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part, and one M. of the third part, in consideration of the intended marriage, certain lands and the goods in question consisting of horses, cows, and several articles of household furniture, described as being in and upon and around the premises and appurtenances used and occupied by the said J. M. and being city number, &c., were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns. The marriage took place on the 27th March. Within five days from the execution of the assignment it was duly registered in the proper office as a bill of sale. The affidavit of bona fides was made by the plaintiff after the marriage, she being described therein as the bargainee. The goods were afterwards seized by an exe-

cution creditor of the husband and the plaintiff claimed them:—Held, that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. Schroeder v. Harnott, 28 L. T. N. S. 702, followed. (2) That the plaintiff was a person who, as bargainee, might properly make the affidavit of bona fides. (3) That the goods were sufficiently described and identified:—Semble, that a marriage contract or settlement in the form of the instrument in question, was not a sale of personal property within the Act and that registration therefore was not necessary. Per Patterson, J. A.—(1) That the transaction was within the statute; and (2) that the legal title to the goods was in the plaintiff. Whiting v. Hovey, 12 A. R. 119, Dominion Bank v. Davidson, 12 A. R. 90, referred to. *Connell* v. *Hickock*, 15 A. R. 518.

Nova Scotia Act — *Fixtures.*] — The "fixtures" included in the meaning of the expression "personal chattels" by s. 10 of the Nova Scotia Bills of Sale Act, are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.—An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia Bills of Sale Act, R. S. N. S. 5 ser. c. 92, and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee. *Warner* v. *Don*, 26 S. C. R. 388.

Policy of the Act.]—Remarks upon the policy of the Chattel Mortgage Act. See *Barker* v. *Leeson*, 1 O. R. 114.

Power of Attorney to Enforce Mortgages.]—A debtor had executed several chattel mortgages to secure indorsers of his paper, and afterwards a power of attorney to their appointee to sell and pay the mortgage debts:—Held, that the transaction was neither a mortgage nor a sale, and that the instrument did not require registration. *Patterson* v. *Kingsley*, 25 Gr. 425.

Ship.]—Held, that the furniture, glass, crockery, table linen, beds, &c., on board a steamboat used for carrying passengers on Lake Ontario, passed under a mortgage of the vessel with all her apparel, furniture, &c., as part of the vessel; and that the mortgage, being of a registered vessel, was exempt from registry under the Chattel Mortgage Act. *Patton* v. *Foy*, 9 C. P. 512.

Timber — *Property not in Existence.*]—The plaintiff and W. made an agreement, by which plaintiff was to make advances to W. to enable him to draw out and to make and get to market a quantity of timber. It was agreed that the timber then made, and all thereafter made, should be delivered to the plaintiff as security, and in proof of such delivery should be marked as specified, and that it should be rafted to market under W.'s directions. The timber was seized by defendant as sheriff under an execution against W.; and the plaintiff, claiming under this deed, replevied:—Held, that W. could not be looked upon merely as agent of the plaintiff, and the timber regarded as the plaintiff's from the first, for that would be inconsistent with the deed:—Held, also, that the statute requiring registration could apply only to that part of the timber in existence as timber, and owned by W. at the execution of the instrument, but that it clearly applied to that portion, and therefore for want of registration the deed must be held void altogether; but, at all events, it could have operated to pass only the timber made and capable of delivery at the time of its execution, and such as, being made afterwards, was delivered to the plaintiff and marked for him. *Short* v. *Ruttan*, 12 U. C. R. 79.

See, also, *Ruttan* v. *Short*, 12 U. C. R. 485.

Timber — *Property not in Existence.*]—The plaintiffs held a mortgage from one C. of 700 pieces of timber, "together with whatever quantity of squared timber the said party of the first part may manufacture during the remainder of the season." The timber made after this mortgage was marked as it was got out, with the plaintiffs' mark, but remained in C.'s possession, and was seized by the defendant, an execution creditor:—Held, that the plaintiffs could not recover for it under their mortgage. *Cummings* v. *Morgan*, 12 U. C. R. 565.

Timber.]—Semble, that a sale of growing timber does not come within the operation of the Bills of Sale and Chattel Mortgage Act. *Steinhoff* v. *McRae*, 13 O. R. 546.

II. Change of Possession.

Assignment for Creditors — *Assignor Continuing to Sell.*]—Where a debtor, just before several executions issued against his property, assigned it all to trustees for the benefit of his creditors, delivering to the agent of the trustees one article in the name of all, and then took down his name from over his shop door, but remained with his clerks in the possession of the goods, selling them as if his own, but accounting to the trustees for the proceeds; and the property was taken under the executions by the sheriff:—Held, in trespass by the trustees against the sheriff, the jury having negatived their possession, that a verdict for the defendant was correct. *Armstrong* v. *Moodie*, 6 O. S. 538.

Assignment for Creditors—*Assignor's Clerk in Possession.*] — The plaintiffs, assignees for the benefit of creditors, proved clearly a delivery of the goods; but it was shewn that they had employed the assignor's clerk as their agent to keep and sell the goods in the shop, and that he had in some instances, without their knowledge, permitted the proceeds to be applied in payment of some small claims against the assignor, and once had paid money into the bank to the credit of the assignor, that he might draw a cheque for it immediately, to pay a privileged claim which they had instructed their agent to pay; but the plaintiffs knew nothing of the deposit in the bank, or of the drawing the cheque. It also appeared that their agent took no steps to give public intimation of the change of possession, either directly or by removing the assignor's name as the party carrying on the business, though he made weekly returns of sales to the assignees; and this seemed to

have been done at the solicitation of the assignor, who represented to him that he hoped to make arrangements again to resume the business. It appeared, too, that the fact of any change having been made was generally unknown in the neighbourhood:—Held, that upon this evidence it was properly left to the jury to say whether there was an actual and continued change of possession, and that they were warranted in finding that there was. *Foster* v. *Smith*, 13 U. C. R. 243.

Assignment for Creditors—*Assignor's Clerk in Possession.*]—As to the goods in the warehouse of the assignor, C., who had been his clerk and book-keeper, was employed by the plaintiffs, assignees for the benefit of creditors, as their agent to dispose of the stock, and collect the debts due, &c.; and he took possession accordingly, opened new books in the name of the assignees, and sold and collected the assets under their instructions, but continued in the same place, the name of the assignor remaining above the door as usual:—Held, a sufficient change of possession within the meaning of the Act. *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Assignment for Creditors—*Assignor in Control.*]—The assignor remained in his store after the assignment, having the same clerk, and his sign remained over the door, nor were any goods removed. There was no evidence of change of possession that could be apparent to others than parties concerned, and the bill of sale was not filed:—Held, not sufficient change of possession. *McLeod* v. *Hamilton*, 15 U. C. R. 111.

Assignment for Creditors—*Assignor Continuing on the Premises.*]—In considering whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purposes of the assignment, and the circumstances of the case; and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignees should remove the goods or take exclusive possession, as in the case of an ordinary sale. The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact for the jury as evidence to shew that the transfer was colourable:—Held, that here the jury was warranted in finding a sufficient change. *Maulson* v. *Commercial Bank*, 17 U. C. R. 30.

Attempt to Take Possession.]—The defendants seized goods in the possession of McL. under an execution against him; and the plaintiffs, the Bank of M., claimed the goods as assignees under an unregistered bill of sale given by McL. to one F., as collateral security for indebtedness. There was no change of possession. Afterwards McL. agreed with the bank to hold the goods as tenant at will at a rental, and subsequently the bank made an ineffectual attempt to take possession:—Held, that the attempt to take possession of the goods was not sufficient to satisfy R. S. O. 1877 c. 119, and that the defendant was therefore entitled to succeed. Parkes v. St. George, 10 A. R. 496, distinguished. *McKellar* v. *McGibbon*, 12 A. R. 221.

Consignment to Auctioneer—*Orders to Pay Proceeds.*]—B., a dry goods dealer in Ottawa, consigned his stock-in-trade to S. S. & Co., auctioneers in Toronto, for sale, the proceeds to be applied (1st) in payment of $800 advanced to B. by S. S. & Co., and (2nd) in payment of $250 advanced by McM. & Co. After the goods had reached the warehouse of S. S. & Co., B. gave other orders on the proceeds, which they accepted conditionally. After the sale had been advertised, but before the time appointed for selling, the sheriff levied on the goods under an execution sued out by the defendants, who, on ascertaining the nature and amount of S. S. & Co.'s claim, paid the same to them, and the sale by arrangement was allowed to proceed, the amount realized therefrom being paid into the hands of the sheriff to hold the same until the rights of all parties were ascertained. The sheriff thereupon caused the several claimants to interplead:—Held, affirming 31 C. P. 320, that the several orders on S. S. & Co. operated as equitable assignments of the goods or their proceeds; that the consignment to S. S. & Co. was as complete and continuous a change of possession as under the circumstances it was possible to effect, and therefore no necessity existed under the Chattel Mortgage Act for registering the orders, if that could be done; and that the defendants having by their payment to S. S. & Co. been subrogated to their rights, were entitled in priority to all the other claimants to rank upon the proceeds for the sum so advanced. *McMaster* v. *Garland*, 8 A. R. 1.

Evidence.]—Held, that the change of possession in this case was sufficient, and being complete before the defendants' fi. fa. was placed in the sheriff's hands, the plaintiffs were entitled to recover. *Taylor* v. *Commercial Bank*, 4 C. P. 447.

Evidence.]—Held, under the facts of this case, that if the mortgage had come within the Act it would have been void, not having been kept in force by registration or accompanied by change of possession. *Frazer* v. *Lazier*, 9 U. C. R. 679.

Evidence.]—The evidence, as stated in this case, was held not sufficient to shew an actual and continued change of possession. *Heward* v. *Mitchell*, 10 U. C. R. 535.

Evidence.]—Held, that the facts, stated in this case, did not shew a sufficient change of possession to dispense with filing. *Wilson* v. *Kerr*, 17 U. C. R. 168.

Evidence.]—Held, under the facts stated in this case, that there was no sufficient change of possession to dispense with registration. *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

Evidence.]—Held, reversing 9 O. R. 314, that in this case there had been such an actual and continued change of possession as to defeat the executions against the company. Parkes v. St. George, 10 A. R. 496, and Scribner v. Kinloch, 12 A. R. 367, followed. *Whiting* v. *Hovey*, 13 A. R. 7. See *S. C., sub nom. Hovey* v. *Whiting*, 14 S. C. R. 515.

Gift.]—It was alleged that the plaintiff, who was living with his mother, gave the horses in question to her for his board, but no price was fixed for them, and they were kept at the house and used by the plaintiff as before:—Held, that there was no sufficient change of possession to dispense with a registered bill of sale, and the sale was void as

against the assignee in insolvency of the plaintiff. *Snarr* v. *Smith*, 45 U. C. R. 156.

Goods in Possession of Third Person.]—One Robins agreed to make for Ruthven, the execution debtor, an iron fence for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking Ruthven's note, and the fence, which was then in Robins' yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written agreement. When the note fell due Ruthven authorized G. to sell the fence, but it remained until it was seized under an execution against Ruthven:—Held, that the execution could not prevail against G.'s claim. *Gurney* v. *James*, 19 U. C. R. 156.

Goods in Vendor's Hands More Than Reasonable Time.]—Plaintiff, on the 31st May, 1861, purchased and paid for a carriage from F., a carriage maker, for $175, but did not remove it from the shop. Shortly after the plaintiff's wife saw another carriage which she preferred, and it was agreed that the plaintiff should have it if he chose, for an additional sum, the one first purchased to be his if he did not take the other. At the time of the sale the defendant, as sheriff, held an execution against F., of which F. had notice, and he received another after the sale. F. carried on business as usual, with defendant's consent, and the defendant did not seize till the 11th June:—Held, that the plaintiff, having left the carriage in the vendor's hands more than a reasonable time for its removal, the sale came within the Act, C. S. U. C. 45, and there being no delivery and change of possession, nor any bill of sale filed, the property remained in F.'s hands liable to seizure. *Carruthers* v. *Reynolds*, 12 C. P. 596.

Goods not Mentioned in Mortgage.]—Some goods not mentioned in the schedules were delivered by one of the mortgagors to the plaintiff's agent, on the 4th May, 1863; the sheriff received the execution on the 27th:—Held, that such delivery was good against the sheriff. *Mills* v. *King*, 1 C. P. 223.

Grain in Possession of Warehouseman.]—The defendants, warehousemen, holding certain grain for one M., gave him a warehouse receipt, which on the 3rd September he indorsed to the plaintiff, who had purchased the grain either from or through him. On the 5th September, the sheriff received a fi. fa. against M., under which he seized, and M. having on the 22nd made a voluntary assignment in insolvency, the sheriff gave an order for the grain to the assignee. The plaintiff brought detinue and trover against defendants, who had shipped a portion of the grain to him on the 23rd October, but retained the rest:—Held, that he was entitled to recover; that the grain passed to the plaintiff by the sale; and there was a sufficient change of possession, and the only one that the nature of the case permitted, in the fact that upon and after the sale the defendants held the grain for the plaintiff, instead of for M., who was not himself in actual possession when he sold. *Richardson* v. *Gray*, 29 U. C. R. 360.

Land and Chattels.]—Where the land and buildings on which the chattels are, are conveyed by the same deed as the chattels, the assignee, though held to be in possession of the land by virtue of his deed, is not to be looked upon as having taken possession of the chattels also, so as to dispense with filing the assignment; he must either actually take possession of the buildings, or the assignor must go out. *Carscallen* v. *Woodie*, 15 U. C. R. 92.

C. owning a mill, with the machinery in it, assigned the whole property, both real and personal, including the lumber, stock-in-trade, &c., on the premises, to the plaintiff, in trust for himself and other creditors. The deed was registered on the day of execution, but not filed in the county court, when, on the day after the execution, the sheriff seized the machinery, &c., under a fi. fa. against goods; nor was the deed afterwards filed. The assignor did not leave the mill, but continued to work it with his men for the benefit of the assignee:—Held, 1. That there was not an actual and continued change of possession; and, 2. that for want of filing the assignment the fi. fa. must prevail. *Ib.*

Lease.]—Oral lease of farm and chattels—Delivery and change of possession. See *Oliver* v. *Newhouse*, 32 C. P. 90, 8 A. R. 122.

Marking Sheep.]—Plaintiff bought from R. a number of sheep, paying him part of the price at the time and the balance within a few days. Upon the first payment being made plaintiff marked the sheep with red paint as his property, and they were then placed apart from the rest of R.'s sheep in a separate field on the latter's farm, where they were to remain until required by plaintiff. Plaintiff was a butcher, and it appeared to be the custom among butchers to leave with farmers stock purchased from them until convenient to remove it. This had also been the course of dealing between plaintiff and R. on previous occasions. The sheep thus remained on R.'s premises until seized under an attachment against R., as an absconding debtor:—Held, that the mere marking of the sheep, or the removal of them from one field of the seller to another, did not constitute a sufficient delivery or change of possession:—Held, also, that there was no evidence of a sufficiently established custom or mode of dealing among farmers of treating as their own, property really belonging to others, to put third parties upon inquiry as to the actual ownership. Quære, whether such inquiry would be admissible in a case arising under the statute in question. *Doyle* v. *Lasher*, 16 C. P. 263.

Material in Hands of Workmen.]—M., a ship builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose, some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M.'s men, when A. distrained both it and the vessels for rent:—Held, there had been a sufficient change of possession of the timber to dispense with a registered assignment, and that both it and the vessels were exempt from distress. *Gildersleeve* v. *Ault*, 16 U. C. R. 401.

Partial Change.]—Held, that although the deed in this case, for want of registration could have no effect with respect to the furniture, of which there had been no sufficient

change of possession, yet that it was not thereby avoided as to those goods which went into and remained in possession of the assignees. *Taylor* v. *Whittemore*, 10 U. C. R. 440.

Partial Change.]—An interpleader issue is to be taken distributively, and an assignee should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registration. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

Partial Change.] — Quære, whether, when as to part only of the goods assigned there had been no change of possession, the assignment, unless filed, is void altogether. *Olmstead* v. *Smith*, 15 U. C. R. 421.

Possession to Trustee or Bailee—*Increasing Claim.*]—Where possession is changed it need not be given personally to the creditor, purchaser, or mortgagee; it may equally be given to a trustee or bailee for him: and the debtor may increase the claim of such bailee, or may charge the goods with further sums in favour of other persons. *McMaster* v. *Garland*, 31 C. P. 320. See *S. C.*, 8 A. R. 1.

Purchaser from Mortgagee.]—Semble, that a purchaser from a mortgagee under the power of sale contained in a mortgage, leaving the mortgagor in possession, is protected so long as the mortgage under which he bought has the protection given it by registration; but when the term of the mortgage expires the purchaser is no longer protected, unless he takes actual possession, or procures and registers a bill of sale from the mortgagee. *Carlisle* v. *Tait*, 32 C. P. 43.

Question of Fact.]—It is not a question of law, but for the decision of a jury, under all the circumstances, whether there has been an immediate and continued change of possession sufficient to satisfy the statute. *Waldie* v. *Grange*, 8 C. P. 431.

Registration.]—Of the household furniture there had been no change of possession, and the court being left to draw the same inferences as a jury would:—Held, per Robinson, C. J., that notwithstanding the registration of the assignment, such furniture did not pass:—Per Burns, J., that it did not pass, because the assignment was not properly registered by filing a copy only. *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Timber.]—To make valid against creditors of the vendor a sale of timber to be cut down by him, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession, as in the case of other chattels. *McMillan* v. *McSherry*, 15 Gr. 133.

Transfer from Husband to Wife.]—A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof as required by the Bills of Sale Act. *Hogaboom* v. *Graydon*, 26 O. R. 298.

Vacant Building—*Key.*]—Where goods in a shop or other unoccupied building under lock and key, are sold by the owner, and the key delivered to the purchaser, who goes to the place and examines and checks over the goods, and then locks up the place again:—Held, that this constitutes an actual and continued change of possession, so as to satisfy the statute, and the purchaser need not either personally or by some one for him remain in possession or remove the goods. *McMartin* v. *Moore*, 27 C. P. 397.

Vendor Acting as Purchaser's Clerk.]—The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may still be "an actual and continued change of possession," as required by R. S. O. 1877 c. 119, s. 5. Ontario Bank v. Wilcox, 43 U. C. R. 469, distinguished. *Kinloch* v. *Scribner*, 14 S. C. R. 77; *S. C.*, *sub nom. Scribner* v. *McLaren*, 2 O. R. 265; *S. C.*, *sub nom. Scribner* v. *Kinloch*, 12 A. R. 367.

III. Consideration and Bona Fides.

Bill of Sale Really a Mortgage.]—The facts that a bill of sale, on the face of it absolute, is in truth only a mortgage, and that the vendor after the sale is allowed to remain in possession of the goods, are badges of fraud to be weighed by a jury, not conclusive proofs of fraud. *Hunter* v. *Corbett*, 7 U. C. R. 75.

Debt Disproportionate to Property.]—Where a debtor mortgaged all his personal property, including the most trifling articles, to secure a debt very small in proportion to their value:—Held, that although no evidence of value was given, and the bona fides of the debt was not disputed, it should have been left to the jury to say whether these circumstances were not sufficient to shew that the deed was made, not for the security of the assignee, but for the purposes of the debtor, and to shield his property from other creditors. *Fleming* v. *McNaughten*, 16 U. C. R. 194.

Discount of Draft.]—Part of the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant, in the course of business, on the mortgagor, a customer, and discounted at a bank:—Held, that the mere fact of the draft having been discounted at the bank would not justify the court in assuming that the debt represented by the draft was paid, and that the remedy on the draft was to be alone looked to; and therefore that the amount of the indebtedness in the mortgage could not be said to be untruly stated. Meriden Silver Plating Co. v. Lee, 2 O. R. 451, commented on. *Hepburn* v. *Park*, 6 O. R. 472. Followed in *Hyman* v. *Cuthbertson*, 10 O. R. 443.

Erroneous Statement of Consideration.]—The consideration in the mortgage was stated as $1,148; but it appeared in evidence that the amount actually owing was only $1,030.80:—Held, that the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud or no fraud. *Hamilton* v. *Harrison*, 46 U. C. R. 127.

Erroneous Statement of Consideration.]—Held, that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. 1877 c. 119, not requiring, as does the corresponding English Act, that the consideration should be truly expressed. *Tidey* v. *Craib*, 4 O. R. 636.

Erroneous Statement of Consideration.]—A misstatement of the consideration in a chattel mortgage is not, in the absence of bad faith, ipso facto a fatal defect. It is merely an element to be considered in dealing with the question of bona fides. Hamilton v. Harrison, 46 U. C. R. 127, and Jaffray v. Robinson, C. A., 16th September, 1878, (not reported), distinguished. *Marthinson* v. *Patterson*, 19 A. R. 188.

Erroneous Statement of Consideration—*Creditor.*]—Held, following Parkes v. St. George, 10 A. R. 496, that the plaintiffs not being execution creditors, could not maintain an action to set aside a chattel mortgage on the ground that the debt was incorrectly stated therein. *Hyman* v. *Cuthbertson*, 10 O. R. 443.

Evidence.]—Interpleader to try the right of plaintiff to goods seized under an execution against one Lafler at defendant's suit. A verdict was given for plaintiff for the part of the goods contained in a mortgage to one Lawrence. The judgment debtor mortgaged certain goods to Lawrence, under a power of sale in which mortgage the goods were sold to F., as agent for plaintiff and defendant. It was held, upon the facts and evidence set out in the case, that the verdict was not sustained, there being reason to infer that the plaintiff had given up his interest in the goods to Lafler; and a new trial was granted on payment of costs. *May* v. *Routledge*, 14 C. P. 534.

Fixed Sum and Upwards.]—The consideration in the mortgage being stated at £10,000 and upwards:—Held, good, the amount being certain as to £10,000, and it not being shewn that there were more goods than would satisfy that amount. *McGee* v. *Smith*, 9 C. P. 89.

Fraud — *Possession—Onus.*] — The due registration of a bill of sale prevents the inference of fraud being drawn from the retention of possession of the goods by the bargainor. Cookson v. Swire, 9 App. Cas., at pp. 654-5, specially referred to. *Belanger* v. *Menard*, 27 O. R. 209.

Implied Agreement to Retain Furniture.]—In an interpleader issue, the court being left to draw the same inferences as a jury:—Held, that it was fraudulent for the assignor to assign on the understanding that he should be allowed to keep possession of his household furniture. *Wilson* v. *Kerr*, 17 U. C. R. 168; 18 U. C. R. 470.

Jury's Finding.]—The plaintiff claimed goods under a mortgage duly filed. The main question was the consideration for such mortgage. The plaintiff proved that it arose mainly for goods left in the mortgagor's possession by the plaintiff's grandfather. The jury having found for the plaintiff, the court refused to interfere. *Harrington* v. *Marsh*, 8 C. P. 227.

Mortgagor Selling.]—By the mortgage the mortgagor was to continue in possession, selling the goods, and accounting to the mortgagee for the proceeds on demand:—Held, not to invalidate the mortgage, or afford per se any evidence of fraud. *Ross* v. *Conger*, 14 U. C. R. 525.

Nominal Consideration — *Contemporaneous Unregistered Trust.*]—A bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to and forming part of the instrument (not registered) is invalid; the conveyance registered must shew the true and full consideration for which it is given. *Arnold* v. *Robertson*, 8 C. P. 147. Followed in *Fraser* v. *Gladstone*, 11 C. P. 125.

Note for Part of Consideration.]—A mortgage was given for $1,070. It afterwards appeared that the amount was made up in part of a note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage, and not paid for some months afterwards:—Held, that in the absence of fraud the mortgage was valid. *Walker* v. *Niles*, 18 Gr. 210.

Oral Agreement.]—Under 20 Vict. c. 3, a mortgage cannot be supported which is given in great part for a debt not existing, but for advances which the mortgagee has merely promised verbally to make, and had not made when the mortgage was executed or the affidavit for registry made. *Robinson* v. *Paterson*, 18 U. C. R. 55.

Partnership Effects to be First Sold.]—A provision that the household furniture of one partner is not to be sold for the purposes of the deed until the partnership effects are exhausted, is in law no badge of fraud. *McGee* v. *Smith*, 9 C. P. 89.

Pleading—*Mortgage to Secure Sum to be Ascertained—Refusal to Ascertain Amount—Damages.*]—See *Garland* v. *McDonald*, 41 U. C. R. 573.

Present Debt Payable in Future.]—The mortgage shewed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt:—Held, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future day. *Farlinger* v. *McDonald*, 45 U. C. R. 233.

Presumption of Consideration.]—In an action against the sheriff for goods seized, the plaintiffs claimed under a mortgage of the 12th November, 1857, and defendant under an execution of the 18th. The time for payment had not arrived, but the mortgage provided that if the mortgagor should sell any of the goods, the mortgagee might take possession; and the plaintiffs, who were in possession at the seizure, claimed to have taken the goods under this condition, though the breach of it and the plaintiffs' entry therefor were not proved:—Held, that the plaintiffs need not prove the consideration for their mortgage in the first instance, but that it must be presumed until impeached. *Squair* v. *Fortune*, 18 U. C. R. 547.

Separate Debts — *Joint Mortgagees.*] — Where a bill of sale was made to two jointly, and filed on an affidavit of bona fides by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately: — Held, sufficient. *McLeod* v. *Fortune*, 19 U. C. R. 100.

Separate Debts—*Joint Mortgagees.*]—F. owed the plaintiff and M. $200 and $100 respectively for goods supplied by them, and had given a chattel mortgage on his property to Flint for $600. Being pressed by Flint, he applied to the plaintiff and M. for the money, offering them a chattel mortgage therefor as well as for what he already owed them, which they agreed to, but not having the money at the time they borrowed it from J., giving him their note indorsed by F., and Flint was paid off and his mortgage discharged. F. gave to the plaintiff and M. the mortgage in question, which was in the usual form, the expressed consideration being $900. The affidavit of bona fides was made by the plaintiff alone, and stated that the mortgagor was justly and truly indebted to him and M. as the mortgagees therein named in the sum of $900 mentioned therein, &c.; and on the renewal of the mortgage the affidavit was made by plaintiff in like manner. The plaintiff and M. were not connected in business. The note was renewed several times, F. being a party to only one of the renewals. Some months after the mortgage was given the plaintiff and M., to protect themselves, bought in the goods at a bailiff's sale for rent and taxes, and they were subsequently seized on an execution at the defendant's suit, when the plaintiff and M. claimed, and an interpleader was directed:—Held, that the mortgage was valid: that the evidence, more fully set out in the report, shewed that it was given for a present advance by the mortgagees, and not merely as security for a liability incurred as accommodation makers of the note, so as to bring the transaction within s. 6 of the Chattel Mortgage Act:—Held, also, that the fact of part of the consideration of the mortgage consisting of separate debts to the plaintiff and M. did not prevent the plaintiff making the affidavit of bona fides, the first section of the Act not being limited to cases of joint mortgagees connected in business, &c.:—Held, also, that the plaintiff and M. acquired a good title as purchasers at the bailiff's sale, and that such sale was not within the Act so as to require the registration of a bill of sale, or an actual and continued change of possession: but, semble, that the plaintiff and M. could also rely on the mortgage:—Held, therefore, that the plaintiff and M. were entitled to recover. *Severs* v. *Clarke*, 30 C. P. 363, and *Corby* v. *Clarke*, *ib.* 368.

Separate Debts — *Mortgage to One — Effect of Taking Possession.*] — A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons: McL. made the usual affidavit of bona fides, asserting that the whole sum was due him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D., and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession:—Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession, nor the fact of the seizure under execution before taking possession, affected the position of the plaintiffs:—Held, also, that the taking possession could not be viewed as a preference within 48 Vict. c. 26, s. 2. *Bank of Hamilton* v. *Tamblyn*, 16 O. R. 247.

Unstamped Notes.]—See *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

IV. Form and Construction.

1. *In General.*

Clerical Error.]—Party of "first" part, instead of "second" part in the assignment:—Held, immaterial. *Taylor* v. *Commercial Bank*, 4 C. P. 447.

Date of Actual Execution.]—The date in a bill of sale is immaterial if it is registered after its actual execution within the time required by R. S. O. 1897 c. 148, the Bills of Sale and Chattel Mortgage Act. On a bonâ fide sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale. *McDonald* v. *Gaunt*, 30 O. R. 398.

Seal.]—A chattel mortgage need not be under seal. *Paterson* v. *Maughan*, 39 U. C. R. 371.

See also, *Halpenny* v. *Pennock*, 33 U. C. R. 229.

Time for Payment.] — Where the payments to be made on a chattel mortgage extend over a year from its date, it is void as contrary to the policy of the Act respecting chattel mortgages. *O'Neill* v. *Small*, 15 C. L. J. 114. See next case.

Time for Payment.]—Where a chattel mortgage is taken to secure a debt, the time for payment may be extended beyond a year. *Kerry* v. *James*, 21 A. R. 338.

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2. *Affidavit of Bona Fides.*

Adherence to Statutory Form.]—The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale under s. 4 of the Nova Scotia Act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. *Archibald* v. *Hubley*, 18 S. C. R. 116.

Adherence to Statutory Form.] — Where an affidavit of bona fides to a bill of sale states that the sale was not made for the purpose of holding or enabling the bargainee

to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the statute uses the words "against any creditors of the bargainor," such violation does not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. The statute requires the affidavit to be made by a witness to the execution of the bill of sale, but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness. *Emerson* v. *Bannerman*, 19 S. C. R. 1.

Adherence to Statutory Form.]—The Act in force in Nova Scotia relating to bills of sale, R. S. N. S. 5th ser. c. 92, requires by s. 4 that every such instrument shall be accompanied by an affidavit by the grantor, and s. 11 provides that the affidavit shall be, as nearly as may be, in the form given in schedules to the Act. The form prescribed begins as follows: "I, A. B., of....., in the county of....., (occupation), make oath and say." An affidavit accompanying a bill of sale having omitted to state the occupation of the grantor:—Held, that as the affidavit referred in terms to the instrument itself, in which the occupation of the deponent was stated, the statute was complied with. Per Taschereau, J.—The onus was upon the persons attacking the bill of sale to prove, by direct evidence, that the grantor had an occupation, which they had failed to do. *Smith* v. *McLean*, 21 S. C. R. 355.

Adherence to Statutory Form.]—By R. S. N. S. 5th ser. c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of bona fides, "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at.....in the county of....., this.....day of.....A.D.... Before me....., a commissioner," etc.:—Held, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891," &c., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in the county of Annapolis." Archibald v. Hubley, 18 S. C. R. 116, followed; Smith v. McLean, 21 S. C. R. 355, distinguished. *Morse* v. *Phinney*, 22 S. C. R. 583.

Adherence to Statutory Form.]—The Bills of Sale Act, Nova Scotia, R. S. N. S. 5th ser. c. 92, by s. 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by s. 5, if the mortgage is to secure a debt not matured the affidavit must follow another form. By s. 11 either affidavit must be, "as nearly as may be," in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms:—Held, that this affidavit was not "as nearly as may be" in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same the mortgage was void for want of such compliance. *Reid* v. *Creighton*, 24 S. C. R. 69.

Affidavit Sworn Before Execution.]—Where the affidavit of bona fides to a chattel mortgage was sworn to before the execution of the mortgage, the mortgage was held invalid. Reid v. Gowans, Court of Appeal, 15th October, 1885, (not reported), followed. *Building and Loan Association* v. *Betzner*, 10 C. L. T. Occ. N. 112.

Agent.]—13 & 14 Vict. c. 62, requires that the mortgagee himself shall make the affidavit; therefore a mortgage filed upon an affidavit of his agent was held void. *Holmes* v. *Vancamp*, 10 U. C. R. 510.

Agent.]—Held, reversing 32 C. P. 43, that it need not appear in the affidavit, or the mortgage, or the papers filed therewith, that the agent of the mortgagee, making the affidavit, was aware of the circumstances connected with such mortgage. *Carlisle* v. *Tait*, 7 A. R. 10.

Clerical Error—*Incomplete Affidavit.*]—The affidavit of bona fides in a chattel mortgage taken to secure the mortgagee against his indorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing me, the said mortgagee therein named, against his indorsement of a certain promissory note for (sic) or any renewal of the said recited promissory notes:"—Held, that "his indorsement" might be read "my indorsement," as this was clearly a clerical error, but that even with this correction, the clause remained vague and incomplete, and that the affidavit was therefore fatally defective. *Boldrick* v. *Ryan*, 17 A. R. 253.

Commissioner—*Draftsman of the Instrument.*]—A person who prepared the assignment may take an affidavit as commissioner. *Noell* v. *Pell*, 7 L. J. 322.

Commissioner's Addition Omitted.]—The affidavit of bona fides in a chattel mortgage purported to be sworn before "T. B. F." without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., &c.:"—Held, no objection to the affidavit of bona fides. *Hamilton* v. *Harrison*, 46 U. C. R. 127.

Commissioner's Addition — *Solicitor's Power to Take Affidavit.*]—An affidavit of bona fides in a chattel mortgage sworn before a person who is in fact a commissioner authorized to take affidavits in and for the high court, but who places after his signature in the jurat only the words "A Comr., &c." is good. Such an affidavit may be made before a solicitor employed in the office of the mortgagees' solicitors. *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515.

Commissioner's Signature Omitted.]—Where the signature of the commissioner to the affidavit of bona fides to a chattel mortgage was omitted through inadvertence, the instrument was held invalid as against a subsequent execution creditor, although it was satisfactorily proved that the oath was in fact administered. *Nisbet* v. *Cock*, 4 A. R. 200.

Company—*President.*]—The president or other principal officer of a corporation taking a mortgage for and in the name of the corporation does not act as its agent, but as principal in the exercise of its corporate powers; and may therefore make the affida-

vit of bona fides under C. S. U. C. c. 45, without authority in writing. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

Company — *Manager.*] — The affidavit of bona fides of a chattel mortgage was made by the manager of a loan society, no written authority to him being filed with the mortgage, nor any statement contained in the affidavit as to his knowledge of the circumstances:—Held, insufficient. Bank of Toronto v. McDougall, 15 C. P. 475, distinguished. *Freehold Loan and Savings Co.* v. *Bank of Commerce*, 44 U. C. R. 284.

Company—*Officer — Agent — Authority.*] —Where the affidavit of bona fides of a chattel mortgage to an incorporated trading company was made by the secretary-treasurer, who was also a shareholder in the company and had an important share in the management of its affairs, there being, however, a president and vice-president:—Held, that the affiant was to be regarded not as one of the mortgagees, but as an agent, and, as no written authority to him was registered, as required by R. S. O. 1887 c. 125, s. 1, the mortgage was invalid as against creditors. Bank of Toronto v. McDougall, 15 C. P. 475, distinguished. Freehold Loan and Savings Co. v. Bank of Commerce, 44 U. C. R. 284, followed. *Greene and Sons Co.* v. *Castleman*, 25 O. R. 113.

"Creditor" "Instead of Creditors."] —That the mortgage was not made to prevent "the creditor," (instead of creditors) "of such mortgagor obtaining payment of any claims against him:"—Held, insufficient. *Harding* v. *Knowlson*, 17 U. C. R. 564.

Departure From Form.]—An affidavit that the "bill of sale was executed in good faith and for good consideration," instead of "that the sale is bonâ fide and for good consideration:"—Held, under the circumstances of this case, insufficient. *Boynton* v. *Boyd*, 12 C. P. 334.

Deponent's Addition.]—"Secretary of the Board of Arts and Manufactures:"—Held, a sufficient addition. *Noell* v. *Pell*, 7 L. J. 322.

"Due or Accruing Due."]—That the mortgage was executed for the purpose of securing the payment of the money so justly "due or accruing due:"—Held, sufficient, being in the terms of the Act. *Squair* v. *Fortune*, 18 U. C. R. 547.

"Due or Accruing Due."]—The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due:"—Held, that the debt might be stated as due when it really was due, and that it need not be necessarily stated as either due or accruing. *Farlinger* v. *McDonald*, 45 U. C. R. 233.

Error in Description.] — An affidavit that the deed was not made to enable the assignor (instead of the assignee) to hold the goods against creditors:—Held, bad. *Olmstead* v. *Smith*, 15 U. C. R. 421.

"Estate and Effects" Instead of "Goods."]—That it was made "for the purposes and trusts therein set forth," and not for the purpose of holding, &c., "the estate and effects mentioned therein," instead of "the goods," as in the statute:—Held, sufficient. *Mason* v. *Thomas*, 23 U. C. R. 305.

Indemnity.]—A. mortgaged to B. for a debt due by C., and C., to secure A., gave him a chattel mortgage conditioned to be void on his paying the amount of the debt either to A. or B., or indemnifying A. against his suretyship. This was registered under 13 & 14 Vict. c. 62, on an affidavit in the form prescribed, that C. was "justly and truly indebted to A." in the amount of the mortgage. It was objected that such mortgage was void as against the plaintiff, a creditor of C., because the affidavit could not have been made consistently with the facts:—Held, 1. that A. could properly make the affidavit; and 2. that if he could not, then the mortgage, not being within the statute, would not have required registration at all. *Baldwin* v. *Benjamin*, 16 U. C. R. 52.

Jurat.]—The jurat to an affidavit on a chattel mortgage was as follows: "Sworn before me at the Brantford of —— in the —— county of Brantford, this 13th day of October, A.D. 1855: George W. Mallock, a commissioner for taking affidavits in the Queen's Bench, in and for the said county of Brant:"—Held, sufficient. *DeForrest* v. *Bunnell*, 15 U. C. R. 370.

Liability "of" Instead of "for."]—An affidavit that the mortgage was made to secure the mortgagee against the payment of such liability "of," instead of "for," the mortgagor, by reason of the notes to secure against the indorsement of which it was given:—Held, sufficient. *Mathers* v. *Lynch*, 28 U. C. R. 354.

Money not Actually Advanced.]—The affidavit of bona fides attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mortgagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made. In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage:—Held, reversing 27 O. R. 545, that the mortgage was valid. *Martin* v. *Sampson*, 24 A. R. 1.

Omission.]—An affidavit that the mortgage was executed in good faith, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage, or preventing the creditors of the said L., (the mortgagor), from obtaining payment of any claim against him:—Held, insufficient, for not stating that it was not made to protect the goods "against the creditors of the mortgagor," as required by the Act, 20 Vict. c. 3. *Boulton* v. *Smith*, 17 U. C. R. 400, 18 U. C. R. 458.

Omission.]—An affidavit stated that an assignment for the benefit of creditors was made "bonâ fide," omitting the words, "for good consideration:"—Held, bad. *Mason* v. *Thomas*, 23 U. C. R. 305.

Omission.]—An affidavit that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against

——not saying against whom: —Held, clearly not a compliance with the Chattel Mortgage Act. *Re Andrews*, 2 A. R. 24.

Omission.]—The affidavit of bona fides stated that the mortgage was not made for the purpose of protecting the goods against the creditors of M. and D.—not adding, or either of them—or preventing the creditors obtaining their claims against him—instead of them:—Held, sufficient. *Bertram* v. *Pendry*, 27 C. P. 371.

Omission.] — The omission of the word "him," at the conclusion of the affidavit of bona fides registered with a chattel mortgage, has the effect of destroying the security as against an execution creditor who has seized while the goods remained in statu quo, but does not impair the instrument as between the parties. *Davis* v. *Wickson*, 1 O. R. 369.

One of Several Bargainees.]—An affidavit made by one of several bargainees or assignees of goods (before 20 Vict. c. 3):—Held, sufficient. *Balkwell* v. *Beddome*, 16 U. C. R. 203; *Heward* v. *Mitchell*, 11 U. C. R. 625.

One of Several Mortgagees.] — It is sufficient if one of several mortgagees make the affidavit required by R. S. O. 1877 c. 119, s. 2. *Tidey* v. *Craib*, 4 O. R. 696.

One of Two Bargainees.]—Where a bill of sale was made to two jointly, and filed on an affidavit of bona fides made by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately:—Held, sufficient. *McLeod* v. *Fortune*, 19 U. C. R. 100.

Partner.]—One partner can make the affidavit of bona fides. *Ross* v. *Dunn*, 16 A. R. 552.

Plural Instead of Singular.]—H. and I. being indebted to a bank, gave to T., the agent of the branch at H., and to the other plaintiff, their general manager, as trustees, a mortgage to secure the debt. T. had no express power to take this security, the other plaintiff was absent, and the bank on hearing of the transaction repudiated it. The mortgage, made by H., I., and S., of the first part, recited that they were indebted to the mortgagees, and had agreed to secure payment of their indebtedness, but H. alone assigned the goods, and there was a proviso that the mortgage should be void if they should pay. The affidavit was that H., I., and S., "the mortgagors," were indebted, that the instrument was not executed for the purpose of protecting the goods against the creditors of the said H., I., and S., "mortgagors therein named, or preventing the creditors of the said mortgagors," &c.:—Held, that describing the three as mortgagors, when only H. conveyed anything, was not a fatal objection. *Taylor* v. *Ainslie*, 19 C. P. 78.

Reference to Mortgage.]—An affidavit that the mortgagor was justly and truly indebted to the mortgagee in the sum of £800, or thereabouts, as fully set forth in the mortgage; that the mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the mortgagee for his said indorsement, and not for the purpose of protecting the goods against the creditors of the mortgagor:—Held, sufficient, under Baldwin v. Benjamin, 16 U. C. R. 52. *Valentine* v. *Smith*, 9 C. P. 59.

Singular for Plural.]—Held, that recitals which used the singular instead of the plural number, and an affidavit which stated that the conveyance was not for the purpose of enabling "the bargainee to hold," &c., there being two bargainees, did not vitiate the instrument. *Tyas* v. *McMaster*, 8 C. P. 446.

Singular for Plural.] — The affidavit stated that the mortgage was not granted for the purpose of protecting the goods and chattels against the creditors of the two mortgagors, naming them, or preventing the creditors of the said mortgagor from obtaining payment for any claim against him, the said mortgagor:—Held, sufficient, for that the word "mortgagor" would mean each of the mortgagors previously mentioned. *Farlinger* v. *McDonald*, 45 U. C. R. 233.

Statement of Consideration.] — The affidavit of bona fides in a bill of sale, which the evidence shewed was taken in satisfaction of a previous loan from the bargainee to the bargainor, stated that the sale was bona fide and for good consideration, namely, $830 (which was the consideration expressed in the bill of sale), advanced by the bargainee by way of a loan:—Held, that the affidavit substantially complied with s. 5 of R. S. O. 1887 c. 125, and that the addition of the words "advanced, etc., by way of a loan," did not render the affidavit defective. *Ormsby* v. *Jarvis, Chapman* v. *Jarvis*, 22 O. R. 11.

Statement of Indebtedness.] — The mortgage did not state the amount of the indebtedness; and the affidavit of bona fides was equally defective, as it merely stated that the mortgagors "are fully indebted to me," the mortgagee, "in a large sum of money," no sum being mentioned:—Held, void as against the plaintiffs, the amount of indebtedness existing or created by the mortgage not being mentioned therein, and in the affidavit of bona fides as required by ss. 1 and 2 of R. S. O. 1877 c. 119. *Stevens* v. *Barfoot*, 9 O. R. 692; 13 A. R. 366.

Statement of Indebtedness.]—A mortgagee under a chattel mortgage to secure an existing indebtedness made the affidavit of bona fides required by s. 6 of R. S. O. 1887 c. 125, for a mortgage to secure future advances instead of the affidavit required by s. 2:—Held, that the affidavit was defective in not stating "that the mortgagor was justly and truly indebted to the mortgagee," and that the mortgage could not be looked at to aid the affidavit in this requirement. *Midland Loan and Savings Co.* v. *Cowieson*, 20 O. R. 583.

Technical Forms.]—It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of court. *De Forrest* v. *Bunnell*, 15 U. C. R. 370; *Moyer* v. *Davidson*, 7 C. P. 521.

Time of Making.]—Affidavits under 13 & 14 Vict. c. 62, need not be made on the day the mortgage is executed. *Perry* v. *Ruttan*, 10 U. C. R. 637.

Trustee—*Conversion of Goods.*]—A chattel mortgage to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged chattels, it was contended that the mortgage was invalid because the mortgagee could not properly make the usual affidavit of bona fides, as there was no debt due to him:—Held, notwithstanding there was nothing on the face of the mortgage to shew the fiduciary position of the mortgagee, that the mortgage was valid. *Brodie* v. *Ruttan*, 16 U. C. R. 209, applied and followed. At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power:—Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale. A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold: from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods. *Light* v. *Hawley*, 29 O. R. 25.

Two Deponents.]—The words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word "severally" in the affidavit to a mortgage:—Held, sufficient. *Moyer* v. *Davidson*, 7 C. P. 521.

Two Mortgagors—"*Or Either of Them.*"]—That a mortgage by two was not executed to secure the goods against the creditors of the mortgagors, nor to prevent such creditors from recovering, &c., is sufficient, without adding "or either of them," as regards the mortgagors, or "or any or either of them" as regards the creditors. *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381. Followed in *Taylor* v. *Ainslie*, 19 C. P. 78.

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

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3. *Affidavit of Execution.*

Affidavit in Form Right but in Fact Wrong.]—Where a witness to a mortgage by two swears that he saw both execute, when in fact he only saw one, and the mortgage has been registered on such affidavit, it is sufficient. *DeForrest* v. *Bunnell*, 15 U. C. R. 370.

Date of Instrument and of Execution.]—Held, no objection that the affidavit of execution did not state the date of the bill of sale or on what day it was executed. *McLeod* v. *Fortune*, 19 U. C. R. 100.

Deponent's Addition.]—The want of deponent's addition is no objection to an affidavit made for registration of a chattel mortgage. *Brodie* v. *Ruttan*, 16 U. C. R. 207.

Mayor of Foreign Town.]—An affidavit of execution sworn before the mayor of a foreign town is useless. *DeForrest* v. *Bunnell*, 15 U. C. R. 370.

Name of Deponent.]—It is no objection that the second Christian name of a deponent to an affidavit of the execution of a chattel mortgage is not written in full, but the initial only given. *DeForrest* v. *Bunnell*, 15 U. C. R. 370.

Subscribing Witness.]—Held, under 12 Vict. c. 74, that it was not essential that the affidavit of execution should be of a subscribing witness; and that where the original had no subscribing witness, but in the copy filed the name of the person who made the affidavit was inserted as a witness, the variance was not material. *Armstrong* v. *Ausman*, 11 U. C. R. 498.

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4. *Description of Goods.*

After Acquired Goods.]—A description in a chattel mortgage of after acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage.

and the amending Act, 55 Vict. c. 26 (O.), has not made any difference in this respect. *Horsfall* v. *Boisseau*, 21 A. R. 663.

After Acquired Goods.]—The mortgage in this case clearly could not pass after acquired goods, for though after acquired goods may be affected in equity, it could only be when the mortgage shews an intention to do so. *Mason* v. *Macdonald*, 25 C. P. 435.

After Acquired Goods.]—Although the rule at law is, that an instrument intended either to assign or charge chattels of which the assignor has not the possession, is imperfect without some subsequent act of the assignor, the same is not the case in equity, neither does it prevail in insolvency proceedings, where the court is bound to work out the equities between the parties. On a sale by a partner of his interest in the partnership effects to his co-partner, and for the purpose of securing the amount due on such purchase, the purchaser, T., executed a mortgage to the vendor on "all the stock-in-trade, consisting of drugs, chemicals, * * * and in fact everything in stock or held by the late firm of T. & P. in connection with their business * * * and now in possession of the said party of the first part [the purchaser] in or upon the shop or premises occupied by him on the north side of Kent street, in * * * and also any stock purchased hereafter by the said T., and which may be in his possession upon said premises during the continuance of this security or any renewal thereof." Afterwards T. executed a renewal of this mortgage, describing the property substantially as above, and as being in his possession on the date of the first mortgage, and "also any stock purchased by the said mortgagor thereafter and now in his possession; and also any stock purchased hereafter by the said mortgagor, and which may be in his possession, upon the said premises, at any time during the continuance of this security or any renewal thereof:"—Held, (1) that stock acquired by T. after the execution of such second mortgage, as well as that acquired by him after the date of the first and before the execution of the second mortgage, was bound by such second mortgage, and that the mortgagee was entitled to retain the same as against the assignee in insolvency of the mortgagor; and (2) that the property was sufficiently described in the mortgage both as to its nature and locality. *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 492.

After Acquired Property.]—Held, that the terms of the agreement in this case were not sufficiently comprehensive to cover the substituted, renewed, or added stock-in-trade. *Kitching* v. *Hicks*, 6 O. R. 739.

After Acquired Property — *Executions.*]—A chattel mortgage conveyed to the plaintiff the stock-in-trade of the mortgagor, which purported to be enumerated in a schedule and was described as being on certain named premises. The schedule after setting out the goods proceeded: "And all goods * * * which at any time may be owned by the said mortgagor and kept in the said store for sale * * * and whether now in stock or hereafter to be purchased and placed in stock:"—Held, that after-acquired stock brought into the business in the ordinary course thereof, became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time when such stock was brought into the business; the equitable right of the mortgagee under such agreement attaching immediately on the goods reaching the premises. *Coyne* v. *Lee*, 14 A. R. 593.

Animals—*Age.*]—In a bill of sale certain goods were described as "one brown stallion, ten years old; one bay horse, eight years old: one black mare, nine years old:"—Held, a sufficient description. *Cornell* v. *Abell*, 31 C. P. 107.

Books of Account — *Schedule.*]—N. & Co. by deed assigned to M. all and singular the "furniture and effects of them, the said N. & Co., and which will be more particularly mentioned and described in the schedule to these presents hereafter to be annexed, marked A., and all other their personal estate and effects whatsoever and wheresoever situated." The schedule was not filled up at the time of executing or filing the assignment, but was afterwards filled up by a third person without reference to the assignors, and the books in question were mentioned in it, but remained in their possession. Afterwards N. & Co., by another deed, assigned to the plaintiff all the debts owing to them, giving him power to examine and take extracts from their accounts for the purpose of making up and adjusting such debts properly. The books were handed to the plaintiff by N. & Co., in pursuance of this deed, and having been taken from him by defendant, he replevied. Defendant set up M.'s right:—Held, that the plaintiff was entitled to recover, for the schedule to the first assignment, filled up as it was, could have no effect, and the books did not pass under the operative words. *Crawford* v. *Brown*, 17 U. C. R. 126.

Chattels—*Animals.*]—What is a sufficient description of chattels and animals discussed. See *Boldrick* v. *Ryan*, 17 A. R. 253.

See Connell v. *Hickock*, 15 A. R. 518.

Crops—*Error in Description of Land.*]—M., owning parts of lots 13 and 14 in the 2nd concession of Murray, gave a chattel mortgage of certain crops, grain, hay, &c., described as "now being on the premises situate on the north-east half of lot 14 in the 2nd concession, and north half of lot 14 in the said concession of Murray:"—Held, that crops and hay upon lot 13 could not pass. *Grass* v. *Austin*, 7 A. R. 511.

Crops.]—Crops to be grown may be covered by a chattel mortgage, and a chattel mortgage of "crops which may be sown during the currency of this mortgage," covers crops sown after the mortgage falls due but remains unpaid. *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515.

Definite Quantity.] — "14,415 feet of prepared moulding:"—Held, a sufficient and full description under the statute. *Noell* v. *Pell*, 7 L. J. 322.

Erroneous Description of Dwelling-house—*Falsa Demonstratio.*]—Goods intended to be included in a chattel mortgage were described therein as those mentioned in the schedule, the property of the mortgagors, situate upon the premises on the north-east corner of certain streets in a township. The

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

Furniture — *Locality.*] — Goods were described in a chattel mortgage as "one kitchen table, four chairs, all contained in and about the dwelling-house and barn of the mortgagor, situate at or on lots," &c.:—Held, sufficient. *Nattrass* v. *Phair*, 37 U. C. R. 153.

General Words.]—The words "one single buggy," in a chattel mortgage:—Held, not a sufficient description to satisfy R. S. O. 1877 c. 119, s. 23. *Holt* v. *Carmichael*, 2 A. R. 639.

General Words.]—In an assignment the goods were described as "all the household furniture, goods, chattels, and effects belonging to and being in the dwelling-house of the said Burrowes, and which are enumerated and set forth in the second schedule hereunto annexed; and also the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth." In the margin of the schedule different localities were mentioned, and opposite to them the goods specified, the articles in question being as follows:—"Stable and coach house; three horses, three sets harness, one straw-cutter, one cow, one cutter, two buggies, &c. Lumber yard: two waggons, one pair bob-sleighs, four wheelbarrows, trestles and scaffolding, *old lumber, &c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet flooring, one pair of timber wheels, one hand cart, two yard dogs, cut stone*:"—Held, that the articles in italics were sufficiently described, and passed as stock-in-trade, and that the description as to the others was insufficient. *Haworth* v. *Fletcher*, 20 U. C. R. 278.

General Words — *Articles Capable of Specific Description.*]—The goods and chattels were described in a chattel mortgage as follows:—Certain specific articles were first enumerated in the mortgage, and the description then proceeded, "also the stock of gold and silver watches, jewellery, and electro-silver plate, which, at the date hereof, is in the possession of the mortgagor in his said store" (being a certain store of the mortgagor thereinbefore specified). The evidence shewed the electro-plated goods and watches were numbered, and might have been identified thereby:—Held, a sufficient description of the goods mortgaged. *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

General Words — *Locality.*] — "Seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling-house, all the lumber and logs in and about the saw mill and premises of the said grantor, and all the blacksmith's tools now in possession of the said party of the first part, six cows and four stoves:—Held, a sufficient description as to the household furniture, lumber and logs, and insufficient as to the other goods. *Rose* v. *Scott*, 17 U. C. R. 385.

General Words — *Locality.*]—"One set of double harness, four cows, one yoke of steers, four yearling calves, eighteen sheep, one sow and pigs, two waggons, one cutter, one sleigh, two ploughs, one harrow, one cultivator, one straw cutter, three stoves, two dozen chairs, four tables, five bedsteads, bed and bedding, two bureaux, one sideboard, two carpets," called goods, chattels, furniture, and household stuff, without stating where they were situate or in whose possession:—Held, insufficient; but semble, that the mortgage was good to pass other property properly described. *Hiscott* v. *Murray*, 12 C. P. 315.

General Words— *Locality.*] — The Consolidated Statutes of Manitoba, c. 49, s. 5, enact: "All the instruments mentioned in this Act whether for the sale or mortgage of goods and chattels, shall contain such a full and sufficient description thereof that the same may be thereby readily and easily known and distinguished:"—Held, that where goods in a chattel mortgage, were described as "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described and particularly mentioned and described in the schedule hereunto annexed marked A.; all of which goods and chattels are now situate, lying, and being, etc." (particularly describing the premises), without stating that such goods were all the goods on the said premises, there was not a full and sufficient description within the meaning of the above enactment, and the mortgage was void as against execution creditors. *McCall* v. *Wolff*, 13 S. C. R. 130.

General Words—*Locality—Schedule.*]—A chattel mortgage described the goods as "all the goods, chattels, furniture and household stuff whatsoever, the property of the said mortgagor, situate and being in and upon the hotel, stables and premises known as Strong's Hotel, in the said city of London; which said goods and chattels, furniture and household stuff, are more particularly, but without restriction to the above description, described and set out in the schedule hereto annexed marked A.—that is to say, any goods and chattels, furniture and household stuff, in and upon the said hotel, stables and premises, not included in the said schedule are not to be excluded from this security." In the schedule was contained: "Yard and stables, one omnibus, two bay horses, aged * * the whole of this above named property, goods, and chattels, household furniture, horses, and waggons, now being in and upon the premises known as Strong's Hotel," on, &c. At the

time of giving the mortgage the mortgagor owned only two horses for the use of the omnibus, one of which was not a bay horse:—Held, that this horse would not pass by the description in the schedule, but that it passed by the general words in the mortgage, as being in and upon the stables and premises; and that the omnibus passed. *Fitzgerald* v. *Johnston*, 41 U. C. R. 440.

General Words — *Specific Locality.*]—The goods were specified as particularly mentioned in a schedule annexed, in which they were described as one buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter; and the following household furniture, namely, in the small parlour, one stove, &c., enumerating the articles in different rooms:—Held, sufficient as to the furniture, but insufficient as to the other goods. *Sutherland* v. *Nixon*, 21 U. C. R. 629.

General Words — *Specific Locality.*]—"All the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, and every other article or thing on or about the south half of lot 24, in &c.:"—Held, sufficient. *Balkwell* v. *Beddome*, 16 U. C. R. 263.

General Words — *Specific Locality.*]—All the goods, &c., of the assignor being in and about his warehouse on Y. street, and all his furniture in and about his dwelling-house on W. street, and all bonds, bills, and securities for money, loans, stock, notes, &c., whatsoever, and wheresoever, belonging, due, or owing to him:—Held, sufficient. *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

General Words — *Specific Locality* — *Stock-in-Trade.*]—In a deed of assignment the property was described as "all the real estate, lands, tenements, and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they have any estate, right or interest of any kind or description, with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock-in-trade, goods, chattels * * and all other the personal estate and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever." The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, &c., in or upon said premises:—Held, that this was a sufficient description of the property intended to be conveyed to satisfy s. 23 of R. S. O. 1877 c. 119. McCall v. Wolff, 13 S. C. R. 130, approved and distinguished. *Hovey* v. *Whiting*, 14 S. C. R. 515. See *S. C., sub nom. Whiting* v. *Hovey*, 13 A. R. 7, 9 O. R. 314.

Semble, a description of property in a bill of sale or chattel mortgage as "the stock-in-trade" of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient. Nolan v. Donelly, 4 O. R. 440, observed upon. McCall v Wolff, 13 S. C. R. 130, followed. *Ib.*

Goods "In Bond."]—Semble, that the description of goods as "in bond," means in the customs warehouse, and is a sufficient description as regards locality. *May* v. *Security Loan and Savings Co.*, 45 U. C. R. 106.

Goods not on Described Premises.]—A description of the goods as "being now on the premises occupied by the" mortgagors "in the town of Peterborough, being lot," &c., "and being composed of one stumping machine, one prize buggy, one lumber waggon complete," &c.:—Held, sufficient as to all the goods, though the stumping machine and waggon were not on the premises. *Bertram* v. *Pendry*, 27 C. P. 371.

Individual and Joint Property.]—A deed was executed by J. N. Kline & Son, of the first part, whereby, after reciting that they had proposed and agreed to assign all their personal estate and effects to certain parties of the second part, they conveyed and assigned in the said parties "all and singular the stock-in-trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to or due or owing to the said parties of the first part, and which are set forth in the schedule hereto annexed, marked with the letter "A.," and subscribed by the parties hereto of the first and second parts; and all the personal estate whatsoever of the said parties of the first part, and all their estate and interest therein." No schedule was attached to the deed at its execution, but schedules were afterwards annexed, signed John N. Kline & Son, John N. Kline, junr., Anthony Kline:—Held, that independently of the schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline. *Heward* v. *Mitchell*, 10 U. C. R. 535.

Life Assurance Policy.] — Quære, are the words, "all bills, bonds, notes, securities, accounts, books, book debts, and documents securing money," in a general assignment for the benefit of creditors, sufficient to pass a policy on the life of the assignor held by him for his own benefit. *Lee* v. *Gorrie*, 1 C. L. J. 76.

Locality.]—An assignment of "all the stock-in-trade, merchandise, goods, and effects," in the shop occupied by the assignor, situate on the south side of King street, in the city of Toronto, and known and numbered 77, which said goods and chattels are particularly mentioned in the schedule annexed hereto, and marked "A.:" which schedule began, "stock in workshops," and went on describing what was therein, and next described what was in the front shop:—Held, sufficient to pass not only what was contained in the front shop first described, but what was contained in a continuous shop consisting of the front shop and two workshops. *Noell* v. *Pell*, 7 L. J. 322.

Locality.]—The goods were described as "all the goods in the house of the mortgagor; in bedroom No. 1, one bureau," &c., describing the articles in each room, and adding, "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen street, in the town of Brampton; also, one bay mare, one covered buggy," &c., "being on the premises of the party of the first part on said Queen street; also the following goods and

articles, being in the store of the party of the first part, on the corner of Queen and Main streets, in the said town of Brampton; that is to say, eighty-five gallons of vinegar," giving a long list; "and also the following goods, being of the stock-in-trade of the party of the first part, taken in the month of April last; that is to say, sixteen pieces of tweed," &c.: —Held, that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store. *Mathers* v. *Lynch*, 28 U. C. 354.

Remarks as to the insufficiency of description of goods by locality. *Ib.*

Locality—*Goods in Possession of Third Person.*]—C. and J., by mortgage, dated 6th February, 1863, conveyed certain goods, mentioned and described in schedules attached thereto, to the plaintiff. Some of the goods mentioned therein were in possession of the manufacturer, one R.; other portions were in certain rooms in the American and Burlington hotels. The description given merely designated a portion of the property by locality, giving no particular description, and was as follows: "All and singular the goods and chattels, furniture, household stuff, and articles particularly mentioned and expressed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the city of Hamilton, and are about to be placed in the building known as the Burlington Hotel." The schedule began: "Schedule mentioned and referred to in the annexed indenture: one set parlour furniture," &c. (describing some articles), "in parlour H. One walnut bedstead," &c. (describing several articles) "in parlour C.":—Held, 1. Upon the authority of Fraser v. Bank of Toronto, 19 U. C. R. 383, and Powell v. Bank of Upper Canada, 11 C. P. 303, that all the goods in the schedule described as having been in certain rooms in either of the hotels, passed by the mortgage; 2. that all the goods described as being in certain rooms, and which were not in those rooms at the time, did not pass; 3. that goods described specifically (as one omnibus, &c.), without any local description, passed, under the authority of the same cases; also, because the description would be sufficient in detinue; 4. that all the goods which were made at the time of executing the mortgage, and were the property of the mortgagors in Reid's warehouse, passed under the mortgage as a distinct grant from those in the schedules. *Mills* v. *King*, 14 C. P. 223.

Locality Limited.]—In an action against a sheriff for false return the defence was that the goods seized and subsequently, on his being indemnified, abandoned by him, and which were on Bald Lake, Buckhorn Lake, Sandy Creek, and Squaw River, were covered by a chattel mortgage to a bank, the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River, and the shore adjacent thereto." The evidence shewed that the former waters were well known as such, and as distinct from and forming no part of the latter, and that no part of the goods seized had ever been "in and upon" the latter:—Held, that the words in the mortgage, "now in and upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mortgage, and the shore adjacent thereto, and could not include the goods seized. *Donnelly* v. *Hall*, 7 O. R. 581.

Locomotives.]—Held, if it were necessary to determine that point, that the two locomotives sold were sufficiently described in the deed set out in this case. *Burton* v. *Bellhouse*, 20 U. C. R. 60.

Piano.] — "One piano, Dominion make, numbered 2773," is a sufficient description in a bill of sale. *Field* v. *Hart*, 22 A. R. 449.

Saw-Logs — *Lumber.*] — A mortgage on saw-logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of them. *White* v. *Brown*, 12 U. C. R. 477.

Schedule.]—All the goods, chattels, furniture, and household stuff "now in Sword's Hotel, Toronto, or particularly mentioned and expressed in a certain schedule marked A. hereunder written or hereunder annexed," will not include goods not in the schedule. *Kingston* v. *Chapman*, 9 C. P. 130.

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

Schedule.]—Plaintiff claimed under an assignment which had a schedule of goods attached, intended to be passed thereby. The goods in question had gone into the store prior to the execution of the assignment, and were not in the schedule:—Held, that the assignment only passed what was contained in the inventory. *Gunn* v. *Ruttan*, 7 C. P. 516.

Schedule—*Locality.*]—The property was described as "the goods, chattels, furniture, and household stuff expressed in the schedule hereunto annexed," which schedule was headed, "An inventory of goods and chattels in the possession of one J. R." on a named day. It proceeded to mention certain rooms and the articles therein contained: then jewellery, blankets, household linen, silver, &c., the locality of the house in which the goods, &c., were contained not being mentioned:—Held, sufficient. *Powell* v. *Bank of Upper Canada*, 11 C. P. 303.

Schedule—*Rooms.*]—The goods were described as set forth in the schedules annexed. Schedule C. was headed, "Household furniture in J. E. W.'s residence," and specified the several articles in detail, giving a list of those contained in each room, from which the

sheriff said he had no difficulty in identifying them:—Held, sufficient. Schedule D. was headed, "Household furniture and property of J. R. McDermott," and the several apartments containing the furniture were specified:—Held, also sufficient, as it might be assumed to refer to the party's residence. *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.

Schedule—*Change of Place of Business.*] Where persons carrying on business as manufacturers of hoops and staves at their factory at B., and also as general storekeepers at L., in the same county, made a chattel mortgage conveying their goods and chattels to defendant, as set forth in two schedules annexed thereto, schedule A. covering the machinery and other goods and chattels in the factory, and which, after describing them, extended to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stave manufacturing or not, or into or upon any other premises thereafter to be occupied by the mortgagors, or either of them, it being understood that all logs, staves and bolts manufactured and timber brought on the mortgagors' premises or not, after the execution of the mortgage, should be covered thereby; the other schedule, B., covering the goods and chattels in the general store, and extending to goods and chattels thereafter brought into the said store premises:—Held, that the provision in schedule B. as to after acquired goods referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into the store at B., to which that business had been subsequently removed; and that the provision as to after acquired goods in schedule A. did not apply to the after acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule. *Milligan* v. *Sutherland*, 27 O. R. 235.

Shares—*Expressio Unius.*]—All the assignor's "stock-in-trade, wares, merchandise, groceries, household furniture, and movable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf, and tenement in Ontario street, in the city of Kingston, or elsewhere (save and except and excluding the goods and chattels of the said J. F." the assignor, "in the possession, control, or charge of D. McW. of Adolphustown only), and also all his stock in the Kingston Marine Railway Company;" — Held, that shares in the Bay of Quinte Steamboat Company would not pass. *Hewitt* v. *Corbett*, 15 U. C. R. 39.

Ship's Furniture.]—Held, that the furniture, glass, crockery, table linen, beds, &c., on board a steamboat used for carrying passengers on Lake Ontario, passed under a mortgage of the vessel with all her apparel, furniture, &c., as part of the vessel; and that the mortgage, being of a registered vessel, was exempt from registry under the Chattel Mortgage Act. *Patton* v. *Foy*, 9 C. P. 512.

Ship—*Piano.*]—Semble, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances." *St. John* v. *Bullivant*, 45 U. C. R. 614.

Stock-in-Trade.] — "All my stock-in-trade, goods, wares, and merchandise in my store situate at," &c.:—Semble, not sufficient; but it was unnecessary to decide the question, as there had been a change of possession. *Hutchison* v. *Roberts*, 7 C. P. 470.

Stock-in-Trade.]—"All and singular his stock-in-trade, chattels, debts," &c., and "all his personal estate, and effects whatsoever and wheresoever:"—Held, as there had been a change of possession, that 20 Vict. c. 3 did not apply, otherwise the description would have been insufficient. *Howell* v. *McFarlane*, 16 U. C. R. 469.

Stock-in-Trade.]—In a deed of assignment for the benefit of creditors, goods and chattels were described as all the stock-in-trade, goods and chattels, &c., including, among other things, all their stock-in-trade which they, the assignors, "now have in their store and dwelling in the village of Renfrew:"—Held, description insufficient, in that the kind of stock-in-trade should have been mentioned. *Nolan* v. *Donnelly*, 4 O. R. 449.

Stock-in-Trade—*General Words.*] —"All and singular the stock-in-trade of the said W.," the assignor, "situate on Ontario street, in the said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses, and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years, leases, and securities for money;"—Held, insufficient as to all the goods. *Wilson* v. *Kerr*, 17 U. C. R. 168, 18 U. C. R. 470.

Stock-in-Trade—"*In Course of Delivery.*"]—A trader, in consideration of a debt, by deed assigned to the plaintiff all his stock-in-trade, &c., on certain premises, "or in course of delivery to him:"—Held, to pass his interest in goods lying at the wharf in the town where he resided, but not actually delivered to him. *McPherson* v. *Reynolds*, 6 C. P. 491.

Stock-in-Trade—*Locality.*]—Held, before 20 Vict. c. 3, that goods in a mortgage were sufficiently described as "all the stock of dry goods, hardware, crockery, groceries, and other goods, wares, and merchandise in the store and premises occupied by the mortgagor at," &c., if it were clearly made out that those in question were in the mortgagor's store, and his, at the execution of the instrument; and, held, also, that the evidence of identity in this case was sufficient. *Ross* v. *Conger*, 14 U. C. R. 523.

Stock-in-Trade—*Specific Locality.*]—Section 6 of the North-West Territories Ordinance provides that: "All the instruments mentioned in this Ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular the goods, chattels, stock-in-trade, fixtures, and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north-half of section six, township nineteen, range twenty-eight west of the fourth principal meridian:"—Held, affirming 1 N. W. T. Rep. No. 1, p. 88, that the description was sufficient. McCall v. Wolff, 13 S. C. R. 130, distinguished. Hovey v. Whit-

ing, 14 S. R. C. 515. followed. *Thomson* v. *Quirk*, 18 S. C. R. 695.

Tools — *General Words.*] — In a chattel mortgage made by M. & Co., the goods were described as "Two sets of blacksmithing and one set of waggon maker's tools complete, together with all their floating capital, stock-in-trade, to the value of $1,000, connected with the business they carry on in the said village of Waterdown, as waggon and carriage builders, general blacksmiths, &c., under the name and firm of M. & Co.:"—Held, an insufficient description as regarded the tools. *Mason* v. *MacDonald*, 25 C. P. 435.

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5. Indorsements and Advances.

Advances—*Agreement.*]—A mortgage purported to secure $1,600, acknowledged to have been paid by the mortgagees, the property mortgaged being 2,500 logs, and the proviso for redemption being on payment of $1,600, at seven per cent., on or before 1st of September, or by delivering lumber of first and second classes, as agreed between the parties, to that value. The agreement, which was of even date, declared that in consideration of the $1,600 then paid and advanced to the mortgagors by plaintiffs, "which sum is collaterally secured to the parties by chattel mortgage bearing even date herewith," &c., the mortgagors agreed to deliver to plaintiffs all the first and second class lumber made at their mill on or before 1st October then next; and plaintiffs agreed to pay at the prices named, "or, if the advance now made is not exhausted, to allow them for the lumber so delivered at rates aforesaid." The affidavit of the mortgagees was in the usual form under s. 2 of the Chattel Mortgage Act:—Held, that the mortgage was one within ss. 1 and 2, and not s. 5, of the Chattel Mortgage Act: that it was therefore not open to objection for not truly shewing the real transaction between the parties; and that the affidavit was sufficient. Baldwin v. Benjamin, 16 U. C. R. 52, followed. *Beecher* v. *Austin*, 21 C. P. 334.

Advances — *Cheque for Advance to be Drawn Against — Partner.*] — A mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith and in the honest belief that it would enable him to carry on his business agreed to make a fresh advance to him of about one-half of his indebtedness to them, and took from him to one of the firm a chattel mortgage for the whole amount, the mortgagee making the usual affidavit of bona fides. When the mortgage was executed a cheque for the fresh advance was given to the customer, who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm until the amount of the cheque was paid, when it was returned: —Held, that even if the mortgage was defective under the Chattel Mortgage Act yet the plaintiffs, execution creditors, were not entitled to succeed, because the mortgagee had taken actual possession of the goods before the delivery of the writ to the sheriff:—Held, also, that the mortgage was valid, for under the Chattel Mortgage Act, though the debt was due to the partnership, one partner could properly take the mortgage and make the affidavit of bona fides, and it was a mortgage to secure a present actual advance, and not future advances so as to come within s. 6 of the Act:—Held, also, that even if the mortgage had been invalid and the mortgagee had taken possession and sold after the delivery of the writ an action for an account of the proceeds would not lie against him at the suit of the execution creditor. His only remedy would be to follow the goods, and seize them under his execution. *Ross* v. *Dunn*, 16 A. R. 552.

Advances — *Present and Future.*] — The mortgage, besides being a security for $1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods and merchandise to enable the mortgagor "to carry on business,"—not "to enter into and carry on" as in the statute,—which should "be repaid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto:" — Held, that the omission of the words "to enter into" could not render it unnecessary to register the mortgage, as regarded the $1,400. Quære, whether the clause for future advances was not void as enabling payment to be delayed beyond the year. *McLean* v. *Pinkerton*, 7 A. R. 490.

Advances—*Subsequent Change in Time.*] —Where advances were to be made in sums and at times specified, and a mortgage taken to secure their payment:—Held, that a departure from the agreement in the times and manner of such advances could not alone defeat the mortgage, though it might be urged to the jury as against the bona fides of the transaction. *Strange* v. *Dillon*, 22 U. C. R. 223.

Advances in Goods.]—Quære, whether a mortgage to secure advances in flour is within C. S. U. C. c. 45, s. 5, or whether only advances in money are intended:—Semble, that the Act extends to advances either in money or goods. *Sutherland* v. *Nixon*, 21 U. C. R. 629.

Advances in Goods.]—The "advances" referred to in R. S. O. 1877 c. 119, s. 6, need not be pecuniary. *Goulding* v. *Deeming*, 15 O. R. 201.

Affidavit Going Too Far.]—In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the mortgagee against his indorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such indorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited, or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise:"—Held, that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, and could not vitiate the security. Keough v. Price, 27 C. P. 309, remarked upon. *Driscoll* v. *Green*, 8 A. R. 366.

Agreement Not Set Out.]—Semble, it is not essential to the validity of a chattel mortgage to secure the mortgagee against the indorsement of any bill or note, &c., under s. 6 of R. S. O. 1877 c. 119, that it should set forth fully the agreement between the parties and the amount of the liability intended to be created, and that the liability which it professes to secure should be truly stated. *Barber* v. *Macpherson*, 13 A. R. 356.

Agreement Set Out—*Possible Extension.*]—A chattel mortgage to indemnify an indorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability. The requirements of s. 6 of the Chattel Mortgage Act, R. S. O. 1877 c. 119, as to setting forth an agreement in the mortgage apply only to mortgages to secure future advances for the purposes therein mentioned. In the case of a mortgage under that section as security against liabilities incurred by indorsing, or in any other way, all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mortgage, and shall be sufficiently described or identified therein. The reference in such a mortgage to a possible future renewal or extension of the liability, which has not been agreed to and which the mortgagee is not bound to grant, does not invalidate the mortgage if in other respects sufficient. *Embury* v. *West*, 15 A. R. 357.

Agreement Set Out.]—A chattel mortgage recited that the mortgagee had indorsed, at the request and for the accommodation of the mortgagors, a certain promissory note bearing even date therewith, and payable three months after date to C. B., or order, for $1,000. The proviso and covenant were to pay the said note at maturity, and save harmless the said mortgagee against his indorsement thereof. The affidavit of the mortgagee stated that he had indorsed the promissory note in the mortgage named: "that the said mortgage was executed in good faith, and for the express purpose of securing the due payment of the said promissory note, and security and indemnity to me against the said indorsement or any loss thereby, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said mortgagors therein named, or preventing the creditors of such mortgagors from obtaining payment of any claim against the said mortgagors:"—Held, that if necessary the agreement between the parties was sufficiently set forth in the mortgage and verified in the affidavit; but, quære, whether this is required except in the case of an agreement for future advances:—Held, also, that the affidavit was otherwise sufficient, though not in the exact words of the statute. *O'Donohoe* v. *Wilson*, 42 U. C. R. 329.

Antecedent Advance—*Affidavit of Bona Fides.*]—The mortgagor had agreed to deliver lumber to plaintiff, at specified prices, up to September, 1870, which plaintiff was only bound to pay for as delivered, and not to make advances; but at the date of the mortgage plaintiff had advanced about $250 beyond the value of the lumber delivered, and to assist the mortgagor still further he advanced $450 more, on his agreeing to execute the mortgage to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber:—Held, that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber: that it was not invalid, as not shewing the true dealing between the parties: that the affidavit, which was in the common form as for a debt due, was sufficient. *Clarke* v. *Bates*, 21 C. P. 348.

Form of Recital.]—A recital that the plaintiff had indorsed three notes made by J., giving the dates, sums, and the time of payment, for the accommodation of J., and that J. had agreed to enter into the mortgage to indemnify and save harmless the mortgagee of and from payment of said notes, and from all liability or damage in respect thereof:—Held, clearly sufficient. *Mathers* v. *Lynch*, 28 U. C. R. 354; *Robinson* v. *Paterson*, 18 U. C. R. 55.

Notes Not Payable Within a Year.]—A mortgage to secure the plaintiff as indorser of notes not payable within a year:—Held, invalid. *May* v. *Security Loan and Savings Co.*, 45 U. C. R. 106.

Renewals Not Limited to Year.]—In a chattel mortgage to secure the plaintiff, the mortgagee, against certain notes on which he was an indorser, the notes were set out, and were all payable within the year: but in the recital the mortgage was stated to be executed not only as security against these notes, but also against any note or notes thereafter to be indorsed by the plaintiff for the mortgagor's accommodation by way of renewal of the said recited note, or otherwise howsoever. The proviso was, for the payment of the said notes, and all and every other note or notes which might thereafter be indorsed by the mortgagor for the plaintiff by way of renewal of the aforesaid note, or otherwise: and the covenant was to pay the said note, and all future and other promissory notes which the said mortgagee should thereafter indorse for the accommodation of the mortgagor. Semble, that the mortgage was on its face invalid, in not shewing that the liability of the mortgagor was limited in duration to one year, as required by C. S. U. C. c. 45, s. 5; but the affidavit made on re-filing the mortgage shewed that no such restriction was intended, the notes having been several times renewed, and only a small sum paid on them; and on this ground therefore the mortgage was held bad:—Held, also, that the mortgage was invalid, in consequence of the affidavit of bona fides not stating the amount of the liability intended to be created and covered; for the covenant shewed that it was intended as a security against the notes specified, and any other notes which might be indorsed, and the affidavit stated that it was executed to secure against the payment of such liability. Quære as to the effect of the word note, instead of notes, being used in the affidavit and mortgage. A second mortgage for the same reason was also held bad. A third mortgage, subsequently given, contained nearly all the notes referred to in the above mortgages, while it not only appeared that none of such notes were then in existence, they having all been renewed several times and reduced in amount, but that it also con-

tained a further note which was not indorsed at all:—Held, that this mortgage was also bad, as it could not be said to contain a true statement of the plaintiff's liability. *Keough* v. *Price*, 27 C. P. 309.

Substitution of Indorser's Notes.]—The mortgage was given, as appeared by the recitals in it, to secure the plaintiff against indorsements for the mortgagors, and before the re-filing he had taken up most of the notes and renewed them by his own notes, to which the mortgagors were not parties:—Held, that the mortgage was not thereby invalidated. *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.

Terms Not Set Out.]—L. mortgaged to the plaintiffs for £140 2s. 5d., reciting that he was indebted to them in £214 10s. 11d.; and that they had become security for him as indorsers of a note for £25 11s. 6d., making together £240 2s. 5d., for £100 of which he had previously given them another mortgage. In trespass against the sheriff for seizing the goods under an execution:—Held, that the mortgage was defective in not shewing the terms, nature, and effect of the liability incurred by indorsing. *Boulton* v. *Smith*, 17 U. C. R. 400, 18 U. C. R. 458.

Time Limitation — *Consideration.*] — A chattel mortgage, given to secure the mortgagee against his indorsements for a mortgagor, must shew on its face that the notes indorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be void against creditors or purchasers, but not against the assignee in insolvency. Notes not properly stamped, taken by a bank, are invalid if the bank does not attach double stamps and properly cancel the same when it first receives the notes, and will not support a chattel mortgage. *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

V. Registration.

Copy.]—Under 20 Vict. c. 3, a copy of an absolute assignment may be filed, as well as of a mortgage. *Harris* v. *Commercial Bank*, 16 U. C. R. 437.

Followed in *Perrin* v. *Davis*, 9 C. P. 147.

Declaration of Trust.] — Held, that a bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. *Arnold* v. *Robertson*, 8 C. P. 147.

Followed in *Fraser* v. *Gladstone*, 11 C. P. 125.

Delay.]—Held, that the assignment in this case was not avoided by a delay of eight days in registering it. *Balkwell* v. *Beddome*, 16 U. C. R. 203.

Execution Before Registration.]—Before 20 Vict. c. 3, an execution coming in before the filing of an assignment is entitled to prevail, though a reasonable time for filing may not have elapsed. *Carscallen* v. *Moodie*, 15 U. C. R. 92.

Instrument Not Within the Act.]—If the mortgage is one which the statute does not provide for, or the affidavit cannot possibly be made, then the mortgage is not avoided by the Act for want of registration, or of the recitals required by the Act, but the Act does not apply at all, and the mortgage stands as at common law. *Baldwin* v. *Benjamin*, 16 U. C. R. 52; *Brodie* v. *Ruttan*, *ib.* 207; *Walker* v. *Niles*, 18 Gr. 210; *Mathers* v. *Lynch*, 28 U. C. R. 354; *Paterson* v. *Maughan*, 39 U. C. R. 371; *Burton* v. *Bellhouse*, 20 U. C. R. 60.

Place.]—The description of the mortgagor in the mortgage is at most only primâ facie proof of his residence; and, held, that in this case, upon the evidence set out, the jury were warranted in finding that he had changed his residence to the county in which the mortgage was registered, though he had left his family in the county as of which he was described. *Mellish* v. *Van Norman*, 13 U. C. R. 451.

Relation Back.]—Held, that the registration of a mortgage does not cause it to relate back to its date. *Fechan* v. *Bank of Toronto*, 10 C. P. 32; *Shaw* v. *Gault*, 10 C. P. 236; *Haight* v. *McInnes*, 11 C. P. 518.

But *see, contra, Fechan* v. *Bank of Toronto*, 19 U. C. R. 474.

Removal to Another County.]—Goods covered by mortgage were removed from the county, either on an alleged sale by mortgagor, or against his will, or stolen from him, and were sold in another county to defendant, the mortgagor being, at all events, no party to the removal. Just over two months from removal, the mortgagee, on hearing where they were, went and demanded them from defendant:—Held, that such a removal was not within the statute, requiring a copy to be filed within two months of the permanent removal of the goods from the county. *Clarke* v. *Bates*, 21 C. P. 348.

Sheriff's Bill of Sale.]—Under 12 Vict. c. 74, and 13 & 14 Vict. c. 62, a bill of sale of an execution debtor's goods, executed by a sheriff to a purchaser, whether plaintiff in the execution or not, need not be filed. *Kissock* v. *Jarvis*, 6 C. P. 393.

Sunday.]—A chattel mortgage was duly executed on the 12th July, and filed on the 18th, the 17th having been Sunday:—Held, that such registration was too late, the Act, R. S. O. 1877 c. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days; and that Rule 457, O. J. Act, did not apply. *McLean* v. *Pinkerton*, 7 A. R. 490.

VI. Renewal.

Affidavit of Execution.]—The affidavit of execution need not be repeated, or any copy of it filed, on re-filing a mortgage. *Beaty* v. *Fowler*, 10 U. C. R. 382.

Affidavit Supplementing Statement.]—The statement annexed to the affidavit filed with the copy of mortgage, did not give distinctly all the information required by the Act, but the affidavit and statement together contained all that was necessary:—Held, sufficient. *Walker* v. *Niles*, 18 Gr. 210.

Affidavit Supplementing Statement.]—Held, following Walker v. Niles, 18 Gr. 210, and dissenting from O'Halloran v. Sills,

12 C. P. 465, that on the renewal of a chattel mortgage the statement and affidavit may, when they refer to each other and are meant to be read together, be so read: and that if together they contain the particulars required by the statute the renewal is sufficient. In this case the statement was, "statement shewing the amount still due on a chattel mortgage made by, &c., (mentioning the names of the parties, and date of registration); amount of mortgage, $885; one year's interest at 20 per cent., $137; amount still due, $822;" and subjoined was an affidavit by the mortgagee verifying a copy of the mortgage annexed, and stating, "the above statement shews truly and correctly the interest I still have in the said mortgage and the amount still due thereon. * * * The said mortgage has not been and is not kept on foot for any fraudulent purpose."—Held, sufficient. *Barber* v. *Maughan*, 42 U. C. R. 134.

Affidavit Supplementing Statement—*Immaterial Errors.*]—Where the statement and affidavit filed upon renewal of a chattel mortgage, when read together, give all the information required by R. S. O. 1877 c. 119, s. 10, the renewal is sufficient. *Sloan* v. *Maughan*, 3 A. R. 222.

The statement was that "the interest of the mortgagee in the goods described in the mortgage, of which the annexed is a true copy, and made by C., and dated the 13th March, 1876, is as follows: The amount still due to me, S., on said mortgage for principal is $200." The mortgagee's affidavit stated that the above statement was correct and true, that the mortgage had not been assigned by him, and was not kept on foot for any fraudulent purpose:—Held, sufficient. O'Halloran v. Sills, 12 C. P. 465, remarked upon and distinguished. The copy filed gave the date of the mortgage as the 13th March, 1877, instead of 1876. Held, immaterial, as the mistake could have misled no one. *Ib.*

Affidavit Verifying Statement.] — No affidavit is necessary to verify the statement of the mortgagee's interest required by the Act on re-filing. *Armstrong* v. *Ausman*, 11 U. C. R. 498.

Assignee for the Benefit of Creditors.]—An assignee for the benefit of creditors under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. 1887 c. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient. *Fleming* v. *Ryan*, 21 A. R. 39.

Continuing Duty.]—A mortgagee, to retain his priority, must, under 12 Vict. c. 74, continue to re-file his mortgage after the first re-filing at the end of the first year. *Kissock* v. *Jarvis*, 9 C. P. 156.

Continuing Duty.]—Kissock v. Jarvis, 9 C. P. 156, as to the necessity of the renewal of a chattel mortgage from year to year, approved of and followed, notwithstanding the subsequent legislation contained in R. S. O. 1877 c. 119. *Beaumont* v. *Cramp*, 45 U. C. R. 335.

Fixtures—*Sale Subject to Mortgage—New Mortgage by Purchaser.*]—The owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held not to be prejudiced by his subsequent mortgage of the land. The mortgage was not re-filed within the year, but within the year, the mortgagor having sold the fixtures, the purchaser gave the mortgagee a mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid:—Held, that the omission to re-file did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration," within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect. Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures. *Rose* v. *Hope*, 22 C. P. 482.

Immaterial Mistakes.]—An immaterial variation between a mortgage and the copy filed does not invalidate the re-filing. *Walker* v. *Niles*, 18 Gr. 210.

A mistake in the copy in the number of the lot where the chattels were, was held to be immaterial under the circumstances. *Ib.*

Improper Charge.]—The statement contained an item of $2.25, as paid for re-filing, which the mortgagee had no right to charge:—Held, not to avoid the re-filing. *Walker* v. *Niles*, 18 Gr. 210.

Indorsement—*Note not Paid within the Year.*]—In November, 1881, the plaintiff indorsed a note for the accommodation of M. for $550 at three months, and as indemnity against any liability in respect thereof, or of any renewal, took from M. a chattel mortgage which was only renewed once, although the note remained unpaid until the 4th November, 1882, when $50 was paid by M. on account, and a new note at six months was given for $500, in which the plaintiff joined as maker instead of as indorser, and after this note became due and remained unpaid for six months the plaintiff obtained a second mortgage from M., reciting that he had indorsed a note for $550, which had not been paid, and that plaintiff was still liable thereon, or on the renewal thereof, and was liable to be called upon at any time to pay the amount, and the plaintiff was called upon to pay, and actually did pay the note and interest amounting to about $590. In an interpleader proceeding at the instance of an execution creditor of M.:—Held, that the mortgage was void as against such creditor. The distinction between mortgages under s. 1, and under s. 6 of the Act, considered and acted on. The distinction between the two classes of cases provided for by s. 6 considered. Keough v. Price, 27 C. P. 309; O'Donohoe v. Wilson, 42 U. C. R. 329; Ontario Bank v. Wilcox, 43 U. C. R. 463, commented on. *Barber* v. *Macpherson*, 13 A. R. 356.

Insufficient Information.] — "Statement of amount still due from the mortgagor named in the original bill of sale by way of mortgage, of which the annexed is a true copy: that is to say, $212 for principal, and

the sum of $12.50 for interest, amounting in the whole to the sum of $224.50:"—Held, not to sufficiently exhibit the interest of the mortgagee in the goods claimed, nor shew the principal and interest due thereon. *O'Hallorán* v. *Sills*, 12 C. P. 465.

Interest Calculated in Advance.]—A statement made on the 28th January, stated the amount due for interest as it would be on the 31st, the day of re-filing:—Held, no objection. *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.

New Act.]—Mortgages filed under 12 Vict. c. 74, held not to require re-filing under 20 Vict. c. 3, which repeals it. *Culloden* v. *McDowell*, 17 U. C. R. 359; *Grand Trunk R. W. Co.* v. *Lees*, 9 C. P. 249.

Omission to Renew—*Subsequent Assignment for Creditors.*]—One T. B. being indebted to J. B., the plaintiff, gives him a mortgage, covering the goods in question in this interpleader, to secure $640, dated the 5th February, 1858, which was filed on the 8th, and was not subsequently re-filed. On the 12th February, 1858, T. B. executed an assignment to R. and C. for the benefit of creditors, subject to this mortgage. On the 20th January, 1859, T. B. made an absolute bill of sale to J. B. of the same goods, which was filed on the 2nd February, 1859. B. and A., the defendants in this suit, recovered a judgment against T. B. on the 12th September, 1861, upon which a fi. fa. was issued, and the goods in dispute seized on the 30th December, 1861. J. B., the mortgagee, never had possession of the goods in question:—Held, 1. That J. B. never having taken possession of the property, and no copy of the mortgage having been filed within thirty days before the year expired from its first filing, it ceased to be valid against the creditors of T. B., or any subsequent purchaser or mortgagee in good faith for value. 2. That the due execution and proper filing of the assignment for the benefit of creditors made it a valid instrument, and that upon the expiration of the mortgage at the end of the first year, this assignment would take precedence, and cut it out, notwithstanding it was expressed on its face to be subject to the mortgage. 3. That the bill of sale of the 20th January, 1859, vested no title in the plaintiff, inasmuch as the interest of the grantor was vested in the trustees for creditors, from whom the plaintiff did not purchase bonâ fide and for value. The verdict for defendants was therefore upheld. *Boynton* v. *Boyd*, 12 C. P. 334.

Omission to Renew — *Possession — Execution.*]—A mortgagee having omitted to renew a chattel mortgage, delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining premises, taking from them an instrument under seal, whereby they acknowledged that they had received the goods under and by virtue of the warrant from him, and undertook to deliver them to him on demand. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question:—Held, that what had taken place did not constitute such a taking of possession as is required by the statute. Per Meredith, C.J.—In any event, the act of taking possession after the time for renewal has expired must amount to a new delivery or new transfer by the mortgagor. Per Meredith, C.J., also.—A creditor, prior to the placing of his execution in the sheriff's hands, has no locus standi to attack a mortgage invalid for want of renewal. Clarkson v. McMaster, 25 S. C. R. 96, commented on. Per Meredith, C.J., also.—Sections 38 and 40 of 57 Vict. c. 37 (O.), do not apply to a mortgage which has ceased to be valid for want of renewal. *Heaton* v. *Flood*, 29 O. R. 87.

Possession Taken.] — Where possession has been taken under default in the mortgage within a year from its filing, re-filing is not necessary. *Ross* v. *Elliott*, 11 C. P. 221.

Possession Taken.]—One S., on 25th March, 1868, executed a mortgage to plaintiff, payable the following October, with a proviso that on default the plaintiff, instead of selling the goods, might take possession as absolute owner. On default being made plaintiff accordingly went through a form of taking possession, without, however, any change in the possession, or any assignment of the mortgagor's interest taken or registered, and executed a lease of the goods to the mortgagor. After default, and before this taking of possession by plaintiff, an execution against the goods was placed in the sheriff's hands, but no seizure was made until November, 1869, after the expiration of the mortgage, which had not been renewed:—Held, that the transaction between the parties was void, and that the execution bound the goods. *Chamberlain* v. *Green*, 20 C. P. 304.

Renewal Statement — *Assignment between Making and Filing.*]—A chattel mortgage does not cease to be valid as against creditors, &c., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment. *Daniel* v. *Daniel*, 29 O. R. 493.

Sale.]—B., the customer of a bank, executed a chattel mortgage on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mortgagees proceeded to a sale, and appointed W. their bailiff for that purpose, who had the property appraised and sold it to the plaintiff, a creditor of B., by private sale for $900; and executed a bill of sale thereof. The plaintiff, in his evidence, swore that B. owed him about $1,000, and he thought there was ample security for the $900 and also additional security for B.'s indebtedness to himself, and that the goods seemed to be worth about $5,000; and the plaintiff, without disturbing in any way the possession of B., rented the property to him, and he remained, as he had theretofore been, in possession. In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mortgage and as such agent to make the affidavits required to be made by mortgagees:—Held, that as under the circumstances stated the chattel mortgage was satisfied quoad the goods, the mortgage could not properly be re-filed; and notwithstanding the continued possession of the mort-

gagor it was not necessary for the plaintiff to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of, or bonâ fide purchasers from, the mortgagor. *Carlisle* v. *Tait*, 7 A. R. 10.

Sale after Time for Renewal.]—A chattel mortgage which has expired by effluxion of time under R. S. O. 1877 c. 119, s. 10, and has not been renewed or re-filed, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default in good faith, made by the mortgagee, with the consent of the mortgagor, though good as between the parties to the mortgage, only passes to the purchaser a title subject to the rights of any creditors who may take steps to follow the goods. *Barker* v. *Leeson*, 1 O. R. 114.

Statement Insufficient—*Affidavit taken by Quebec Notary.*]—The statement on the renewal of a chattel mortgage, attached to a copy of the original mortgage, was merely: "E. S. R. in account with M. M. R." (the mortgagee); and then, "To amount of money secured by chattel mortgage, $2,200; interest thereon for one year at the rate in said mortgage named, $264; $2,464." The mortgagee's affidavit stated that she was the mortgagee: that the above statement shewed her interest in the property claimed by virtue of the said mortgage; that "as appears from the said statement, there will be due and owing to me this deponent, on the 6th February next, from E. S. R., the mortgagor, &c., the sum of $2,464, being the $2,200 mentioned therein, and $264 as the interest thereon, under the terms of the said bill of sale," &c.: that no payment on account of either principal money or interest had been made to her or to any one on her behalf: "that the said statement is correct;" and that the said mortgage had been kept on foot for the purpose only of securing the payment of the money owing to the deponent by the terms thereof, and not for any fraudulent purpose. The affidavit was sworn before a notary public in the Province of Quebec:—Held, that the statement and affidavit were insufficient, as the statement neither shewed the interest of the mortgagee in the property claimed, nor a full statement of the amount due for principal and interest, nor did the affidavit allege that the statement was true, as required by C. S. U. C. c. 45, s. 10; and that if the affidavit could be looked to in support of the statement, it was insufficient for that purpose. Held, on appeal, without expressing any opinion as to the other points, that the affidavit was bad, as the notary public in Quebec had no power to take it. *Reynolds* v. *Williamson*, 25 C. P. 49.

Subsequent Purchasers.] — The subsequent purchasers and mortgagees mentioned in s. 10 of the Chattel Mortgage Act, R. S. O. 1877 c. 119, are those becoming such after the expiration of a year from the filing of the mortgage. Where therefore the mortgage was registered in August, 1878, and the plaintiff purchased the property in March, 1879, and the mortgage was not re-filed:—Held, that the plaintiff was not entitled, as against the defendant, who took the property from him in December, 1879. *Hodgins* v. *Johnson*, 5 A. R. 449.

Subsequent Purchasers—*Time.*]—The plaintiff held a chattel mortgage made by one G., which was dated 9th May, 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April, 1880, the plaintiff made affidavit of the amount due up to the 10th April, and re-filed the mortgage under R. S. O. 1877 c. 119, s. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage:—Held, that the defendants were neither creditors nor subsequent purchasers or mortgagees within the statute, and therefore could not object to the mortgage because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year. Semble, that such affidavit and statement should be made within the thirty days. *Griffin* v. *McKenzie*, 46 U. C. R. 93.

Sufficient Statement.]—The statement set out in this case, filed upon the renewal of a mortgage, was held sufficient. *Saulter* v. *Carruthers*, 9 L. J. 158.

Time.]—Where a mortgage was re-filed forty-seven days before a year from the first filing, it was held insufficient, the statute requiring that such re-filing shall take place "within thirty days next preceding" the expiration of one year. *Beaty* v. *Fowler*, 10 U. C. R. 382.

Time.]—Held, that where the first filing was on the 15th May, 1852, a re-filing on the 14th May, 1853, was clearly in time. *Armstrong* v. *Ausman*, 11 U. C. R. 498.

Time.]—The ordinance of the North-West Territories relating to chattel mortgages, Ordinance of 1881 No. 5, provides by s. 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the person making the same after the expiration of one year from the filing thereof, unless a statement, &c., is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887:—Held, that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance. In computing the time mentioned in this section the day of the original filing should be excluded and the mortgagee would have had the whole of the 12th August, 1887, for filing the renewal. *Thomson* v. *Quirk*, 18 S. C. R. 695.

VII. Rights and Liabilities of Mortgagor and Mortgagee.

1. *In General.*

Accounting for Profit.]—One D. held a mortgage with a power to sell upon default, the mortgagor still to be responsible for any balance. Upon default he sold and re-purchased some of the goods, which he subsequently exchanged for land. Upon an action for the balance over the amount realized by the original sale, the defendant contended that the plaintiff must be considered a trustee for him in the re-purchase, and having sold at an

advance must account for the balance:—Held, that to obtain relief, application must be made to equity. *Annes* v. *Dornan*, 10 C. P. 299.

Auctioneer — *Conversion of Goods.*]—An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value. Cochrane v. Rymill, 27 W. R. 776, 40 L. T. N. S. 744, followed. National Bank v. Rymill, 44 L. T. N. S. 767, and Barker v. Furlong, [1891] 2 Ch. 172, distinguished. *Johnston* v. *Henderson*, 28 O. R. 25.

Bailiff Seizing for Rent.]—A bailiff seized certain goods under a landlord's warrant, for rent in arrear, but did not remain in possession, or take any further steps to execute it, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, a person having a mortgage on the goods took possession under it, and removed the goods, for which the landlord replevied:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

Damages for Seizure—*Mortgagee's Action.*]—A mortgagee may maintain an action against a person seizing and selling the property mortgaged, the right of possession of the goods at the time of such sale being rightfully in the mortgagor, and the reversionary estate in the plaintiff as mortgagee. *McLeod* v. *Mercer*, 6 C. P. 197.

Execution — *Equity of Redemption.*]—Semble, that under an execution against a mortgagor, the sheriff may seize goods in the possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption. *Smith* v. *Cobourg and Peterborough R. W. Co.*, 3 P. R. 113.

Execution — *Mortgagee's Interest.*]—M. sold goods to P., and took back a mortgage on them for the price, together with P.'s note. Afterwards, and after 22 Vict. c. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor:—Held, that the assignment of the mortgage to F. was void under 22 Vict. c. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore having possession, was entitled to hold the goods as against the execution creditor. *Ferrie* v. *Cleghorn*, 19 U. C. R. 241.

Foreclosure — *Chattels and Realty.*] — The mortgagee of chattels, like the mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured by the mortgage. *Cook* v. *Flood*, 5 Gr. 463.

Where a party held a mortgage on chattel property, and also mortgages on real estate, the court refused to make a decree for sale of the chattels and of foreclosure as to the realty. *Ib.*

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

Merger.]—A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On 4th April, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On the 5th April, 1888, H. leased the property to A. J. C. for a year. When the fall wheat was ripe, A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value:—Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s right as chattel mortgagee became prior in point of time to the title of H., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security. *Cameron* v. *Gibson*, 17 O. R. 233.

Mortgagee Carrying on Business.]—The plaintiff, carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant; the instrument by which it was effected, stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the

money being expended by the defendant with the assent of the plaintiff; other money being part of the profits of the business was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that as the new stock belonged to the mortgagee himself and the plaintiff could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) that although the defendant's right on default, was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account. *Foster* v. *Morden*, 29 Gr. 25.

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

Priorities—*Chattel Mortgage not Filed—Subsequent Assignment for the Benefit of Creditors.*]—See *McAllister* v. *Forsyth*, 12 S. C. R. 1.

Priorities—*Execution — Assignee in Insolvency.*]—An execution against an insolvent debtor is superseded by an attachment in insolvency, and a chattel mortgage void against an execution creditor, but good against an assignee in insolvency, prevails over an execution so superseded. *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460.

Priorities — *Execution.*] — On the 9th January M. & Co. mortgaged goods to R., which on the 19th the sheriff seized under a fi. fa. On the 22nd February, while the sheriff was in possession, M. & Co. made a bill of sale to the plaintiff. The mortgage to R. was satisfied after the seizure, and before the sale by the sheriff, (which took place by consent of all parties,) but whether before or after the execution of the bill of sale to the plaintiff did not appear:—Held, that the fi. fa. was entitled to prevail over the plaintiff's claim. *Taylor* v. *Jarvis*, 15 U. C. R. 21.

Priorities—*Execution.*]—H. and I. being indebted to a bank, arranged with the plaintiff T., the bank's agent at H., where the debt arose, that in order to secure the same a mortgage should be given to him and the other plaintiff, the bank's general manager in Canada. T. had no express power to bind the bank to take this security, and his co-plaintiff was at the time absent from the country, and ignorant of the transaction. A mortgage was accordingly drawn up, dated 22nd June, 1867, and purported to be made between H., I., and S., of the first part, and the plaintiffs, as trustees for the bank, of the second part, reciting that the parties of the first part were indebted to the bank in certain bills of exchange, and witnessing that H. in consideration, &c., assigned to the plaintiffs the household furniture in his residence, with a proviso that the mortgage was to be void on payment by parties of the first part of the bills of exchange. On the court of directors in England being apprised of the transaction both by T. and his co-plaintiff, in a report made to them by the latter in condemnation of it, they at once repudiated it, and on 22nd August following wrote T. distinctly to that effect; and when their letter reached him, on the 5th September, the goods were still in H.'s possession, and nothing had been done under the mortgage beyond recording it. On the 7th September T. resigned his position in the bank, and on 16th September defendant's execution against the goods of H. and I. was placed in the sheriff's hands. In the following October the bank instructed T.'s successor to realize the security:—Held, that the bank by their repudiation of the mortgage had let in defendant's execution, and that their subsequent ratification of T.'s acts and adoption of the security could not defeat the writ. *Taylor* v. *Ainslie*, 19 C. P. 78.

Priorities—*Execution.*]—Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

Priorities — *Rent.*] — The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff, hearing that the goods were going to be seized for rent, took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenant waiving an inventory, advertising, &c., sold them within two days to a nephew of the landlord:—Held, that the landlord's two visits of the 17th and 24th February, did not amount to a distress:—Quære, whether a tenant can waive all statutable formalities as to inventory, &c., as regards the mortgagee. *Whimsell* v. *Gifford*, 3 O. R. 1.

Removal of Gas Fixtures.]—T. K. & Co., carrying on business as gas fitters and plumbers, contracted verbally with D., an hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this Province on account of ill-health, having previously executed a power of attorney to one S., authorizing him to carry on his business during his absence. T. K. & Co. having discovered that D.'s estate was greatly involved, refused to proceed with their contract unless secured for their work and materials; where-

upon S., with a view of inducing them to complete their contract, in pursuance of a previous arrangement, executed as such attorney a chattel mortgage of the goods furnished by them, securing to them payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work:—Held, that T. K. & Co. were not under this mortgage entitled to remove any of the fittings put in the hotel; their only remedy being for the price of their work and material under their contract with D. Jacques v. Worthington, 7 Gr. 192, distinguished and approved of. *McQuesten* v. *Thompson*, 2 E. & A. 167.

Sheriff Seizing—*Order for Possession.*]—A mortgagee having taken possession, as he alleged, under the mortgage, the sheriff seized the property under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again:—Held, that there was no power to make such order. *Smith* v. *Cobourg and Peterborough R. W. Co.*, 3 P. R. 113.

Trespass — *Jus Tertii.*]—In an action against a division court bailiff for selling under execution a horse which the plaintiff claimed to be exempt, it appeared that at the time of the seizure and sale the horse was included in a chattel mortgage given by the plaintiff to one M.:—Held, that the defendant could not set up the right of the mortgagee as a defence. *McMartin* v. *Hurlburt*, 2 A. R. 146.

Trespass—*Agent.*]—The treasurer of an insurance company, for whom he has taken a mortgage in his own name, may sue a wrong doer for taking the goods mortgaged, although he has no beneficial interest in them. *Brodie* v. *Benjamin*, 16 U. C. R. 207.

See, also, *Baldwin* v. *Benjamin*, *ib.* 52.

Trespass—*Mortgagee not in Possession.*]—A mortgagee who has not taken actual possession, is not liable in trespass for an injury occasioned by the goods mortgaged. *Campbell* v. *Reid*, 14 U. C. R. 305.

M. & Co. having wrongfully placed a quantity of stone on the plaintiff's land, afterwards mortgaged it with other property to defendant. Default had been made in payment, but the defendant had not taken possession, or interfered in any way with the stone; when asked to remove it, however, he had refused, and forbade the plaintiff doing so himself:—Held, that as mortgagee he was not liable to the plaintiff in trespass for allowing the stone to remain. *Ib.*

Trespass—*Sheriff.*]—An action of trespass will not lie by a mortgagee against a sheriff for seizing goods which were subject to a mortgage, but of which the mortgagors had possession. *Street* v. *Hamilton*, 5 O. S. 658.

Trespass — *Sheriff.*] — B. mortgaged to plaintiff certain goods, with a covenant that in case of default in payment, or of B.'s attempting to dispose of the goods, the plaintiff might take possession and sell or retain them for his own use, but there was no clause authorizing B. to remain in possession until default:—Held, that the plaintiff had a sufficient right to possession to maintain trespass against the sheriff seizing under a fi. fa. against B., the jury having found the mortgage to be bonâ fide. *Porter* v. *Flintoft*, 6 C. P. 335.

Trespass — *Sheriff.*]—Plaintiff owning a stock of goods and some furniture and shop fixtures, sold out to one S., taking a mortgage in security, which was duly filed. S. continued to carry on business, bringing in other goods, till he became involved and absconded, when the sheriff under an attachment seized all the property in the store:—Held, the property being distinguishable, that the sheriff was liable for trespass. *Boys* v. *Smith*, 8 C. P. 248.

The sheriff being in possession under the attachment refused to execute a writ of replevin at the suit of the plaintiff, two instalments of whose mortgage were overdue:—Held, that the sheriff was liable for not executing the writ. *S. C.*, 9 C. P. 27.

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2. *Possession.*

Absence of Re-demise Clause — *Contracts by Mortgagor.*]—S., who was engaged in the lumber business, becoming indebted to the suppliants in a large sum of money, mortgaged to them by two separate instruments certain lumber, logs, and timber as security for the payment of such indebtedness. The first mortgage was executed on the 18th December, 1876, and the second on the 11th May, 1877. By a collateral arrangement made at the time the first mortgage was executed, and by a proviso contained in the second indenture, S. was allowed to remain in possession of the property, and to attend to its manufacture and sale for the benefit of the suppliants. On the 15th May, 1878, S. became insolvent, but prior to such insolvency the suppliants had taken possession of the lumber, logs, and timber, and thereafter obtained a release of S.'s equity of redemption from his assignee. On the 6th June, 1877, while S. was in possession of the property in the manner above mentioned, by a letter addressed to the Minister of Inland Revenue he offered and agreed to pay the Government the sum of $2 per 1,000 ft. b.m on all lumber to be shipped by him through the canals during the then current season, and also the whole amount of his indebtedness for canal tolls and dues then in arrear. This offer was accepted by the Government, and the agreement was acted upon by S. during the season of 1877. In 1878, after the suppliants had taken possession of the property and begun to ship the lumber for themselves without paying the sum agreed upon between S. and the Government, the collector of slide dues refused to allow such lumber to pass through the canals, and caused the same to be seized and detained until the amount due upon it in respect of said agreement was fully paid:—Held, there being no re-demise clause or proviso in the mortgage of the 18th December, 1876, whereby the mortgagor might have remained in possession until default, the Judge, sitting in the court of exchequer, not as a court of appeal, but in an Ontario case to administer the law of Ontario, was bound by the decisions in McAulay v. Allen, 20 C. P. 417, and Samuel v. Coulter, 28 C. P. 240, to hold that, upon the execution of such mortgage, the suppliants were entitled to immediate possession of the

property granted thereby, and might, if they had pleased, at any time have exercised their right to sell thereunder without the mortgagor's intervention or consent. But, while the terms of the second mortgage reserved to the suppliants the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale thereof might be entered into, and to whom upon sales it should be consigned, it was expressly provided therein that the business of such manufacture and sale should be transacted through the intervention of the mortgagor for the benefit of the suppliants. The effect and intent of the second mortgage, therefore, was to make the suppliants principals and S., the mortgagor, their agent in carrying on the business thereafter with their property, and for their sole benefit, until the property should be sold or they were paid their claim. (2) As such agent S. must be held to have had sufficient authority to bind the suppliants by his agreement with the Government, which, under all the circumstances, was a reasonable and proper one and made in the interest of the suppliants. (3) But whether S. was, or was not, authorized to make such an agreement with the Government, the suppliants adopted, ratified, and confirmed the agreement by acting under it and advancing moneys to pay the Government in accordance with its terms after they must be held to have had full knowledge of the nature and effect of it. *Merchants Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

Breach of Agreement.]—Plaintiff mortgaged to defendant, with a proviso for redemption on payment of £125 on the 20th October, and an agreement that the plaintiff should account to defendant for the price of any of the goods sold by him in the course of business before that day, and that on default, or in case plaintiff should attempt to sell or dispose of the goods without defendant's consent in writing, defendant might enter and take said goods. On the same day defendant gave the plaintiff a writing authorizing him to proceed to sell the goods that day mortgaged to him, "and to continue selling the same until further notice in writing, subject nevertheless to the proviso of the said bill of sale in other respects." The plaintiff, on the 17th October, mortgaged the same goods to one C. to secure a debt:—Held, a violation of the agreement between plaintiff and defendant, and that defendant was entitled to enter and take possession of the goods. *Closter* v. *Headley*, 12 U. C. R. 364.

Collateral Agreement.]—The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. The goods were so taken, and the defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in the action, alleging that H., the mortgagee, verbally agreed to pay these executions which were made part of the money secured:—Held, that defendant as assignee, took subject to such agreement (which did not vary the terms of the mortgage), though without notice of it; and that the plaintiff was therefore improperly nonsuited. *Martin* v. *Bearman*, 45 U. C. R. 205.

Evidence of Identity.] — The mortgage contained a proviso that in case the mortgagor should attempt to sell or part with the possession of or remove out of the county the goods, or any part of them, the mortgagee might take possession of and sell them, and break open doors, &c., for that purpose. The mortgagee, claiming under this proviso, brought trover for the goods, which defendant had seized under a distress for rent. It appeared that the goods were seized in October in the house mentioned in the mortgage, which had been executed in the previous August, and were of the same kind and description as those set out in the mortgage:—Held, sufficient evidence that they were the same goods as those mortgaged. *Nattrass* v. *Phair*, 37 U. C. R. 153.

The defendant, it appeared, in order to seize the goods under the distress, broke into the house by forcing open the window. Quære, as to the right of action of the plaintiff (the mortgagee) therefor. A new trial was granted, in order to ascertain the facts more fully. *Ib.*

Immediate Possession.] — A chattel mortgage need not be under seal; and when it contains no re-demise, the mortgagee may take immediate possession. *Paterson* v. *Maughan*, 39 U. C. R. 371.

Immediate Possession.]—Held, following McAulay v. Allen, 20 C. P. 417, that an action will not lie by a mortgagor of chattels against the mortgagee, for seizure thereof before default in payment, where there is no re-demise clause. *Samuel* v. *Coulter*, 28 C. P. 240.

Implied Right to Possession.] — A chattel mortgage in the usual form on certain goods to secure the payment of $1,700 by half-yearly instalments, contained no redemise clause. It was provided, however, that on default of payment, &c., or in case of the mortgagor attempting to sell or part with the possession of the goods without the mortgagee's consent in writing, &c., the mortgagee might enter and take the goods, and sell the same; and also on default of payment the mortgagee might distrain; and further, that it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of such default should peaceably and quietly have, hold, and occupy the said goods without the let, &c., of the mortgagor. Before any default was made the mortgagee entered and seized and sold the goods, for which the mortgagor brought an action, the first and second counts being in trespass and trover, and the third count being for seizing and selling the goods without the plaintiff's consent before default made, whereby the plaintiff was deprived of his right to redeem, &c.:—Held, that the plaintiff was entitled to recover on the third count, the plaintiff being entitled to the restitution of his property on the performance of the condition on which he mortgaged it, which the mortgagee by his wrongful act had prevented from being accomplished. *Bingham* v. *Bettinson*, 30 C. P. 488.

See Boys v. *Smith*, 9 C. P. 27, affirmed on appeal, 6 L. J. 182.

Implied Right to Possession.]—In a chattel mortgage containing no re-demise clause there may be an implied contract that the mortgagor shall remain in possession un-

til default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. Porter v. Flintoff, 6 C. P. 335, distinguished. *Dedrick* v. *Ashdown*, 15 S. C. R. 227.

Jus Tertii.]—The plaintiff mortgaged his goods to A., of whom the defendant was administratrix. The goods came into the possession of defendant, but under what circumstances did not appear. The mortgage contained an agreement that on default the mortgagee might take possession, and a statement that delivery of possession was given at the time of executing the mortgage. There was no evidence that the mortgage money had been paid. The plaintiff afterwards executed three other mortgages of the same goods to other parties, each containing a similar agreement as to default, and a similar statement as to delivery of possession:—Held, that the plaintiff could not recover either in trover or detinue, and that the defendant might, as against him, set up the right of the other mortgagees. *Ruttan* v. *Beamish*, 10 C. P. 90.

Mortgagor Selling—*Verbal Assent.*]—The plaintiff mortgaged to H. B. certain goods, the mortgage containing a proviso for a defeazance on payment within a year, and covenants for payment, and for entry on nonpayment, or in case the mortgagor should sell, &c., the goods or any of them without the mortgagee's written assent. The usual statement as to putting the mortgagee in possession was struck out. H. B. assigned to defendant. Subsequently the plaintiff claiming to have the defendant's verbal assent, which the defendant wholly denied, sold some of the goods to H. B., whereupon defendant took the goods and removed them off the premises, but they were forcibly brought back by plaintiff, and seized by his landlord for rent. Defendant then replevied the goods and sold them by auction. The plaintiff having sued defendant for the taking and conversion, the jury found that defendant verbally consented to the sale:—Held, that defendant was entitled to take the goods; that even if in equity a verbal assent would be sufficient if admitted or clearly proved to have been given and acted upon, the evidence here failed to establish such assent:—Held, also, that even if plaintiff could recover it would only be to the extent of his interest in the goods. Quære, as to the effect of the absence of the re-demise clause on the particular form of this mortgage. *Bunker* v. *Emmany*, 28 C. P. 438.

Mortgagor Selling—*Verbal Assent.*]—A chattel mortgage contained a proviso that in case the mortgagor should attempt to sell, &c., the mortgaged goods, or any of them, without the mortgagee's written consent, the mortgagee might enter and take the goods. The mortgagor, without such written consent, sold a pair of horses, part of the mortgaged goods, to the plaintiff, when the defendant, the mortgagee, entered and took them, and after keeping them for four days returned them to the plaintiff, who was not subsequently disturbed in his possession. The plaintiff having sued the defendant for the taking:—Held, that he was entitled to recover, for that the evidence, as set out in the case, shewed that the defendant either verbally consented to the sale or acted in such a manner as estopped him from denying that the property passed to the plaintiff. Bunker v. Emmany, 28 C. P. 438, distinguished:—Held, also, that the plaintiff could only recover damages for the four days' detention, and not for the value of the horses in addition. *Loucks* v. *McSloy*, 29 C. P. 54.

Mortgagor Attempting to Sell.]—The chattel mortgage contained no re-demise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods:—Held, that the mortgagee had the right under the circumstances of this case to take the goods, although default in payment had not been made. *Whimsell* v. *Giffard*, 3 O. R. 1.

Mortgagor Attempting to Sell.]—In a chattel mortgage of the stock-in-trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment:—Held, that this proviso only prohibited the sale of goods other than in the ordinary course of business. *Dedrick* v. *Ashdown*, 15 S. C. R. 227.

Note Outstanding — *Refusal to Allow Redemption.*]—H., in consideration of his relieving C. from executions against him, procured from C. and his wife, the plaintiff, a promissory note for the amount thereof, and also a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank, and with the proceeds paid off the executions. Afterwards, but before the maturity of the note, and while it was in the bank's hands, claiming that there was a breach of the mortgage by the removal of certain goods, which was disproved, and refusing to allow the mortgagors to redeem, he took the goods thereunder, and sold them, selling goods beyond the amount required to satisfy the mortgage, including the plaintiff's own goods to the amount of $137.50. In an action by the plaintiff to recover the damage thereby sustained, the jury gave $275:—Held, that the plaintiff was entitled to recover: 1. The note being the principal security, and the chattel mortgage merely collateral, H. could not proceed on the mortgage while the note was thus outstanding. 2. The sale was illegal by reason of the refusal of redemption. 3. Even if the sale were merely irregular in selling for a supposed breach, the plaintiff was entitled to recover the value of the excess of the goods sold, and other damages beyond nominal for her interest in the goods; and the verdict was held not excessive. A removal of goods to justify a seizure under a chattel mortgage must be by the mortgagors or on their behalf, and not a wrongful removal by others. *Cochrane* v. *Boucher*, 3 O. R. 462.

Omission to Renew.]—E. mortgaged a horse to defendant in April, 1864, with a proviso that if he should attempt to dispose of it defendant might take possession and sell. E. did dispose of the horse to the plaintiff within a few weeks. The mortgage was not re-filed, but the defendant took another in February, 1865, for the same money with other advances. In July, having first discovered the sale, he seized under the proviso:—Held, that having neglected to re-

file the mortgage and taken another, he had lost his right to seize. *Courtis* v. *Webb*, 25 U. C. R. 576.

Seizure before Default—*Damages.*]—Held, following Porter v. Flintoff, 6 C. P. 335, and Ruttan v. Beamish, 10 C. P. 90, that an action will not lie, at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession by the mortgagor until default; and that even if an action would lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer. *McAulay* v. *Allen*, 20 C. P. 417.

Time.]—A. and S. mortgaged to the plaintiff with a proviso for redemption if they should within twelve months pay the plaintiff a certain debt, and duly retire and pay a certain protested bill of exchange indorsed by the plaintiff, &c., but in default of either of said provisoes, the plaintiff might enter and take possession and sell. A. and S. did not retire the bill:—Held, that the plaintiff had a right to enter and take possession without waiting for the twelve months. *Eccles* v. *Small*, 6 C. P. 479.

VIII. Special Persons.

Agent.]—A person advancing money belonging to others, but for which he is responsible, may take a mortgage for it in his own name. *White* v. *Brown*, 12 U. C. R. 477.

Agent.]—The fact that the debt is not due to the mortgagee himself for his own benefit, does not prevent the mortgage from being registered under the statute. *Brodie* v. *Ruttan*, 16 U. C. R. 207. See, also, *Baldwin* v. *Benjamin*, *ib.* 52.

Bank.]—Right of bank to take chattel mortgage. See *In re Rainy Lake Lumber Co.*, *Stewart* v. *Union Bank of Lower Canada*, 15 A. R. 749.

Crown.]—The Sovereign may take a chattel mortgage from any subject, (under our Acts,) through and in the name of the head of the department to which the debt is due. *McGee* v. *Smith*, 9 C. P. 89.

Husband and Wife.]—Husband absent from the country—Mortgage by wife on furniture purchased by her—Right of husband against mortgagee. See *Halpenny* v. *Pennock*, 33 U. C. R. 229.

Husband and Wife—*Security for Bar of Dower.*]—A husband executed to his wife a chattel mortgage to secure her against loss by reason of her having barred her dower in certain mortgages of land. The goods were seized by his execution creditors, claimed by her, and sold pending interpleader proceedings. The husband was still living:—Held, that the money, the proceeds of the goods, must remain in court to abide further order, so that the wife could have the same security that she had by the mortgage; and if she could not hereafter become entitled to the money, it would be available to the husband's creditors:—Held, also, that the chattel mortgage was valid, notwithstanding anything in R. S. O. 1887 c. 125, s. 6. *Morris* v. *Martin*, 19 O. R. 564.

Partner.]—One partner of a firm authorized the other to obtain an indorser, in order to raise money from a bank:—Held, that if express authority was required, this empowered the partner to mortgage all the stock-in-trade of the firm to secure such indorser. *Paterson* v. *Maughan*, 39 U. C. R. 371.

Partner.]—Where an arrangement had been entered into between the partners of a firm whereby, although moneys were to be advanced by the firm, the securities therefor were to be taken in the individual name of each partner according as each was willing to accept the security of the person seeking to borrow:—Held, that a chattel mortgage so taken was valid as against creditors, and that the mortgagee could properly make the affidavit of bona fides:—Semble, there is no legal objection to a loan being made by one member from the moneys of a firm, and the taking as a security therefor a chattel mortgage to himself. *Hobbs Hardware Co.* v. *Kitchen*, 17 O. R. 363.

Treasurer of Company.]—A treasurer of a mutual insurance company may take a mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have power to take it. *Brodie* v. *Ruttan*, 16 U. C. R. 207.

IX. Who May Impeach.

Assignee in Insolvency.]—The assignee of an insolvent mortgagor can, for the benefit of creditors, impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act. *Re Barrett*, 5 A. R. 206.

Assignee in Insolvency.]—In trover for goods against an assignee in insolvency:—Held, following the last case, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent, just as an execution creditor or subsequent purchaser for value may do. *Snarr* v. *Smith*, 45 U. C. R. 156.

Assignee for Creditors.]—The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the master in chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiffs' mortgage:—Held, that the defendant was not entitled to the order, for when the plaintiffs demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman* v. *Bourne*, 5 O. R. 430.

Assignee for Creditors.]—Section 2 of 55 Vict. c. 26 (O.), does not enable an assignee for the general benefit of creditors to

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

Assignee for Creditors.]—An assignee for the general benefit of creditors is, by virtue of 55 Vict. c. 26, s. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor, where such mortgage is by reason of such defect "void against creditors." As against such an assignee an oral agreement, of which he has notice, by the assignor to give to an indorser a chattel mortgage to secure him against liability, will be enforced. *Kerry* v. *James*, 21 A. R. 338.

Assignee for Creditors—*Agreement to give Mortgage—Registration of Agreement.*] An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given. Kerry v. James, 21 A. R. 338, considered. After judgment in the assignee's favour the Act 59 Vict. c. 34 (O.) was passed, and the agreement in question was registered:—Held, that this did not validate it. *Hope* v. *May*, 24 A. R. 16.

Assignee for Creditors—*Agreement to Give Mortgage.*]—Certain creditors, believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors:—Held, in an action by the assignee, that notwithstanding the agreement, the Act 54 Vict. c. 20 (O.), amending the Act relating to fraudulent preferences by insolvent persons, applied, that the doctrine of pressure was not applicable, and that the fraudulent intent must be presumed. *Breese* v. *Knox*, 24 A. R. 293.

Creditors—*Impeaching Judgment.*]—The mortgage in this case was filed upon an insufficient affidavit. The defendant was shewn to be a creditor of the mortgagor when the mortgage was given:—Held, therefore, that it was void as against him at the first; and the court refused, on the suggestion of the mortgagee, to question the regularity of the defendant's judgment entered after the date of the mortgage, or an attachment issued upon it. *Holmes* v. *Vancamp*, 10 U. C. R. 510.

Creditors—*Possession.*]—Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of $1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th January, 1882, executed a mortgage to S. on all their stock-in-trade, securing $2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd March following, advance to them $300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of $2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for $101.94 and interest, and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee:—Held, that even if the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as might render the security void under R. S. O. 1877 c. 119, as against creditors, yet it being clearly shewn that everything between the parties in connection therewith was done bonâ fide, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the court reversed the judgment of the court below, 2 O. R. 342. *Parkes* v. *St. George*, 10 A. R. 496.

Creditors.]—Held, that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment; and following Parkes v. St. George, 2 O. R. 342, and Meriden Silver Co. v. Lee, 2 O. R. 451, that the assignment did not prevent them from impeaching it. *Kitching* v. *Hicks*, 6 O. R. 739.

Creditors.]—Held, following Parkes v. St. George, 10 A. R. 496, that the plaintiffs, not being execution creditors, could not maintain an action to set aside the mortgage on the ground that the debt was incorrectly stated therein. *Hyman* v. *Cuthbertson*, 10 O. R. 443.

Creditors.]—Where a sheriff seized goods under a writ of execution placed in his hands subsequently to the making of an unregistered chattel mortgage, and subsequently also to the mortgagee having, under the power therein in that behalf, taken possession of the goods, and having sold them to a purchaser, who had also gone into possession:—Held, on interpleader, that the goods were not exigible by the sheriff, as against such purchaser. "Actual and continued change of possession," which by 55 Vict. c. 26, s. 3 (O.), is to be "open and reasonably sufficient to afford public notice thereof," has reference only to the "actual and continued change of possession" mentioned in ss. 1 and 5 of the Chattel Mortgage Act, R. S. O. 1887 c. 125, and does not refer to possession taken by a mortgagee after default. The

words "persons who become creditors" in 55 Vict. c. 26, s. 4, mean persons who become execution creditors as provided for in s. 2 of that Act, unless they are simple contract creditors suing on behalf of themselves and other creditors as provided for in s. 2. *Gillard* v. *Bollert*, 24 O. R. 147.

Creditors.]—"Void as against creditors" in s. 2 of 55 Vict. c. 26 (O.), which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and a sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached. Whether such an action can be brought by a simple contract creditor whose debt is not due, quære. *Meriden Britannia Co.* v. *Braden*, 21 A. R. 352.

Creditors—*Assignee for Creditors—Agreement not to Register.*]—By the Act relating to chattel mortgages, R. S. O. 1887 c. 125, a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict. c. 26, s. 2 (O.), that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences, R. S. O. 1887 c. 124. By s. 4 of 55 Vict. c. 26 a mortgage so void shall not, by subsequent taking of possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors * * before such taking of possession:"—Held, reversing 22 A. R. 138, that under this legislation a mortgage so void is void against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set the mortgage aside, and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession. Held, also, that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, such mortgage is, on grounds of public policy, void ab initio. *Clarkson* v. *McMaster*, 25 S. C. R. 96.

Liquidator.]—Quære, whether the liquidator of a company under the Winding-Up Act of Canada, R. S. C. c. 129, can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *In re Rainy Lake Lumber Co., Stewart* v. *Union Bank of Lower Canada*, 15 A. R. 749.

Prior Lienholder.]—The plaintiff sued for conversion of certain "withes lying on the island in the mouth of the river Moira," claimed by him under a written instrument, not under seal, whereby A., the owner, assumed to assign the withes to the plaintiff, as security for money lent. The defendants asserted a lien on the withes for advances to A., and also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to the plaintiff's mortgage:—Held, that the instrument was a good mortgage, though without seal, and was not void for want of registration as against the defendants claiming under the alleged prior delivery. The alleged lien for advances could not be enforced against the plaintiff, who was found by the jury to be an innocent mortgagee for value; and the jury having upon contradictory evidence found against the alleged prior delivery, the refusal to disturb the verdict was affirmed. Paterson v. Maughan, 39 U. C. R. 371, approved of and followed. *Hall* v. *Collins Bay Rafting and Forwarding Company*, 12 A. R. 65.

Purchaser.]—A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration within s. 5 of the Bills of Sale Act. *Williams* v. *Leonard & Sons*, 26 S. C. R. 406.

Purchaser with Notice.]—A mortgage not sufficiently describing the goods is void as against subsequent purchasers in good faith, and notice of such mortgage to the purchaser will not affect his right. *Moffat* v. *Coulson*, 19 U. C. R. 341.

Purchaser with Notice.]—Section 9 of the Chattel Mortgage Act, C. S. U. C. c. 45, provides that in the event of the permanent removal of the goods mortgaged into another county, a certified copy of the mortgage shall be filed in such county within two months from such removal, otherwise "the mortgage shall be null and void as against subsequent purchasers and mortgagees for valuable consideration, as if never executed:"—Held, that the words "in good faith," found in ss. 3 and 4 of the Act could not be imported into this section after "mortgagees;" and that a purchaser for value of the goods, though with notice of the mortgage, was entitled as against the mortgagee. *Morrow* v. *Rorke*, 39 U. C. R. 500.

Subsequent Mortgagee—*Consideration.*]—A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was made before such possession, although at the time of the seizure there was no default under the subsequent mortgage, and the mortgagor was by the terms of it entitled to retain possession until default. Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should, nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued. *Marthinson* v. *Patterson*, 20 O. R. 125. See the next two cases.

Subsequent Mortgagee—*Consideration.*]—Held, that the plaintiff could not under his prior chattel mortgage, by taking possession of the mortgaged chattels, after the execution and filing of a subsequent chattel mortgage to the defendant, although before the time

at which the defendant could have taken possession, hold the mortgaged goods against the defendant, where the plaintiff's mortgage did not comply with the Act, if the defendant's mortgage had complied therewith. Judgment in 20 O. R. 125, affirmed on this point. But where the amount of the consideration for the defendant's mortgage was less than the amount expressed therein and sworn to by the defendant in his affidavit of bona fides as the true amount:—Held, that the defendant's mortgage did not comply with the Act, and the plaintiff, by reason of taking possession as before mentioned, could hold the goods against the defendant. Robinson v. Paterson, 18 U. C. R. 55, followed. Hamilton v. Harrison, 46 U. C. R. 127, not followed. Judgment in 20 O. R. 125, reversed on this point. Held, also, that the "subsequent purchasers or mortgagees" referred to in s. 4 of R. S. O. 1887 c. 125, are those whose purchases or mortgages are accompanied by an immediate delivery and followed by an actual and continued change of possession, or who have complied with the provisions of the Act, and as neither the plaintiff nor the defendant came within the words, the plaintiff, being prior in point of time, had priority; but if the defendant could be treated as a subsequent mortgagee, he was not a subsequent mortgagee in good faith, by reason of the falsity of his mortgage.—Held, lastly, doubting, but following, Moffatt v. Coulson, 19 U. C. R. 341, that notice of the plaintiff's mortgage when he took his own was not a reason for depriving the defendant of the status of a subsequent mortgagee in good faith. *Marthinson v. Patterson*, 20 O. R. 720. See the next case.

Subsequent Mortgagee — *Consideration.*] Taking possession of the mortgaged chattels does not make good a defective chattel mortgage as against a subsequent validly registered bonâ fide chattel mortgage existing at the time such possession is taken. Per Burton and Maclennan, JJ. A.—It is immaterial whether the subsequent mortgage has been validly registered or not, or whether there has or has not been notice of the prior mortgage. Per Hagarty, C. J. O.—If neither mortgage has been validly registered, that which is prior in date will prevail. Per Hagarty, C. J. O., Osler, and Maclennan, JJ.A.—A misstatement of the consideration in a chattel mortgage is not, in the absence of bad faith, ipso facto a fatal defect. It is merely an element to be considered in dealing with the question of bona fides. Hamilton v. Harrison, 46 U. C. R. 127, and Jaffray v. Robinson, C.A., 16th September, 1878 (not reported), considered. Judgment in 20 O. R. 720, reversed, and that in 20 O. R. 125, restored. *Marthinson* v. *Patterson*, 19 A. R. 188.

Subsequent Mortgagees With Notice.]—Where two mortgagees, the defendants in this action, took a chattel mortgage to themselves to secure certain moneys, having at the time knowledge of a pre-existing debt from the mortgagor to T., and of a prior, but unrenewed, chattel mortgage to T. to secure the same:—Held, that such conduct did not amount to mala fides, and that T.'s unrenewed mortgage was void as against them under R. S. O. 1877 c. 119. *Tidey* v. *Craib*, 4 O. R. 696.

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

X. Miscellaneous Cases.

Curing Formal Defects.]—A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands, but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. 1877 c. 118, would not suffice to cure the defects. *Smith* v. *Fair*, 11 A. R. 755.

Discharge in Insolvency.]—The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge:—Held, that the debt under the chattel mortgage was not extinguished. *Beaty* v. *Samuel*, 29 Gr. 105.

Effect of Taking Two Mortgages.]—On the 18th July, 1851, one M. gave the plaintiff a mortgage on certain goods, which was duly registered on the following day. On the 16th July, 1852, he executed another mortgage, but to secure a smaller sum, the goods mortgaged being, with a few exceptions, the same as the first; this was registered on the 19th. On the same day, and before the registration, a fi. fa. against M. was placed in the sheriff's hands. There was not in the case of either mortgage any actual delivery of goods:—Held, that the fi. fa. was entitled to prevail: that the first mortgage was waived by taking the second, and was therefore out of the question, though in any case it would have ceased to be in force after the 18th of July, and the second filing would have been too late. *McMartin* v. *McDougall*, 10 U. C. R. 399.

Fixtures.]—The owner of land upon which there are fixtures, such as machinery in a mill, has a right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held, not to be prejudiced by his subsequent mortgage of the land. *Ross* v. *Hope*, 22 C. P. 482.

Hire Receipts—*Transfer of Rights—Conditional Sale of Chattels.*]—The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account) before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148:—Held, that the transaction was invalid as against execution creditors under s. 37 of that Act, and was not within s. 41, s.s. 4, which is intended to except only conditional sales of chattels within R. S. O. 1897, c. 149, which this was not:—Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her. *Eby* v. *McTavish*, 32 O. R. 187.

Insurance — *Assignment — Condition Against—Chattel Mortgage—Effect of.*]—See INSURANCE, III. 3 (b).

Substitution of Mortgages.] — Held, that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his indorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a renewal, there being evidence that when the later mortgage was taken it was not intended to abandon the earlier one. McMartin v. McDougall, 10 U. C. R. 399, commented on. Boulton v. Smith, 17 U. C. R. 400, 18 U. C. R. 458, referred to. Smale v. Burr, L. R. 8 C. P. 64; Ramsden v. Lupton, L. R. 9 Q. B. 17, distinguished. *Boldrick v. Ryan*, 17 A. R. 253.

Taxes — *Purchase from Mortgagee.*]—Goods purchased from the chattel mortgagee thereof are not "claimed * * by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R. S. O. 1897 c. 224 s. 135, s.-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor. Judgment below, 31 O. R. 301, affirmed. *Horsman v. City of Toronto*, 27 A. R. 475.

Transfer—*Examination of Transferee.*]—A chattel mortgage is a transfer of property and effects within the meaning of 49 Vict. c. 16, s. 12 (O.) *Blakely v. Blaase*, 12 P. R. 565.

BLASPHEMY.

See PUBLIC MORALS AND CONVENIENCE, IV.

BOND.

I. CONSIDERATION, 849.

II. CONSTRUCTION AND EFFECT, 850.

III. PRACTICE AND RIGHTS IN ENFORCING BONDS.

1. *In General*, 853.

2. *Pleading*, 860.

IV. RELEASE AND SATISFACTION, 864.

V. MISCELLANEOUS CASES, 865.

I. CONSIDERATION.

Duress — *Illegality.*]—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of s. 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress. Per Osler, J. A.—The bond was also illegal and void on the ground that not being required by law, it was given in order that the law might be put in force, which ought to have been put in force and acted upon without it. *City of St. Thomas v. Yearsley*, 22 A. R. 340.

Fraud.]—The obligor of a bond which by the plaintiff's own shewing is clearly fraudulent, need not plead fraud to prevent a recovery. *Smith v. Dittrich*, 8 U. C. R. 589.

Indemnity by Alleged Owner of Stolen Horse.]—A party suspected of stealing a horse was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner (the prosecutor) but before doing so took a bond of indemnity:—Held, that such bond was not necessarily void as contrary to the general policy of the law. *Ballard v. Pope*, 3 U. C. R. 317.

Indemnity to Sheriff by Execution Debtor.] — The sheriff, holding executions against defendant at the suit of different parties, took from him a bond reciting that he had seized his goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, the wrongful execution, or non-execution of the said writ:"—Semble, that such a bond would be void at common law, as being an indemnity to the sheriff for disobeying the command of the writ. *Corbett v. Hopkirk*, 9 U. C. R. 479.

Stifling Prosecution.]—In an action on a bond executed by J. to secure an indebtedness of L. to plaintiff bank, the evidence shewed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute:—Held, that the consideration for said bond was illegal and J. was not liable thereon. *People's Bank of Halifax v. Johnson*, 20 S. C. R. 541.

II. CONSTRUCTION AND EFFECT.

Agent for Sale.]—One M. and his sureties gave a bond to F., the plaintiff, reciting that F. had "appointed the above bounden M. his agent to sell certain articles and things, which the said F. is to manufacture and send to the said M. for that purpose, at and for the prices the said F. may put upon such articles and things in his instructions to said M., and has also appointed the said M. his agent to collect and receive all moneys arising out of such sales to the use of said F." The condition then was, "that if the above bounden M. shall in all things well and faithfully carry out the said agency on his part, and shall well and truly make correct and faithful returns to the said F. of all moneys arising out of the sale of any of the articles or things aforesaid, *and of all other moneys the said M. may at any time during the continuance of the said agency collect for the said F., at the time and in the manner mentioned in the instructions of the said F., and agreed to by the said M., then*," &c.:—Held, that the words in italics did not refer only to such moneys as were to be derived from the proceeds of sales effected by M., and that upon default for other moneys than those arising from such sales collected by him the sureties were liable to F. *Fleury v. Moore*, 34 U. C. R. 319.

Alteration of Will.] — The defendant gave plaintiff a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C.:—Held, that the condition was broken. *McCormick* v. *McRae*, 11 U. C. R. 187.

Breach—*Demand.*]—Debt on bond, conditioned that defendant should "pay to the plaintiff £43 15s. in building stone, at 15s. per cord, to be delivered for that sum in the town of Hamilton, at such times and in such places as should be required by plaintiff; twenty cords to be delivered by the 20th September then next, and the remainder in one year. Plea, that from the making of the bond until the expiration of one year, defendant had always been ready and willing to deliver the said stone at such times and places as should be required by plaintiff, &c., yet that the plaintiff did not, within one year from the date of the bond, require him to deliver the said stone or any part thereof:—Held, on demurrer, a good defence. *Stinson* v. *Branigan*, 10 U. C. R. 210.

Breach—*Demand.*]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal on demand of all moneys received and not paid out by him, that a personal demand of payment should be made on him. And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties. *Port Elgin Public School Board* v. *Eby*, 26 O. R. 73.

Condition — *Inconsistency.*]—The condition of a bond must be construed as a whole, and any apparent repugnance may be reconciled by giving it effect according to the intent apparent on the whole instrument. *Nicolls* v. *Madill*, 6 U. C. R. 115.

Condition—*Mutuality.*]—H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit five per cent. of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons:—Held, affirming 18 A. R. 415, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond. *Brantford, Waterloo, and Lake Erie R. W. Co.* v. *Huffman*, 19 S. C. R. 336.

Contemporaneous Agreement.] — To an action on a bond, defendant cannot set up a separate contemporaneous agreement not under seal, varying the condition from that which the bond itself imports. *Cramer* v. *Hodgson*, 3 U. C. R. 174.

Continuing Security.]—Where defendant agreed to lend the plaintiff £2,000, to be advanced as it might be required, and received from plaintiff a conveyance of land to secure the advances, and gave back a bond reciting the agreement, and binding himself to reconvey the lands on re-payment of the sum advanced on a certain day, and defendant before that day made further advances to £10,000, and received timber, &c., on account to £7,000:—Held, that the bond was a continuing security, and that defendant was not obliged to re-convey on payment of the £2,000 first advanced. *Wells* v. *Ritchie*, 6 O. S. 13.

Maintenance — *Penalty—Right to Sue for Support.*]—The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to and is not satisfied by payment of the amount of the penalty, and the obligee has the right to sue for her support as it accrues from time to time. *Baker* v. *Trusts and Guarantee Co.*, 29 O. R. 456.

Omission — *Payee not Named.*]—The omission to say expressly to whom money payable is to be paid, may be supplied by intendment. *Allen* v. *Coy*, 7 U. C. R. 419.

Omission — *Conclusion of Condition.*]—So may the conclusion of the condition, "then this obligation shall be void." *Day* v. *Spafford*, 5 O. S. 57.

Penalty.]—A bond without a penalty may be good as a covenant or agreement. *Mewburn* v. *Mackelcan*, 19 A. R. 729.

Recital.] — A condition will not be restricted by the recital, unless the intention of the parties as apparent on the whole instrument requires it. *Canada P. B. & S. Society* v. *Lewis*, 8 C. P. 352.

A bond recited that L. had mortgaged to plaintiffs certain premises held by him by lease; and that doubts had arisen whether the lessor was authorized to grant such lease, and the condition was to indemnify the plaintiffs against any loss which they might sustain by reason of the lease turning out invalid, or by reason of the non-payment of the mortgage:—Held, that the recital did not so qualify the condition as to avoid that part of it providing for payment of the mortgage. *Ib.*

Security—*Moneys not Received.*]—In an action for the breach of a condition, assigned in the words used in the bond, "in not having duly rendered all accounts which ought to have been rendered," the plaintiff may recover whatever moneys defendant ought to have received, though in fact he received none. *Small* v. *Stanton*, 3 U. C. R. 148.

Several or Joint.]—A bond to a municipal corporation, "We, G. B., &c., are jointly and severally held and firmly bound &c., unto &c., in the several penal sums of money hereinafter mentioned, that is to say, the said G. B. in £3,000, the said J. P. in £500, the said J. H. W. in £500, (and all the rest in £500 each,) for which several payments &c., we and each of us bind ourselves, and each and every one of our heirs, executors, and administrators," &c.:—Held, a several, not a joint, or joint and several, bond. *County of Essex* v. *Bullock*, 11 C. P. 323.

Successors in Office.]—A bond by a collector to the "treasurer of a town and his successors in office:"—Held, valid, without naming any individual therein. *Judd* v. *Read*, 6 C. P. 362.

III. Practice and Rights in Enforcing Bonds.

1. *In General.*

Agent—*Contribution—Costs of Defence.*]—Defendant was a creditor of one T. H., and at defendant's request one L., on receiving the bond of indemnity sued on in this action, executed a power of attorney to defendant to collect certain rents due by T. H. to L. Defendant then requested L. to sign a distress warrant against T. H., which L. did, and defendant placed it in plaintiff's hands with instructions to seize certain property which defendant had caused to be placed on the demised premises, as well as some other property elsewhere. The plaintiff seized, and shortly afterwards obtained a bond of indemnity from L. The property was claimed by J. H., a son of T. H., but was sold by defendant's instructions, who became the purchaser of a large portion. J. H. brought an action against L. and the plaintiff, and recovered against them. Plaintiff paid the damages and costs, and commenced an action against L. on his bond. This L. settled by conveying to plaintiff a lot of land, and assigning to plaintiff by deed defendant's bond, and the plaintiff then sued defendant on this bond:—Held, that the defendant was liable, for although the distress warrant was executed by L., yet it was done at defendant's request, who assumed the entire direction of the seizure and sale. *Wallace* v. *Gilchrist*, 24 C. P. 40.

Held, also, that L. was damnified, in having to settle the plaintiff's action against him by conveying the land and assigning defendant's bond; and that he was not bound to defend the suit, for the plaintiff having acted under express instructions from L.'s agent, and having been guilty of no wilful neglect or default, L. had no defence. *Ib.*

Held, also, that as the plaintiff's act in seizing and selling was done under defendant's direction, and in good faith, and was not apparently illegal in itself, the rule of no contribution among wrongdoers did not apply. *Ib.*

Held, also, that J. H. had a right of action against plaintiff and L., and it mattered not whether T. H. or J. H. was injured, so long as the plaintiff acted under the warrant, and was in consequence made responsible. *Ib.*

Held, also, that the plaintiff was entitled to recover the costs of defence incurred by him and L. *Ib.*

Annual Payments.]—Defendants gave a bond to plaintiff for £45, conditioned to pay him £45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question raised. He then sued for the seventh year, and the question of defendants' liability was left to the court without pleadings:—Held, that covenant clearly would not lie; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defence; and that the defendants therefore were entitled only to have satisfaction entered on payment of the penalty and costs. *Niven* v. *Jardine*, 23 U. C. R. 470.

Assessment of Damages.]—In an action upon a bond with a penalty conditioned for the payment of a sum of money by instalments, with interest in the meantime on the unpaid principal, by Rule 580 the provisions of 8 & 9 Wm. III. c. 11 as to the assignment or suggestion of breaches, and as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario, but in all other respects the practice and proceedings are the same as in an ordinary action, and subject to the Rules. The claim in such an action is not the subject of a special indorsement under Rules 138 and 603, but is in the nature of a claim for damages. Upon the defendant in such an action making default in delivering a defence, judgment is to be obtained by the plaintiffs by motion under Rule 593, and should be for the penalty, and for assessment of damages for the breaches assigned, or to be suggested, in such way as may be thought proper under Rules 578, 579. Where the action comes for assessment of damages before a Judge sitting for the trial of actions, he can do no more than assess the damages in respect of the breaches of the bond for which execution is to be issued. *Star Life Assurance Society* v. *Southgate*, 18 P. R. 151.

Assessment of Damages.] — An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence. The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—Held, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. Star Life Assurance Society v. Southgate, 18 P. R. 151, followed. *Appleby* v. *Turner*, 19 P. R. 145.

Assessment of Damages.]—To debt on bond for £400, setting out the condition and assigning breaches, defendant craved oyer and demurred, and the plaintiff having succeeded on the demurrer, entered judgment for the penalty and issued execution. Defendant then moved to set aside the proceedings, but the plaintiff had leave to amend, by substituting an interlocutory for the final judgment, and entering an award of venire to assess damages, and inquire of further breaches, although three years had elapsed from the entry of judgment. *Douglass* v. *Powell*, 2 O. S. 87.

Assessment of Damages.]—Where non est factum is pleaded, and breaches assigned in the declaration:—Semble, no special entry of ven. fac. to assess damages is necessary, but if required the court will allow it to be made afterwards. *Corrigal* v. *Boulton*, 16 U. C. R. 520.

Breach—*Demand of Payment at Named Place and Time.*]—The plaintiffs sued for in-

terest on two bonds made by defendants on the 27th January, 1855, for the payment to the plaintiffs or order of the principal money named, on the 1st November, 1855, at the agency of the Bank of Upper Canada in Hamilton, together with interest thereon. Both counts alleged that although defendants paid the principal on the 29th January, 1861, with interest up to the 1st November, 1855, yet they had not paid any interest after that day. In the second count it was averred that the bond was in defendants' possession and cancelled by them, and the plaintiffs therefore could not present it on the day appointed for payment; and that on that day defendants had no money at the agency, and gave no instruction to the manager there to pay. Defendants pleaded, to the first count, that they were always ready to pay the principal and interest according to the bond, and did pay the same when presented, but that the bond was not presented at the said agency on the day appointed for payment, nor at any other time; and that defendants never owed nor covenanted to pay the plaintiffs interest after that day, when they were ready to have paid both principal and interest. And to the second count, that they had money at the said agency to pay the bond, but the plaintiffs had no one there, nor was anyone there on that day or at any time after to receive the same; and that they never owed, &c., (as in the last plea):—Held, on demurrer, both pleas good; and that the omission to aver presentment in the first count was cured by the plea. The eighth plea was leave and license; and was held bad, as no answer to an action of covenant. *McDonald* v. *Great Western R. W. Co.*, 21 U. C. R. 223.

At the trial it appeared that the bonds declared on in the first count had never been in the plaintiffs' custody, having been retained at their request by defendants' solicitor, and it was proved that when the bonds fell due, and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented:—Held, that the pleas were proved; that defendants were not liable to pay interest after the bonds matured; and the Judge properly directed a verdict in their favour. *Ib.*

Charitable Subscription.] — A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's lands. *Anderson* v. *Paine*, 14 Gr. 110.

Demand of Payment at Named Place.]—The bonds produced acknowledged defendants to be "indebted to the holder hereof in the sum of £——, and do hereby promise to pay the same to such holder at the agency of the Bank of Montreal, at Ottawa, on, &c., on the surrender of this bond, with interest, at the rate of, &c., payable, &c., upon presentation of the several warrants or coupons hereunto annexed, at the agency of the Bank of Montreal at the city of Ottawa aforesaid." The declaration stated that defendants, by their bond, sealed, &c., became bound to the holder thereof in the sum of, &c., with interest, &c., to be paid to such holder thereof, on, &c., and the plaintiff became holder thereof, &c., yet said sum with interest had not been paid. It was admitted at the trial that the bonds were not presented at the place where they were made payable; and it was proved that if they had been so presented, defendants had not funds there to meet them:—Held, that there was no variance between the bonds declared on and those produced, in the former being stated as payable to holders generally, while the latter were payable only on surrender and at a particular place. Held, also, that it was not necessary for plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place, and a tender of the surrender of the bonds, or a readiness to surrender them. *Fellowes* v. *Ottawa Gas Co.*, 19 C. P. 174.

Destroyed Bond.]—The jurisdiction of equity in the case of lost bonds exists also in the case of bonds which have been destroyed. *County of Frontenac* v. *Breden*, 17 Gr. 645.

Division of Municipality.]—The bond was taken to "the municipality of the township of Whitby," and afterwards the township was divided by 20 Vict. c. 113, into Whitby and East Whitby:—Held, that the bond was properly sued upon in the name of the corporation of Whitby. *Township of Whitby* v. *Harrison*, 18 U. C. R. 603.

Estoppel.]—Evidence of being executed in blank—estoppel from denying execution. See *Regina* v. *Chesley*, 16 S. C. R. 306.

Instalments—*Interest.*] — Sci. fa. on a bond conditioned to pay $2,782.68, in five equal annual instalments, with interest on the whole amount from time to time remaining due, on the 1st June in each year. The declaration recited that the first instalment and interest, due on the 1st June, 1862, had been paid: that on 30th November, 1864, damages were assessed for the second and third instalments, and interest on the unpaid principal, $2,226, up to 1st June, 1864, which were paid on 15th April, 1865: that there was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st June, 1865, with interest on the said $2,226, from 1st June, 1864, to 15th April, 1865, and interest from said 15th April, on the principal remaining unpaid on that day, to 1st June, 1865. The plaintiffs claimed execution for the damages to be assessed on this further breach:—Held, that interest on the $2,226 could not be recovered, for the plaintiffs on their sci. fa. for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that sci. fa., 30th November, 1864, which would include interest; and their execution for such damages would bear interest also:—Held, also, that the objection might be taken by demurrer to so much of the breach as claimed such interest, for the award of execution being claimed for three separate sums, each claim might be treated as the assignment of a separate breach. *Randall* v. *Burton*, 25 U. C. R. 9.

Action on bond payable by instalments. Judgment was entered for the penalty. Proceedings were had from time to time by sci. fa.:—Held, that defendants were bound to pay the expense of levying the sum due, but that the whole amount the plaintiffs were entitled to recover was limited to the penalty. *Randall* v. *Burton*, 4 P. R. 9.

The plaintiff may not charge interest on the penalty, or amounts remaining due thereon. *Ib.*

Instalments Due After Action.] — Where in debt on bond for the payment of money in two instalments only one was due

when process issued, but the plaintiff assigned breaches for both, the second being due before declaration:—Held, that he could assess his damages on both breaches; and semble, in such a case the declaration is the commencement of the action. *Leach* v. *Stevenson*, 3 O. S. 310.

Instalments Not Due.]—Defendant gave a bond to plaintiff to abide by the award of arbitrators. The arbitrators awarded $400 to be paid in three instalments, the two last to be secured by defendant upon real estate, and payable at a future day. Defendant neither paid the first instalment, nor secured the second and third in the manner directed:—Held, that plaintiff was entitled to assess his damages for the whole three instalments, although the last two were not due. *Bond* v. *Bond*, 10 C. P. 327.

Instalments Not Due.]—Action on a bond conditioned to pay money by instalments, to recover the first instalment. Pleas, non est factum and payment. After issue joined, defendant paid the sum then due; and to another suit for the second instalment, he pleaded in abatement the former action:—Held, that he was entitled to succeed; for, 1. the plaintiff might have proceeded with the previous action and obtained judgment, as the payment after action could not cure the breach; and, 2. the cause of action, which is the penalty, was the same in both suits. *Randall* v. *Burton*, 23 U. C. R. 268.

Interest.]—A plaintiff on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty. *McMahon* v. *Ingersoll*, 6 O. S. 301.

Interest.]—The bond contained a stipulation that in the event of any sum being found due by M. to the bank, interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank* v. *Springer; Exchange Bank* v. *Barnes*, 13 A. R. 390.

Interest—*Damages in Lieu of Interest.*]—See *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132.

Judgment as Security.]—The plaintiff had recovered £16 as damages for breach of the condition, the penalty being £500. Judgment had been entered for the debt and damages, and duly registered. An application, shewing payment of the damages and costs, to have satisfaction entered, was refused with costs, as the plaintiff was entitled to the judgment as a security for further breaches. *Hill* v. *Hill*, 1 P. R. 268.

Limiting Execution.]—On a bond for the conveyance of land, the verdict was taken for the plaintiff for $1,000, and 20 cents for the detention, no evidence of damage having been given. Defendant moved to restrain the execution to 1s. damages, the bond being within 8 & 9 Will. III. c. 11:—Held, that such application before the entry of judgment was premature. *Greer* v. *Johnson*, 32 U. C. R. 77.

Misnomer.]—An obligor who is called by a wrong name in a bond, but executes it by his right name, must be sued by his name in the bond. *Ketchum* v. *Brady*, M. T. 3 Vict.

Municipal Treasurer.]—Section 60 of 13 & 14 Vict. c. 67, requiring the collector to give a bond, as required by by-law, is directory, and not so imperative as to make the collection of the taxes illegal where a bond from the collector's surety had been given to the treasurer instead of the town by its corporate name, and no by-law had been passed by the corporation under that section. *Judd* v. *Read*, 6 C. P. 362.

Municipal Treasurer.]—In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of F., for the performance by defendant P. of his duties as collector:—Held, approving Judd v. Read, 6 C. P. 362, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality. *Todd* v. *Perry*, 20 U. C. R. 649.

Non-production.]—Where the plaintiff was nonsuited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, the nonsuit was set aside and a new trial granted on payment of costs, the bond having been afterwards found. *Muirhead* v. *McDougall*, H. T. 2 Vict.

Obligor's Attempt to Destroy Bond.]—Trover may be maintained against the obligor of a bond for securing the fidelity of a clerk, the obligor having torn off the seal (and this although the bond might be considered as still subsisting and sufficient to sustain the action of debt), and damage may be recovered against the obligor to the amount of the penalty. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Plaintiff Author of His Own Damage—*Fraud—Pleading.*]—Debt on a bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A. to the plaintiff, through the agency of B., and which sum was also claimed to have been paid to the plaintiff by one C., and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified of his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C., for the said sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shewn that the recovery by C. had been on admissions made by plaintiff after the execution of the bond:—Held, not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. *Powell* v. *Boulton*, 2 U. C. R. 487.

The plaintiff having in the last case assigned two breaches, setting out a judgment for the sum of money in the condition mentioned, and not specifying any particular sum for which judgment had been recovered:—Held, sufficient, on motion in arrest of judgment. *Powell* v. *Boulton*, 3 U. C. R. 19.

Priorities.]—A. gave a voluntary bond to B. for £5,000 and a few days afterwards a

like bond to C.: neither was given for any fraudulent purpose. C. recovered judgment on the second bond; and the obligor had not property enough to pay both bonds:—Held, that B., whose bond was prior in date, had no equity to restrain proceedings by C. to enforce the judgment recovered; nor to set aside a conveyance made by A. of land of less value than the judgment, and which C. had accepted in discharge thereof. *Newenham* v. *Mountcashel*, 19 Gr. 530.

Production.]—Where a bond is pleaded with a profert, the admission of its execution, under a Judge's summons, does not dispense with its production at trial. *Lesslie* v. *Leahy*, 5 O. S. 482.

Purchase Money—*Plea Denying Tender of Conveyance.*]—In an action on a bond for the payment of purchase money of land taken by a railway company, no suggestion having been made as to any defect in title, and plaintiff's counsel offering to deliver at once a conveyance of the land to the company, the court refused to allow a plea to be added denying tender of conveyance before action. *Masson* v. *Robertson*, 44 U. C. R. 323.

Representative Capacity.] — Plaintiff sued as executrix on a bond made to her in her own right:—Held, that she could not recover, and nonsuit entered. *Haie* v. *Montgomery*, T. T. 3 & 4 Vict.

Seal.]—Defence to an action on a bond against sureties that the bond when executed had no seals. See *Marshall* v. *Township of Shelburne*, 14 S. C. R. 737.

Second Action—*Time to Plead.*]—Defendant executed in favour of plaintiff a bond in the penal sum of £700, conditioned to pay £350, with interest, by instalments. Plaintiff obtained a verdict on the bond for the penalty, 1s. damages for detention, and £21 damages, assessed on breaches assigned, after which defendant paid the damages and costs. Instead of entering judgment for the penalty as a security for future breaches, the plaintiff commenced a second action for another instalment and interest. Defendant without intimating that he intended to plead in abatement, as a favour asked plaintiff for further time to plead, which was granted. Sixteen days after declaration defendant pleaded the pendency of the former action, and prayed judgment whether plaintiff ought a second time to implead him for the same cause of action, attaching to the plea an affidavit of its truth. The plea was set aside with costs, and plaintiff allowed to sign judgment by default unless defendant should pay costs and plead within four days. *Carlisle* v. *Hostel*, 7 L. J. 99.

Set-off.]—Non est factum and a set-off may be pleaded together, to debt on bond. *Atkins* v. *Clark*, 6 O. S. 35.

Set-off.]—Defendant pleaded a set-off of a judgment recovered in debt on bond for £223 15s. 3d., being £200 debt, 1s. damages, and £15 14s. 3d., costs. The plaintiff replied nul tiel record, and the judgment appeared to be for the recovery of the debt, damages, and costs, and also £55 15s. for damages assessed on account of breaches of the bond:—Held, no variance. *Bowerman* v. *Brown*, 2 U. C. R. 409.

Special Indorsement.]—A. and B., having become sureties for C., the receiver in a suit in chancery, and who was to account yearly, were sued for C.'s default on a specially indorsed writ, and judgment signed for £490 16s. 10d.:—Held, upon a motion on affidavit, as to the facts, that £92 11s. 9d. was all that was due; and that the claim was not such that a judgment upon a specially indorsed writ could be signed. *Buell* v. *Whitney*, 11 C. P. 240.

Successor in Office.]—Where the plaintiff declared in debt on bond as "Governor-General of Canada and Judge of the court of probate in Upper Canada," on a bond made by the defendants to "Sir John Colborne, at the time of the execution thereof being Lieutenant-Governor of Upper Canada, and Judge of the court of probate therein, and to his successor in office," and assigned as a breach, the non-payment of the penalty to the said "Sir John Colborne or any other person or persons whatever," whereby an action had accrued to the plaintiff as "Governor-General, and Judge of the court of probate, and successor of Sir John Colborne," the declaration was held bad on special demurrer, for not shewing where or when the plaintiff became the successor of Sir John Colborne, and for not negativing payment of the penalty to plaintiff, and for averring that the action had accrued to the plaintiff as "Governor-General and Judge of the court of probate." *Bagot* v. *McKenzie*, 6 O. S. 580.

Verdict for Penalty.]—In debt on bond, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under 8 & 9 Will. III. c. 11, it is irregular to take a verdict for the penalty, and the verdict may be set aside. *Brock District Council* v. *Bowen*, 7 U. C. R. 471.

Semble, that the breaches may be suggested even after verdict, and then the plaintiff may go down before a jury and assess his damages. *Ib.*

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2. *Pleading.*

In debt on bond, a plea that the plaintiffs had not made a conveyance according to agreement, was held bad on special demurrer, for not shewing what the agreement was, although it was referred to and its contents might be collected from the condition of the bond as set out on oyer. *McGilvray* v. *McDonnell*, Tay. 139.

Where the plaintiff declared upon a penal bill, and proved a bond with a condition:—Held, not a sufficient variance to set aside the verdict. *De Riviere* v. *Grant*, Tay. 473.

In debt on a bond conditioned on delivery of good merchantable grain to deliver a certain quantity of whiskey, an averment in the declaration of a delivery of good distillery grain, but that defendants did not deliver the whiskey, was held bad on general demurrer. *Cowper* v. *Fairman*, 3 O. S. 568.

Debt on bond against two defendants, conditioned that A., as a bank agent, should account as often as called upon. Pleas: that before action brought A. ceased to be agent, and that while he was agent he kept all the clauses, &c., in the condition; 2. that A. paid the plaintiffs the amount of the penalty in the bond:—Held, bad on general demurrer,

the first plea not answering the condition, and the second not being pleaded as accord and satisfaction, nor any release shewn. *Bank of Upper Canada* v. *Boulton*, 4 O. S. 158.

Debt on bond conditioned that "the defendant, his heirs and assigns, should permit the plaintiff to cut down and carry away all the firewood from certain lands, without let, suit, hindrance, &c." Plea, that defendant always permitted, &c. Replication, that defendant conveyed the land in fee to a stranger, who would not permit plaintiff to cut the wood, &c.:—Held, bad, on demurrer, as shewing no breach, the bond being a license under seal binding on defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no actual obstruction. *Fowke* v. *Fothergill*, 4 O. S. 185.

In an action on a bond, where the plea is that the bond was conditioned to perform an award, and no award made, the plaintiff must either deny the condition as alleged, or reply specially setting out an award and assigning a breach. He will not be permitted to take issue on the plea under s. 108 C. S. U. C. c. 22, and such a replication will be struck out under s. 119, as embarrassing. *Cowan* v. *White*, 9 L. J. 131.

To debt on an indemnity bond defendant pleaded non damnificatus, and the plaintiff having replied, shewing how she was damnified, defendant rejoined that the injury arose through plaintiff's own fraudulent act. The rejoinder was held a departure, and bad on general demurrer. *Hamilton* v. *Davis*, 1 U. C. R. 490.

The plea of non damnificatus to a declaration on a bond containing specific conditions, not to indemnify generally, is bad. *Kingsmill* v. *Gardiner*, 1 U. C. R. 223; *McDonald* v. *May*, 5 U. C. R. 68.

Defendant may plead that the payment by the obligee was without necessity, and made in his own wrong. *Hamilton* v. *Davis*, 1 U. C. R. 176.

Where in debt on an indemnity bond defendant pleaded that if the plaintiff was damnified she was damnified of her own wrong, on which the plaintiff took issue, and did not assign any breach:—Held, that the issue was on the plaintiff. *Hamilton* v. *Davis*, 2 U. C. R. 137.

In debt on bond for the performance of the duty of deputy sheriff for six months, and for such period as the sheriff and deputy should agree upon and indorse upon the bond, in answer to a plea of performance the plaintiff replied that the period had been extended, not alleging during the six months:—Held, bad. *Hamilton* v. *Anderson*, 2 U. C. R. 452.

Where the condition requires something to be performed after the making of the bond, a plea of performance will be sufficient if it appear that the thing must necessarily have been performed after the making of the bond, though these words be not used. The condition was to pay over moneys. Plea, payment of all moneys collected, without shewing how much collected:—Held, sufficient. *Denison* v. *Donnelly*, 2 U. C. R. 395.

Condition, to account once in six months. Plea, that defendant did account, not alleging once in every six months:—Held, bad, on special demurrer. *Small* v. *Beasley*, 3 U. C. R. 40.

A., upon being appointed clerk of the market to the board of police of London, entered into a bond to pay a certain sum in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for non-payment, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat;" and then averred that the plaintiffs had no such authority, and that on this account, the bond was void:—Held, bad, in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *Board of Police of London* v. *Talbot*, 3 U. C. R. 311.

Debt on a bond, conditioned to make certain payments at the times stated in the condition. Breach, that £125, parcel of the sum demanded, was not paid, &c.:—Held, bad, in not negativing the payment of the money mentioned in the condition. *Beckett* v. *Gill*, 4 U. C. R. 489.

Where the plaintiff has bound himself to advance money to A. upon certain conditions, and defendant has in the same bond guaranteed the repayment, the plaintiff in suing on the bond should set out with certainty the conditions on which A. was to obtain the money. The averment that A. had not kept all the conditions on his part, without stating them, is bad. A plea also that the plaintiff had not kept all the conditions on his part, when it nowhere appeared what they were, is also bad. Where the plaintiff was either to "secure or advance" the money, a plea stating that he had not "secured and advanced," is bad. *Wright* v. *Benson*, 5 U. C. R. 249.

The plaintiffs, who had taken from defendants a bond for the due performance of a collector's duty, with a condition in it prescribed by certain municipal by-laws, declared upon it as upon a common money bond, without setting out the condition; the defendant pleaded non est factum:—Held, not a fatal variance. It would have been better, however, for the plaintiffs to have set out the condition in their declaration, and assigned breaches. *Brock District Council* v. *Bowen*, 7 U. C. R. 471.

The plaintiffs, by the name of the "Council of the District of Brock," declared on a bond, which when produced at the trial, was found to be given to "the Municipal Council of the Brock District." The bond was not set out on oyer:—Held, variance not fatal. *Brock District Council* v. *Bowen*, 7 U. C. R. 471.

So where a bond was sued upon in the name of the "Trent and Frankford Road Company," and upon being produced was in the name of the "President and Directors of the Trent and Frankford Road Company." *Trent and Frankford Road Company* v. *Marshall*, 10 C. P. 329.

Action on a bond. Plea, that it was obtained by H. and others in collusion with him, by fraud, &c. Replication, that it was not obtained by fraud of H. and others, &c.:—Held, good, though not in the disjunctive. *Turner* v. *Ham*, 9 U. C. R. 255.

Debt on bond given by C. and R., conditioned for the due performance by one D. of the office of secretary and treasurer of the Brantford building society. 7th plea: that the office is an annual one; that the said D. was appointed for one year; that the defendants became sureties for the term of one year and no longer; and that during such term D. faithfully performed the duties. Replication: that the defendants did not become sureties for the period in the plea mentioned, or for any other specified time. 9th plea: that D. did not, before his appointment, become bound in a bond for the due performance of his office, in pursuance of the statute, 9 Vict. c. 90. 10th plea: that the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties:—Held, on demurrer, both pleas bad for uncertainty. 11th plea: that the rules of the society did not provide that the treasurer or other principal officer should, once in every year, prepare a general statement of the funds and effects, according to the statute. Replication: that the rules of the society did provide that the statement referred to in the plea, should be made at least once in every year according to the form of the statute:—Held, on demurrer, replication good. *Wilkes* v. *Clement*, 9 U. C. R. 339.

To debt by an executor on an annuity bond made by defendant to the testator, payable during the lifetime of testator, defendant pleaded: 2. that before the commencement of this suit, to wit, on the first November, he paid to the testator all and every the sums of money which before then were due, &c. The plaintiff replied that defendant did not pay testator all sums of money at any time before the commencement of this suit due &c., by virtue of &c. Defendant pleaded: 3. that before the commencement of this suit he owed plaintiff upon the said writing obligatory £35, and that the testator at the time of his decease was, and plaintiff, since the death of testator, still is indebted to defendant in £100, for use and occupation, &c., which he offered to set off. Plaintiff replied that he was not nor is indebted modo et formâ. Issue was joined on these pleas. No breach was alleged in the declaration nor assigned in the replication, nor suggested under the statute 8 & 9 Will. III. c. 11, s. 8; nor was there an award of venire to assess damages. The jury found for the plaintiff, and assessed the damages generally:—Held, that the issues tendered by the replications were sufficient, and that the allegations in the pleadings were sufficient to warrant the assessment. *Smith* v. *Muirhead*, 13 U. C. R. 9.

The plaintiffs sued defendants H. and D. as having jointly executed a bond to secure payment of rent by H., which being set out in the plea it appeared that T. was also named in it as obligor but had not executed. It appeared that at the execution of the bond T. was not present, and defendant D. told the plaintiff that he could not conveniently attend, but would sign it at any time. T., however, afterwards, on being applied to by the plaintiffs, refused to execute, and no objection had been made by D., although aware of the refusal:—Held, that the non-execution by T. was no defence under a plea of non est factum by H., as shewing a variance between the bond declared on and that set out. *Sidney Road Company* v. *Holmes*, 16 U. C. R. 268. But see *County of Huron* v. *Armstrong*, 27 U. C. R. 533.

Action on bond by collector of taxes for the performance of his duties—Form of declaration. *Judd* v. *Petrie*, 6 C. P. 48.

Declaration on a bond whereby defendants covenanted to pay R., or the holder, at &c., £200 on &c., and interest thereon semi-annually on the delivery at the Gore Bank of the warrants therefor to the bond annexed, and that the plaintiffs became the holders, and have always been ready and willing to deliver said warrants at &c., but £12 for interest is now due:—Held, bad, in not averring an actual delivery of, or an offer to deliver, the warrants at the bank. *Osborne* v. *Preston and Berlin R. W. Co.*, 9 C. P. 241.

A bond is, ex vi termini, taken to be a deed: therefore, a declaration that a defendant became bound &c., whereby the said bond became forfeited, sufficiently discloses an obligation by specialty; though the mere expression "bound" would not. *Provincial Insurance Co.* v. *Walton*, 16 C. P. 62. See also, *Leith* v. *Freeland*, 24 U. C. R. 132.

Debt on bond conditioned to deliver to plaintiff certain wood. Breach, non-delivery. Defendant pleaded, as to part of the breach, payment of $25 into court, and as to the remainder, performance:—Held, on demurrer, a bad plea. Thompson v. Kaye, 13 C. P. 251, distinguished. *Lowe* v. *Morice*, 19 C. P. 123.

IV. Release and Satisfaction.

Security Taken.]—The owner of a steamboat sold ten of the shares in her, taking the bond of the vendee for a portion of the price. The vendee sold the same subject to this bond, and the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond; notwithstanding which proceedings were taken by him to enforce payment of the bond. The court restrained further proceedings thereon, and ordered the bond to be delivered up to be cancelled, with costs. *Thompson* v. *Wilkes*, 5 Gr. 594.

Treasurer of Company.]—Debt on bond given by defendant as one of five joint and several obligors, for the discharge, by one A., of his duties as secretary and treasurer. Pleas, 2. Not damnified; 3. if plaintiffs damnified, damnified by their own default; 5. that the affairs of the plaintiffs were managed by certain directors; that until the 31st January, 1850, A. fulfilled the condition; that from that time till A. ceased to be secretary and treasurer, plaintiffs managed the affairs of the said society contrary to its rules, &c., whereby his liability was greatly increased; by reason whereof he became discharged; 7. the affairs were managed, &c., that said directors, without defendant's consent, ordered that one of the obligors should be released, which order became binding on said society, whereby such obligor was discharged:—Held, on special demurrer, second and third pleas clearly bad. Fifth plea bad, because it was not shewn that the observance of the condition was qualified or affected by some matter existing and in the knowledge of both parties when bond given. Seventh plea bad, as shewing no release properly authorized in law. *Farmers and Mechanics' Building Society* v. *Langstaff*, 9 U. C. R. 183.

Treasurer of Company.]—Action on a similar bond to that in the last case—Plea of performance—Replication, assigning breaches for money received and not paid over, and for fraudulently inducing plaintiffs to grant a certain loan:—Held, good on special demurrer. *Farmers and Mechanics' Building Society* v. *Whittemore*, 9 U. C. R. 297.

Treasurer—*Change of Office.*]—A plea that the bond sued on was given for the due performance of the duties of plaintiffs' secretary and treasurer by A., and that before breach A. was appointed plaintiffs' president and director:—Held, bad, for not shewing that the offices were incompatible, by alleging that the plaintiffs were incorporated under C. S. U. C. c. 49, if that Act would make them incompatible or otherwise. Admitting them to be incompatible, quære, would the acceptance of one vacate the other. *Trent and Frankford Road Co.* v. *Marshall*, 10 C. P. 329.

V. Miscellaneous Cases.

Bankruptcy after Breach.]—Debt on a bond for the payment by S. of ten notes, assigning breaches as to the last six. Plea, that S. did not pay the first two notes, whereupon the bond became forfeited, and afterwards S. became bankrupt, and afterwards defendant became bankrupt, and the debt accrued before his bankruptcy:—Held, that the bond, being forfeited before defendant's bankruptcy, the penalty became a debt, which the plaintiff might have applied to have retained in the hands of defendant's assignee till the contingency happened, and then have proved; and that the plea was good. *Perrin* v. *Hamilton*, 5 C. P. 57.

Cancellation—*Bank.*]—A bond may be given up to be cancelled by the president and directors of a banking corporation, without the appointment of an attorney. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Husband and Wife.]—By husband to wife. *See Glass* v. *Burt*, 8 O. R. 391.

Municipal Bonus.]—Forfeiture of condition in bond and mortgage to carry on a factory for twenty years, &c., in consideration of receiving a municipal bonus. *See Village of Brussels* v. *Ronald*, 4 O. R. 1; 11 A. R. 695.

Official Bonds.]—*See Regina ex rel. Ford* v. *McRae*, 5 P. R. 303; *Canada Agricultural Ins. Co.* v. *Watt*, 30 C. P. 350.

Pork Inspector.]—Sci. fa. on a bond to the Queen for performance of duty by a pork inspector. The assignment of breaches shewed an agreement to refer pork to the inspector for his inspection, and then alleged that he wrongfully branded pork of inferior quality with the words "prime mess pork," &c., contrary to the statute and to his duty. Demurrer, for not alleging that the acts complained of were breaches of his duty or were done by him knowingly, willingly, or designedly, or that he did not in respect of such matters use the best of his skill, judgment and ability:—Held, that the breaches were sufficiently assigned. *Regina* v. *Mowat*, 3 C. P. 228.

Supersedeas.]—Bonds to obtain supersedeas under 2 Will. IV. c. 5, and 5 Will. IV. c. 3. Amount of penalty. *Heather* v. *Wallace*, 4 O. S. 131.

Railway Company—*Provisional Directors—Bonus.*]—By the bond of a railway company, executed by its provisional directors, in consideration of a bonus in aid of the railway, the company agreed to erect and maintain workshops in a certain town during the operation of the railway. The company, after certain changes of name, amalgamated with other companies and formed a larger one under another name, which latter company, although it had agreed to do so, ceased to so maintain the workshops. This last mentioned company subsequently amalgamated with and became part of the defendants' system, and by the amalgamation the defendants became responsible for all liabilities of the other companies:—Held, that the bond of the provisional directors was a corporate act binding on its successors, and, by consequence, on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed. *Town of Whitby* v. *Grand Trunk R. W. Co.*, 32 O. R. 99.

See Assessment and Taxes, IV.—Costs, VII. 2 (b), (c)—Court of Appeal, II. 1—Indemnity—Principal and Surety.

BONUS.

See Municipal Corporations, VI.

BOUNDARY.

Acquiescence.]—Defendants claimed under a lease of 50 acres, described as commencing in the rear of 150 acres of the lot, and running back 43 chains 75 links, executed in 1824 by S., who in 1826 conveyed the remaining 150 acres to one L., describing it as commencing in front on lake Erie at the south-east angle of the lot, and running back 131 chains 25 links. L. had a survey made in 1828, and a post was then planted to mark his north boundary. It appeared that defendants never questioned this limit, but in 1858, when having their own 50 acres surveyed, they directed the surveyor to assume it as their southern line. They afterwards moved their north fence further back, which gave rise to this action:—Held, that the defendants, who appeared to have their full 50 acres according to the old limits, must shew their right to change the boundaries so long acquiesced in, and that it was unnecessary for the plaintiff in the first instance to prove his claim by actual survey. *Iler* v. *Nolan*, 21 U. C. R. 309.

Acquiescence.]—Trespass, to try the boundary line between plaintiff and defendant; the former claimed title to part of N. W. part of lot No. 20 in the sixth concession of South Dumfries, by metes and bounds;

the defendant claimed the east half. The descriptions in the deeds did not conflict. A line was originally run for the prior holders of the property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by the plaintiff. In 1849, one M. at plaintiff's request ran a line supposed to be acquiesced in by defendant, but upon the erection of a fence thereon by the plaintiff the defendant objected, and it was removed. In 1863 one P. ran a line, claimed by the plaintiff as the true line, and which caused this dispute, and two surveyors being present at the time on defendant's behalf, concurred in opinion that this line was correct. The jury having found for the plaintiff:—Held, that the line originally run, and now contended for by defendant, was not binding upon the parties, and that the evidence shewed the line run by P. and acquiesced in by the defendant, to be the correct one; and therefore the verdict was right. *McNaught* v. *Turnbull*, 13 C. P. 426.

Agreement.]—Held, that while two persons are in difference about the boundary, and shew by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, and to hold accordingly, either party may make a conveyance to a third person, which will enable the alienee to hold according to the true boundary, though at the time of the conveyance there might be some of his land in the possession of the other, in consequence of the line between them having been mistaken. *Doe Beckett* v. *Nightingale*, 5 U. C. R. 518.

Agreement.]—Estoppel of adjoining proprietor from disputing line run by surveyor with his acquiescence after building operations had been commenced. *Grasett* v. *Carter*, 10 S. C. R. 105.

Deed—*Estoppel.*]—In trespass q. c. f. it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the north-east angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to boundary between lots one and two. *Crossthwaite* v. *Gage*, 32 U. C. R. 196.

In trespass q. c. f. it appeared that about twelve years before one W., defendant's tenant, having moved the fence between plaintiff and defendant, an agreement in writing was entered into between W. and the plaintiff, that they would employ B., a surveyor, to establish the original line between lots one and two, and would be bound by it; and defendant by a memorandum, signed by him at the foot of this agreement, agreed to abide by it. The land in dispute was then in W.'s possession, and it was alleged that B. had not completed his survey:—Held, no evidence to support defendant's plea of leave and license. *Ib.*

Description.]—A road company incorporated to make a road from the town of Sandwich to the town of Windsor:—Held, not authorized to go beyond the entrance of Windsor from Sandwich. Held, also, that as no limits had been assigned to the town of Windsor when the defendants were incorporated, the court would look to what the proprietor of land on which a part of what was commonly called Windsor stood, had designated Windsor on a plan which he had filed in the registry office, and referred to in giving deeds; and to the popular understanding as to what constituted Windsor. *Dougall* v. *Sandwich and Windsor Road Co.*, 12 U. C. R. 59.

Highway—*Changes.*]—J. L. conveyed to G. L. a piece of land extending 103 ft. 6 in. along the south side of Wellington street easterly, from its intersection with Elgin street, covenanting that should the line of Wellington street be shifted to the north he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 feet to the north, and as Elgin street intersected it at an acute angle, the intersection was about 11 feet further west than before. G. L. having obtained a conveyance in accordance with the covenant:—Held, that he was entitled to have his eastern boundary produced on its original course, at right angles to Wellington street, though he would thus have more than 103 feet 6 inches on the street; for the intention was to give all the land in front of that first conveyed to him, and between it and the street as altered. *Lang* v. *Mathewman*, 32 U. C. R. 126.

Possession.]—Trespass q. c. f., describing the locus in quo by metes and bounds, and as part of "what has heretofore been known as lot 15, first concession, Delaware." The defendant gave no evidence of title. The plaintiff claimed by virtue of his possession, and it appeared that more than twenty years ago, relying on an erroneous survey, he had fenced in a part of the defendant's lot 14 in the broken front concession. This fence, if continued, would have included the part in question, but it had never been extended to any part of lot 14 in the first concession:—Held, that the plaintiff could not be considered as having any such possession of the locus in quo as would entitle him to recover. *Weld* v. *Scott*, 12 U. C. R. 537.

Possession.]—In the case of a disputed boundary line between two farms, conflicting evidence was given as to how far an old line, which was admitted to have been part of the original survey of the township, extended. Defendant proved acts of ownership by himself and predecessors over the locus in quo in putting up a brush fence more then twenty years before action brought, and cutting timber since, but the jury found in favour of the plaintiff. The question as to possession having been fairly left to the jury, and the weight of evidence as to the true boundary, appearing to be in the plaintiff's favour, the court refused to interfere. *Creighton* v. *Chambers*, 6 C. P. 282.

Possession.]—Trespass q. c. f. The division line between two lots being in dispute, the plaintiff proved that the line he contended for had been run by a surveyor and fenced for about forty rods fifty years ago, and that it had been the recognised boundary between the parties. Lately defendant employed a surveyor who ran a different line (probably right, although not done in strict accordance with the statute), and defendant moved his

fence in accordance with it. The jury having found for defendant, the plaintiff moved for a new trial on affidavits that the fence moved had been standing more then twenty years. The court granted a new trial on payment of costs, the Chief Justice stating, that "compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed." *Wideman* v. *Bruce*, 7 C. P. 134.

River.]—The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto, lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch of the river: —Held, that the city limits extended to the middle of the river. *In re McDonough*, 30 U. C. R. 288.

Where two properties or municipalities are divided by a river or highway, the limit of each is primâ facie the centre of the river or road. *Ib.*

See CONSTITUTIONAL LAW, II. 21—DEED, III. 4—EJECTMENT, VI. 18 (b)—IMPROVEMENTS, I. — LIMITATION OF ACTIONS, II. 3 (a), 6—PLANS AND SURVEYS—SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 5 (a)—TRESPASS, II. 9 (a)—WATER AND WATERCOURSES, VIII.

BOUNDARY LINE COMMISSIONERS.

See FENCES, III.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE, II.

BRIBERY.

See CONSTITUTIONAL LAW, II. 11—CRIMINAL LAW, IX. 5—PARLIAMENT, I. 3, 7 (a).

BRIDGE.

Assessment.] — The suspension bridge across the Niagara river at Clifton, with the stone towers, &c., supporting it, is land and real property within the Assessment Act, 29 & 30 Vict. c. 52, s. 3. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U. C. R. 194.

Damages.] — Injury to a bridge by a steamer drifting against it—Evidence of negligence. See *Cataraqui Bridge Co.* v. *Holcomb*, 21 U. C. R. 273; *Gilmour* v. *Bay of Quinte Bridge Co.*, 20 A. R. 281.

Ferry—*Interference.*] — Nominal damages and costs awarded against defendant for infringing the rights of the plaintiff's ferriage, by building a temporary bridge across the river, defendant having removed the bridge. See *Galarneau* v. *Guilbault*, 16 S. C. R. 579.

International Bridge.]—As to the rights and powers of the respective corporations, Canadian and American, owning a bridge. See *Attorney-General* v. *Niagara Falls International Bridge Co.*, 29 Gr. 34, 491.

Liability to Repair.]—Desjardins Canal Company—Duty to keep in repair. See *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

Toll-Bridge — *Free Bridge.*]—44 & 45 Vict. c. 90, s. 3 (Q.), granted to respondent a statutory privilege to construct a toll-bridge across the Chaudière river in the parish of St. George, and prevented any other person from erecting another bridge within a league above or below respondent's bridge. After the bridge had been erected and used for several years the appellant municipality passed a by-law to erect a free bridge across the Chaudière river in close proximity to the toll-bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge:—Held, that the erection of the free bridge by the municipality would be an infringement of the respondent's franchise of a toll-bridge, and the injunction should be granted. *Township of Aubert-Gallion* v. *Roy*, 21 S. C. R. 456.

See CONSTITUTIONAL LAW, II. 21.—MANDAMUS, II. 4 (b) — RAILWAY, VII. 2—WAY, I. VIII.

BRITISH COLUMBIA LAND ACT.

See CROWN, II. 1.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW, II — CROWN — RAILWAY, XXI., XXVII.

BROKER.

Disobedience of Instructions.] — Action against defendants, stock-brokers at Toronto, for breach of duty in not buying certain stock for the plaintiff. On 25th March, the plaintiff by telegraph instructed defendants to buy the stock at 114 or less, which defendants by letter in reply agreed to do, but said that the telegram was received too late to enable them to act on it that day. On Monday following, the 27th, defendants telegraphed plaintiff that they had cancelled his order in the meantime, as there were unfavourable rumours about the stock, and that they were writing. The plaintiff received this about noon the same day, but did not answer it, waiting for the letter, which he received about five o'clock the following day, the 28th, being to the same effect as the telegram, and asking the plaintiff to repeat the order if he wished defendants to buy for him. The plaintiff on the receipt of the letter wrote, that from defendants' telegram he expected something more tangible and definite than mere general unfavourable impression and suspicion for not filling his order, and therefore waited for de-

fendants' letter; that he had given a positive order to buy, &c.:—Held, (1) that the correspondence shewed that the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions and exercising their discretion; that the construction of the correspondence was for the court and not for the jury; (2) that at all events no damage was proved, as on the Monday when the plaintiff became aware that defendants had decided not to buy, the stock was still at 114. *Smith* v. *Forbes*, 32 C. P. 571.

Gaming Contracts.] — Article 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. c. 109, s. 18 (Imp.), and renders null and void all contracts by way of gaming and wagering. A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation:—Held, that these were not gaming contracts within the meaning of the Code. *Forget* v. *Ostigny*, [1895] A. C. 318.

Insolvent Act.]—A banker and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks:—Held, a trader, within the Insolvent Act of 1869. *Duncan* v. *Smart*, 35 U. C. R. 532.

See, also, *Bagwell* v. *Hamilton*, 10 L. J. 305.

Margins — *Fictitious Transactions.*]—Plaintiff employed F. as his broker to purchase shares in Federal Bank stock and to carry the same for him until 1st December on margin, depositing with him a large sum of money for that purpose. F. transferred his business to the defendants in July and with it paid over to them the whole of the money which had been left in his hands by the plaintiff and they assumed F.'s contract with the latter. On the 10th August they informed him of this by letter. On the 12th October the defendants called upon plaintiff to pay $2,000 additional margin, the stock having fallen in value, and on default they professed to sell and represented to him that they had sold his shares at a loss and charged him with the difference thereon—upwards of $2,000. It appeared that F. had never bought shares for the plaintiff; that he had not transferred, and that the defendants had never received, any shares from him for the plaintiff. The alleged sale of these shares with the loss or difference on which the defendants had charged the plaintiff was a mere pretence, defendants never having had any shares of the plaintiff to sell, and the broker with whom they had made the arrangement to become the pretended purchaser having bought none from them:—Held, that the plaintiff was entitled to recover the money he had deposited with F. and which the defendants had received from him, as money had and received. *Sutherland* v. *Cox*, 6 O. R. 505, 15 A. R. 541. Affirmed by the supreme court, 24 C. L. J. 55.

A contract by a broker to purchase stock for a customer is not satisfied by the broker holding himself liable to account for the market value of the stock when the customer calls upon him to do so or then purchasing stock to comply with the demand. If any such custom existed among brokers, of which there was no evidence, it would not be binding on the customer, unless he knew of it and specially submitted to its conditions. *Ib.*

Margins—*Sale—Damages.*]—The plaintiff pledged with the defendants certain shares of bank stock as security for a loan, under an agreement in writing providing that he was to keep up a cash margin of not less than ten per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance." The plaintiff claimed that before default was made, the bank wrongfully loaned or sold his stock without his knowledge or consent, and that he was entitled to credit for the amount realized and to a return of interest paid, and damages for being compelled to give additional security. The defendants alleged that although the stock was transferred backwards and forwards by way of loan, it was never sold until default was made:—Held, that if the stock was sold before default made, such sale was tortious, and, following Ex parte Dennison, 3 Ves. 552, that a loan of the stock was a sale; and that the plaintiff might elect, either to claim damages, or to affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being the highest point of the stock market between the conversion and the next default. But that if default was made, the bank was entitled to sell the stock without notice; but only for the purpose of liquidating the advance, and that credit must be given for the proceeds at the current rates of the days on which the transfers were made, until the shares had been transferred. *Carnegie* v. *Federal Bank of Canada*, 5 O. R. 418.

In his pleadings, in an action for an account the plaintiff set up that on 23rd April, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the master's office, the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether, having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they still held it, and whether they were not liable to be charged with its market value as of that date:—Semble, that inasmuch as it appeared that the defendants held at the date of the loan 160 shares of the bank in question; and inasmuch as the particular shares were not identified or earmarked in any way, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on the date in question. *S. C.*, 8 O. R. 75.

Pledge of Shares—*Re-pledge by Brokers.*]—The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of margins certain other shares in the same company, the transfer being in the same form "in trust." The loan company were paid off by the brokers at the plaintiff's request and the brokers continued to hold

the first shares as well as the others as security. The brokers subsequently on the security of all the shares obtained a loan from the defendants of a much larger amount than that due by the plaintiff to the brokers:—Held, reversing 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers, and that the words "in trust," referred not to the plaintiff's title, but to that of the transferees as managers for the loan company. *Duggan* v. *London and Canadian Loan and Agency Co.*, 18 A. R. 305. Reversed by the supreme court, 20 S. C. R. 481, but restored by the judicial committee, [1893] A. C. 506.

Pledge of Stock—*Re-pledge by Broker—Alleged Custom.*] — The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, and it was agreed that the plaintiff might call for his stock or the defendants for their money on two days' notice. The defendants being in need of that stock immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory notes for the amount claimed by the defendants. He subsequently discovered that they had sold the stock. The defendants set up in defence to this action for the wrongful sale an alleged custom of brokers that upon stock being pledged to a broker he might use it as his own, being ready to return to the pledgee when called upon an equal number of shares of the same stock:—Held, that no such custom was proved, nor would such a custom be valid: that the parties might have agreed to be bound by such manner of dealing, but in this case no such agreement was proved. *Mara* v. *Cox*, 6 O. R. 359.

Held, that the defendants might lawfully have repledged the stock to enable them to raise the advances to the plaintiff, but that the sales and other dispositions of the stock by the defendants without notice to the plaintiff, and when he was not in default, were wrongful, and that the plaintiff was entitled to recover from the defendants the prices at which they sold the stock. *Ib.*

The jury found that the settlement which resulted in the plaintiff giving notes to the defendants was made by him with full knowledge of his rights, but under pressure, and on this and other findings a verdict was returned for the defendants. The court, being of opinion that the plaintiff was entitled to a verdict but for this finding, and that the finding was against law and evidence, directed a new trial. *Ib.*

Sale of Shares—*Inability to Deliver.*]—A firm of brokers purchased twenty shares of bank stock for the defendant, the latter agreeing to repay to the former the price paid therefor on demand with interest, the brokers to hold the stock as collateral security and receive a ten per cent. margin and one-quarter per cent. commission. The brokers took the stock in their own names, and then transferred it to a loan company together with other stock of the same character, the transfer by them, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by the defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made from time to time as the stock fell. On the 27th June, 1884, the brokers suspended payment, at which date the stock had fallen considerably; and on the 26th December they made an assignment for the benefit of creditors to the plaintiff. Neither at the time of the suspension or assignment, was any unpledged or unhypothecated stock held for or by the brokers, nor was any transferred to the plaintiff, there being only a right in him to redeem any stock undisposed of by the pledgees. On the 4th August, 1885, after the stock had, by legislative enactment, been reduced to one-half its original par value, or from $100 to $50 per share, the plaintiff offered to transfer twenty shares of the reduced stock, which the defendant refused to accept. The plaintiff then brought this action against defendant to recover the alleged balance due on the stock:—Held, there could be no recovery, for that the delivery of the stock and payment of the price were concurrent acts, and the brokers were not in a position after the time of insolvency to deliver the same, while at the time of the plaintiff's offer there was no stock of the nominal value per share of that which the brokers purchased for the defendant. *Clarkson* v. *Snider*, 10 O. R. 561.

Sale of Shares—*Undisclosed Principal—Marginal Transfer—Indemnity.*]—The plaintiff sold and transferred his shares in a bank to C., a broker, who sold them on the stock exchange to the defendant, also a broker, in ignorance that the latter was acting for a customer. The transfer in the bank books from C. was effected by leaving the transferee's name blank, and marking the shares in the margin of the transfer as subject to the order of the defendant, who similarly marked them subject to the order of his principal, whose name was filled in as transferee, and who duly accepted the transfer. Within a month from the sale by the plaintiff, the bank was ordered to be wound up, and in the liquidation the plaintiff was compelled, as a contributory, to pay the double liability under ss. 70 and 77 of the Bank Act, R. S. C. c. 120. The plaintiff recovered judgment against C. for the amount he had paid, and afterwards took an assignment from C. of his right to indemnity against the defendant. In an action to enforce this right:—Held, (*a*) that the obligation to indemnify arose from the purchase, and not from the transfer; that a broker acting in his own name, for an undisclosed principal, assumes the liability of the latter, and the fact that the transfer was executed in a form intended to enable the defendant to pass the shares to the ultimate purchaser did not relieve the defendant from his liability. (*b*) That, although C. had not satisfied the judgment, he was entitled to indemnity from the defendant, and, after judgment, to assign his rights to the plaintiff, who could enforce them:—Held, also, that the mere existence of a liability to indemnify the plaintiff gave no right of action to C., and that the Statute of Limitations did not begin to run in favour of the defendant until the recovery of judgment against C. Sutherland v. Webster, 21 A. R. 228, and Eddowes v. Argentine Loan Co., 63 L. T. N. S. 364, followed:—Held, further, that the plaintiff's right against C. first accrued when the liquidators became entitled to immediate payment. Before this action, the plaintiff sued the defendant and C. on an assignment to him of C.'s claim against the defendant, made be-

fore the plaintiff's judgment against C., which action was dismissed against the defendant, on the ground that C. had not before judgment been damnified, and the defendant sought herein to set up that dismissal in bar of this action:—Held, no defence to this action. A by-law of the stock exchange, not authorized by their Act of incorporation, provided that all disputes between members, arising out of transactions on the exchange, should be referred to arbitrators:—Held, that they had no right to pass such a by-law ousting members from their right to resort to the courts of the Province. Essery v. Court Pride of the Dominion, 2 O. R. 596, considered. *Boultbee* v. *Gzowski*, 28 O. R. 285. Reversed in the court of appeal, 24 A. R. 502; and restored in the supreme court, 29 S. C. R. 54.

Special Contract.]—Held, that when to the ordinary business of a broker, some special employment and undertaking is superadded by express contract, his liability results from such contract, and not simply from his character of broker. *Deady* v. *Goodenough*, 5 C. P. 163.

Action against defendant as broker and commission agent, for negligence in delivering goods to the purchaser without the price being paid, and for not using due care that the purchaser was solvent. Evidence—Verdict for plaintiff—New trial granted on payment of costs. *Ib.*

Stock Exchange.] — The defendant in giving authority to the plaintiffs to do business on the stock exchange must be taken in the absence of evidence to the contrary, to have employed them on the terms of the stock exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds. *Forget* v. *Baxter*, [1900] A. C. 467.

See SALE OF GOODS.

BUILDINGS.

Architect.]—Duty of architect in superintending erection of buildings. See *Badgley* v. *Dickson*, 13 A. R. 494.

Fire After Sale.]—Destruction by fire after contract for sale. See *Stephenson* v. *Bain*, 8 P. R. 258.

Fire Limits.]—By the Municipal Act the corporation of Toronto was authorized to pass by-laws, among other things, to prevent the erection of wooden buildings within such parts of the city as the corporation might define. The city council accordingly passed a by-law defining what were termed the fire limits of the city, and prohibiting the erection of any building within such limits other than of stone, brick, iron, or other material of an incombustible nature:—Held, that the by-law was void, as not being confined to wooden buildings, and therefore unauthorized. *Attorney-General* v. *Campbell*, 19 Gr. 299.

Illegal Building — *Damages.*]—On the 26th September, 1877, S. contracted to erect a proper and legal building for W. on his (W.'s) land, in the city of St. John. Two days after, a by-law of the city of St. John, under the Act of the legislature, 41 Vict. c. 6, "The St. John Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, W. reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail, or execution of the work without avoiding the contract, &c. By the contract it was also declared that W. had engaged B. as superintendent of the erection —his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and issue certificates. While W.'s building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to W. and McM., his neighbour. On an action by McM. against W. and S. to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, $3,952, and $1,375 for loss of rent:—Held, that at the time of the injury complained of, the contract for the erection of W.'s building being in contravention of the provisions of a valid by-law of the city of St. John, the defendant W., his contractors, and his agent (S.), were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to McM. charged in the declaration. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded. *Walker* v. *McMillan*, 6 S. C. R. 241.

Insurance.]—A tug is not a "building" within the meaning of the 10th statutory condition of an insurance policy. *Mitchell* v. *City of London Fire Ins. Co.*, 12 O. R. 706.

Lateral Support.]—The plaintiff owned a dwelling house for 20 years, and the defendant intending to erect a house on her land adjoining, employed an architect, who drew the plans whereby trenches to lay the foundation were to be dug adjoining the plaintiff's foundation wall, and the depth of the trenches was shewn. This work was let out to a contractor, and through his negligence in digging the trenches, &c., the wall of the plaintiff's house fell:—Held, that the plaintiff by twenty years' user, his house having been built for that time, had acquired, if that were necessary to maintain this action, the right to support for his house from defendant's adjacent soil:—Held, also, that the defendant was liable, for the damage arose not in a matter collateral to, but in the performance of the very act which the contractor was employed to perform. Butler v. Hunter, 7 H. & N. 826, and Bower v. Peate, L. R. 1 Q. B. 321, commented upon. *Wheelhouse* v. *Darch*, 28 C. P. 269.

Lateral Support.]—Plaintiff, tenant for years, sued for injury to his stock-in-trade, caused by his wall falling from defendant's excavation on an adjoining lot. The wall was over twenty years old, but there had been unity of seisin of both lots for a year, about the middle of the period. Then plaintiff's landlord sold defendant's lot in fee:—Held, that no easement had been acquired by lapse of time:—Held, also, that there was evidence of negligence in fact, causing damage, and that the plaintiff could therefore recover, irrespective of any acquired easement:—Held, also,

that lateral support to land in its natural state is a right of property; that the right to support for buildings is an easement; and that such an easement is not within the Prescription Act. Quære, whether, on the authorities, the landlord, when he conveyed defendant's lot, did, by implication of law, reserve the right to support to his then existing wall, and the grantee thereby assented to such reservation. Remarks on the law as to damages, where the land is weighted with buildings. *Backus* v. *Smith*, 44 U. C. R. 428. The case was reversed on appeal, 30th June, 1880 (not reported.)

Lessor and Lessee—"*Buildings and Fixtures.*"]—The Crown, represented by the Commissioner of Public Works for the Province of Quebec, in the year 1851, demised certain lands in the city of Montreal to the plaintiff's predecessors in title for the purpose of being used for the construction of a dock and shipyard for the building, reception, and repair of vessels. The lease contained a proviso for its cancellation, under certain circumstances, upon the lessors or their successors in office paying to the "lessees, their executors, administrators or assigns, the then value (with an addition of ten per cent. thereon) of all the buildings and fixtures that shall be thereon erected and belonging to the said lessees:" —Held, that the words "buildings and fixtures" in the proviso were large enough to include not only what were buildings, in the ordinary acceptation of the term, and the dock itself, but also whatever was accessory to, and necessary for the use of, such buildings and dock. *Grier* v. *The Queen*, 4 Ex. C. R. 168.

Lessor and Lessee — "*Buildings and Erections*"—"*Improvements.*"]—The lessor of a water lot who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the work so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term:—Held, affirming 22 A. R. 415, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso. *Adamson* v. *Rogers*, 26 S. C. R. 159.

Lessor and Lessee — "*Buildings and Erections*" — *Fixtures and Machinery.*]—A covenant in a lease to pay for "buildings and erections" on the demised premises covers and includes fixtures and machinery which would have been fixtures but for 58 Vict. c. 26, s. 2, s.s. (c). (O.) *Re Brantford Electric and Power Company and Draper*, 28 O. R. 40; 24 A. R. 301.

Lien.]—A builder has no lien upon a house built by him on the land of his employer for the price of the building. *Johnson* v. *Crew*, 5 O. S. 200.

Negligence—*Fall of Wall.*]—In an action under 10 & 11 Vict. c. 6, by an administratrix for negligently causing the death of her husband, the declaration stated that the defendant was possessed of a close, and one T. A. was possessed of another close adjoining the defendant's; that upon defendant's close a wall was standing, which before and at the times when, &c., was to the knowledge of defendant in a dilapidated and dangerous state, and leaning towards the close of T. A., by reason whereof it became the duty of the defendant to take reasonable precautions to prevent the wall from falling; but that well knowing the premises, he wrongfully permitted the wall to remain in that state, and that afterwards, by reason of such neglect, and while, &c., the said wall fell upon the close of T. A. and in falling killed deceased, who was then lawfully in the said close of T. A. Defendant pleaded not guilty:—Held, that the declaration disclosed a legal liability in defendant, and that the evidence (which is set out in the report) warranted a verdict for the plaintiff. Semble, that under this issue defendant was at liberty to shew that the accident was caused either wholly or in part by the negligence of the deceased, or of others for whom the defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence; and that, supposing the state of the wall as alleged in the declaration to be admitted in the pleadings, yet the defendant might, in evidence, shew its actual condition, as bearing upon the question of negligence. *Kinney* v. *Morley*, 2 C. P. 228.

Negligence—*Snow.*]—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. *Lazarus* v. *City of Toronto*, 19 U. C. R. 9.

Defendants, a city corporation, owning land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower storey was occupied by one S. as lessee of H., and the upper storey and garret by defendant. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof:—Held, that defendants were not liable. *Ib.*

Negligence—*Snow.*]—Liability for injury occasioned by ice and snow falling from the roof of a house. See *Landreville* v. *Gowin*, 6 O. R. 455.

Obstructing Highway.]—By 4 Will. IV. c. 23, the corporation of Toronto is empowered, among other things, to regulate and prevent the incumbrance of the streets; and a city ordinance, made in pursuance of that power, allowing persons building houses to occupy a certain portion of the streets with their building materials, is good; but any person who is building, leaving his materials in the streets, under the ordinance, must provide lights in the night, or he will be responsible for any accident that may occur from his neglect. *Hervey* v. *French*, E. T. 3 Vict.

Obstructing Highway.] — Action for damages occasioned to a street railway by the breaking down of the machinery used in removing a building from one part of the city to another, when crossing the railway track, and so impeding their traffic. See *Toronto Street Railway Co.* v. *Dollery*, 12 A. R. 679.

Owners in Severalty.] — Owners in severalty of halves of a house. Removal by

one owner of one-half of the house. See *Wray* v. *Morrison*, 9 O. R. 180.

Party Wall—*Window.*]—Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, without the latter's consent, and subsequently opened a window through the wall so raised so as to overlook the plaintiff's premises:—Held, that by piercing the window defendant had distinctly given notice that he had ceased to regard the wall as a party wall, that it was an unauthorized user of the party wall, and that plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule* v. *Stratford*, 1 O. R. 335.

Party Wall—*Covenant to Pay.*]—C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed by writing under his seal to erect a party wall on the dividing line, and equally upon both lots. Defendant agreed to pay for the half of the front forty feet thereof when erected, and for the rear portion thereof whenever the defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants, and the plaintiffs entered into possession. Some years later defendant erected a building on his lot, making use of the rear part of such party wall, by reason of which he became liable to pay $98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:—Held, that the plaintiffs were not entitled as vendees of C. to recover, the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs. *Kenny* v. *Mackenzie*, 12 A. R. 346.

Party Wall—*Improper User—Damages.*]—The plaintiff was the surviving trustee under the will of one J. B. of certain land on which was erected a two-storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two storeys higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff, under the Ontario Judicature Act, Rule 95, was entitled to maintain an action as representing the estate, without making the cestuis que trust parties; and that he was entitled to a decree that the defendant should desist from further using the wall built on the plaintiff's wall, or the ends of the joists which he had placed therein, but not to a direction that the defendant should pull down such wall, which the defendant had not erected:—Held, also, that the plaintiff was entitled to recover as damages the expense of removing such wall, so erected on his wall, and the damages occasioned by his wall being weakened, but not damages for the loss of a sale of the property by reason of the erection. *Brooke* v. *McLean*, 5 O. R. 209.

Party Wall — *Easement — Extension of User.*]—The plaintiffs claimed that the wall between their and the defendant's buildings was a party wall; that defendant had, without plaintiffs' consent, raised it a foot above the plaintiffs' premises, and altered the roof from a flat to a slanting one, whereby water was discharged on the plaintiffs' premises and injured them, for which they claimed damages; and also asked for a declaration that the wall was a party wall; that defendant should be restrained from preventing plaintiffs from using the wall, together with the new part, on payment by plaintiffs of half the cost thereof, and also from allowing the water to be discharged on plaintiffs' premises. The wall was proved to be wholly on the defendant's land. The part constituting the cellar foundation projected some seven inches, upon which the plaintiffs had rested the joists of their building in the cellar, the joists of the upper floors being let into the wall. The jury found that the wall was a party wall, and that the plaintiffs had sustained $35 damages:—Held, that the wall was not a party wall, nor was there any evidence from which a grant of, or the right to use, a part thereof, could be presumed; that it was misdirection in the learned Judge to tell the jury that the user of the wall for the said purposes for over twenty years constituted it a party wall, for at most it would merely give an easement for such purposes. This, however, was not in question, as plaintiffs' claim was not to continue such use, but to extend it; and that there was also misdirection in stating that the defendant would be bound by any arrangement made between the plaintiffs' predecessors in title and the tenant of the defendant's predecessors in title under a twenty years' building lease, and whereby the lessor, at the expiration of the term, took the buildings at a valuation, for there was nothing to shew that the defendant's predecessors were parties to the arrangement. *James* v. *Clement*, 13 O. R. 115.

Party Wall—*Quebec Law —Demolition of Works.*]—See *Joyce* v. *Hart*, 1 S. C. R. 321.

Party Wall—*Municipal Powers—Internal Walls.*]—Sub-section 18 of s. 496 of the Municipal Act, R. S. O. c. 184, does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. *Regina* v. *Copp*, 17 O. R. 738.

Party Wall — *Declaration of Right.*]—Action to have verbal agreement relating to party wall put in writing and executed for the purpose of registration. See *Brooks* v. *Conley*, 8 O. R. 549.

Removal of Building—*Trover.*]—The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he also had agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all the buildings thereon:—Held, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere. *Cleaver* v. *Culloden*, 15 U. C. R. 582.

Removal of Building—*Mortgage—Damages.*]—The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that though the building had been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 15 Gr. 616.

Trespass.]—R. brought an action against H. for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. H. pleaded, inter alia, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased in 1872 the property from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor, in searching the title, did not search under C.'s name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen:—Held, that the continuance of illegal burdens on R.'s property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of C. *Ross* v. *Hunter*, 7 S. C. R. 289.

Vendor and Purchaser—*Party Wall.*]—M. having purchased lot 14 for a building lot resisted completion of the contract on the ground that a party wall of the width of nine inches had been built on the line between lots 14 and 15, which at some places came over on to lot 14 to the extent of six inches, and at another place to the extent of nine inches, and that he could not get rid of the wall without engaging in a lawsuit with the owner of lot 15, and that the party wall was not suitable to the class of buildings which he desired to put up, and was worse than useless to him. The evidence shewed the wall did not depreciate the value of the land:—Held, that this being so, and under all the circumstances of this case, specific performance must be decreed, though the matter complained of might have been proper for compensation, had such been sought under the condition of sale relating thereto. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

Vendor and Purchaser—"*Solid Brick Houses.*"]—Two houses were built with extensions in rear in a terrace or row, the outside walls of the terrace and the extensions being brick, but the inside walls between the houses themselves and the adjoining houses, and also between the extensions and the main houses to the height of the roofs of the extensions, being of wood, and the outside rear walls of the houses, above the roofs of the extensions, were brick resting upon timbers at the top of the wooden wall below. In an action for specific performance:—Held, not to be "solid brick" houses. Semble, they were not "brick houses." *Stevenson* v. *McHenry*, 16 O. R. 139.

See NEGLIGENCE, VI.

BUILDING SOCIETIES.

Action—*Plaintiffs.*]—Under 9 Vict. c. 90 s. 12, the president and treasurer of a building society may sue in their proper names without further description. *Doe d. Barwick* v. *Clement*, 7 U. C. R. 549.

But the president and treasurer suing must be such when commencing the action. *Doe d. Morgan* v. *Boyer*, 9 U. C. R. 318.

Building societies may sue in their corporate name. *Farmers and Mechanics' Building Society* v. *Langstaff*, 9 U. C. R. 183; *Canada Permanent Building Society* v. *Bank of Upper Canada*, 10 Gr. 203.

Plaintiffs, under a power in a mortgage to them by B., sold the land to L., who paid the president, but had received no conveyance; and the president, with his concurrence, then brought ejectment in the name of the society against the mortgagor, to enable them to give the purchaser possession. Defendant, after verdict, applied to set aside the proceedings as brought without the plaintiffs' authority:—Held, that there was clearly no pretence for such an application. *Essex Building Society* v. *Beeman*, 19 U. C. R. 509.

Remarks as to the right of a society to bring ejectment in their corporate name, on a mortgage to the president and secretary. *Ib.*

Administration of Assets—*Parties.*]—A decree was obtained in a suit by a shareholder on behalf of himself and all other shareholders, for the administration of the assets of the society, and charging the directors with losses sustained:—Held, that persons who had ceased to be directors before the suit could not be made parties in the master's office. *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275.

Authority to Agent to Sell.]—It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell under a power of sale in a mortgage; the entry in the books of the society is sufficient for that purpose. *Osborne* v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326.

Clerk.]—As to the nature and duration of the appointment of a clerk. See *Hughes* v. *Canada Permanent Building and Savings Society*, 39 U. C. R. 221.

Collateral Security.]—Building societies can take only real property security, and cannot take collateral security for loans on real

property. *Canada Permanent Building and Savings Society* v. *Lewis*, 8 C. P. 352.

Collateral Security.]—But even before 22 Vict. c. 45, they might take a bond as additional security for money overdue on mortgage. *Hope* v. *Glass*, 23 U. C. R. 86.

Fines.]—A by-law provided that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of the year, when the share or shares in default shall be declared forfeited to the society;" that a month before the expiration of such year, the secretary should notify the defaulter, calling his attention to the by-law; that in case of the defaulter being a borrower, these fines should be trebled, and that at the end of six months' default the mortgage should be liable to foreclosure, and to be declared forfeited:—Held, that the by-law being penal should be construed strictly; and that the fines could be imposed on borrowers only for twelve, and on non-borrowers for six, months, the right to forfeit or to foreclose being then substituted:—Held, also, that such fines could not be recovered on a common count, but that the declaration should set out the by-law. *Ottawa Union Building Society* v. *Scott*, 24 U. C. R. 341.

Fines.]—A rule of the society declared, that, in case of default in the monthly subscriptions, the defaulter should pay a fine of 3d. per share for the first month, 6d. for the second month, and 1s. for the third month, doubling the fine for each succeeding month, till the expiration of the first six months; and that after that time the share should become forfeited:—Held, that no fine was chargeable after the first six months. Such a rule cannot be waived by the directors. *Wilson* v. *Upper Canada Building Society*, 12 Gr. 206.

Where the members ceased paying their monthly subscriptions in ten years after the establishment of the society, under the supposition, on the part of all, that the society should then terminate, and did not resume paying, but it was subsequently found that, from mismanagement and losses, further payments were necessary:—Held, that the rule as to fines was not to be enforced as regarded monthly subscriptions falling due after all had ceased to pay. *Ib.*

Interest—*Usury.*]—See *Canada Permanent Building and Savings Society* v. *Rowell*, 19 U. C. R. 124; *Canada Permanent Building and Savings Society* v. *Harris*, 16 C. P. 64.

Interest—*Payments on Shares.*]—Where a mortgage by a borrowing member recited that he had purchased seven shares of £100 each, and was conditioned for the payment of the monthly subscriptions upon such shares, and of interest upon said £700, by equal monthly payments of £3 10s. each, and provided for sale of the property in case of default, and for the society's retaining out of the proceeds the remainder of the £700 then unpaid, and all interest, fines, and other sums due or payable, giving credit for subscriptions theretofore paid and interest thereon at six per cent. from the time of payment, and for payment of the surplus to the mortgagor:—Held, that the mortgagor was not liable to pay £3 10s. a month, or 10s. per share for the interest for the whole period, but only at that rate on so much of the £700 as from time to time was due after giving credit for the monthly subscriptions paid. *Wilson* v. *Upper Canada Building Society*, 12 Gr. 206.

Interest — *Usury—Bonus.*]—Building societies are virtually exempted from the usury laws. *Freehold Permanent Building and Savings Society* v. *Choate*, 18 Gr. 412.

Mortgages taken for advances to borrowing members need not express how much of the interest reserved is a bonus in respect of the sum advanced, and how much for interest. *Ib.*

Loan to Person not a Member.]—Held, under C. S. U. C. c. 53, s. 40, and 36 Vict. c. 104, s. 9 (D.), that the plaintiffs, a loan and savings society, were empowered to make loans by way of mortgage of real estate to a person not a member thereof, and to take as collateral security therefor the promissory note of a person also not such member. *Freehold Loan and Savings Society* v. *Farrell*, 31 C. P. 453.

Moneys Deposited upon Savings Bank Account—*Petition—Costs.*]—A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. 1887 c. 169. An administrator appointed by a court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of s. 47 of R. S. O. 1887 c. 169, "share, bond, debenture, or obligation," applied to a savings bank account, petitioned the court under s. 49:—Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them:—Held, also, that the doubts of the petitioners were reasonable and they were entitled to costs. *Re Ging*, 20 O. R. 1.

Mortgage to Officers — *Successors.*]—A mortgage was made, pursuant to 9 Vict. c. 90, to the president and treasurer of a building society, their successors and assigns, in trust for the society. The society having subsequently exercised the power of sale, the then president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal not being the society's seal. The purchaser sold to G., who objected to the title:—Held, that the lands were conveyed in fee simple to the president and treasurer by the mortgage, and that these officers for the time being had the power to convey in fee, that the power was duly exercised by them, and G. was bound to accept the title. *Re Inglehart and Gagnier*, 29 Gr. 418.

Participating Borrowers—*Liquidation — Assessments — Interest — Usury—Law of Quebec.*]—See *Guertin* v. *Sansterre*, 27 S. C. R. 522.

Power to Purchase Land—*Power to Build—Law of Quebec.*]—See *Compagnie de Villas du Cap Gibraltar* v. *Hughes*, 11 S. C. R. 537.

Promissory Note.] — Declaration on a note made by defendants, a building society incorporated under C. S. U. C. c. 53:—Held, good on demurrer; for they might legally make notes under certain circumstances. *Snarr* v. *Toronto Permanent Building and Savings Society*, 29 U. C. R. 317.

Rules—*Interest.*]—By one of the rules of a savings and loan society, which were subscribed by all members on obtaining loans or advances of shares, it was provided that when a payment off of a mortgage was made before it became due, the present value of future repayments should be calculated to the end of the term, and discounted at such rate of interest and on such terms as the directors might determine; and by another of the rules the directors, on default, were empowered to sell the mortgaged estate, and on such sale to retain and apply so much of the purchase money as should be necessary to redeem the property pursuant to the provisions contained in the foregoing rule:—Held, that the master proceeded on an erroneous principle in calculating interest on the sum advanced at nine per cent. from the date of its advance until the day appointed for payment; and that he was bound to ascertain the amount necessary to discharge the mortgage by the same rules, and on the same principle, as the directors of the society computed the same. *Crone* v. *Crone*, 26 Gr. 459.

Rules—*Interest—Costs.*]—By s. 3 of 37 Vict. c. 50 (D.), borrowers from building societies incorporated under C. S. U. C. c. 53, though not members of the society or signing the rules, are made subject to all rules in force at the time of becoming borrowers, so that by virtue of such rules the society, on a sale of land under a mortgage given by such borrower to the society on default before the expiration of the term fixed by the mortgage, are not restricted to the amount originally advanced with the then accrued interest, but are entitled in addition thereto to discount the future repayment at such rate of interest, and on such terms as the directors determine. The costs of sale and commission thereon were held to be properly chargeable, but not a charge for insurance and survey, or the costs of an action on the covenant, as not coming within the rules. *Green* v. *Hamilton Provident Loan Co.*, 31 C. P. 574.

Rules—*Redemption.*]—By one of the rules of a building society it was provided that "If any member shall desire to have his property discharged from a mortgage to the society before the expiration of the full time for which it has been taken, he shall be allowed to do so on payment of all repayments, any fines, or other sums due in respect thereof up to the time of redemption * * and of the present value of future repayments, calculated to the end of the term, and discounted at such rate of interest and on such terms as the directors may determine." The effect of a person obtaining a loan from the society was, that he became a member of the society, and as such assented to all the rules thereof. Therefore, where a suit was instituted upon a mortgage by reason of default having been made in repayment, the court held the society had the right to say upon what terms the future repayments should be computed, and that if the society saw fit to do so they could insist on repayment of the whole amount of the mortgage, which included the principal sum and interest for the whole period the mortgage had to run. *Western Canada Loan and Savings Society* v. *Hodges*, 22 Gr. 596.

Rules—*Subsequent Changes—Representations.*]—A circular was issued, with the knowledge of the directors of the defendant company, which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan:—Held, that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, the evidence shewing that what was put forward in the circular as the rule of the society was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract. *Hodgins* v. *Ontario Loan and Debenture Co.*, 7 A. R. 202.

Held, that although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society had agreed to pay him in advance on receiving that security therefor, &c., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules. *Ib.*

Shares—*Forfeiture.*]—In January, 1864, a non-borrowing member died intestate. No one administered until June, 1869. In that interval his shares ran into arrear, and in consequence the society in November, 1865, declared them forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been, or been supposed to have been, wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:—Held, 1. that the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; 2. that the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture and the procuring letters of administration was no answer to the claim. *Glass* v. *Hope*, 16 Gr. 420, in appeal from *S. C.*, 14 Gr. 484.

Shares—*Payment.*]—Where a building society should, if properly managed, have terminated in ten years, but did not:—Held, that borrowing as well as non-borrowing members were bound to continue paying their monthly subscriptions, if necessary, until they reached the amount of their shares. *Wilson* v. *Upper Canada Building Society*, 12 Gr. 206.

Treasurer—*Bond.*]—Under 9 Vict. c. 90, it is not essential to a bond for the performance of the treasurer's duties, that he should join in it with his sureties. Two pleas intended to set up this defence were held bad for uncertainty. 11th plea, that the rules of the society did not provide that the treasurer or other principal officer should, once at least in every year, prepare a general statement of the funds and effects, according to the statute.

Replication, that the rules did provide that the statement referred to in the plea should be made at least once in every year according to the form of the statute, &c.:—Held, replication good. *Wilkes* v. *Clement*, 9 U. C. R. 339.

BUILDINGS, ERECTIONS, AND IMPROVEMENTS.

See LANDLORD AND TENANT, VII. — WAY, V. 2.

BURGLARY.

See CRIMINAL LAW, IX. 6.

BUTTER FACTORIES AND CHEESE FACTORIES.

Act to Prevent Frauds against Cheese Factories.]—The "Act to Provide against Frauds in the supplying of Milk to Cheese or Butter Manufactories," 51 Vict. c. 32 (O.), though penal in its nature, does not deal with criminal law within the meaning of s. 91, s.-s. 27, of the B. N. A. Act, but merely protects private rights and is intra vires. *Regina* v. *Wason*, 17 A. R. 221; reversing 17 O. R. 58.

Act to Prevent Frauds against Cheese Factories.] — A conviction under s. 1 of 52 Vict. c. 43 (D.), for supplying to a cheese factory milk from which the cream had been removed, was quashed, as neither in the evidence or in the conviction was any offence against the Act shewn, it not having been proved that the milk was supplied to be manufactured; but without costs. *Regina* v. *Westgate*, 21 O. R. 621.

Act to Prevent Frauds against Cheese Factories.]—The Act 52 Vict. c. 43 (D.), an Act to provide against frauds in the supplying of milk to cheese factories, &c., is intra vires the Dominion Parliament. *Regina* v. *Stone*, 23 O. R. 46.

Contract to Sell Product — *Persons Liable.*]—A cheese factory called the Tin Cap Factory, having been established by a number of persons called patrons—namely, persons sending milk to the factory, and receiving in return either cheese or the price of its sale, in proportion to the quantity of milk delivered—they met together, and appointed three of their number, the defendants H. M., G., and C., to be a committee to manage the business, and another, the defendant A. M., to look after the sales and report to the committee. It did not appear to whom the factory building belonged. A. M., acting under instructions from the committee, entered into a contract to sell to the plaintiff the season's cheese, stating: "We have this day sold the cheese manufactured at the Tin Cap Factory," &c., signed by A. M. only. The evidence was contradictory as to whether his instructions were limited to the July supply or extended to the season; but it appeared that the committee, after they were informed of it, assisted in the deliveries after July:—Held, in an action by plaintiff against the committee and A. M., for not delivering the cheese, that the patrons were part-owners of the cheese made at the factory; and that he and the committee were liable on the contract. Quære, whether all the other patrons were not liable also; but there being no plea in abatement, it was unnecessary to decide this question. A. M., on being sued alone, pleaded the nonjoinder of the other defendants. Per Galt, J., he was precluded from insisting that he was not liable if they also were not liable with him. *Gill* v. *Morrison*, 26 C. P. 124.

The contract after agreeing to sell the cheese, stated: "We commenced making on the 1st July. Have now on hand — cheese. Will make until 31st October. Will have 800 to 900 in number:"—Held, that this was not a contract for from 800 to 900 boxes, but a representation only of what the factory was expected to produce. *Ib.*

BUYING OFFICES.

See CRIMINAL LAW, IX. 7.

BY-LAWS.

See ASSESSMENT AND TAXES, III.—INTOXICATING LIQUORS, IV. 2 — MUNICIPAL CORPORATIONS, III. 1, VII., VIII., IX. 1, XII. 5, XVI. 1, XXIX.—PLANS AND SURVEYS, VI. — RAILWAY, I. 2 (a) — SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 3 (a), (c), (d), (e), 4 (a) (b), (c), (d)—WAY, IV. 5.

CABS.

See MUNICIPAL CORPORATIONS, XXIX. 4.

CALLS.

See COMPANY, VII. 2—RAILWAY, XXIV. 2.

CANADA TEMPERANCE ACT.

See INTOXICATING LIQUORS, II.

CANALS.

See HARBOURS, CANALS, AND DOCKS—WATER AND WATERCOURSES, III.

CANCELLATION.

See COMPANY, VII. 3 — CONTRACT, V.—CROWN, II. 6 (b)—DEED, II.—INSURANCE, V. 5.

CANDIDATE.

See MUNICIPAL CORPORATIONS, XIX. 4—PARLIAMENT, I. 4.

CAPIAS AD RESPONDENDUM.

See ARREST, I., II.—MALICIOUS PROCEDURE, I. 6 (a).

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CARRIERS.

I. OCCUPATION AND PROOF THEREOF, 889.

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I. OCCUPATION AND PROOF THEREOF.

Evidence of Occupation — *Refusal to Carry.*]—The plaintiff proved a receipt signed by defendants contracting to carry, on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in G. had arrangements with defendants for the carriage of fish:—Held, some evidence that defendants were carriers, and that if so, they were liable to an action at common law for refusing to carry except upon conditions limiting their common law liability:—Held, also, that to support such action it must be shewn that the plaintiff tendered the goods to be carried, as well as the fare:—Held, also, that the contract to be inferred from the evidence stated in the case, was a limited not a general one as declared upon. *Leonard* v. *American Express Co.*, 26 U. C. R. 533.

Express Company — *Discrimination in Customers—Charges.*]—An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, providing they are reasonable. An action by a rival company which collected together small parcels for the carriage of which it charged a rate much smaller than the defendants an express company, did for similar parcels, packed them together in one large parcel, and sought to compel the defendants, at great loss, to carry such parcel by size and weight rate, was dismissed. *Johnson* v. *Dominion Express Company*, 28 O. R. 203.

Forwarder.]—A forwarder is a common carrier, and not liable for loss from the act of God or the King's enemies. *Smith* v. *Whiting*, 3 O. S. 597.

Lumberman Carrying Lumber.] — A lumberman agreeing to carry lumber for hire at the request of the owner thereof, does not thereby become a common carrier. *Re Coombe, Cockburn, and Campbell*, 24 Gr. 519.

Person Transporting Goods for Hire.] —A person engaging to transport goods for hire is not, by virtue of such engagement merely, a common carrier. *Benedict* v. *Arthur*, 6 U. C. R. 204.

Warehousemen.]—When in an action against common carriers from Kingston to Montreal, it was proved that the plaintiff had sent his goods to defendants at a season when they could not be forwarded, and defendants received them into their store at Kingston to be forwarded at the earliest opportunity, and before the navigation had opened, or time for transportation had arrived, they were destroyed in defendants' storehouse without their default, by an accidental fire, and a verdict was found for the plaintiff:—Held, that it ought to have been distinctly left to the jury to find whether the defendants received the goods only as warehousemen until the opening of navigation, or whether their liability as carriers commenced from the moment of their receipt; and it not having been so left to them, the court granted a new trial. *Ham* v. *McPherson*, 6 O. S. 360.

Held, on a subsequent trial, that it was a question for the jury whether defendants received the goods as carriers or warehousemen, and that the circumstance of the navigation being closed by the ice every year at the season of the receipt of the goods, and also at the time of the fire, did not necessarily determine, as a matter of law, that the defendants must be looked upon as having acted in their character of warehousemen only. *S. C.*, H. T. 6 Vict.

Warehousemen.]—Where flour was delivered to defendants, who were warehousemen and carriers, with directions to sell as much of it as they could during the winter, and put the remainder in transitu for plaintiff in the spring, and some sales having been made before navigation opened in the spring, an accidental fire destroyed the remainder, without any default or negligence of defendants:—Held, that as the flour at the time of the fire was in the hands of defendants as warehousemen, and not as common carriers, they were not responsible. *Thirkell* v. *McPherson*, 1 U. C. R. 318.

Warehousemen.]—When a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company. *Milloy* v. *Grand Trunk R. W. Co.*, 21 A. R. 404; reversing 23 O. R. 454.

Warehousemen.]—See *Beckett* v. *Urquhart*, 1 U. C. R. 188; *Cluxton* v. *Dickson*, 27 C. P. 170.

II. BILLS OF LADING.

Advances.]—Per Burton, J.A.—Bills of lading are not intended as a representation to the public that they may safely advance their money upon them, but are mere contracts between the carrier and the shipper. *Erb* v. *Great Western R. W. Co.*, 3 A. R. 446.

Per Patterson, J.A.—Bills of lading are not only intended as an assurance to the shipper,

but as a representation to the "banker or private person" with whom the statute deals, that they may act on the faith of them, and advance their money. *Ib.*

Assignment to Bank—*Re-assignment by Bank to Shippers.*]—M. & Co., at Guelph, bought a car load of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own names as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was indorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days' sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat and ground; and 55 barrels of flour, the equivalent, was delivered by him to defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-indorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co. The case having been tried without a jury:—Held, that M. & Co., on the re-indorsement by the bank to them, were in as of their former title, not as assignees of the bank with the rights given to the latter by the statute, and that their rights must be considered as if the bank had never intervened. *Mason* v. *Great Western R. W. Co.*, 31 U. C. R. 73.

Connecting Lines—*Through Contract.*—The plaintiff agreed with the M. D. T. Co. for the conveyance of butter from London in Ontario to England. The butter was carried from London to the Suspension Bridge by the G. W. Ry. Co., from the Bridge to New York by the N. Y. C. R. R. Co., and from New York to England by the G. W. Steamship Co., bills of lading being given at London to the plaintiff by a person who signed as agent severally and not jointly for the M. D. T. Co., the G.W. Ry. Co., and the G. W. Steamship Co. The plaintiff sued for damage sustained by the butter, joining the three companies as defendants under the O. J. Act, s. 91. It appeared that the damage occurred while the butter was on a lighter of the N. Y. C. R. R. Co. in New York harbour, and before it was actually delivered at the pier or on board a vessel of the steamship company:—Held, that the M. D. T. Co., by virtue of its through contract was liable for the damage; that the responsibility of the steamship company had not attached until after the damage was done, one of the terms of the bill of lading being that "this contract is executed and accomplished and the liability of the G. W. Ry. and its connections as common carriers thereunder terminates on the delivery of the goods or property to the steamer or steamship company's pier at New York, where the responsibility of the steamship company commences, and not before;" and that inasmuch as the butter had been received in England by the consignees without objection, the steamship company would have been protected by conditions which by the bill of lading were made part of the contract, one of which was to the same effect as the condition in question in Moore v. Harris, 1 App. Cas. 318. The judgment in 4 O. R. 723, as to the defendants the Merchants' Despatch Company was affirmed. *Hately* v. *Merchants' Despatch Transportation Co.*, 12 A. R. 201.

Custom of Port.]—A trade custom in order to be binding upon the public generally must be shewn to be known to all persons whose interests require them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. *Parsons* v. *Hart*, 30 S. C. R. 473.

Quebec Contract.]—Held, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. 1877 c. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario; and in the absence of proof it would be assumed to be the same. *Langdon* v. *Robertson*, 13 O. R. 497.

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

Shipping Note—*Railway—Signature by Agent.*]—The plaintiffs sued for non-delivery of certain goods received by defendants from one G. W., to be carried from Paris, Ont., to St. John, N. B., and there delivered to one R. W., or to such person as he should direct, alleging that the said R. W. duly indorsed the shipping note of the said goods in manner and form provided by statute to the plaintiffs, who then became and are the lawful and bonâ fide holders of the same for valuable consideration, and entitled to the possession of the said goods. Plea, setting out the alleged shipping note verbatim, which was in the usual form, dated at Paris station, G. T. R., acknowledging the receipt of the goods from G. W., addressed to R. W., St. John, subject to the terms and conditions stated. It was signed "W. S. Martin, Agent, G. T. R.," and on the face of it was written, "Deliver to order of Royal Canadian Bank—R. Wallace." The plea then averred that the indorsement to the plaintiffs mentioned in the declaration was that mentioned in the plea on the face of the shipping note, and that there was no other indorsement; and that G. W. did not, at any time before this suit, deliver the flour in the said shipping note mentioned, or any part thereof, to the defendants, in manner and form as in the declaration and shipping note mentioned:—Held, on demurrer, that the plea was bad, not being either in

denial of the plaintiffs' title as indorsees for value, or of the defendants having signed or given the shipping note as alleged; and that it was not so framed as to enable the court to determine whether the defendants were estopped from denying the delivery to them of the goods mentioned in the bill of lading, which was the point argued. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 227.

Semble, however, that the shipping note was a bill of lading within 33 Vict. c. 19, s. 3 (O.); and that the insertion of the word "train" in the Act (not found in the English statute, 18 & 19 Vict. c. 111) clearly makes it applicable to railways. *Ib.*

Semble, also, that it was unnecessary to allege in the declaration that the plaintiffs, being bankers, acquired the shipping note as collateral security, as authorized by 34 Vict. c. 5 (D.); though the plaintiffs would have to shew this under a denial of the indorsement. *Ib.*

Semble, also, that under the Interpretation Act, 31 Vict. c. 1, s. 7, s.-s. 9 (O.), the defendants, though a corporation, would be "persons signing" the bill of lading, if signed by their authorized agent. *Ib.*

Signing — *Indorsement* — *Advances*— *Damages.*]—B. held a bill of lading in duplicate for 100 barrels of flour on board the steamer "Corinthian," consigned to his order at Kingston. He sold the flour to H. at $7 per barrel, and went with him to the plaintiff bank, where he indorsed the two bills in blank, and gave them to H. H. attached one to his draft for $500, which he discounted, and applied the proceeds towards paying B. The duplicate bill of lading H. kept, and the next day he got B. to write on it, over his indorsement, "Deliver to order of H." This duplicate got into the possession of defendants at Kingston, not indorsed, and they obtained the flour there from the wharfinger by representing that they had B.'s order. Plaintiffs brought trover, and the jury found that there had been no sale of the flour by H. to defendants. On objections taken to the plaintiffs' title:—Held, 1. That the bill of lading was valid, though signed by the purser, not by the master; 2. that the indorsement of the bill of lading in blank was sufficient, without specifying that it was indorsed to secure the note discounted; 3. that the alteration, by converting the general into a special indorsement, was immaterial; 4. that under the circumstances, the indorsement by B. to the bank was sufficient without H.'s indorsement, either because B. was in truth the owner, or because H. having so represented to the plaintiffs, he and defendants claiming under him were estopped; 5. that the plaintiffs were entitled to recover the full value of the grain, not merely the $500 advanced by them. *Royal Canadian Bank* v. *Carruthers*, 28 U. C. R. 578; 29 U. C. R. 283.

Transfer of Property.]—The declaration alleged that the plaintiff by his agents delivered to the defendants 8,000 bushels of his corn, to be carried from Chicago to Stratford, &c., and to be delivered to the Bank of Montreal or their assigns; that the bank assigned the corn to the plaintiff, yet that defendants neglected for an unreasonable time to carry and deliver it, whereby the plaintiff lost a market and was afterwards obliged to sell for a less price than he would otherwise have done. It appeared that the corn was shipped by M. & Co. "as agents and forwarders," on account of whom it might concern, to be delivered to the Bank of Montreal or their assigns, and the bill of lading was indorsed by the agent of the bank to the plaintiff, with whom the defendants treated as the owner, and delivered it to him after some delay caused by a charge made and afterwards remitted by them. It was objected that only the consignor or consignee could sue upon this contract, not the plaintiff; that the bank could not assign to him; and if they could, the right of action would not pass. There was no evidence to shew what interest the bank had in the corn:—Held, there being no plea denying plaintiff's property in the corn, that he was admitted to have been the owner when it was shipped; that the bill of lading did not transfer the property to the bank, in whom no other right was shewn; that their indorsement was therefore unnecessary; and that he was entitled to maintain the action. Semble, however, that if he had first acquired his title by such indorsement, he might have sued defendants for any negligence occurring after they had recognized him as owner. *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

A bill of lading is not conclusive proof of the change of property, like a bill of sale; it is a question of evidence whether such an operation should be given to it. *Ib.*

III. Goods and Animals.

Animals — *Knowledge of Special Purpose.*]—Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits. *Kennedy* v. *American Express Co.*, 22 A. R. 278.

Change of Destination — *Agent's Powers.*]—The plaintiff, a dealer in grain, &c., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the sea-board the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose, who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London on the 12th February, it did not reach there until the 23rd March, too late for the sowing trade, so that the seed had to be sold at a heavy loss:—Held, affirming 1 O. R. 47, (1) that the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the de-

fendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London:—Semble, that the same rule applies where the goods are not intended for immediate sale at their place of destination. *Monteith* v. *Merchants' Despatch and Transportation Co.*, 9 A. R. 282.

Condition Limiting Liability—*Part of Line in Foreign Country.*]—The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada. Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, U.S., to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, U.S., by negligence from which they were protected from liability by the terms of the contract for carriage:—Held, that the provisions of s. 246 of 51 Vict. c. 29 (D.), disabling a railway company from relieving itself from liability for its own negligence or that of its servants, were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed. *Macdonald* v. *Grand Trunk R. W. Co.*, 31 O. R. 663.

Connecting Lines—*Authority of Agent.*]—E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Railway and Chicago and N. W. R. W. Co., care Northern Pacific Railway Company at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G. and wrote to him, "I enclose you card of advice, and if you will kindly fill it up when you make the shipment and send it to me, I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in British Columbia:—Held, affirming 21 A. R. 322, and 22 O. R. 645, that on arrival of the goods at St. Paul the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for. *Northern Pacific R. W. Co.* v. *Grant*, 24 S. C. R. 546.

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

Consignee not Found.] — Obligation as to delivery of goods, where the consignee cannot be found. *Close* v. *Beatty*, 28 C. P. 470.

Contract — *Damages.*]—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith:—Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong. The measure of damages against carriers for non-delivery of trees considered. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Damages—*Illusory Tender of Goods.*]—Action for the value of 50 kegs of butter delivered by plaintiff to defendants to carry from G. to T. Defendants relied upon a tender of the butter to plaintiff, as preventing the recovery of more than nominal damages. The tender was made in writing by defendants' solicitor, two days before the Assizes, offering for plaintiff's acceptance the 50 kegs of butter, which had been sold by plaintiff to M., and for which M. had recovered against the plaintiff, stating same to be at T. at plaintiff's own risk:—Held, wholly illusory,

and not to partake of any of the incidents of a legal tender, and that plaintiff was entitled to recover the full value of the property. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

Delivery Beyond Limits.]—A parcel was left with an express company's agent, c. o. d. The consignee lived beyond the express company's limits. The parcel was received by the agent without objection, and forwarded by him, and delivered to the consignee without the sum due being collected:—Held, that the company were liable. *Bennett* v. *Vickers*, 12 C. L. J. 51.

The extent of the authority of an agent of an express company, and the liability of the latter under the circumstances set out in this case, discussed. *Ib.*

Discretion of Carrier.]—Construction of a contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use in the time, mode, and place of shipping the goods. *Fowler* v. *Hooker*, 4 U. C. R. 38.

It is no defence for a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent he had done so, and no objection was made by the agent. After, if he had told the agent of his intention before the deviation, and could shew that the agent had any discretion in the matter. *Ib.*

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

Negligence—*Stowage—Fragile Goods.*]—The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only. The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damages caused through improper or insufficient stowage. A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec. When a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding, and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect, or error in judgment of the pilot, master, mariners, or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," held that such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage. *Glengoil Steamship Company* v. *Pilkington*; *Glengoil Steamship Company* v. *Ferguson*, 28 S. C. R. 146.

Particular Route — *Damages.*]—Breach of contract to carry by a particular route. Recovery of damages caused by consequent payment of higher rates. See *Langdon* v. *Robertson*, 13 O. R. 497.

Production of Shipping Bills — *Contributory Negligence.*]—The plaintiffs knowing that the defendants sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to the "I. C. Company," not yet incorporated, and the defendants delivered them to an individual carrying on business in that name and at the ostensible office of the company, without production of the bill:—Held, that the defendants were not liable for misdelivery. There is no law in this Province requiring carriers to take up shipping bills before the delivery of goods. *Conley* v. *Canadian Pacific R. W. Co.*, 32 O. R. 258.

Reduced Rate—*Release of Company.*]—Where the finding of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed. The plaintiffs' agent shipped a quantity of plate glass by defendants' railway, signing an agreement that in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents, a third class rate, and a double first class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under s. 226 of 51 Vict. c. 29 (D.), "The Railway Act," the said classification stating that, the third class rate applied where the goods were "shipped at owners' risk—shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates and signed the agreement assenting to the lower rate, under the belief that the defendants could not, under s. 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first class rate of sixty-six cents and a third class

rate of fifty cents had inter alia been so approved:—Held, per Meredith, C.J., that notwithstanding the payment of the lower rate, and the agreement signed by the agent, the defendants could not, under s. 246, relieve themselves from liability when negligence was proved. Per Rose, J.—The third class rate was the only rate "lawfully payable." If only one rate is fixed the provision in the freight classification as to release was ultra vires as contrary to the provisions of s. 246. Per MacMahon, J.—No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight "lawfully payable," without which there could be no alternative rate, and the release, which would otherwise have been valid, was inoperative. *Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732. Affirmed in appeal, 23 A. R. 115.

Representation as to Receipt.]—The declaration alleged that the defendant before the committing of the grievance, &c., was a carrier and express agent; that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S., and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to his own use; and by reason of such false and fraudulent representation W. obtained time to and did abscond, and the plaintiff lost said money, which he would otherwise have recovered from W.:—Held, on demurrer, that a sufficient cause of action was shewn; that it was unnecessary to allege that defendant knew the representations to be false, the words falsely and fraudulently being equivalent to knowingly; or that defendant was a carrier at the time when, &c., for the ground of action being the fraud, his being a carrier was immaterial. *Young* v. *Vickers*, 32 U. C. R. 385.

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

Special Contract — *Limitation of Liability.*]—By s. 246 (3) of the Railway Act, 1888, 51 Vict. c. 29 (D.), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants:"—Held, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, and Bate v. Canadian Pacific R. W. Co., 15 A. R. 388, distinguished. The Grand Trunk Railway Co. received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," &c.:—Held, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount. *Robertson* v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611; affirming 21 A. R. 204, and 24 O. R. 75.

Wrong Address.]—Address on packages differing from that on abstract—Action for negligence in going by the latter. See *Hunter* v. *Borst*, 13 U. C. R. 141.

IV. Passengers and Luggage.

Assault on Passenger—*Scope of Employment.*]—The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured:—Held, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. *Emerson* v. *Niagara Navigation Company*, 2 O. R. 528.

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Held, that this, under 32 & 33 Vict. c. 20, s. 45 (D.), though a release to the purser, did not constitute any bar to the present action against the company. *Ib.*

Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Ib.*

Connecting Lines—*Negligence—Passenger—Cattle Drover—Free Pass.*]—A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in

charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants."—Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence. Hall v. North-Eastern R. W. Co., L. R. 10 Q. B. 437, applied. *Bicknell* v. *Grand Trunk R. W. Co.*, 26 A. R. 431.

Continuous Journey—*Break in Railway—Omnibus Transfer.*]—The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, via Galt and Berlin. There was a break in the line of the defendants' railway at Galt, the distance between the stations being three-fourths of a mile; an omnibus was provided, as advertised by the defendants, but the plaintiff was asked to pay a fare of ten cents for transfer in it, and refusing to do so, was not permitted to be transported free. He failed to make his connection, and brought this action for damages:—Held, that he was entitled to be conveyed from station to station free of expense; but it would have been reasonable for him to have paid the ten cents and made his connection, and the damages should be restricted to that sum. Costs on the scale of the county court, in which the action was brought, were allowed, as it was to test a right. *Clarry* v. *Grand Trunk R. W. Co.* 29 O. R. 18.

Negligence—*Driver of Coach.*]—In an action against a coach proprietor for injury to a passenger by upsetting, it is no misdirection to tell the jury that unless the driver exercised a sound discretion at the time the accident happened the owner is responsible; and if he could have exercised a sounder judgment or better discretion than he did, as by driving slower or faster, or by directing his passengers to get out at any dangerous or difficult passage, the proprietor is liable. *Stanton* v. *Weller*, H. T. 6 Vict.

Negligence — *Driver.*] — In an action against the proprietors of a railroad car drawn by horses, for an accident to the plaintiff by the carelessness of the driver, an averment that the contract was to carry safely, is supported by proof that the accident arose from the driver's want of care and skill. *Thompson* v. *Macklem*, 2 U. C. R. 300.

Negligence—*Several Defendants.*]—In an action against four, the declaration stated that defendants were proprietors of a stage coach for carrying passengers; that they received the plaintiff as a passenger for reward; and by reason thereof it became and was their duty to use due care in conveying him; yet they, not regarding their duty, did not use due care, &c., but by reason of the carelessness and improper conduct of the defendants, by their servant, he was thrown off and injured, &c.:—Held, that upon this declaration a verdict might be given against three of the defendants, and for the other. *Gunn* v. *Dickson*, 10 U. C. R. 461.

Negligence—*Contributory Negligence.*]—The plaintiff, standing on the front platform of one of the defendants' cars, which was crowded, was thrown off by a jolt and injured, but it did not appear whether, at the time of the accident, he was holding on to the iron rail on the platform or not:—Held, that the fact of the plaintiff not proving affirmatively that he was so holding on was not a ground for nonsuit. *Cornish* v. *Toronto Street R. W. Co.*, 23 C. P. 355.

Negligence — *Climatic Conditions.*] — Where the breaking of a rail is shewn to be due to the severity of the climate and the suddenly great variations of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying, and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. *Canadian Pacific R. W. Co.* v. *Chalifoux*, 22 S. C. R. 721.

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

Special Contract—*Exemption from Liability.*]—The Commercial Travellers' Association of Ontario, by written agreement with the defendant company, obtained for its members for the season of 1885 special privileges in travelling by the company's boats, one of the terms of the agreement being that the members should receive tickets at a reduced rate "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties." This agreement was continued during 1886 by verbal agreement between the manager of the company and the secretary and traffic manager of the association. D., a commercial traveller, obtained a ticket for a passage on one of the company's boats under this agreement, paying the reduced fare, and took on board three trunks containing the usual outfit of a traveller for a jewellery house, valued at about $15,000. The trunks were checked in the usual way and no intimation was given by D. to any of the officials on the boat as to their contents. On the passage the contents of the trunks were damaged by the negligence of the officers of the company and an action was brought by D. and his employers to recover damages for such injury:—Held, affirming 15 A. R. 647, that the agreement between the association and the company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties," the words "against all casualties" do not limit, control, or destroy, but rather strengthen, the protection which the former words "at owner's risk" afforded the defendants. *Dixon* v. *Richelieu Navigation Co.*, 18 S. C. R. 704.

Special Contract — *Reduced Fare.*] — The plaintiff purchased from an agent of

the defendant company at Ottawa what was called a landseeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket explaining that it was for the purpose of identification but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over $1,000, caught fire and was destroyed:—Held, reversing 15 A. R. 388, and 14 O. R. 625, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company. *Bate* v. *Canadian Pacific R. W. Co.*, 18 S. C. R. 697.

Street Car — *Expulsion of Passenger — Damages.*]—See *Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 683; 21 A. R. 578; 24 S. C. R. 570.

Ticket—*Condition Printed on Face—No Stop Over.*]—The suppliant, who was a manufacturers' agent and traveller, purchased an excursion ticket for passage over the Intercolonial Railway between certain points and return within a specified time. On the going half, printed in capitals, were the words, "good on date of issue only," and immediately thereunder, in full-faced type, "no stop over allowed." He knew there was printing on the ticket, but put it into his pocket without reading it. He began the journey on the same day he purchased the ticket, but stopped off for the night at a station about half-way from his destination on the going journey. The next morning he attempted to continue his journey to such destination by a regular passenger train. Being asked for his ticket he presented the one on which he had travelled the evening before, and was told by the conductor that it was good for a continuous passage only. On his refusal to pay the prescribed fare for the rest of the going journey, the conductor put him off the train at a proper place, using no unnecessary force:—Held, that issuing to the suppliant a ticket with the conditions upon which it was issued plainly and distinctly printed upon the face of it was in itself reasonably sufficient notice of such conditions; and if, under the circumstances, he saw fit to put the ticket into his pocket without reading it he had nothing to complain of except his own carelessness or indifference. *Coombes* v. *The Queen*, 4 Ex. C. R. 321. See the next case.

Ticket—*Right to Stop Over.*]—By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. Craig v. Great Western R. W. Co., 24 U. C. R. 509; Briggs v. Grand Trunk R. W. Co., 24 U. C. R. 516; and Cunningham v. Grand Trunk R. W. Co., 9 L. C. Jur. 57, 11 L. C. Jur. 107, approved and followed. *Coombes* v. *The Queen*, 26 S. C. R. 13.

Ticket—*Condition—Viâ Direct Line.*]—A condition in a railway ticket as to travelling "viâ direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others. Semble, in this country it is not the law that a passenger rightfully travelling upon his ticket is bound to pay fare wrongfully demanded, or to leave the train on the conductor's order, at the peril of not being able to recover damages for an assault committed in expelling him by force. The American cases on the subject considered and not followed. Judgment below, 20 O. R. 603, varied. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

Ticket—*Production of.*]—The contract between a person buying a railway ticket and the company on whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment. *Grand Trunk R. W. Co.* v. *Brearer*, 22 S. C. R. 488; reversing 20 A. R. 476, and 22 O. R. 667.

V. Miscellaneous Cases.

Criminal Charge Pending.]—In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant he found that he had absconded; that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in gaol, charged with stealing the money:—Held, that this evidence sufficiently shewed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny under C. S. C. c. 92, s. 55, and a nonsuit was ordered. *Livingstone* v. *Massey*, 23 U. C. R. 156. See *Regina* v. *Massey*, 13 C. P. 484.

Crown.]—Held, under the circumstances of this case Her Majesty could not be held liable as a common carrier. *Regina* v. *McFarlane*, 7 S. C. R. 216.

Crown.]—Liability as carrier. See *Lavoie* v. *The Queen*, 3 Ex. C. R. 96.

Crown.]—Crown's liability for injuries to passengers on government railway. See *Dubé* v. *The Queen*, 3 Ex. C. R. 147.

Excess.]—Claim of carrier for excess in quantity named in bill of lading. See *Murton* v. *Kingston and Montreal Forwarding Co.*, 32 C. P. 366.

Express Company.]—Right to the facilities afforded by railways in the conduct of their business. See *Vickers Express Co.* v.

Canadian Pacific R. W. Co., 9 O. R. 251, 13 A. R. 270.

Freight—*Cross-claim.*]—It is an established rule of English law that negligence or breach of duty cannot be set up as a defence in action for the recovery of freight, where the defendant has derived a partial benefit under the contract, but defendant must bring a cross action for damages. *Brown* v. *Muckle*, 7 L. J. 208.

Such rule must be taken to prevail in division courts, notwithstanding the provisions of the Division Courts Act enabling the Judge to decide according to equity and good conscience. *Ib.*

A different rule prevails in several states of the neighbouring republic, and is highly convenient as calculated to prevent multiplicity of suits. *Ib.*

Freight — *Payment to Wharfinger.*] — Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, according to the custom and usage of forwarders and carriers at T., paid the plaintiffs' claim:—Held, plea bad, for not averring notice of the custom to the plaintiffs. *Torrance* v. *Hayes*, 2 C. P. 338; 3 C. P. 274.

Declaration for work and labour by carriers by water. Plea, that a wharfinger, to whom goods were delivered by plaintiffs for defendants, was agent of plaintiffs to receive payment, and that they paid him accordingly:—Held, that from the course of dealing between such parties, as set out in the evidence, the wharfinger was such an agent. Held, also, that after delivery of the goods without exacting freight, the wharfinger still continued plaintiffs' agent to demand and receive the freight till his authority was revoked. *S. C.*, 3 C. P. 278.

Interpleader—*Grain — Inability to Deliver Specific Property—Claim for Unliquidated Damages.*]—Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway company's elevators in common with other grain of like grade, and at its destination was claimed by the indorsee of the bill of lading, and also by an investment company claiming under a mortgage from the shipper, an interpleader order was made, upon the application of the railway company as carriers or bailees, notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, and notwithstanding that the investment company's claim was, as contended, one for unliquidated damages for conversion of the grain. Attenborough v. St. Katharine's Dock Co., 3 C. P. D. 450, followed. *Re Canadian Pacific R. W. Co. and Carruthers*, 17 P. R. 277.

Letters Delivered.]—Held, 1. That it is not illegal to deliver a money letter to a private friend on his journey, provided such letter be delivered by such friend to the party to whom it is addressed; 2. that such friend as a gratuitous bailee would be bound to take as much care of the letter as he would take of his own; 3. that if lost where he does take such care he is not responsible. *Tindall* v. *Hayward*, 7 L. J. 243.

Loss of Letter.]—Held, that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable, under the facts of this case, for the loss of a letter containing a note. *Holman* v. *Weller*, 8 U. C. R. 262.

Officer of Ship—*Liability of Owners.*]—Where a person delivers a parcel to carry to a person on board a boat, not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible for its loss. *McLeod* v. *Eberts*, 7 U. C. R. 244.

If, however, the parcel is delivered to the person on board to be carried, not on any private undertaking, but as an officer of the boat, the owners of the boat would be chargeable with the loss, though they were to have no reward for carrying; but then, to establish the liability of the owners, it would be necessary for the jury to find gross negligence in the owners or their servants, or at least a want of that ordinary care which a prudent man would take of his own goods. *Ib.*

Pleading.]—Action against several defendants charged as common carriers, in case. A traverse of the delivery to the defendants of the parcel, without saying "or any or either of them:"—Held, good. *Park* v. *Davis*, 6 U. C. R. 411.

In an action on the case (by the plaintiffs in ejectment) against defendants as common carriers, for not delivering within a reasonable time the record of nisi prius at the assize town:—Held, that defendants could not put in issue the plaintiffs' title to the land. *Ib.*

Promissory Note — *Non-presentment.*]—Plaintiff sued defendant, an agent of an express company, on an alleged undertaking to take and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the indorsers. Breach, that defendant did not present or notify, in consequence of which the indorsers refused to pay the note. The evidence shewed no demand by the plaintiff upon the indorsers for payment, nor refusal by them to pay:—Held, that without such evidence, &c., the plaintiff could at most recover only nominal damages; but that defendant was entitled to a verdict, for that on the evidence he had fulfilled his contract by carrying the note to the place agreed upon, and placing it in the hands of a notary for presentment and protest. *McQuarrie* v. *Fargo*, 21 C. P. 478.

Sunday.]—Conveying travellers on Sunday. See *Regina* v. *Daggett*, *Regina* v. *Fortier*, 1 O. R. 537; *Attorney-General ex rel. Hobbs* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 19 O. R. 624; *Attorney-General* v. *Hamilton Street Railway Co.*, 24 A. R. 170.

Venue.]—In an action on the case against carriers, the venue cannot be changed on the common affidavit. *Ham* v. *McPherson*, M. T. 6 Vict.

See CROWN, III. 1.

CASE RESERVED.

See CRIMINAL LAW, VIII. 2 (d)—SESSIONS, III. 2.

CATTLE.

See ANIMALS, II.

CATTLE GUARDS.

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CERTIORARI.

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I. IN CIVIL PROCEEDINGS.

1. *In General.*

Arrest.]—Certiorari granted to remove a cause, defendant having been arrested. *Winaker* v. *Pringle*, 1 P. R. 357.

Judgment in Inferior Court.] — A certiorari must have been delivered to the proper officer before the entry of final judgment, or, after interlocutory judgment, before the jury have been sworn on the assessment; otherwise a procedendo will be ordered, even though the record has been returned and filed in the court above. *Barnes* v. *Cox*, 16 C. P. 236.

Patent Act.]—A motion for a writ of certiorari to bring up into this court all the proceedings, &c., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for noncompliance with the provisions of s. 28 of the Patent Act of 1872 was refused. *In re Bell Telephone Company*, 9 O. R. 339.

Railway Act.]—Held, that the divisional court had no power to remove proceedings by certiorari in order that the decision of a judge might be quashed or rescinded as made in excess of his authority as a special tribunal under the Railway Act. *Re McQuillan and Guelph Junction R. W. Co.*, 12 P. R. 294.

2. *County Court.*

Interpleader.]—A certiorari does not lie to remove an interpleader issue. If such a writ do improvidently issue, the application should be to quash the certiorari, and not for a procedendo. *Jones* v. *Harris*, 6 L. J. 16.

Mortgage Action.]—Section 57 of the County Courts Act, C. S. U. C. c. 15, does not authorize the removal of a case to the court of chancery, where such removal is desired on account of the existence of a subsequent mortgage upon the premises exceeding the jurisdiction of the court. *Mitchell* v. *Martin*, 2 C. L. J. 249.

Plaintiff Applying — *Replevin.*] — A. brought replevin in the county court and obtained a verdict, which was set aside because title to land came in question. Nothing was said in the rule about a new trial, but he served another notice of trial, and the cause was made a remanet. The surety being sued in this court on the replevin bond for not prosecuting the suit with effect, moved for a mandamus to compel the county court to proceed with the action, or a certiorari to remove it, and in the meantime to stay proceedings in this court; but the court refused to interfere. Semble, that a certiorari imports jurisdiction in the inferior court, and will not lie to determine whether it exists, at least not at the instance of the plaintiff who sued there. *Meyers* v. *Baker, Hargreaves* v. *Meyers*, 26 U. C. R. 16.

23 Vict. c. 44, prohibits a certiorari unless the debt or damages claimed exceed $100. Quære, therefore, whether replevin is within the Act. *Ib.*

The mandamus was refused, among other reasons, because the applicant had a remedy by appeal from the rule in the county court setting aside the verdict. *Ib.*

Title to Land.]—Where in replevin in a county court the plaintiff shewed clearly that he had reason to believe that the title to the land would be brought in question by defendant, a certiorari was granted. *Heaton* v. *Cornwall*, 4 P. R. 148.

Want of Jurisdiction.] — Where an action has been brought in the county court beyond its jurisdiction, or when being rightly brought there the jurisdiction has been determined by matter of pleading or evidence, the whole proceedings are coram non judice and void, and they cannot be removed by certiorari. *O'Brien* v. *Welsh*, 28 U. C. R. 394.

3. *District Court.*

Judgment.]—The court set aside a certiorari, to remove proceedings from a district court after judgment and execution, and without any application to this court or a judge, laying any especial ground. *Douglas* v. *Hutchinson*, 5 O. S. 341.

Judgment for Defendant.] — A judgment for defendant cannot be removed from a district court into the King's Bench under 19 Geo. III. c. 70. *Gregory* v. *Flannegan*, 2 O. S. 518.

Right to.]—A certiorari under 19 Geo. III. c. 70, may issue to remove a cause from a district court into the Queen's bench. *Balducin* v. *Roddy*, 3 O. S. 166.

Verdict.]—A certiorari will not lie to an inferior court—e. g. a district court, after verdict, although this court may be of opinion that evidence rejected should have been received. *Tully* v. *Glass*, 3 O. S. 149.

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4. Division Court.

Agreement of the Parties.]—Where a certiorari is regularly issued for the removal of a cause from the division court after new trial granted, a previous alleged understanding between the parties that the cause should be tried in the division court is no ground for interfering with the certiorari. *Help* v. *Lucas*, 8 L. J. 184.

Case Partly Heard.]—After the hearing of a cause has been proceeded with before the Judge, though no jury is sworn, it is too late to serve a writ of certiorari. *Gallagher* v. *Bathie*, 2 C. L. J. 73.

A cause was heard and evidence taken, and judgment was postponed to be given at the clerk's office on a future day. Afterwards, and before that day, a writ of certiorari was served:—Held, too late, and a procedendo was awarded. *Ib.*

Interpleader.]—An interpleader issue in a division court held not within s. 51 of the Division Courts Act, and so not removable by certiorari. *Russell* v. *Williams*, 8 L. J. 277.

Intituling Affidavits.] — Affidavits under 13 & 14 Vict. c. 53, s. 85, to remove a cause from the division court, must be intituled in the court in which the motion is made, not in the division court. *Smyth* v. *Nicholls*, 1 P. R. 355.

Held, that in this case no sufficient ground for a removal was shewn. *Ib.*

Judge Wrong in Law.]—Held, that a Judge of a division court having expressed an erroneous opinion in a case, is no ground for removal. *Holmes* v. *Reeve*, 5 P. R. 58.

Judgment — *New Trial.*] — A certiorari will not be granted after judgment and execution regularly issued and money made and paid over, although a new trial may have been granted subsequently in the division court. *McKenzie* v. *Keene*, 5 L. J. 225.

Legal Question.]—A suit will be removed upon its being shewn that questions of law as to the Statute of Limitations will arise at the trial. *Ridley* v. *Tullock*, 3 L. J. 14.

Legal Questions.]—A suit brought by an incorporated company will be removed, if it be shewn that difficult questions of law will arise as to the powers conferred by the Act of incorporation. *Cataraqui Cemetery Co.* v. *Burrowes*, 3 L. J. 47.

Legal Questions — *Residence.*] — A certiorari was granted under 13 & 14 Vict. c. 53, where defendant resided in a part of the Province far distant from the division in which the suit was commenced, and also on account of a difficult question of law. *Nugent* v. *Chambers*, 3 L. J. 108.

Plaintiff Applying.]—A plaintiff is not entitled to remove his own plaint from a division court. *Prudhomme* v. *Lazure*, 3 P. R. 355.

Taking Chance.] — Where a defendant knows all the facts before the trial, but, nevertheless, argues the case and obtains an opinion from the Judge, the case should not be removed, even though the Judge desire it. *Holmes* v. *Reeve*, 5 P. R. 58.

Taking Chance.]—This case was tried before the division court Judge, who gave his decision in favour of the plaintiff, but formally reserved the giving of judgment to a subsequent day, to enable the defendants to move for prohibition or certiorari. In the meantime the defendants gave the required notice:—Held, that the defendants could not thus wait and take the chances of a decision in their favour, and finding it adverse, apply for a writ of certiorari and properly obtain it. Black v. Wesley, 8 L. J. 277, Gallagher v. Bathie, 2 C. L. J. 73, and Holmes v. Reeve, 5 P. R. 58, followed. *In re Knight* v. *United Townships of Medora and Wood*, 11 O. R. 138; 14 A. R. 112.

Verdict.]—Held, that the Imperial statute 43 Eliz. c. 5, applies to cases in division courts, and a certiorari was held too late where a jury was empanelled by the Judge, and verdict rendered before delivery of certiorari to the Judge. *Black* v. *Wesley*, 8 L. J. 277.

Semble, the Act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called. *Ib.*

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5. Proceedings after Removal.

Costs—*Judgment Set Aside.*]—Where the judgment of a court of requests had been removed into this court by certiorari, and set aside upon defendant's application, without any interference by plaintiff, the court refused an attachment against him for non-payment of costs of removing the proceedings. *Cramer* v. *Nelles*, Tay. 36.

Costs—*Scale.*]—An order for a certiorari to bring up a case into a superior court, entitles defendant to the full costs of that court, if he succeeds in the action, without any certificate of the Judge who tries the cause. Costs for superfluous or irrelevant matter introduced into affidavits will not be allowed, and in extreme cases the Judge will disallow costs for the whole affidavit. *Corley* v. *Roblin*, 5 L. J. 225.

Costs of Removal.] — Where the case was removed from the division court into the common pleas by defendant, who obtained a verdict, and the order for the certiorari was silent as to the costs, defendant, on entering judgment, was not allowed the costs of removal. *Kerr* v. *Cornell*, 1 C. L. J. 326.

Directions to Proceed.]—The court will not direct how proceedings are to be carried on after the removal of a cause from a district court to the Queen's bench. *Copping* v. *McDonell*, 5 O. S. 311.

Filing Papers—*Venue.*] — Where cases have been brought up from the division court of an outer county, into one of the superior courts at Toronto, by certiorari, the papers

should be filed in the Crown office at Toronto; but the venue need not be laid in the county of York. *Chambers* v. *Chambers*, 3 L. J. 205.

New Cause of Action.]—Held, 1. That although a plaintiff may, after removal of his plaint from a division court, declare in the superior court in a different form of action, he cannot declare for a different cause of action: 2. that if he vary his cause of action, the declaration may be set aside with costs; 3. that where plaintiff sued for injuries done to a filly by defendant's bull, and afterwards declared in the superior court for entry by defendant on plaintiff's land with the bull, and tearing up the soil, &c., the cause of action was varied. *Mason* v. *Morgan*, 3 P. R. 325.

New Cause of Action.]—A claim in the division court for $40, for detention of plaintiff by defendants on a journey from Toronto to Detroit and back, (the journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back,) was removed by certiorari into the Queen's bench, where the declaration was in contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar, considering the want of technicality in division court pleadings. *Hunter* v. *Grand Trunk R. W. Co.*, 6 P. R. 67.

Option to Proceed.]—A Judge, having all the material facts before him, has a right to grant a certiorari and impose such terms as he may think fit, but not to deprive the plaintiff of his legal right in regard to the position of the cause. When a defendant removes a cause, the plaintiff has the option to proceed or not, but if the pleadings be removed and stand as pleadings in the superior court, the defendant will be in a position to compel the plaintiff to proceed. The plaintiff must declare de novo. A Judge has no power to change the venue by the order granting the writ of certiorari: it should be a substantive motion, when the plaintiff has shewn where he will lay his venue after the cause has been removed. *Patterson* v. *Smith*, 14 C. P. 525.

Plaintiff Applying.]—Where the plaintiff, pending an issue in law, removed the case by certiorari to the Queen's bench, and defendant refused to enter an appearance after notice, an order to compel him to do so, or to assist the plaintiff to proceed, was refused. Quære, as to the plaintiff's right to remove his own cause under such circumstances. *Dennison* v. *Knox*, 3 P. R. 150.

Pleading.] — Where a cause is removed from the county court after issue joined:—Semble, that the plaintiff should declare de novo. In this case the plaintiff did so declare, and signed judgment, though defendants had not appeared. Defendants moved to set aside the judgment, but made no objection for the want of appearance:—Held, that they were precluded from afterwards objecting on that point. *Hankey* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 472.

Pleading.]—A case being at issue in the county court, was removed into the Queen's bench by certiorari, and the plaintiff proceeded upon the pleadings as they stood, filing no new declaration, and entering no appearance above:—Held, that defendants having gone to trial without objection could not object after verdict. *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 428.

Proceeding in Court Below.]—An application made below after the removal to set aside the final judgment entered, because the claim was unliquidated, had been refused, because, having complied with the certiorari, the Judge had no longer jurisdiction in the cause:—Held, that the subject matter of the suit being within the jurisdiction of the Judge below, his judgment could not be reviewed on the proceedings before this court; but, semble, that if it appeared on the face of the record that the judgment was final when it ought to have been interlocutory, a writ of error would lie. Semble, that any proceedings in the court below after removal of the cause into this court, could not be sustained:—Held, also, that after the return of the record, &c., under the procedendo, to the court below, the Judge there had no power to set aside the judgment and let defendant in, upon terms, to plead. *Barnes* v. *Cox*, 16 C. P. 230.

II. In Criminal Proceedings.

1. *In What Cases.*

By-law.]—Held, following Re Bates, 40 U. C. R. 284, that the conviction being for the breach of a by-law the writ of certiorari was not taken away by R. S. O. 1877 c. 74. *Regina* v. *Washington*, 46 U. C. R. 221.

Cheese Factory Act.]—The right to certiorari is not taken away in cases arising under the Act to provide against frauds in the supplying of milk to cheese and butter manufactories, 51 Vict. c. 32 (O.), but even if it were the court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction. *Regina* v. *Dowling*, 17 O. R. 688.

Committal for Trial — *Discharge on Bail.*] — Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a superior court of law has still power to remove the proceedings on certiorari, but in its discretion it will not do so where there is no reason to apprehend that he will not be fairly tried. *Regina* v. *Adams*, 8 P. R. 462.

Conviction—*Appeal.*] — Where a defendant, having been convicted of evading toll, appealed to the quarter sessions, where he was tried before a jury and acquitted, this court refused a certiorari to remove the proceedings, the effect of which would be to put him a second time upon his trial. *Stewart* v. *Blackburn*, 25 U. C. R. 16.

Conviction—*Appeal.*]—Where a conviction affirmed on appeal to the sessions, was brought up by certiorari, contrary to 32 & 33 Vict. c. 31, s. 71 (D.), as amended by 33 Vict. c. 27, s. 2, which enacts that in such case no certiorari shall issue:—Held, that the court could not quash the conviction (the case being one in which the magistrate had jurisdiction), though it was clearly bad, and

no motion had been made to quash the certiorari. *Regina* v. *Johnson*, 30 U. C. R. 423.

Conviction.]—A conviction having been brought up by certiorari, when, under 32 & 33 Vict. c. 31 (D.), no such writ could issue:—Per Richards, C.J., and Morrison, J., it could not be quashed, but the court could only discharge the defendant. Semble, per Wilson, J., that being before the court it might be quashed. *Regina* v. *Leveque*, 30 U. C. R. 509.

Conviction—*Appeal.*]—Notice of appeal given, but insufficient—Certiorari therefor not taken away. *Regina* v. *Caswell*, 33 U. C. R. 303.

Conviction—*Appeal.*]—Conviction — Appeal under 38 Vict. c. 11 (O.). — Delay — Transmission of papers—Return to certiorari —Duty of justices of the peace. See *Regina* v. *Slaven*, 38 U. C. R. 557.

Conviction Quashed.]—A. engaged B. and his hired man C. to build a house for him, and agreed to pay B. his ordinary wages, and $1 per diem for C. A. making default, was convicted before a magistrate under the Master and Servant Act, and ordered to pay B. $15.50 for C.'s services. A. appealed, but the appeal was adjourned to another session when the conviction was quashed. B. then obtained a summons to shew cause why a certiorari should not issue to return the order quashing the conviction, &c., in the Queen's bench:—Held, that the applicant had a right to the certiorari; but, semble, that the proceedings to reinstate this conviction were unnecessary. *In re Doyle and McCumber*, 4 P. R. 32.

Coroner's Inquisition.]—The improper reception of evidence is no ground for a certiorari to bring up a coroner's inquisition. Regina v. Ingham, 5 B. & S. at p. 200, specially referred to. *Regina* v. *Sanderson*, 15 O. R. 109.

Depositions.]—Quere, as to the power of a Judge in chambers, on an application of a prisoner for his discharge on a bad warrant, to remand him, and in aid of the prosecution to order a certiorari to bring up the depositions, &c. *In re Carmichael*, 10 L. J. 325.

Evidence Rejected.] — Refusal to hear witnesses for defence under 30 Vict. c. 43 (O.). Certiorari not taken away by s. 35. See *Re Holland*, 37 U. C. R. 214.

Evidence Rejected.]—Held, that a defendant is not entitled to remove proceedings by certiorari, to a superior court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. But held, that even had the conviction in this case been moved to be quashed, and an order nisi applied for upon the magistrate and prosecutor for a mandamus, to the former to hear further evidence which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere. *Regina* v. *Richardson*, 8 O. R. 651.

The writ of certiorari is not taken away by s. 28 of 32 & 33 Vict. c. 32 (D.). *S. C.*, 11 P. R. 95.

Illegal Adjudication—*Appeal.*] — The divisional court of Queen's bench has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect to such adjudication; and s. 71 of 32 & 33 Vict. c. 31 (D.), does not take away the certiorari in such a case. *McLellan* v. *McKinnon*, 1 O. R. 219.

Indictment.]—An indictment cannot be removed by certiorari from the court of general quarter sessions to the Queen's bench after verdict, even by consent of the parties. *Regina* v. *Lafferty*, 9 U. C. R. 306.

Indictment.]—Nor from the assizes after judgment pronounced, for the purpose of applying for a new trial. *Regina* v. *Smith*, 10 U. C. R. 99; *Regina* v. *Crabbe*, 11 U. C. R. 447.

Indictment — *Acquittal.*] — After an acquittal in a criminal case, the court refused a certiorari to remove the indictment with a view of applying for a new trial or to stay the entry of judgment, so that a new indictment might be preferred and tried without prejudice. *Regina* v. *Whittier*, 12 U. C. R. 214.

Indictment—*Acquittal.*]—After acquittal for nuisance a motion was made for a certiorari to remove the indictment, with a view to new trial, no ground being shewn by affidavit; and the new trial was moved for on the same day, being the fourth day of term:—Held, that the certiorari, after acquittal, could not issue as of course; but that if it could, it would have been unnecessary to move for a new trial within the first four days of term. *Regina* v. *Gzowski*, 14 U. C. R. 591.

Indictment.]—See *Regina* v. *Ottawa and Gloucester Road Co.*, 42 U. C. R. 478.

Magistrate no Jurisdiction.] — Held, that the defendant appearing, on the evidence returned, to have bonâ fide asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor of B., under ss. 72 or 185 of 12 Vict. c. 82; and that consequently the mayor's summary conviction of the defendant, under that Act, might be quashed by certiorari. *Regina* v. *Taylor*, 8 U. C. R. 257.

Magistrate not Qualified.]—The only evidence offered in proof of an objection that the magistrate before whom the recognizance in this case had been taken, was not properly qualified, was a certificate, purporting to be under the hand and seal of the clerk of the peace, that he did not find in his office any qualification filed by the magistrate:—Held, insufficient. *Regina* v. *White*, 21 C. P. 354.

Sessions—*District Rates.*] — A certiorari lies to remove orders of sessions relating to the expenditure of the district rates and assessments, at the instance of the attorney-

general, without notice. *Rex* v. *Justices of Newcastle*, Dra. 114.

Sessions—*Reasonable Doubt.*]—Where it is shewn to a Judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Master and Servant Act, he will order a certiorari for the removal of the conviction, notwithstanding the confirmation of it by the sessions on appeal. *In re Sullivan*, 8 L. J. 276.

Sessions—*Jurisdiction of Justices.*]—Defendant was convicted under 8 Vict. c. 45 for working on Sunday at his ordinary calling. He appealed to the quarter sessions, where the question was tried before a jury and the conviction affirmed. The proceedings having been removed by certiorari to this court:—Held, that a certiorari would lie, not to examine the finding of the jury on the facts, but to determine whether the justices had exceeded their jurisdiction. *Hespeler* v. *Shaw*, 16 U. C. R. 104.

Sessions.]—The proper proceeding to reverse a judgment of the court of quarter sessions on an indictment is a writ of error, not certiorari and habeas corpus. *Regina* v. *Powell*, 21 U. C. R. 215.

Sessions — *Recognizance to Appear.*]—Held, that a recognizance to appear for trial on a charge of perjury at the sessions was wrong, as the court had no jurisdiction in perjury, but a certiorari to remove it was refused, as the time for the appearance of the party had gone by. *Regina* v. *Currie*, 31 U. C. R. 582.

Sessions.]—It is improper to call on the court of general sessions to shew cause to a rule for a certiorari. *Re Nash and McCracken*, 33 U. C. R. 181.

Sessions.]—In the case of a conviction for an offence, not being a crime, affirmed on appeal to the sessions, the writ of certiorari is not taken away by 38 Vict. c. 4 (O.). *In re Bates*, 40 U. C. R. 284.

Sessions—*Appeal.*]—Quære, whether the right to a certiorari was taken away by an appeal to the quarter sessions. *Regina* v. *Sparham*, 8 O. R. 570.

Sessions—*Appeal.*]—The defendants having been convicted by a police magistrate of an offence against the provisions of C. S. C. c. 95, appealed to the quarter sessions, and the convictions were affirmed. Defendants now applied for a certiorari to remove the convictions, notwithstanding that 32 & 33 Vict. c. 31, s. 71 (D.), as amended by 33 Vict. c. 27, s. 2 (D.), expressly takes away the right to certiorari where there has been an appeal to the sessions:—Held, that where the magistrate has jurisdiction over the offence charged, and the right to certiorari is taken away, the court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the certiorari was refused. *Regina* v. *Scott*, 10 P. R. 517.

Sessions—*Appeal.*] — Held, that though not expressly so enacted, 49 Vict. c. 49 (D.), is retrospective in its operations and applies to convictions whether made before or after the passing of the Act, and that under s. 7 the right to certiorari is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction. *Regina* v. *Lynch*, 12 O. R. 372.

Sessions — *Appeal* — *Rejection of Evidence.*]—The defendant was convicted by two justices of the peace under the Weights and Measures Act, 42 Vict. c. 16, s. 14, s.-s. 2 (D.), as amended by 47 Vict. c. 36, s. 7 (D.), of obstructing an inspector in the discharge of his duty, and was fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing before the justices the defendant tendered his own evidence, which was excluded. The defendant appealed to the quarter sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed. On motion for certiorari:—Held, that the conviction having been affirmed in appeal certiorari was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the justices and the quarter sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by certiorari. *Regina* v. *Dunning*, 14 O. R. 52.

Temperance Act — *Absence of Jurisdiction.*]—Semble, that although the Temperance Act of 1864, 27 & 28 Vict. c. 18, s. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise. *In re Watts, In re Emery*, 5 P. R. 267.

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2. *Notice of Application.*

Conviction in Court.] — Held, that a conviction once regularly brought into, and put upon the files of the court, is there for all purposes, and a defendant may move to quash it, however or at whosesoever instance it may have been brought there. Where, therefore, on an application for a habeas corpus, under R. S. O. 1877 c. 70, a certiorari had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance. Regina v. Levecque, 30 U. C. R. 509, distinguished. *Regina* v. *Wehlan*, 45 U. C. R. 396.

Discharge Asked for.]—Quære, whether the certiorari in this case was properly issued without the notice, &c., required by 13 Geo. II. c. 18, though the object was to obtain the prisoner's discharge, not to quash the conviction. *Regina* v. *Munro*, 24 U. C. R. 44.

Grounds of Objection.]—Semble, that in a notice under 13 Geo. II. c. 18, of application to remove a conviction the grounds of objection to such conviction need not be stated. *In re Taylor* v. *Davy*, 1 P. R. 346.

Magistrate.]—Notice of application for a certiorari must be given to the convicting magistrate, and the want of it is good cause against a rule nisi to quash the conviction. *Regina* v. *Peterman*, 23 U. C. R. 516.

Private Prosecutor.]—The affidavit of service of a notice of motion for a certiorari to remove a conviction, must identify the magistrates served as the convicting magistrates. But an affidavit defective in this respect was allowed to be amended, the time for moving for the certiorari not having expired. Such an objection was held not to be waived by the attorney having accepted service for the convicting justices, and undertaken to shew cause. The notice need not be served on the private prosecutor. *Re Lake*, 42 U. C. R. 206.

Prosecutor's Application.] — Where the application for a certiorari is made by the prosecutor, no notice to the justice is necessary. *Regina* v. *Murray*, 27 U. C. R. 134.

Second Application.] — Where, on an application made after notice to the convicting justices for a rule for a certiorari, the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was—Held, that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices. *Regina* v. *McAllan*, 45 U. C. R. 462.

Sessions.]—Notice of application for a certiorari to remove a conviction confirmed by the quarter sessions, must be given to the chairman and his associates, or any two of them, by whom the order affirming such conviction was made: and where a certiorari had been obtained without such notice, and a rule nisi obtained to quash such conviction and order, the certiorari was set aside. *Regina* v. *Ellis*, 25 U. C. R. 324.

Sessions.]—Held, that, under the circumstances of this case, no notice to the chairman of the sessions of the defendant's intention to move for a certiorari was necessary. *Regina* v. *Caswell*, 33 U. C. R. 330.

Time—*Waiver.*]—A preliminary objection, that the magistrate had not six full days' notice of the application for the writ of certiorari taken on the return of the motion to make absolute the order nisi to quash the conviction, was overruled, on the ground that the magistrate, on the facts appearing in the case, had waived the right to take the objection. *Regina* v. *Whitaker*, 24 U. R. 437.

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3. *Practice and Procedure in General.*

Amending Conviction.]—Held, that an amended conviction cannot be put in after the return of a writ of certiorari. *Regina* v. *MacKenzie*, 6 O. R. 165.

Amending Conviction.]—A magistrate can amend his conviction at any time before the return of the certiorari. *Regina* v. *McCarthy*, 11 O. R. 657.

Conclusive Effect of Return.] — The defendant having been convicted for selling liquor without a license, the depositions returned to the court by the convicting magistrate under a certiorari shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash stated that the party had a license in fact, and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was not proved or given in evidence:—Held, that the return to the certiorari was conclusive, and that the court could not go behind it. *Regina* v. *Strachan*, 20 C. P. 182.

Costs.] — Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and the defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The court, however, has power to make payment of costs a condition of any indulgence granted in such a case, such as the postponement of the trial or a new trial. *Regina* v. *Hart*, 45 U. C. R. 1.

Disputed Facts — *Jurisdiction.*]—Where the proceedings before a magistrate are removed under 29 & 30 Vict. c. 45, the Judge is not to sit as a court of appeal from the findings of the police magistrate upon the evidence which that officer has taken; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a general rule except upon an appeal. *Regina* v. *Green*, 12 P. R. 373.

Evidence Omitted.] — Semble, that if material evidence be given before a magistrate, but unintentionally omitted from his return, an amendment may be allowed to supply it, but only with the concurrence of the parties, and of the witness by whom the deposition was signed, in the correctness of the additions, but it cannot be supplied by affidavit. *Regina v. McNancy*, 5 P. R. 438.

Evidence Required.] — Where a certiorari simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it. *Regina* v. *McNancy*, 5 P. R. 438.

Evidence set out.] — Where a magistrate, on a summary trial, took no written depositions, but the conviction returned to a certiorari set out the evidence:—Held, in the absence of anything to shew that there was any other or different evidence given, that the return must be taken to be a true and full statement. Semble, that had there been proof of any other or different evidence given, the magistrate might have been required to return it, or to amend the conviction by setting it out. *Regina* v. *Flannigan*, 32 U. C. R. 593.

Intituling Papers.]—On application for a certiorari to remove conviction of one J. B., for selling liquor without license:—Held, 1. That the rule nisi was properly intituled "In the matter of J. B.;" and that it need not state into which court the conviction was to be removed, this being sufficiently shewn by the intituling it in the court in which the motion was made. *In re Barrett*, 28 U. C. R. 559.

Irregularity.]—In shewing cause to a rule nisi to quash a conviction, objection may

be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. *Regina* v. *McAllan*, 45 U. C. R. 402.

Mistake in Time.]—Owing to a mistake in the Crown office, a rule to return the certiorari, and afterwards a rule for an attachment issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Joice and Anglin*, 39 U. C. R. 197.

Objections Open.]—Held, that the defendant having had the certiorari directed to the magistrate who had convicted was estopped from objecting that the conviction was in reality made by three justices as appeared from the memorandum of conviction which was signed by them. *Regina* v. *Smith*, 46 U. C. R. 442.

Objections to be Stated.]—A defendant applying for a certiorari to remove an indictment from the sessions must shew that it is probable the case will not be fairly or satisfactorily tried in the court below, and if difficulties on points of law form the ground of application, they must be specifically stated. *In re Kellett and Porter*, 2 P. R. 102.

Practice After Removal.]—A certiorari issued on the 12th April, 1872, on notice of defendant to a police magistrate, to return a conviction for selling liquor without a license. The writ was returned on the 21st May, in Easter term, with conviction and recognizance, and both defendants appeared to it by taking out rules. The prosecutor then obtained a rule nisi to quash the certiorari, and for a procedendo to the police magistrate. But up to this time there had been no motion to quash the conviction:—Held, that the proper practice is, that an appearance to the certiorari should be filed in the Crown office, and the case set down on the paper, so that either party might move for a conviction. That the defendant was in default in not having moved to quash the conviction, or set down the case on the paper. Semble, that an affirmance of the conviction by the prosecutor is necessary to obtain the costs, and further, as this was not done, the court declined to estreat the recognizance. A procedendo was awarded, it being thought more advisable that the police magistrate should enforce the conviction than the court above. *Regina* v. *Flannigan*, 9 C. L. J. 237.

Quashing Certiorari.] — Where the recognizance to prosecute a certiorari, returned after allowance of the latter by the convicting justices together with the conviction, is substantially and clearly bad, and the conviction may possibly be upheld, the allowance of the certiorari may be quashed on the return of the rule nisi to quash the conviction, without a substantive motion for that purpose; but otherwise, where the objection is a trivial one, or the conviction is clearly defective and must inevitably be quashed. *Regina* v. *Cluff*, 46 U. C. R. 565.

Recognizance—*Irregularity.*]— In shewing cause to the rule nisi to quash the conviction, it was objected that the recognizance was irregular, being dated before the conviction, but held, that this was ground only for a motion to quash the certiorari, or the allowance of it. *Regina* v. *Hoggard*, 30 U. C. R. 152.

Recognizance.]—Held, that on the return of a writ of certiorari, a recognizance is unnecessary. *Regina* v. *Nunn*, 10 P. R. 365.

Recognizance.]—Held, that since the passing of the Dominion statute 49 Vict. c. 49, s. 8, there is no longer necessity for a defendant, on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required:—Held, also, that the words "shall no longer apply" in s. 8 mean that from the day of the passing of the statute the Imperial Act 5 Geo. II. c. 19, shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under s. 6 of the Dominion Act. *Regina* v. *Scalwell*, 12 O. R. 391.

Recognizance—*Form.*] — Where the affidavit accompanying a recognizance filed on a motion for a rule nisi to quash a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that they were worth $100 over and above any amount for which they might be liable as sureties, it was held insufficient. The rule in force as to recognizances prior to the passing of the Criminal Code is still in force. *Regina* v. *Robinet*, 16 P. R. 49.

Remedy for False Return.]—The only remedy for a false return to a certiorari is by action on the case at the suit of the aggrieved party, or by criminal information. *Regina* v. *Arnold*, 8 C. L. T. Occ. N. 271.

Supreme Court of Canada—*Inquiring into Merits.*]—Application was made to the Chief Justice of the supreme court of Canada in chambers, on behalf of a person arrested on a warrant issued on a conviction by a magistrate, for a writ of habeas corpus, and for a certiorari to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed. On appeal to the full court:—Held, the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion at which he arrived as to the prisoner's guilt, the supreme court could not go behind the conviction and inquire into the merits of the case by the use of a writ of habeas corpus, and so constitute itself a court of appeal from the magistrate's decision. *In re Trepanier*, 12 S. C. R. 111.

The only appellate power conferred on the court in criminal cases is by s. 49 of the Supreme and Exchequer Court Act, and it could not have been the intention of the legislature while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all summary convictions before police or other magistrates throughout the Dominion. *Ib.*

Section 34 of the Supreme Court Amendment Act of 1876, does not in any case authorize the issue of a writ of certiorari to accompany a writ of habeas corpus granted by a Judge of the supreme court in chambers; and as the proceedings before the court on habeas corpus arising out of a criminal charge are only by way of appeal from the decision of such Judge in chambers, the said section does not authorize the court to issue a writ of certiorari in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court. *Ib.*

To Whom Directed.] — On a motion to quash a conviction by a justice of the peace which had been appealed to the county Judge, an objection that the writ of certiorari was improperly directed to, and returned by the clerk of the peace and county attorney, instead of the county Judge or magistrate, was overruled. *Regina* v. *Frawley*, 45 U. C. R. 227.

Vacation.]—The certiorari to bring up the depositions cannot properly be issued in vacation, returnable before a Judge in chambers. *In re Burley*, 1 C. L. J. 34.

See INTOXICATING LIQUORS, II. 3 (d), IV. 5 (a)—JUSTICE OF THE PEACE, II. 2—NUISANCE, III.—SESSIONS, III. 3, 4.

CESTUI QUE TRUST.

See PARTIES, II. 14 — TRUSTS AND TRUSTEES, I.

CHALLENGE OF JURY.

See CRIMINAL LAW, VIII. 5—TRIAL, V. 2.

CHAMBERS.

See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, III.

CHAMPERTY AND MAINTENANCE.

I. IN GENERAL, 921.

II. STATUTE OF MAINTENANCE, 925.

I. IN GENERAL.

Administration — *Acquiring Claim.*]—O., assuming that the firm of T. & O. of which he was a member had a small claim of about $300 against the estate of A. M. C., a deceased intestate, ascertained that H. & Co. had a large one of over $7,000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A. M. C.'s estate, which they declined to do. H. & Co. offered to sell their claim to him for $2,000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim for the purpose of collecting it, under an agreement by which he was to pay H. & Co. one-half of the amount collected on said claim after payment of costs. H. & Co. did not make themselves responsible for any costs. O. obtained an administration order against M. E. C. the administratrix of A. M. C., who, not knowing anything of the claim on the H. & Co. notes, did not resist the making of the order; but when the facts were elicited in the master's office, and when O.'s own claim was disallowed by the master, filed a petition to have the order set aside on the grounds of champerty:—Held, that as a decree of administration is for the benefit of all the creditors, and as another creditor had established a claim under it, the administration order could not be set aside:—Held, also, that the agreement between O. and H. & Co. was champertous or so strongly savouring of it that it could not be maintained, and that O. could not prove on the notes in this administration suit. Reynell v. Sprye, 1 D. M. & G. 671, and Hutley v. Hutley, L. R. 8 Q. B. 112, considered. *Re Cannon, Oates* v. *Cannon*, 13 O. R. 70. See the next case.

Administration—*Acquiring Claim—Reassignment.*]—O. brought in a claim in certain administration proceedings on promissory notes as signed to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed: (See the preceding case). O. thereupon redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations:—Held, also, that H. & Co. might now assert their title to the notes, and prove on them notwithstanding the former champertous agreement with O. *Re Cannon, Oates* v. *Cannon* (2), 13 O. R. 705.

Assignee of Mortgage Attacking Prior Mortgage.]—Where an assignment was executed by a puisne incumbrancer to another, for the purpose of filing a bill to impeach a prior mortgage for fraud, and which bill was accordingly filed; the court, without determining what might have been the result of a suit brought simply to redeem, or one instituted by the puisne incumbrancer himself, dismissed the bill with costs, notwithstanding the right to redeem formed one alternative of the prayer, it being evident that the alleged fraud was the ground upon which the plaintiff principally relied, and the agreement between the parties savouring strongly of champerty and maintenance. *Muchall* v. *Banks*, 10 Gr. 25.

Assignment of Judgment — *Action by Assignee.*]—See *Cole* v. *Bank of Montreal*, 39 U. C. R. 54.

Discovery — *Pleading.*]—Discovery was not enforceable in equity in cases of champerty and maintenance, nor should it be under the equivalent remedies given by the Judicature Act; and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement. Semble, that the rigorous rules which obtained in earlier days in England are not to be imported into her dependencies without some modification. Ram Coomar v. Chunder, 2 App. Cas., at p. 210, specially referred to.

To an action under Lord Campbell's Act the defendants pleaded that it was brought and maintained under a champertous agreement which disentitled the plaintiff to sue:—Held, that this defence should not be struck out; if proved, it was for the court to say what effect should follow. *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Election Petition — *Contribution to Costs.*]—It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe Election, Edwards* v. *Cook*, 1 H. E. C. 617; 10 C. L. J. 232.

Execution Creditors—*Third Person Aiding.*] — The plaintiffs having a judgment against B. and P., agreed with defendant that if such judgment, or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one-third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if successful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized, were found, on an interpleader issue, to be the claimant's. The plaintiffs thereupon sued defendant on the agreement, for their costs of defence in the interpleader, &c.:—Held, that if such agreement extended to these costs, it was illegal as being contrary to public policy, if not within the definition of champerty: and if it did not so extend the plaintiffs could not recover. *Kerr* v. *Brunton*, 24 U. C. R. 390.

Judgment Creditor of Mortgagor Suing Mortgagee.]—Where one having obtained an assignment of a judgment against a mortgagor brought an action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled so to sue, and that such assignment of judgment was not in contravention of the law respecting champerty and maintenance. *Harper* v. *Culbert*, 5 O. R. 152.

Litigious Rights.] — The plaintiff admitted himself to have been a mere speculative purchaser, buying for less than one-sixth of its value a piece of land which he knew to be in the occupation of another person who claimed to be the owner, from a vendor whom he sought out, and who did not pretend to be the owner of the subject of the purchase, whom the plaintiff agreed to indemnify against the costs of the litigation which both anticipated, and who was to share in the fruits of the contemplated law suit:—Held, that this contract savoured of maintenance and champerty, and was not that honest bonâ fide purchase which alone the registry law was intended to protect. *Wigle* v. *Setterington*, 19 Gr. 512.

Litigious Rights.]—B. became holder of forty shares upon transfers from D. et al., in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a superior court judgment rendered in a suit of one C., other shares, which had been confiscated for similar reasons, were declared to be valid and to have been illegally forfeited. Thereupon B. by a petition for writ of mandamus asked that he be recognized as a member of the society and be paid the amount of dividends already declared in favour of and paid to other shareholders. B.'s action was met, amongst other pleas, by one setting forth that B. had acquired under the transfers in question litigious rights, and that by law he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon, and the cost of transfers:—Held, that at the time of the purchase of said shares, B. was a buyer of litigious rights within the provisions of Art. 1583 Civil Code (Q.), and under Art. 1582 could only recover from the liquidators the price paid by him with interest thereon.—Also, that the exception in Art. 1584, s. 4, of C. C. only applies to the particular demand in litigation which has been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment. *Brady* v. *Stewart*, 15 S. C. R. 82.

Purchase Pending Action for Specific Performance.] — The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between plaintiffs and T., one of the now defendants, pending such suit, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for the security for costs which the plaintiffs had been ordered to give in said suit, and pay all costs incurred or to be incurred therein, or in any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs having sued defendants on the last mentioned covenant:—Held, upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance, and they therefore could not recover. *Carr* v. *Tannahill*, 30 U. C. R. 217.

The plaintiffs replied to the plea on equitable grounds, that in the chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the hearing the cause was compromised, and a decree made by agreement by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties and treated by the court as valid. Remarks as to the effect of this replication. *Ib.*

The plaintiffs having amended their declaration, it was held on demurrer to be still bad, for the promise as stated was not based on the transactions subsequent to the agreement which had been held void for champerty, but that agreement was alleged to be part of the consideration, and being bad avoided the whole contract. *S. C.*, 31 U. C. R. 201.

Held, also, that the denial by these defendants, in their answer in chancery, that the agreement was illegal, could not estop them from asserting such illegality here. *Ib.*

Representative Capacity—*Indemnity.*]—After the hearing and before the appeal was argued, a motion was made to strike the case out of the list, on the ground of maintenance, and it was shewn that one of the defendants did not wish to proceed with this suit; but that as he was pressed to do so by his vestry and churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to costs. Per Boyd, C.—There was maintenance in the suit though not in the criminal sense, and the case should be struck out. Per Proudfoot, J.—There was no maintenance. *Langtry* v. *Dumoulin*, 7 O. R. 644.

Right to Call Trustee to Account.]—An heir-at-law being supposed to have a right to call trustees to account and to impeach sales made by them, such supposed right being considered very doubtful and being one which could only be reached through a suit in this court, he, being himself unwilling to litigate the question, assigned his interest to a third person; and, by the agreement, the consideration for such an assignment was only to be paid in case of success:—Held, that a merely speculative purchase of this kind savouring of maintenance or champerty, could not be enforced in equity. *Little* v. *Hawkins*, 19 Gr. 267.

Security for Costs.]—In ejectment the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure the plaintiff for future services of the same kind, and of £25 already paid and advanced by plaintiff to him, &c., he (M.) covenanted, granted, and agreed that he would stand seised and possessed of the land in question to the use of plaintiff, his heirs, and assigns, by way of charge, security, and mortgage on the land for said money and costs; and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a charge, mortgage, and security upon the land for the amount so to be ascertained, or M. would, and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c.:—Semble, that the instrument was not void for champerty or maintenance. *Miller* v. *Stitt*, 17 C. P. 559.

Solicitor Prosecuting Claim.] — An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void. *O'Connor* v. *Gemmill*, 29 O. R. 47, 26 A. R. 27.

II. Statute of Maintenance.

The mortgagor being in possession at the time of a conveyance in fee by the mortgagee, is no objection to the conveyance, the doctrine of disseisin not applying as between the mortgagor and mortgagee. *Doe d. Dunlop* v. *McNab*, 5 U. C. R. 289; *Doe d. Dunlap* v. *McDougal*, Tay. 464.

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, was not a disseisin of the grantee. *Doe d. West* v. *Howard*, 5 O. S. 462.

Held, that while two persons are in difference about their boundary, and shew by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, and to hold accordingly, either party may convey to a third person so as to enable the alienee to hold according to the true boundary, though there may be some of the land in possession of the other, in consequence of the line between them having been mistaken. *Doe d. Beckett* v. *Nightingale*, 5 U. C. R. 518.

To bring the giving of a note in payment of land within 32 Hen. VIII. c. 9, care must be had to allege enough to meet the provisions of the statute. Where, therefore, the defendant merely averred that the plaintiff was not, for a year next before the bargain, "in receipt of the rents and profits," without saying that he was not "in possession of the land, or of the reversion or remainder thereof:"—Held, plea bad. *Nicolls* v. *Madill*, 6 U. C. R. 415.

A mere verbal bargain for the sale of land would not subject a person to the penalty under 32 Hen. VIII. c. 9, for buying a pretended title. *Aubrey* q. t. v. *Smith*, 7 U. C. R. 213.

A person could not be convicted merely on his own admission, that he had taken a deed from a party out of possession; some evidence aliunde must be adduced of the existence of such a deed. *Ib.*

A tenant holding over is in no case a disseisor. *Doe Charles* v. *Cotton*, 8 U. C. R. 313.

A deed by the reversioner was good, though another person, holding under the life estate of the tenant by the curtesy, was in actual possession. *Doe Burnham* v. *Bowyer*, 8 U. C. R. 607.

An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury and with knowledge of his claim. One M., in 1839, having a right of purchase of a lot from the Crown, mortgaged to DeB. to secure payment of a sum by instalments, the last of which would fall due in 1849. Soon after the mortgage, M. gave to B. a bond for a deed, on certain conditions to be fulfilled by B., who took possession. In 1850, the plaintiff went in under an agreement for purchase from B., who had not fulfilled the conditions of his bond. In 1851, the defendant took an assignment of DeB.'s mortgage, and in the same year he claimed before the heir and devisee commission, making the usual affidavit of ignorance of any adverse claim, and obtained a patent. The plaintiff thereupon brought an action on the case, alleging in the first and second counts that the defendant, maliciously contriving and intending to injure him, represented himself as assignee of the original nominee of the crown and claimed as such before the commission; and in order to defraud the plaintiff, and not having himself any well founded claim, and knowing the plaintiff's claim, made affidavit that he was not aware of any adverse claim, and procured his own claim to be allowed—whereby, &c. The third and fourth counts, founded on the statute 32

Hen. VIII. c. 9, were for buying M.'s pretended right, the defendant being in possession claiming title:—Held, that on the evidence the allegations were not supported; and that admitting them all to be true, no ground of action would be shewn. *Shields* v. *DeBlaquiere*, 12 U. C. R. 386.

A., the owner of lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds; the defendant, A.'s son and heir-at-law, subsequently released to S., the release being recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff sued defendant for the penalty under 32 Hen. VIII. c. 9, for selling a pretended right:—Held, that 14 & 15 Vict. c. 7, would not apply in defendant's favour, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right; but held, also, approving Major q. t. v. Reynolds, H. T. 6 Vict., that by the registration of the deed to S. the conveyance to the plaintiff became fraudulent in its inception, and therefore he could not recover. Semble, that the effect of 14 & 15 Vict. c. 7, is to repeal 32 Hen. VIII., and not merely to permit the sale of a right of entry subject to the penalty. *Baby* q. t. v. *Watson*, 13 U. C. R. 531.

Held, in ejectment, that the defendant being in possession of the land at the date of the deed to the plaintiff, 16th March, 1842, nothing passed to the plaintiff by that deed, as the statute authorizing the conveyance of a right of entry was not then passed. *Bishop of Toronto* v. *Cantwell*, 12 C. P. 607.

Where the grantors were in possession of half the property conveyed, and had an undisputed life estate therein, but their title to the remainder in fee, subject to such life estate, was disputed:—Held, that the rule laid down in Prosser v. Edmonds, 1 Y. & C. 7, did not apply to their grantee of such half, and that the grantee might maintain a bill therefor. In such a case, an objection taken at the hearing to a bill by the grantors and grantees against the adverse claimant of the whole property was disallowed. *Mason* v. *Seney*, 11 Gr. 447.

The plaintiffs were heirs-at-law of M. A. M., a married woman, to whom in 1849, her husband, G. S. M., joining in the deed, one G. conveyed five acres of land, part of a lot of 100 acres conveyed to him in 1841 by the patentee under a Crown grant of the year 1828. G. S. M. was in possession of four acres of the five acres in question for some time before 1835, when he married, and then he and his wife remained in possession of the four acres till 1849, and then of the four acres and the additional one acre till the wife's death in 1864:—Held, affirming 21 C. R. 281, that the deeds from the patentee to G. and from G. to M. A. M. might be upheld, notwithstanding the Statute of Maintenance, 32 Hen. VIII. c. 9. Per Hagarty, C. J. O., and Osler, J. A.—The statute applies only to cases of adverse possession, and there being no evidence one way or the other, the court was not bound to draw the inference that the possession of G. S. M. was adverse to the patentee. If it did apply and G. had only a pretenced title, still that pretenced title had been lawfully acquired by M. A. M. to the strengthening of her possessory title, there being nothing in the statute avoiding such a transaction. Per Maclennan, J. A.—The statute did not apply because the possession of G. S. M. having begun (as Maclennan, J. A., upon the evidence held) while the title was in the Crown, was not then adverse, and would not become so without a subsequent ouster by him of which there was no evidence. Burton, J. A., agreed on that point with Maclennan, J. A., but held that there was no evidence of his prior possession. *Marsh* v. *Webb*, 19 A. R. 564. See the next case.

In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one M., who had entered on the land, was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land, the defendants, claiming title through M., set up the Statute of Limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the Statute of Maintenance, and G. had, therefore, nothing to convey in 1849:—Held, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did, M. could not avail himself of the Statute of Maintenance, as he would have to establish disseisin of the grantor, and the Crown could not be disseised; nor would the statute avail as against the patentee, as the original entry, not being tortious, the possession would not become adverse without a new entry:—Held, further, that if the possession began after the grant, the deed to G. in 1841 was not absolutely void under the Statute of Maintenance, but only void as against the party in possession, and M. being in possession, a conveyance to him would have been good under s. 4 of the statute, and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife, and subsequent acts, was estopped from denying the title of his wife's grantor. *Webb* v. *Marsh*, 22 S. C. R. 437.

For other decisions under 32 Hen. VIII. and the law as it stood before 14 & 15 Vict. c. 7, see *Purdy* q. t. v. *Ryder*, Tay. 236; *Doe Dixon* v. *Grant*, 3 O. S. 511; *Major* q. t. v. *Reynolds*, H. T. 6 Vict.; *May* q. t. v. *Dettrick*, 5 O. S. 77; *McKenzie* v. *Miller*, 6 O. S. 459; *Doe d. Dunn* v. *McLean*, 1 U. C. R. 151; *Doe d. Dettrick* v. *Dettrick*, 2 U. C. R. 153; *Doe d. McMillan* v. *Brock*, 2 U. C. R. 270; *Beans* q. t. v. *Eddie*, 2 U. C. R. 286; *Beasley* q. t. v. *Cahill*, 2 U. C. R. 320; *Baldwin* q. t. v. *Henderson*, 2 U. C. R. 388, 3 U. C. R. 287, 4 U. C. R. 361; *Doe d. Peterson*, v. *Cronk*, 5 U. C. R. 135; *Doe d. Bonter* v. *Savage*, 5 U. C. R. 223; *Doe d. Clark* v. *McInnis*, 6 U. C. R. 28; *Doe d. Moffatt* v. *Scratch*, 5 U. C. R. 351; *Doe d. Simpson* v. *Milloy*, 6 U. C. R. 302; *Nicolls* v. *Madill*, 6 U. C. R. 415; *Doe d. McKenzie* v. *Fairman*, 7 U. C. R. 411; *Ross* q. t. v. *Meyers*, 9 U. C. R. 284; *Doe d. Spafford* v. *Breackenridge*, 1 C. P. 492; *Fraser* v. *Fraser*, 14 C. P. 79; *Smith* v. *Hall*, 25 U. C. R. 554.

CHANGE OF POSSESSION.

See BILLS OF SALE, II.

CHARITY.

See WILL.

CHARTERPARTY.

See SHIP, IV.

CHATTELS.

See LANDLORD AND TENANT, XIV.—LIEN, II., VI.—SPECIFIC PERFORMANCE, IV.—TRESPASS, I.—TROVER AND DETINUE.

CHATTEL MORTGAGE.

See BILLS OF SALE.

CHEQUES.

See BANKS AND BANKING, II.—BILLS OF EXCHANGE—PAYMENT, III. 4.

CHOSE IN ACTION.

I. ASSIGNABILITY AND MODE OF ASSIGNING, 929.

II. EFFECT OF ASSIGNMENT, 933.

III. PERSON TO BRING ACTION, 938.

IV. PLEADING, 943.

V. MISCELLANEOUS CASES, 944.

I. ASSIGNABILITY AND MODE OF ASSIGNING.

Alimony.]—A bond to secure payment of alimony to the wife, was held, not to be assignable. *Reiffenstein* v. *Hooper*, 36 U. C. R. 295.

Bill of Exchange.] — Defendant purchased goods from L., who said he would draw on the defendant through the Merchants Bank, and did so; and the manager of the bank swore that he discounted the bill for L. on the faith of L.'s representation that defendant owed him the money and would call and accept it:—Held, that this was not sufficient to constitute an equitable assignment of the debt by L. to the bank; and that the payment of the draft by the defendant to the bank after L.'s insolvency, was therefore no defence against a purchaser of L.'s estate from the official assignee, in an action for the price of the goods. *Lamb* v. *Sutherland; Lamb* v. *Allen*, 37 U. C. R. 143.

Bill of Exchange — *Letter.*]—Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when it was discounted, and the holder neglected to put on double stamps as required by the statute, it was held not to constitute an equitable assignment of the fund of the drawer in the hands of such corporation, but the drawer having written to the corporation directing them to pay such draft from the fund coming to him, such letter was held to constitute a good equitable assignment. *Robertson* v. *Grant*, 3 Ch. Ch. 331.

Bill of Exchange.]—One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order on the defendant in the following form:—"Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. road, and charge to my account:"—Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable. *Hall* v. *Prittie*, 17 A. R. 306.

Cheque.]—The holder of a cheque by the mere fact of its being drawn in his favour, acquires no right of action in equity as upon an equitable assignment against the drawee. *Caldwell* v. *Merchants Bank of Canada*, 26 C. P. 294.

Contract—*Estoppel.*]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, and of which they were duly notified: "Pay to the order of D. the sum of $306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone:—Held, that there was a good equitable assignment in favour of D. of money due on the 1st June; and that defendants, by the payment of the other order, were estopped from denying that there were sufficient moneys then due to the contractor to cover his order. *Bank of British North America* v. *Gibson*, 21 O. R. 613.

Contract—*Evidence of Intention.*]—The contractor for the erection of a building for the defendants during its progress gave to various persons orders upon the defendants for sums due them by him, in the following form:—"Dungannon, September 12, 1890. To the directors of the Dungannon Driving Park Association. Please pay to D. M. the sum of $——, and oblige (signed) T. F. H., contractor:"—Held, that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants. Hall v. Prittie, 17 A. R. 306, followed. The evidence, however, shewed that there was only one fund out of which the directors could be expected to pay the orders; that the nature of that fund and its origin were well known to all the parties; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and these persons expected to get, orders which were to be paid out of the contract price; and that the directors understood the orders as intended to deal with portions of the contract price, and to be payable only out of that particular fund:—Held, that the court should look to the real intention of all the parties to the transaction, and give effect to it, by declaring that the contractor did make an equitable assignment to each of the orderholders of a portion of the fund. *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 264.

Covenant — *Assignment of Covenant by one Joint Covenantee to his Co-covenantees.*]—One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. 1887 c. 122, assign to his co-covenantees his interest

in the covenant, and they can then sue upon it without joining him as plaintiff. A conveyance of the equity of redemption to one of several joint mortgagees, he convenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt. *Scarlett* v. *Nattress*, 23 A. R. 297.

Debentures.]—Assignment of debentures and coupons for interest. See *McKenzie* v. *Montreal and Ottawa Junction R. W. Co.*, 27 C. P. 224; 29 C. P. 333.

Grain to be Shipped.]—One W., plaintiff's tenant, being in arrear for rent, and having wheat in the barn, had a settlement with plaintiff, when plaintiff told him he must give him security before he would allow him to ship his grain. It was agreed that plaintiff should see defendant, to whom W. had been in the habit of shipping his produce, and ascertain whether he would accept an order from W. for the grain. Defendant agreed to accept the order, which he drew out, mentioning, however, no amount. Plaintiff and W. then saw defendant, when W., in defendant's presence, signed an order on defendant for $299.85 in the plaintiff's favour, which defendant said he would pay as soon as he realized on the grain. There was conflicting evidence as to whether plaintiff did or did not tell defendant that unless he got the order he would not let the grain go; but he admitted that he drew the order, and its execution by W., and that he told plaintiff he would pay it. The grain had not at that time been, but was on the 4th of October following, shipped to defendant, who subsequently sold it and paid the proceeds to W., who had verbally instructed him before the receipt of the grain not to pay the order in plaintiff's favour, though written instructions to that effect did not reach him until after its receipt:—Held, that plaintiff was not entitled to recover as an assignee of a chose in action under R. S. O. 1877 c. 116; but, held, that the property was stamped with the equitable right, and that defendant was not merely cognizant of such claim, but had promised to co-operate in enforcing it, and that when the property reached his hands he was bound to carry out the trust, and no interference on W.'s part could relieve him from the obligation. *Mitchell* v. *Goodall*, 44 U. C. R. 398, 5 A. R. 164.

Insurance — *Covenant in Mortgage.*]—Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting short forms of mortgages operates as an equitable assignment of the insurance when effected. *Greet* v. *Citizens' Ins. Co.*; *Greet* v. *Royal Ins. Co.*, 5 A. R. 596; 27 Gr. 121.

Insurance—*Assignment before Loss.*]—The interest of the insured in a policy of insurance upon chattels may, before loss, be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels. *McPhillips* v. *London Mutual Fire Ins. Co.*, 23 A. R. 524.

Judgment.]—Assignment of foreign judgment. *Fowler* v. *Vail*, 27 C. P. 417.

Money Payable under Award.] — Plaintiff sued on an arbitration bond, alleging an award that defendant should pay the plaintiff a sum of money, and convey to him certain lands, and assigning as breaches nonpayment and neglect to convey. Defendant pleaded as to the first breach, that since 35 Vict. c. 12 (O.), the plaintiff had assigned to one B. the money awarded, of which defendant had notice:—Held, a good plea; for that such assignment of the money alone, without the bond, was valid under the Act. *Wellington* v. *Chard*, 22 C. P. 518.

Non-acceptance by Debtor.] — Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, which order the debtor was notified of, but did not accept:—Held, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered. *Farquhar* v. *City of Toronto*, 12 Gr. 186.

Negligence.]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—Per Armour, C.J.—The claim did not by virtue of R. S. O. 1887 c. 122, s. 7, pass to the plaintiff so as to enable him to maintain an action therefor in his own name, but in any event no negligence was proved. On appeal to the divisional court the judgment was affirmed on the ground of the absence of any proof of negligence, but per MacMahon, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 23 O. R. 696.

Parol Assignment.] — A parol assignment of a chose in action is valid, notwithstanding s. 7 of the Mercantile Amendment Act, R. S. O. 1887 c. 122. *Trusts Corporation of Ontario* v. *Rider*, 24 A. R. 157; affirming 27 O. R. 592.

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

Partner.]—D. C., one of two partners, in consideration of $100 paid to him, assigned to the plaintiff a debt of $118, due to the firm for goods sold to the defendant in the ordinary course of business, by a deed made and executed in his individual name, without his partner's knowledge, but by which he professed to transfer all debts due to the two

partners, naming them, from the defendant. At the trial his partner swore that he considered himself bound by the assignment, and that he thought that D. C. had authority to make it:—Held, that the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other. Held, also, that, even in the absence of implied authority, the subsequent ratification was sufficient. Held, also, that the transfer being by deed did not deprive it of its effect as a written contract. *Howell v. McFarland*, 2 A. R. 31.

Power of Attorney to Sell.]—A debtor had executed several chattel mortgages to secure indorsers of his paper, and afterwards a power of attorney to their appointee to sell and pay the mortgage debts:—Held, that the power was in effect an equitable assignment. *Patterson v. Kingsley*, 25 Gr. 425.

Purchase Money.] — While the defendants C. & E. were negotiating with the defendant J. for the purchase of his stock of goods, the plaintiffs presented to C. & E. an order upon them for part of the anticipated purchase money, which order they had obtained from J. in payment of a debt due by him to the plaintiffs. This order C. & E. refused to pay or accept. The sale was subsequently completed, and the price paid in full to J.:—Held, that no charge on the purchase money had thus been created, and payment therefore could not be enforced against C. & E. Mitchell v. Goodall, 5 A. R. 164, and McMaster v. Garland, 8 A. R. 1, observed upon and explained. *Brown v. Johnston*, 12 A. R. 189.

Rent.]—Rent to accrue is not a chose in action. *Harris v. Meyers*, 2 Ch. Ch. 121.

Work to be Done.]—It is no objection to an assignment in equity of a claim against a third person, that the work upon which the claim is to arise has yet to be performed. *Buntin v. Georgen*, 19 Gr. 167.

A printer being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, which he refused to supply unless secured therefor; thereupon a memorandum was signed with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the completion of the work:—Held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the general authority of the managers of the business. *Ib.*

The customer, after having been notified of this arrangement, paid the amount to the printer:—Held, that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee. *Ib.*

II. Effect of Assignment.

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

Attorney for Sale of Land—*Advances—Attorney Purchasing.*]—The attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself:—Held, that he was not personally liable to pay the amount of the charge. Judgment below, 27 O. R. 511, reversed. Execution of the document creating the further charge was proved by affidavit, and attached to it but without any proof of execution were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the registrar and registered:—Held, affirming the judgment below, 27 O. R. 511, that the defect in registration was cured by s. 80 of the Registry Act, R. S. O. 1887 c. 114, and that the attorney, who subsequently became the purchaser of the lands in question, was affected with notice of the plaintiff's rights. *Armstrong v. Lye*, 24 A. R. 543.

Contract—*Subsequent Assignee.*] — The plaintiff being liable as surety for P., P. gave him an order for the amount on the government, for whom P. was working. This order P. countermanded before any acceptance by the government. The debt having been paid by a sale of the plaintiff's property, and P.'s contract having been assigned to M., who received from the government the money due upon it:—Held, that M. was bound to pay the amount of the order. *Foote v. Matthews*, 4 Gr. 366.

Contract—*Cross-claim.*] — Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. 1877 c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J., his right to do so depended wholly upon R. S. O. 1877 c. 116, s. 10. In this case the learned Judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *Exchange Bank v. Stinson*, 32 C. P. 158.

Contract—*Right of Contractee to Make Deductions.*]—A contract between the defendants and the plaintiff's assignor for the paving of a certain street provided that the former might deduct and pay the price of any materials unpaid for by the latter. The contractor assigned to the plaintiff all moneys to become due under the contract, of which the defendants were duly notified. Subsequently the defendants deducted from the contract moneys the amount of a claim for

materials furnished to the contractor, and paid the same:—Held, that they had a right so to do, the plaintiff's assignment being necessarily subject to the provisions of the original contract. *Farquhar* v. *City of Toronto*, 26 O. R. 356.

Contract—*Default.*]—The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of (plaintiff) $400 value received and charge to account of (contractor)," and the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than $400 of the contract price had yet to be earned, and the defendant put an end to the contract and completed the building, the cost being more than the contract price:—Held, that the order was not a bill of exchange because the time of payment was indefinite, nor an equitable assignment because the fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor, or some one on his behalf, and that by reason of his default no liability arose. Brice v. Bannister, 3 Q. B. D. 569, distinguished. *Thomson* v. *Huggins*, 23 A. R. 191.

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

Debenture — *Creditors of Assignor.*] — The holder of a debenture issued by the trustees of a Methodist church, transferred it without consideration, by signing an indorsement as follows:—"Pay to J. G. or order" —and delivered the same to the indorsee:—Held, that such transfer did not vest the debt in the transferee so as to prevent the claims of the creditors of the original holder attaching upon it. *Gott* v. *Gott*, 9 Gr. 165.

Equities—*Fraud.*]—A bond was executed for the conveyance of real estate, which by the contrivance of the agent of the obligee, falsely stated that the purchase money agreed upon had been all paid to the obligor, which bond the obligee transferred to a bonâ fide assignee for value, who filed a bill to enforce the execution of a conveyance. The court, however, following the rule that the assignee of a chose in action takes subject to all equities affecting the same, refused a decree except upon the terms of payment of such sum as might, on taking an account, be found due to the obligor in respect of the purchase money. *Gould* v. *Close*, 21 Gr. 273.

Equities — *Mortgage.*] — The assignee of a mortgage, like the assignee of a note (after maturity) or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument. *Elliott* v. *McConnell*, 21 Gr. 276.

Equities.]—The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. The goods were so taken, and defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H., the mortgagee, verbally agreed to pay these executions, which were made part of the money secured:—Held, that the defendant, as assignee, took subject to such agreement (which did not vary the terms of the mortgage), though without notice of it; and that the plaintiff therefore was improperly nonsuited. *Martin* v. *Bearman*, 45 U. C. R. 205.

Equities.]—Held, that the fact that L. had assigned to his wife his claim against the company for payment for services rendered by him after the winding-up order had been acted on, made no difference to a claim of the company against him for a debt based upon a breach of trust, since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order. *Re Bolt and Iron Co., Livingston's Case*, 14 O. R. 211; 16 A. R. 397.

Life Insurance.]—A debtor, or trustee of a fund, is not responsible to an assignee of the creditor, or payee of the fund, for dealing with the latter persons without reference to the assignment unless it is found either that at the time of so dealing he actually knew of the assignee's title, or that he had previously received a notice sufficiently distinct to give him an intelligent apprehension of the fact that the assignee had acquired an

interest in the claim or fund. A life insurance company issued two policies upon a man's life, one policy being payable generally and the other to his wife. The assured made an assignment for the benefit of his creditors, and the assignee, who at the time knew only of the policy payable generally, wrote to the company referring to this policy by number and informing them of the assignment. The assured's wife had died before the assignment was made and the policy in her favour had become part of the assured's estate and had passed to the assignee. A few weeks after notice of the assignment had been given to the company the assured informed them of his wife's death, and obtained from them the surrender value of the policy in which she was named as beneficiary. There was no imputation of bad faith, and the officers of the company swore that they had, at the time, no recollection of notice of the assignment for the benefit of creditors having been given:—Held, that under the circumstances the company were not responsible for paying the surrender value of the policy to the husband. *Crawford* v. *Canada Life Assurance Company*, 24 A. R. 643.

Mortgage — *Interest.*] — The Trust and Loan Co., being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual:—Held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest. *Reid* v. *Whitehead*, 10 Gr. 446.

Payment after Notice.]—By the terms of a deed of surrender of a lease of a farm to the plaintiff, the lessee W. was to have the privilege of reaping or selling the fall wheat sown, on payment of the rent in advance, or securing it by first of October, 1878. On that day arriving without such payment or security, the plaintiff refused to allow its removal, whereupon W. offered to give plaintiff an order for $290.85, the amount of rent alleged to be due, on the defendant, a commission merchant to whom W. was accustomed to send his grain for sale, if defendant would accept it. The plaintiff accordingly saw defendant, who said he would accept it if it was all right, and drew up an order in plaintiff's favour, which W. signed. The grain was then shipped to defendant, and sold by him. Before the grain arrived, or at all events before it was sold, W. verbally notified defendant not to pay plaintiff, and the defendant requiring written notice, W. wrote defendant stating that he had found plaintiff's account incorrect, and not to pay plaintiff without further instructions. The defendant thereupon, although expressly notified by the plaintiff's solicitor that the plaintiff insisted on his right to be paid, paid over the amount of the order to W.:—Held, affirming 44 U. C. R. 398, that there was a good equitable assignment, and the plaintiff was therefore entitled to recover. *Mitchell* v. *Goodall*, 5 A. R. 164.

Set-off — *Estoppel.*] — Defendant having pleaded a set-off to an action upon a covenant for the payment of money, the plaintiff replied on equitable grounds, in substance, that the deed declared on, and the money sued for, were before this action, and before the alleged set-off had accrued, duly assigned for value by plaintiff to D., and by D. to B.; that defendant had notice of and assented to both assignments, and that this action was brought for B.'s benefit, the plaintiff being a nominal plaintiff only; that after the said assignments and notice thereof B. sued defendant in the plaintiff's name on the same covenant for another breach, to which defendant pleaded non est factum, and a verdict and judgment were recovered against him, which he paid; and it is inequitable that he should now set up the defence pleaded:—Held, on demurrer, replication good. *Dennison* v. *Knox*, 24 U. C. R. 119.

Set-off.]—By an agreement for the dissolution of a firm, it was provided that all claims and demands, notes, bills and book accounts belonging to the firm were to be collected by the plaintiffs, who were to be the owners thereof, and by virtue of which the plaintiffs sued defendant for a balance alleged to be due for goods sold and delivered by the firm to defendant, who set up a claim for damages for non-delivery of goods by the firm, which arose before the dissolution of the partnership:—Held, a valid assignment of a debt due by defendant to the plaintiffs; and that the defendant could set off the claim for damages arising by reason of a breach of the agreement under which the debt arose. The difference between the Imperial and Ontario Choses in Action Act referred to. *Scyfang* v. *Mann*, 27 O. R. 631.

III. Person to Bring Action.

Action by Assignee—*Adding Assignor.*] —An assignee of a chose in action having improperly sued, an amendment by adding the name of the assignor as a plaintiff, was refused on appeal after trial, as such an amendment could only have been made on payment of all costs, and this would have been of no practical advantage to the assignor, who could still sue in his own name. *Wood* v. *McAlpine*, 1 A. R. 234.

Agreement to Convey Land.] — Land having been conveyed in consideration of the grantee agreeing to convey a certain portion to a third person, who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion. *Shaw* v. *Shaw*, 17 Gr. 282.

Assignor Trustee.]—A party may assign a chose in action so as to make himself a trustee for the assignee, and give the latter the right to use his name to collect the debt. *Ham* v. *Ham*, 6 C. P. 37.

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

Contract—*Sale of Goods—Non-delivery.*]—Defendants agreed with R. to sell and deliver to him a quantity of lumber by a certain day. After that day R., with defendants' assent, assigned the contract and all his interest in it to plaintiff, and defendants afterwards told the plaintiff's agent they would carry out the contract, and delivered some of the lumber to plaintiff:—Held, the suit being commenced before 35 Vict. c. 12 (O.), that the plaintiff was only the assignee of a chose in action, and could not sue defendants for not delivering the rest of the lumber. *Eakins* v. *Gawley*, 33 U. C. R. 178.

Costs—*Absolute Assignment.*]—B. and D. having a claim against a company, B. assigned his interest in it to D. upon certain trusts, in which, however, B. had no interest:—Held, that the assignment was absolute and B. entitled to sue:—Held, also, that B. having been president of the company when the costs were incurred was no objection. *Duff* v. *Canadian Mutual Fire Insurance Co.*, 9 P. R. 292.

Covenant to Pay for Buildings.]—Lessor covenanted with lessee that he would at the expiration of the term pay him his heirs or assigns a valuation for his buildings on the land devised:—Held, that the assignee of the term and of all claims under the covenants in the lease could as the assignee of a chose in action, sue in his own name the executors of the covenantor under R. S. O. 1877 c. 116, s. 7. *In re Haisley*, 44 U. C. R. 345.

Covenant—*Judgment—Estoppel.*]—One D. had recovered three judgments against different persons, one in the county court and two in the Queen's bench. The defendants, being assignees of these judgments, received payment of and discharged the county court judgment, and afterwards by deed assigned to one F. the said several judgments, covenanting that they had received no payment thereon, and had not released any part thereof. F. assigned to M. "the said several judgments," and said assignment to him, "and all benefits to be derived therefrom, either at law or in equity." And M., by deed, indorsed on the assignment to himself, assigned to the plaintiff "all his right, title, interest, and claim to and in the said several judgments referred to in the within assignment thereof:"—Held, that the plaintiff could, in his own name, sue the defendants on their covenant, either as assignee of the covenant under 35 Vict. c. 12 (O.), or as having an equitable right to enforce the covenant, against defendants for a "purely money demand," under s. 2 of the A. J. Act of 1873; and that it could not be said that there being no judgment to assign, the covenant could not be assigned as incident to it, for defendants by their deed and covenant were estopped from asserting that the judgment had then been paid. Held, also, that there was clearly no champerty or maintenance in the assignment from F. to M., or from M. to the plaintiff. *Cole* v. *Bank of Montreal*, 39 U. C. R. 54.

Creditor Assigning to Himself and Partner.]—B. assigned to his partner and to himself a debt due from defendant to himself for goods sold, &c.:—Held, that under 29 Vict. c. 28, and 35 Vict. c. 12 (O.), B. and his partner could sue for this debt in their joint names. *Blair* v. *Ellis*, 34 U. C. R. 466.

Damages—*Action Quia Timet.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm. Mewburn v. Mackelcan, 19 A. R. 729, and Leith v. Freeland, 24 U. C. R. 152, distinguished. Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Damages—*Solicitor — Negligence.*] — A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—Per Armour, C.J., at the trial:—The claim did not by virtue of R. S. O. 1887 c. 122, s. 7, pass to the plaintiff so as to enable him to maintain an action therefor in his own name, but in any event no negligence was proved. On appeal to the divisional court the judgment was affirmed on the ground of the absence of any proof of negligence, but per MacMahon, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 23 O. R. 636.

Insurance Moneys.]—C. by instrument under seal assigned to defendant, as security for moneys due, his interest in certain policies of insurance on which he had actions pending. C. afterwards gave to B. & Co. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. & Co. indorsed the order and delivered it to plaintiff by whom it was presented to the defendant, who wrote his name across its face. B. & Co. afterwards delivered to plaintiff a document signed by them stating that having been informed that the indorsed order was not negotiable by indorsement, to perfect plaintiff's title and enable him to obtain the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same. The defendant having received the amount due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. & Co. and C. being necessary to protect C.'s rights, C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill:—Held, that the question of want of parties was res judicata by the judgment on the demurrer and could not be raised again by the answer. Even if it could the judgment was right as C. was not a necessary party. As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defend-

ant, and was treated by all the parties as a negotiable instrument. Defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order. *McKean* v. *Jones*, 19 S. C. R. 489.

Mortgage.]—Where an assignment of a mortgage on land is absolute in form, though as a matter of fact the assignor retains a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. *Ward* v. *Hughes*, 8 O. R. 138.

Nominal Assignee.] — An assignee, in order to obtain the benefit of 35 Vict. c. 12 (O.), must take the beneficial interest in the claim assigned. He cannot sue in his own name where the assignment has been made only in order to enable him to bring the action. An amendment by adding the name of the assignor as a plaintiff was refused at this stage. *Wood* v. *McAlpine*, 1 A. R. 234.

Notice of Assignment.] — The Revised Statutes of Nova Scotia, 4 ser., c. 94, s. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the supreme court as his assignor might have done, and s. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice:—"Pictou, Nov. 21st, 1878. Alex. Grant, Esq.: Admin. Estate of Alexander McDonald, deceased. Dear Sir,—You are hereby notified in accordance with c. 94 of the Revised Statutes, s. 357, that the debt due by the above estate to Findlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him. S. H. Holmes, Atty. of Alex. D. Cameron:"—Held, that the notice was sufficient compliance with the statute. *Grant* v. *Cameron*, 18 S. C. R. 716.

Notice of Transfer — *Condition Precedent to Right of Action—Quebec Law.*]—See *Murphy* v. *Bury*, 24 S. C. R. 668.

Proceeding in Equity.]—To enable the assignee of a chose in action to proceed in equity for its recovery, he must shew the existence of some difficulty or obstacle to prevent him from recovering at law. *Ross* v. *Munro*, 6 Gr. 431.

Purchaser—*Money Due to Vendor.*]—K. owned a propeller which had been employed by government, for whom S. was acting as agent. He sold her to the plaintiff, and addressed the following letter to S.: "Dear Sir,—As owner of the pro. 'S. C. Ives,' now employed by you on account of the Canadian government in conveying materials to Point au Pelé light house, I beg to inform you that I have this day conveyed to E. J. Sterling, Esq., of Cleveland, all my right to the payment of moneys for services performed by said boat under our contract. You will therefore, after presentation of this, account to him or his agent for such sums as said boat may be entitled to on account of work performed under our contract." At the foot of this the plaintiff signed an order to pay the money to the captain of the vessel. This money was afterwards seized by the sheriff under an attachment against K., which was subsequently set aside. Whether it was so seized in the hands of S. or of the captain did not appear:—Held, reversing 17 U. C. R. 361, that the plaintiff could not maintain an action for the money in his own name against the sheriff. *Sterling* v. *McEwen*, 18 U. C. R. 466.

Quebec Law—*Moneys Entrusted for Investment — Transfer — Prête-nom.*] — See *Moodie* v. *Jones*, 19 S. C. R. 266.

Quebec Law — *Personal Right — Invalid Assignment.*] — See *Demers* v. *Duhaime*, 16 S. C. R. 366.

Re-assignment.] — Under the provisions of R. S. O. 1887 c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.—Where creditors refused to accept the benefit of an assignment under R. S. O. 1887 c. 124, and the assignor was notified of such refusal and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock-in-trade who sold the goods in an improper manner. *Rennie* v. *Block*, 26 S. C. R. 356.

Receiver.]—A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring action in his own name for the collection of debts due to a certain grange, and brought this action pursuant thereto, it was held, that an amendment should be made adding the grange as co-plaintiffs without security being given for their costs, they being insolvent. If there was no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGuin* v. *Fretts*, 13 O. R. 699.

Receiver.] — S. recovered a judgment against S. S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under the will of the latter. The share not being paid over plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action:—Held, that the right of action was in S. S. and not the plaintiff; by his appointment the plaintiff became entitled to receive the amount, and the defendants, the executors, having notice of his appointment, could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name. McGuin v. Fretts, 13 O. R. 699, followed. *Stuart* v. *Grough*, 14 O. R. 255.

Security.]—On an award directing defendant to pay to the plaintiffs $320, one of the plaintiffs, H., indorsed the following memorandum:—"I hereby assign the within award in this matter to W. N., to secure payment of the sum of $130, this day lent and advanced by him to me, and I hereby authorize him in my name to take all necessary steps for the collection of the amount of said award for me, and retain thereout his $130." B., the other plaintiff, indorsed a memorandum under seal on the award confirming the above assignment:—Held, that the assignment did not, under 35 Vict. c. 12, s. 1 (O.), enable the assignee to sue in his own name, for it was not an absolute assignment of the assignors' whole interest in the award, but a pledge to secure a much smaller sum, and the words of the assignment shewed that the assignee was not intended to have such right. *Hostrawser* v. *Robinson*, 23 C. P. 350.

Security—*Assignor Suing.*]—On the 21st June, 1876, the plaintiff assigned to one S. all his claim under the lease, with power to use his name for the collection of the same; but it was proved that this assignment was intended as security only for money lent by S. to the plaintiff:—Held, following Hostrawser v. Robinson, 23 C. P. 350, that the plaintiff, notwithstanding 35 Vict. c. 12 (O.), might sue in his own name. *Dawson* v. *Graham*, 41 U. C. R. 532.

IV. Pleading.

An averment in a declaration that a chose in action "was duly assigned in the manner required by the Act:"—Held, sufficient. *Cousins* v. *Bullen*, 6 P. R. 71.

A plea of assignment of the debt sued before action should state the name of the assignee or allege that it is unknown to defendant. *Ferguson* v. *Elliott*, 12 C. L. J. 249.

In an action brought by the assignees of a chose in action, a plea that the assignment was made without consideration was ordered to be struck out. *Bain* v. *McCarthy*, 13 C. L. J. 298.

To an action on the common counts, defendant pleaded that before action plaintiff, by an instrument in writing, assigned the debt and causes of action in the declaration mentioned to F. and A. Replication, that before action said F. and A., by an instrument in writing, duly re-assigned the said debt, &c., to the plaintiff:—Held, replication good, and not a departure from the declaration. *O'Connor* v. *McNamee*, 28 C. P. 141.

A declaration on the common counts, by the Postmaster-General, alleged that defendants were indebted to one M., who assigned such debt or chose in action to the plaintiff:—Held, sufficient, under 38 Vict. c. 7 (D.), without alleging that the debt was connected with plaintiff's office, that being a matter of evidence. *Postmaster-General* v. *Robertson*, 41 U. C. R. 375.

Declaration, that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of $500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c.:—Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. Mitchell v. Goodall, 44 U. C. R. 398, and Brice v. Bannister, L. R. 3 Q. B. 569, distinguished. *Smith* v. *Ancaster Township*, 45 U. C. R. 86.

The second count stated that D., being largely indebted to plaintiff, and being pressed by him for payment, it was agreed that D. should assign to plaintiff, to secure part of said debt, $500 due and to become due to D. by defendants for work done by D.: that D. gave plaintiff an order upon defendants to pay same to plaintiff: that plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before December, 1879, they would pay the $500 to him: that by said representation plaintiff was prevented from proceeding against D. to recover said $500: that afterwards and before said December, defendants being liable to pay said sum, and well knowing that plaintiff, relying on said representation, refrained from such proceedings, paid the same over to D., in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff:—Held, good, as disclosing a cause of action upon an assignment of a debt due by defendants to D. for work and labour performed for them by D., and a promise on their part to plaintiff to pay such debt. *Ib.*

V. Miscellaneous Cases.

Act Retrospective.]—Held, that 35 Vict. c. 12 (O.), applies to assignments made and causes of action accrued before as well as after the passing of the Act; and that the declaration in this case shewed a sufficient assignment. *Wallace* v. *Gilchrist*, 24 C. P. 40.

Conditional Assignment.]—Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid to return the order, and he subsequently proceeds against the drawer, in respect of such claim, he cannot afterwards enforce his equitable claim against the drawee. *Muir* v. *Waddell*, 14 Gr. 488.

Crown.]—Where a chose in action was assigned, inter alia, for the general benefit of creditors, all the parties interested being before the court and the Crown making no objection, the court gave effect to such assignment. Quære, in the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Execution.]—Writs of execution only bind moneys, choses in action, or securities for money from the time of seizure by the sheriff, and not from the time either of the

issue of the writs or delivery thereof to the sheriff. *McDowell* v. *McDowell*, 10 L. J. 48.

Execution — *Equitable Interest of Purchaser under Contract.*]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of fieri facias against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract. Re Prittie and Crawford, 9 C. L. T. Occ. N. 45, declared to have been inadvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 650.

Re-assignment.] — The plaintiff transferred a covenant for the payment of $4,000, executed by four persons in his favour, to the defendant by an absolute assignment, as security for $2,000; the defendant giving to the plaintiff a separate agreement to "re-assign" on payment of the loan and interest. On a bill to obtain a re-assignment, alleging that such loan had been repaid, the court made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston* v. *Wood*, 27 Gr. 515.

Separation of Counties.]—A recovery by one of two counties, after dissolution, for moneys paid during the union:—Held, to be allowed by 12 Vict. c. 78, s. 15, notwithstanding the technical rule of law against assignment of debts. *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 82.

Succession—*Acceptation of by Minor Subsequent to Action.*] — The acceptation of a succession subsequent to action and pendente lite on behalf of a minor as universal legatee has a retroactive operation. *Martindale* v. *Powers*, 23 S. C. R. 597.

See PARTIES, II. 1.

CHRISTIANITY.

Attack on Christian Doctrines.] — Held, that Christianity in general, and not simply the tenets of particular sects, is part of the recognized law of this Province; and therefore that to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon the fundamental doctrines of Christianity, was a good defence. *Pringle* v. *Town of Napanee*, 43 U. C. R. 285.

CHURCH.

I. CHURCH OF ENGLAND.
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I. CHURCH OF ENGLAND.

1. *In General.*

Church Society—*Synod.*] — The church society of the diocese of T. had become united to and incorporated with the synod of the diocese by Act of parliament. A bond for security for costs of appeal, &c., had been filed, and a motion made to allow such bond, which was objected to on the ground that such bond could not be properly executed without the concurrence of at least one-fourth of the diocese, and unless at least one-fourth of the congregation were represented:—Held, that the synod was bound by what had been done by the proper officers of the former corporation, without waiting for the action of the synod, and that there was an implied authority in the Act authorizing them to take such a proceeding as that in question on behalf of and in the name of the synod; and a stay of proceedings, pending the appeal, was granted. *Boulton* v. *Incorporated Synod of the Diocese of Toronto*, 2 Ch. Ch. 377.

Church Society.]—By the Act of incorporation, 7 Vict. c. 68, the church society of Toronto is enabled to hold real estate without any license for that purpose. *Church Society of the Diocese of Toronto* v. *Crandall*, 8 Gr. 34.

Church Society—*Breach of Trust.*]—A bill will lie by a member of the corporation of the church society of the diocese of Toronto, on behalf of himself and all other members of the society, to correct and prevent alleged breaches of trust by the corporation; and to such a bill the attorney-general is not a necessary party. *Boulton* v. *Church Society of the Diocese of Toronto*, 15 Gr. 450; *S. C.*, 14 Gr. 123.

Clergy Reserves.]—The 18th clause of 4 & 5 Vict. c. 100, does not apply to clergy reserves. *Byers* v. *Moore*, 5 U. C. R. 4; *Doe d. Weisenberger* v. *McGlennon*, 5 U. C. R. 138.

See Martyn v. *Kennedy*, 4 Gr. 61.

Commutation Fund — *Alteration of By-law.*]—The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the synod to be from time to time passed for that purpose." In 1860 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each $200, with a provision for increase in certain events. In 1873 the plaintiff became entitled

under this by-law, and in 1876 the synod (the successors of the church society) repealed all previous by-laws respecting the fund, and made a different appropriation of it:—Held, affirming 9 A. R. 411, which reversed 29 Gr. 348, that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. *Wright* v. *Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95.

Diocesan Fund.]—The Diocesan Church Society of Nova Scotia, holds a fund for distribution among the Church of England clergymen of the Province, and one of the rules governing its distribution is that no clergyman receiving an income of $1,000 and upwards from certain named sources shall be entitled to participate:—Held, affirming 21 N. S. Rep. 309, that a rector was not debarred from participating in this fund because the salary paid to his curate, if added to his own salary, would exceed the said sum of $1,000, his individual income being less than that amount. *Diocesan Synod of Nova Scotia* v. *Ritchie*, 18 S. C. R. 705.

Evidence.]—As to evidence to prove the contents of a canon of the church society or synod. See *Langtry* v. *Dumoulin*, 7 O. R. 499.

As to evidence to establish the status of certain rectors. See *S. C.*, 7 O. R. 499.

Excommunication — *Injunction.*] — An attendant at an Episcopal church, and one of the lay members of the synod therefrom, filed a bill against the incumbent of the church praying, amongst other things, that the defendant might be restrained from refusing to allow the plaintiff to partake of the Lord's Supper, and from suspending or excommunicating the plaintiff as a member of that congregation or church:—Held, that, although the facts were as alleged by the bill —though denied by the answer—this court had not any jurisdiction to enforce the claim of the plaintiff, as no civil right of the plaintiff had been invaded, the office of lay representative giving only an ecclesiastical, not a civil status. But the court being of opinion that all the grounds of defence, other than that of want of jurisdiction, had signally failed, on dismissing the bill, refused the defendant his costs. *Dunnet* v. *Forneri*, 25 Gr. 199.

Incumbent — *Refusal to Convey.*] — The incumbent of a church, without the consent of the bishop or churchwardens, took a deed of land in his own name as such incumbent, the property having been previously contracted for by the bishop and certain members of the congregation for the site of a church, and on his retirement refused to execute a release. The court ordered him to execute such a release of the estate; and, as his conduct had been unreasonable, refused him his costs, although in strictness the bill, so far as it sought a conveyance, ought to have been dismissed, title having already vested in his successor. *Sanson* v. *Mitchell*, 6 Gr. 582.

Incumbent—*Removal — Trial—"Immorality."*]—The Rev. J. H. being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the bishop under the canon in that behalf of the synod of the said diocese No. 8, "To enquire into the causes which led to the closing of the said churches, and to report whether there was lawful excuse for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient primâ facie ground for instituting further proceedings against the said Rev. J. H. as provided by said canon." The commissioners reported that the churches had been closed "because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches:" that an estrangement existed between the said Rev. J. H. and his parishioners, and they declined his ministrations. But that in the opinion of the commissioners, the proofs adduced were not of such a nature as could be relied on to procure a conviction in an ecclesiastical court; and they declined to recommend the prosecution of further legal action, although they believed there was no hope of a restoration of his ministerial usefulness there, and that there was a primâ facie ground for instituting further proceedings against him as provided by the canon; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said canon being sustained. After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the bishop, by an instrument under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. E. T. as his successor, and the synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the Rev. J. H. to compel the synod to pay him such proceeds:—Held, that the offences (if any) came within the second section of the canon; that any one charged with such an offence has the right to be tried, under section one, by the diocesan court, and has the right of appeal to the metropolitan, under section thirteen; that the bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the diocesan court; and that the plaintiff must succeed:—Held, also, that the general word "immorality" as used in the canon was not restricted by the words following, specifying particular offences, for such offences were not of the same nature as the general word. *Hallwell* v. *Incorporated Synod of the Diocese of Ontario*, 7 O. R. 67.

Incumbent's Salary — *Liability of Churchwardens.*]—The churchwardens of an Anglican congregation which has adopted the free seat system, and in which the only revenue is derived from the voluntary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose. Judgment below, 28 O. R. 452, affirmed. *Daw* v. *Ackerill*, 25 A. R. 37.

Pew—*Grant—Secret Trust — Ejectment.*]—Defendant, being the holder of pews in the church of St. James in Toronto, belonging to the Church of England, conveyed the same by deed to plaintiff, a member of that church. The deed was in reality so made to plaintiff in trust for a corporation, to secure a loan by them to defendant, and several members of the corporation belonged to other religious denominations. Plaintiff was not described in the deed as a member of the Church of England, but the evidence at the trial shewed that he had been in the habit of attending the services of that church:—Held, that there was sufficient evidence that the plaintiff belonged to the Church of England, and that it was not necessary that he should have been so described in the deed. *Ridout* v. *Harris*, 17 C. P. 88.

Held, also, that the deed, even if clothed with an unexpressed trust in favour of a corporation incapacitated under the Church Temporalities Act from being pew holders, by reason of their not belonging to the Church of England, was nevertheless not void in the eye of a court of law because it was apparently good on its face, and it was therefore binding between the parties. Semble, that a court of equity would set aside the deed on account of the existence of such secret trust, but that a court of law would not recognize it even if it were set out. *Ib.*

Held, also, that plaintiff could not maintain ejectment for pews because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the sheriff. *Ib.*

Case is the proper remedy for the disturbance of the right to occupy a pew. *Ib.*

Definition of the words "absolute purchase," contained in s. 7 of the Church Temporalities Act. *Ib.*

The court in banc, after verdict and exception taken, amended the record in ejectment by adding the words, "lands and premises," to the property sued for. *Ib.*

Presentation to Living.]—By 31 Geo. III. c. 31, his Majesty and his successors were empowered to authorize the governor of the province of Quebec to erect parsonages or rectories therein according to the establishment of the Church of England; and in pursuance thereof Sir John Colborne in 1836, then lieutenant-governor, erected and endowed the rectory of K. By a subsequent provincial statute the church society of the diocese of T. was incorporated, and by a later statute the right of presentation was vested in it. Subsequently the legislature erected the diocese of O. out of the diocese of T., and the bishop, clergy, and laity of the diocese were incorporated under the name of the "Incorporated Synod of the Diocese of Ontario," who, by a by-law in 1862, invested the then bishop with the right to appoint to all rectories during his incumbency. The bishop afterwards, on the death of the incumbent, presented to the rectory of K.; whereupon an information was filed by the attorney-general, on the relation of certain of the parishioners, against the bishop and the rector, praying to have such by-law of the synod declared void and set aside. A demurrer by the bishop and rector for want of equity was allowed, the court considering that under the several Acts and proceedings which had been passed and taken the right of presentation was vested in the bishop during his incumbency. But, quære, if the church society of the diocese of T., before the setting off of the diocese of O., had passed a by-law similar to the one passed by the synod of O., whether the right to make such presentation did not remain with the bishop of T. *Attorney-General* v. *Lauder*, 9 Gr. 401.

Presentation to Living—*Consultation.*]—By one of the canons of the Episcopal church in this Province it was provided "that on the vacancy of any rectory, incumbency, or mission within the diocese * * the appointment to the vacancy shall rest in the Lord Bishop of the diocese; * * provided that before making such appointment the bishop shall consult with the churchwardens of said parish or mission, and with the lay representatives of the same:"—Held, that the consultation here referred to was not intended to be by correspondence, but in a personal interview with the churchwardens and lay representatives, so as to afford an opportunity of stating reasons for or against any nominee to fill such vacancy; the suggestion and discussion of other names; the state of the congregation, its likings and dislikings; what would be for the advantage of the church, the circumstances of the locality, and all the numberless particulars that might or ought to have an influence in guiding the opinion of the bishop in filling such vacancy. But, quære, if after such consultation it is not left discretionary with the bishop to comply with the wishes of the delegates, and exercise his own judgment as to what is best for the congregation, even in contravention of the wishes of the delegates. Held, also, that the facts in this case did not shew that any consultation had been had with the representatives of the congregation as to the appointment of the plaintiff to the incumbency, before it was made. *Johnson* v. *Glen*, 26 Gr. 162.

Rector—*Representative Capacity.*]—Upon an application by the churchwardens of St. James' church for leave to appeal from the judgment of the chancery divisional court (7 O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further) as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the litigation; and that the applicants had not such an interest as entitled them to be made parties to the action, and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application should have been made in this court or in the court below. *Langtry* v. *Dumoulin*, 11 A. R. 544. See *S. C., sub nom. DuMoulin* v. *Langtry*, 13 S. C. R. 258.

Temporalities Act.]—3 Vict. c. 74, for the management of the church temporalities, is not confined to parish churches, but embraces all churches in communion with the united church of England and Ireland. *Sanson* v. *Mitchell*, 6 Gr. 582.

Will—*Time—Bishop and Rector.*]—A will is in contemplation of law a "conveyance."

Therefore under the words of s. 16 of 3 Vict. c. 74, "by deed or conveyance," a person may devise, as well as grant by deed, lands to the church of England for the purpose of that Act. *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

A. made his will in 1843; in 1846 he added a codicil merely appointing a new executor "of his will written above:"—Held, that the codicil was a confirmation and not a revocation of the will, which must be still considered as a will made in 1843. Held, that a will as a conveyance is perfect at the time of its execution, though its effect cannot be felt till the death of testator, and that therefore the condition of s. 16 of 3 Vict. c. 74, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will. *Ib.*

A devise under 3 Vict. c. 74, made to the bishop and the rector, is good, notwithstanding the statute speaks of a conveyance to the bishop or rector, &c. *Ib.*

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2. *Churchwardens.*

Action—*Change of Churchwardens.*]—A bill was filed by the churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice, it was held that a notice to dismiss the bill served on the plaintiffs' solicitor was regular. Quære, was it necessary to make the new churchwardens parties. *McFeeters* v. *Dixon*, 3 Ch. Ch. 84.

Bequest to Incumbent — *Action by Churchwardens.*]—Where a testator bequeathed unto the incumbent of a certain church all the property he might die possessed of, to be used for the relief of the poor of the church, to be dispensed by the said incumbent, and the churchwardens brought an action, on behalf of themselves and all the members of the congregation, against the executors, to have the estate administered, and for a declaration that the incumbent was entitled to distribute the fund, and an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church:—Held, on demurrer to the statement of claim, that it was bad in substance, for the churchwardens had no title to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made, and who was not a member of the congregation in the same sense as the plaintiffs and the other members, and s. 6 of the Church Temporalities Act, 3 Vict. c. 74, did not authorize them to sue. *McClenaghan* v. *Grey*, 4 O. R. 329.

Semble, that the said section gives churchwardens authority in certain specified matters, in which all the members of the church are interested, but here the bequest was only to a particular class, viz., the poor of the church, and therefore not within the section. Clowes v. Hilliard, 4 Ch. D. 413, and New Westminster Brewing Co. v. Hannah, 24 W. R. 889, followed, and Werderman v. Société Générale d'Electricité, 19 Ch. D. 246, distinguished. *Ib.*

Contract by Predecessors.]—Under the Church Temporalities Act, 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens, forming a corporation under the Act, so as to be capable as such of suing or being sued, must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by lease from the churchwardens. The churchwardens of a church where the sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church. *Anderson* v. *Worters*, 32 C. P. 659.

Election — *Persons Entitled to Vote.*]—The court has jurisdiction to set aside an improper election of a churchwarden, and for that purpose to carry on a scrutiny of votes. A party so complaining is not compelled to resort to proceedings by mandamus, the remedy in this court being speedy, and there being nothing in the machinery or practice to prevent the decision being equally accurate. *Tully* v. *Farrell*, 23 Gr. 49.

Under the Church Temporalities Act (3 Vict. c. 74, s. 2), all persons of either sex holding pews, whether as owners or lessees thereof, or holding sittings therein under certificates or other memoranda from the churchwardens, are entitled to vote at vestry meetings held for the election of churchwardens. *Ib.*

Where a person claims to be entitled to a vote as holder of a sitting in a pew, the voter must, if required so to do, produce a certificate shewing that the voter holds by leave of the churchwardens; but no particular form of certificate is necessary; a receipt for the rent of such sitting is sufficient. This, however, is not necessary in the case of the lease of a pew; there a verbal lease suffices. *Ib.*

In a proceeding to set aside the election of a churchwarden:—Held, that it was too late, at the hearing, for the defendant to object that the bill should have been on behalf of the plaintiff and such of the members of the vestry as voted for him only; not on behalf of all the members thereof. *Ib.*

On the 29th March, the day of the election of a churchwarden, application was made to rent a pew for three months from the 1st April following, and the application was granted:—Held, that this did not confer a right on the applicant to vote at such election. *Ib.*

Where the absolute owners of pews authorize the churchwardens to lease the same or rent sittings therein, the lessees or occupiers are entitled to vote for churchwardens. *Ib.*

Where on an election of churchwardens several votes of women were taken in favour of the defendant, and the plaintiff, the unsuccessful candidate filed a bill to set aside the election on this, amongst other grounds, the court though it dismissed the bill, refused to make any order as to costs; the unusual course adopted of females voting having invited inquiry, and the court being of opinion that, under the circumstances, the defendant ought to maintain the right to vote at his own expense. *Ib.*

The absolute purchase of a pew in a church creates in the purchaser a fee simple, which is not subject to forfeiture by reason of a change of residence of the purchaser, or his ceasing to frequent such pew; and he may bargain, sell, or assign his interest to another, being a member of the Church of England; or the pew may be apportioned into sittings

amongst several grantees or assignees, either for value or without consideration, each of whom will have a voice in the election of churchwarden; so also the owner of a pew may devise the same, and in the event of intestacy, his interest therein will, like his other freeholds, descend to his heirs-at-law. *Ib.*

Incumbent's House—*Rent.*]—Upon an action against two churchwardens, (by name,) describing them as "the churchwardens of Christ's church, in the village of W.," &c., for the use and occupation of a house rented by the previous churchwardens for the rector: —Held, that under s. 6 of 3 & 4 Vict. c. 74, the action was properly brought; 2. that the taking of the premises and occupation by the clergyman under the previous churchwardens, with the sanction of the vestry and the defendants, was sufficient to bind them as churchwardens. *Maynard* v. *Gamble*, 13 C. P. 56, 407.

Incumbent's Salary.]—Plaintiff sued defendants as churchwardens for his stipend as the incumbent of a church. It appeared that several resolutions were adopted in vestry as to the salary of the clergyman, but only one subsequent to the defendants' acceptance of office, which related to an old balance:—Held, that as plaintiff's claim rested on a voluntary undertaking of the vestry, and the evidence shewed no contract between plaintiff and defendants founded upon a consideration between them, the defendants were entitled to judgment. *Carry* v. *Wallace*, 12 C. P. 372.

Incumbent's Salary—*Voluntary Contributions.*]—Where the free pew system has been adopted in an Anglican church, and the voluntary contributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys whereout to pay his salary. *Daw* v. *Ackcrill*, 28 O. R. 452; 25 A. R. 37.

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3. *Rectory Lands.*

Adverse Possession.]—A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Hill* v. *McKinnon*, 16 U. C. R. 216.

Ejectment.] — In ejectment by a rector for glebe land, he must prove presentation, institution, and induction. *Doe Creen* v. *Friesman*, 1 U. C. R. 420.

Ejectment.]—Quære, in the case of successive incumbents, as to the necessity of such proof in the case of each. *Henderson* v. *White*, 23 C. P. 78.

Lease.]—Lease by rector—Covenant as to cutting timber and clearing — Construction. *Lundy* v. *Tench*, 16 Gr. 597.

Lease.]—One G., a rector, in 1861, leased land to plaintiff for twenty-one years, at an annual rent, with a proviso for re-entry on non-payment. Semble, that such lease was binding on the rector and those claiming under him until forfeited. *O'Hare* v. *McCormick*, 30 U. C. R. 567.

Lease—*Insurable Interest of Lessee.*]—A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Ins. Co.*, 20 C. P. 170.

Leases—*Rights and Powers of Rectors.*]—On the 19th January, 1824, the Crown granted to O. S., G. M., and J. M., in fee, certain land, which had formerly been set apart for a rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and his successors forever, upon the same trusts thereinbefore expressed. On the 21st January, 1836, letters patent issued erecting a rectory in Kingston. Before the 10th May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day by deed poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust, conveyed the land to the said O. S., as rector and incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them. To this was appended another deed poll of the same date, executed by O. S., and declaring for himself and his heirs, that as one of the trustees named in the patent of 1824, he agreed to this assignment, and held the same in his capacity of rector and incumbent of Kingston, and not otherwise. In 1842 O. S. leased the land for twenty-one years, with certain covenants for building and renewal. In this lease he was described as rector, and it recited the two patents of 1824 and 1836. The successor of O. S. brought ejectment against defendants, claiming under this lease:—Held, on the authority of Doe d. Bowyer v. Judge, 11 East 288, that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that: for, semble, in a court of law the ground that the trust to convey being joint was incapable of severance could not arise, the legal estate only being in question. *Lyster* v. *Kirkpatrick*, 26 U. C. R. 217.

But for that decision, semble, that if the appointment of O. S. as rector rendered him ipso facto incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate, vested in him in trust in his natural capacity, to himself as a rector and corporation sole; that whether the grantees in the patent were to be treated as taking a power or as trustees owning the fee, the conveyance by two only of the three was

inoperative; and, semble, that they were trustees. *Ib.*

The two-thirds having passed to O. S. as rector by the conveyance, he still held the remaining third in his natural capacity, and the joint estate was thus severed, for as rector he could not be joint tenant with a natural person. *Ib.*

The law of England in respect to the rights and powers of rectors as to the land vested in them as such, is in force in this country; and in this case the provisions in the defendants' lease respecting renewal were not binding on the plaintiff, as the successor of O. S., the lessor and first rector. *Ib.*

Held, that defendants were not estopped by the lease from denying the power of O. S. to lease, for the recitals professed to shew what title he had. *Ib.*

By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongs others, to convey the same to the incumbent whenever the governor should erect a parsonage or rectory in K. and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in K. In May, 1837, the trusts for which the patent of 1824 had been issued having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and to his successors, subject to the uses and trusts set forth in the grant to them. In 1842 the incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successor to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises:—Held, that the incumbent, either as trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which a priori would extend the lease beyond the twenty-one years. *Kirkpatrick* v. *Lyster*, 13 Gr. 323; 16 Gr. 17.

Held, also, that the mere demand of rent by the successor of the lessor (after the expiration of the twenty-one years) was not such an affirmance of the covenants in the lease as would estop him from disputing them. *S. C.*, 13 Gr. 323.

Rectory Endowment.]—Under the Constitutional Act, 31 Geo. III. c. 31, and the royal commission, Sir J. C., the lieutenant-governor of U. C., had authority to create and endow rectories without any further instructions. The public events in the Province of Upper Canada between 1826 and 1836, were not sufficient to warrant the presumption that such authority had been revoked or suspended. *Attorney-General* v. *Grasett*, 5 Gr. 412; 6 Gr. 200.

Under 31 Geo. III. c. 31, a patent establishing and endowing a rectory or parsonage is not void for want of a grantee being named in it; nor for not defining the limits of the parish within which the rectory was to be, it being established in and for a certain township. *Ib.*

Rectory Endowment.] — Certain land was granted by patent from the Crown, dated 26th December, 1817, to D. B., J. B. R., and W. A., as trustees, for the sole use and benefit of the parishioners of the town of York for ever, as a churchyard and burying ground for the inhabitants of the said town of York, and appurtenant to the church then built thereon. This patent was surrendered to the Crown, and another, dated 4th September, 1820, was issued to the same trustees, reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses hereinafter stated, which trusts were as follows:—"In trust to hold the same for the sole use and benefit of the resident clergyman of the said town of York, and his successors appointed or to be appointed rectors of the Episcopal church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use," * * and when a rectory was erected, and an incumbent appointed * * "the trustees should convey to such incumbent * * and his successors for ever as a corporation sole to and for the same uses and upon the same trusts." Certain other lands were also granted by another patent from the Crown, dated 26th April, 1819, to W. D. P., J. B., and J. S., upon trust to observe such directions, and to consent to and allow such appropriation and disposition of them, and to convey the same in such manner as should thereafter be directed by order in council. These lands were subsequently conveyed by W. D. P., J. B., and J. S. to the other trustees, D. B., J. B. R., and W. A., by deed dated 4th July, 1825, reciting an order in council dated 2nd December, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the order in council), "upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal church, according to the rites and ceremonies of the Church of England therein, to which the said lands are appurtenant," which deed contained a proviso for conveyance by the trustees, upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th September, 1820. The town of York was subsequently incorporated as the city of Toronto, and by letters patent, dated 16th January, 1836, a parsonage or rectory was erected and constituted in the said city of Toronto, designated as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James, and 800 acres of land were set apart as a glebe or endowment, to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or rectory of St. James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of the 4th July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the then trustees, granted the said lands described in the said

patent and deed to the said the Hon. and Rev. J. S., rector of St. James, and his successors in the said rectory for ever as a corporation sole, to and for the same uses and upon the same trusts as are mentioned and expressed in the patent and deed. The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th February, 1847, and was in possession of the said lands, and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th March, 1882. In the year 1866 the statute 29 & 30 Vict. c. 16, intituled, "An Act to provide for the Sale of Rectory Lands in this Province," was passed by the parliament of Canada, which gave the incorporated synod of any diocese of the United Church of England and Ireland in Canada, or the church society, with the consent of the synod where the synod was not incorporated, "full power and authority to sell and absolutely dispose of any lands granted by the Crown in such diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for, any rectory of the said church in such diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested." In a suit brought by the incumbents of several rectories which were subsequently erected in the said city of Toronto, and the synod of the diocese of Toronto, to have the lands covered by the patent of 1820, and the deed of 1825, divided under the provisions of that Act, it was held, affirming 7 O. R. 499, that the lands in question were covered by the terms of the Act: that prior to the year 1866 there were rectory lands derived directly from the clergy reserves, and lands specially granted to trustees, which were treated as endowments for rectories, and that the legislature intended to deal with both classes: that the delivery up and cancellation of the patent of 1817, being to correct an error, could not be held to be such a consideration as would make the patent of 1820 a grant for value: that Crown grants which were of a quasi public character were different from private gifts, and the synod in the case of the former, had petitioned for and obtained the power they desired; that 14 & 15 Vict. c. 175, s. 2 (C. S. C. c. 74), afforded strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain, as well as out of the clergy reserves. *Langtry* v. *Dumoulin*, 7 O. R. 644.

Held, affirming the judgment of the courts below, that the lands in question in this case, were rectory lands within the meaning of the Act 29 & 30 Vict. c. 16, intituled "An Act to provide for the sale of rectory lands in this Province." Held, also, that the lands were held by the rector of the church of St. James, Toronto, as a corporation sole for his own use, and not in trust for the vestry and churchwardens or parishioners of the rectory or parish of St. James, and such vestry and churchwardens had therefore no locus standi in curiâ with respect to said lands. *Dumoulin* v. *Langtry*, 13 S. C. R. 258.

Rectory Endowment.]—The church of St. James was erected into a rectory "at the city of Toronto within the said township (York)," by patent under 31 Geo. III. c. 31, s. 38, in 1836, and was endowed at different times with lands situate, some in the city of Toronto, and some in the township of York. When the lands were sold under 29 & 30 Vict. c. 16, and the proceeds had to be distributed by the synod of Toronto under 41 Vict. c. 69, there were incumbents of parishes in the city of Toronto and in the township of York, and it was contended that only the incumbents of the city parishes were entitled to participate in the distribution. On a special case being stated for the opinion of the court, it was—Held, that the city of Toronto was, for the purposes of the grant erecting the rectory, to be considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory, and that the incumbents of the churches in the township must, under 41 Vict. c. 69, s. 2, be included among the participants in the fund: —Semble, there would appear to have been no authority for the creation of a rectory in this Province other than a rectory for a township. *Incorporated Synod of the Diocese of Toronto* v. *Lewis*, 13 O. R. 738. *Synod of Huron* v. *Smith*, 13 O. R. 755 *n.*

II. Church of Rome.

Bishop—*Borrowing Power.*]—Held, that the R. C. bishop of S., incorporated by 8 Vict. c. 82, as "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada," had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such bishop, which was used in the construction of the episcopal residence and for the purposes of the church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation. *Ruitz v. Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 U. C. R. 269.

The bishop was described in the instrument as "R. C. bishop of Sandwich;"—Held, that this variance from the corporate name was immaterial. *Ib.*

III. Presbyterian Church.

Union Act—*Constitutionality—Dissent.*]—The Act of Union of the Presbyterian churches (38 Vict. c. 75) professes to deal with the funds of colleges at Montreal and at Quebec and with other funds outside of the Province of Ontario:—Held, that although, in respect of these matters, the Act was ultra vires, this did not invalidate the whole Act. *Cowan* v. *Wright*, 23 Gr. 616.

The Act passed for the union of the several Presbyterian churches named therein (38 Vict. c. 75) provides (by s. 2) that any congregation in connection or communion with any of them may, at a meeting of the congregation regularly called according to the constitution of such congregation or the practice of the church with which it is connected, determine, by a majority of the votes of those entitled to vote, not to enter the union, and in such case the congregational property of such congregation shall remain unaffected. By the "model constitution" of one of the churches, by which certain congregations, who had assumed to vote themselves out of the union, were governed, such meetings are to be called by public intimation after divine service on at least one Sabbath ten days previous to the day of meeting, and the decisions are to be by a majority of votes of the male persons present of the

full age of twenty-one who are members or adherents of the church and who reside within the bounds of the same. The meeting at which a congregation had attempted to vote itself out of the union was called on the 12th and held on the 13th, and the voting thereat was confined to the male communicants over the age of twenty-one years:—Held, that the vote was invalid, and that the congregational property was vested in the trustees for the use of the congregation of the united body. In the case of another congregation such vote was taken not at any meeting of the congregation but by depositing votes in the collection plate for two successive Sundays:—Held, that this vote was also invalid, and the same results followed as to the property of the congregation. *Ib.*

Where the members of a congregation of the Presbyterian Church had attempted to vote themselves out of the union of the churches effected by the statute (38 Vict. c. 75) but by reason of their irregular proceedings had failed to do so, an injunction was granted at the instance of the members of the body who had gone into the union to restrain the dissenting portion of such congregation from interfering with their use of the church. *Ib.*

Union Act—*Dissent.*]—Held, under the circumstances appearing in this case, that the anti-unionists had not properly voted themselves out of the union within the six months prescribed in the statute respecting the union of the Presbyterian churches, 38 Vict. c. 75 (O.), and that the property in question, belonged to the Presbyterian Church in Canada, the meeting at which they had assumed to vote themselves out having, according to the practice of the church, been irregularly called by an announcement from the pulpit on Sunday for the following Tuesday; which announcement was made by a minister who had formally dissented from the union, then performing divine service therein, though not duly appointed to the church, the congregation being what is termed a "vacant congregation." Observations on the meaning of "the practice of the church," and the "constitution of the congregation" mentioned in the second section of the Act. Semble, that immediately upon the consummation of the Act of Union, the congregational property of the various churches composing the union became subject to the jurisdiction of the united body, and that the right of dissentients was merely one of withdrawing the property from the union in the manner indicated in the Act. *McRae* v. *McLeod*, 26 Gr. 255.

Union Act—*Dissent.*]—In pursuance of notices duly given from the pulpit by the officiating clergyman, a member of the united Presbyterian body and belonging to the presbytery, a meeting of the congregation was held, at which the members unanimously passed a vote of dissent from the union:—Held, that such dissent entitled the congregation to hold its property as it had held it before the Act of the Legislature was passed for the purpose of uniting several bodies of Presbyterians in Canada. *Decks* v. *Davidson*, 26 Gr. 488.

Union Act—*Minister's House.*]—In 1836, by letters patent, lands were granted to trustees in fee, to hold the same to and for the benefit of the Presbyterian minister for the time being, incumbent of the Presbyterian Church of Scotland then erected in the township of Eldon. The defendant, who had always been a member of such Presbyterian body, was duly inducted as incumbent of the said church and so continued when, in 1875, an Act of the Legislature of Ontario was passed for the union of the several Presbyterian churches then existing in Ontario, but the members of this church voted themselves out of the said union as provided by the Act, notwithstanding which the defendant gave in his adherence to the union:—Held, under these circumstances, that the lands granted by the said patent, as also the church and other buildings erected thereon, belonged to and were the property of the congregation; and that the defendant having joined the union was no longer entitled to hold possession or receive the benefits of the same. *McPherson* v. *McKay*, 26 Gr. 141; 4 A. R. 501.

Union Act — *Pecuniary Interest.*] — In a suit for a declaration of the invalidity of the Quebec Act and relief:—Held, that the plaintiff, as a contributor to the fund affected by 22 Vict. c. 66, was entitled to sue, and that his suit was not barred by reason of the Quebec Act having been passed in conformity with the resolution of a synod of the church to which he belonged. *Dobie* v. *Temporalities Board*, 7 App. Cas. 136.

See S. C., as to constitutionality of the Union Act.

IV. Religious Institutions Generally.

1. *Acquisition and Sale of Property.*

Form of Deed.]—A deed of church property ought to shew how the successors to the trustees named are to be appointed. *In re Baptist Church Property of Stratford*, 2 Ch. Ch. 388.

Minister's Residence.]—Land vested in trustees for the use of, and as a place of residence for, a minister of a religious body, and for such other purposes as the ministers of such body, at their general conference, might from time to time appoint, is not "land held by trustees for the use of a congregation or religious body" within C. S. U. C. c. 69. *In re Methodist Episcopal Church Property in Churchville*, 1 Ch. Ch. 305.

Registration of Deed.]—A deed to come within 24 Vict. c. 43, extending the time for registration of deeds to religious institutions, must have been registered within a year after the passing of it. *In re Baptist Church Property of Stratford*, 2 Ch. Ch. 388.

Repeal of Act.]—36 Vict. c. 36, s. 18, after repealing C. S. U. C. c. 69, and other Acts, contained the following words: "Saving any rights, proceedings, or things legally had, acquired or done under the said Acts, or any of them:"—Held, that these words preserved to rights, proceedings, and things completely had, acquired or done, the efficacy which they had under the Act repealed, but did not continue the operation of the repealed Act for the purpose of perfecting rights, proceedings or things not completely had, acquired or done. *Re United Presbyterian Congregation of London*, 6 P. R. 129.

Where there was a material error in a confirmation deed of lands sold with the sanction of the court under C. S. U. C. c. 69, an

application made after the repeal of that Act for an order authorizing the execution of a new deed was refused. *Ib.*

Sale—*Congregation's Powers.*]—Under 12 Vict. c. 91, the trustees of lands held in trust for the benefit of religious bodies, with the consent of the governing body, can alone exercise the powers given by the Act. A contract for the sale of such lands made in compliance with a resolution of the congregation, by a member of a committee appointed to dispose of such lands, is invalid. *Irving* v. *McLachlan*, 5 Gr. 625.

Sale—*Congregation Ceasing to Exist—Sanction of County Judge.*]—In an application under the Vendor and Purchaser Act, R. S. O. 1887 c. 112, in which the surviving trustee of a congregation, which had separated and ceased to exist, was making title to land belonging to the said congregation, but useless for its original purpose:—Held, following Attorney-General v. Jeffrey, 10 Gr. 273, that the trust had not come to an end:—Held, also, that the sanction of the sale and the approval of the deed by the county Judge as provided for by R. S. O. 1887 c. 237, s. 14, s.-s. 3, is sufficient in lieu of all that is required by s.-ss. 1 and 2:—Held, also, that the statute 9 Geo. IV. c. 2, s. 1, gave to the trustees "the corporate attribute of succession," and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell. *Re Wansley and Brown*, 21 O. R. 34.

Sale—*Daily Paper.*]—Trustees in selling some church property under R. S. O. 1887 c. 237, s. 13, advertised on the same day of the week for four successive weeks in a daily paper:—Held, not a sufficient compliance with the provision of the statute directing publication in a "weekly paper," to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered. *Re East Presbyterian Church and McKay*, 16 O. R. 30.

Sale—*Terms.*]—To effect a sale by trustees under the Act respecting the property of religious institutions in Upper Canada, it is essential that all the requirements of the statute should be complied with, and therefore that the public notice should state the terms of the intended sale. *In re Second Congregational Church Property, Toronto*, 1 Ch. Ch. 349; *Re Baptist Church Property of Stratford*, 2 Ch. Ch. 288.

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2. *Special Trust for Church Purposes.*

Change in Church Government.]—Where real property was given by deed in trust for the Methodist Episcopal Church in Canada, according to the rules adopted by the general annual conference, and that when any of the trustees or their successors should cease to be a member of that church, such trustee should vacate his trusteeship; and at a general conference the majority did away with episcopacy, and having appointed new trustees, claimed the property from the old trustees on the ground that, as they had not conformed to the rules of the general conference, they had ceased to be trustees according to the terms of the trust deed, and the new trustees took possession of the property:—Held, on ejectment brought by the old trustees, that they were entitled to recover, the conference having no power to do away with episcopacy, and the old trustees by continuing in the original church having complied with the terms of the deed. *Doe d. Trustees of Methodist Episcopal Church* v. *Bell*, 5 O. S. 344. But this decision was afterwards overruled in *Doe d. Reynolds* v. *Flint*, M. T. 4 Vict., (not reported,) which was upheld in *Doe d. Methodist Episcopal Trustees* v. *Brass*, 6 O. S. 437.

Change in Church Government.]—The owner of land agreed to sell a site for a burial ground and church, in connection with the Free Church of Scotland, if a congregation thereof could be gotten together. A church was built thereon, and a congregation in connection with the Free Church assembled and performed divine service therein. Several years afterwards the great body of the congregation abandoned their connection with the Free Church; and they, in conjunction with the vendor, assumed to hold possession of the church to the exclusion of such of the members as continued to adhere to the Free Church. On an information filed in the name of the Attorney-General:—Held, that although at first conditional, the contract, by reason of a congregation having assembled in the church, had become absolute, and that so long as even one member remained to claim the site and church on behalf of the Free Church, the right of that body continued, notwithstanding the change of opinion in the body of the members; and, under the circumstances, an injunction was decreed restraining any further interference with such right, and also a specific performance of the contract, with costs. *Attorney-General* v. *Christie*, 13 Gr. 495.

Change in Doctrine.]—In 1821 J. Bowerman and J. Bull joined in conveying certain lands to three persons, trustees of the West Lake meeting of friends, appointed by the monthly meeting to secure the titles of meeting house lots, and burying grounds, "to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said monthly meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting," and in 1835 Bowerman executed a further conveyance of a portion of those lands of which he had been the owner to two of the said trustees, "and to their successors in trust for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the yearly meeting of friends (called Quakers) as now established in London, Old England, and no longer;" habendum "unto the aforesaid trustees of the said monthly meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use, behoof, and benefit of the said monthly meeting." The defendants contended that the identity of the existing monthly meeting with that described in these deeds had been lost by reason of departures from the principles which governed the society of friends at the time the trusts were created, as well in matters of discipline and practice as in points of faith and doctrine, and that the plaintiffs were consequently no longer entitled to the use and possession of the land:—Held, reversing 7

O. R. 17, that the criterion as to the monthly meeting was not adherence to the doctrines and practices which prevailed at the time the trusts were created, but its continued existence as a monthly meeting of the organization of the society of friends to which it belonged at those times, and possibly to its members continuing in religious unity with the London yearly meeting; and that the defendants, never having been recognized by or in connection with the Canada yearly meeting, had no rights as an organization which a court of law could recognize or enforce. *Dorland* v. *Jones*, 12 A. R. 543; *S. C.*, *sub nom. Jones* v. *Dorland*, 14 S. C. R. 39.

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

Congregation Ceasing to Exist—*Division.*]—In 1833 lands situate in Cobourg were conveyed to certain parties, and "the kirk session of the Presbyterian Church of Canada in connection with the Church of Scotland in Cobourg," upon trust for the use of that congregation, who erected a church thereon and used and enjoyed the same until the disruption of the Presbyterian Church of Canada in 1844, similar to that which had previously occurred in Scotland. In Canada, as there, the Presbyterian Church became divided into two churches, one retaining its identity with the Presbyterian Church of Scotland in connection with the Church of Scotland; the other forming a new church, called "The Presbyterian Church of Canada," similar in principle to the Free Church of Scotland; to which the congregation at Cobourg almost unanimously adhered; and they continued to use the same church as hitherto until 1857, there being in the interval no congregation of the Presbyterian Church of Canada in connection with the Church of Scotland. In this year certain residents professing to belong to that church applied to the surviving trustees to have the trust estate devoted to the purposes intended by the donor, by allowing them the use thereof for the purpose of religious worship, which was refused. On an information and bill filed by the Attorney-General and certain persons so claiming to be entitled to the use of the said trust estate, the court declared that the only persons entitled to the use of the said church were those in communion with the Church of Scotland, and the fact that there had ceased to be a "kirk session" at Cobourg was immaterial:—Held, also, that the congregation for the use of whom the trust had been originally created having ceased to exist, any new congregation in connection with the Church of Scotland which might be afterwards organized was a proper object of the gift; and to be such, it was not necessary that it should be a continuation of any previously existing congregation. *Attorney-General* v. *Jeffrey*, 10 Gr. 273.

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3. *Trustees' Appointment, Liabilities, and Rights.*

Action Against Co-trustee.]—Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; and some of the plaintiffs, who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action. *Everett* v. *Howell*, 5 O. S. 592.

Appointment.]—Land was conveyed to the plaintiff C. and four others as "the trustees of the congregation of the Independent Methodist Episcopal Church," with a provision, in case of death or ceasing to be a member of the said church, for the appointment of a successor or successors. The congregation, acting under the directions of what was called the "book of discipline," which provided for an annual election of trustees, elected annually trustees for the property in question, and, among others, the plaintiffs. One of the original trustees under the deed died, and all the others, except the plaintiff C., ceased to be members of the church. Subsequently three of the defendants accepted a lease of the property from C. In ejectment by C. and his co-plaintiffs:—Held, that these co-plaintiffs had been improperly joined with him, for that having been elected trustees under the "book of discipline," and not under the provisions of the trust deed, in place of deceased or disqualified members of the church, they were illegally elected and never in fact became trustees, and their names were therefore ordered to be struck out of the record:—Held, also, that C. was entitled to recover against the defendants, who entered under the lease from him, as they could not deny his title, and there was sufficient evidence of disclaimer on their party to dispense with a notice to quit:—Held, also, that if the deed did not create the grantees, by virtue of R. S. O. 1877 c. 216, a corporation, and they were to be regarded merely as natural persons, the legal estate was in C. and the other three surviving grantees under the deed, and C. was entitled to recover an undivided fourth part of the land; but that if the grantees were created a corporation, then the legal estate was in the corporation, or in the trustees in a corporate capacity, and C. was the only corporator, the others having either died or ceased to be corporators by reason of their having ceased to be members of the church. Objection having been made on the argument, for the first time, that the action should have been brought in the corporate name, or at any rate under the

designation in the deed, the court allowed the record to be amended in this respect, and the verdict to stand in favour of the plaintiff C. *Coleman* v. *Moore*, 44 U. C. R. 328.

Appointment.]—Semble, that R. S. O. 1877 c. 216, s. 10, as to the appointment of trustees of lands by religious bodies, does not require the mode of appointment to be determined at one meeting and the appointment itself made at another. Both things may be done at the one meeting. *Dorland* v. *Jones*, 7 O. R. 17.

Borrowing Powers—*Chattel Mortgage.*]—Held, under the circumstances of this case, that the trustees of a congregation of the Methodist Church had power to borrow money and secure it by chattel mortgage. *Brown* v. *Sweet*, 7 A. R. 725.

Change in Doctrine — *Possession.*]—Land was conveyed to certain persons in trust for a religious body called "The United Brethren in Christ," and a congregation was organized and a church built. Subsequently a division took place in the religious body and it was held, in Itter v. Howe, 23 A. R. 256, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body:—Held, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act. *Brewster* v. *Hendershot*, 27 A. R. 232.

Corporate Capacity.] — Ejectment cannot be maintained on a demise of a Methodist church, as a corporate body; the demise must be in their names as individuals. *Doe d. Methodist Trustees* v. *Carwin*, T. T. 1 & 2 Vict.

Corporate Capacity.]—Where, by deed of bargain and sale, land was conveyed to certain persons named as trustees, and "to others" not named, and their successors, to hold to the persons as named, and "to others, trustees as aforesaid, and their successors in office in fee simple absolute forever, to the only proper use and behoof of the said (the persons named), and others, trustees as aforesaid, and their successors in office for ever, for the use of the minister of the Presbyterian Church, Galt, in connection with the Church of Scotland, and his successors in office," &c.:—Held, that no action would lie on a demise in the name of the trustees of the Presbyterian Church at Galt, as in a corporate capacity, but that a demise might be laid by those named in the deed, though they were not in fact trustees as the deed assumed them to be. *Doe d. Trustees of Presbyterian Church in Galt* v. *Bain*, 3 U. C. R. 198.

Corporate Capacity.] — Held, that the trustees under C. S. U. C. c. 69, may maintain ejectment in their individual names with the subjoined description, "as trustees," &c., stating the name of the congregation for whom they are trustees. At the trial, evidence was tendered to shew that the congregation named in the deed, which was made to the trustees on their appointment in 1864, had ceased to exist before the execution of the deed:—Held, that this was properly rejected: as also evidence to shew that defendant held under the obligees of a bond, in discharge of which the deed was executed. *Humphreys* v. *Hunter*, 20 C. P. 456.

Corporate Capacity.]—Where plaintiffs sued in their individual names, describing themselves as trustees of the Wesleyan Methodist Church of Brussels, an amendment was allowed at the trial by striking out the names and allowing them to sue as a corporation incorporated under C. S. U. C. c. 69:—Held, that the amendment was authorized. *Trustees of Ainleyville Congregation of Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

Corporate Capacity.] — The plaintiffs sued as "The trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and would rebuild it so as better to answer the purposes of said deed, defendant promised to pay them $1690 to assist them in so doing:—Held, 1. That under non-assumpsit only the defendant could not deny that the plaintiffs were a corporation, or had a right to sue on contract in a quasi corporate capacity, but that he should have put that fact in issue by a plea; and that the plaintiffs therefore were not bound to produce their deed. 2. That the plaintiffs being entitled to sue in such capacity, their individuality was merged therein, and the objection that the defendant being a trustee was also one of the plaintiffs could not arise. 3. That the promise being voluntary was no objection, for that plaintiffs, on the faith of it and of other prominent subscriptions, had rebuilt the church and incurred obligations which would form a sufficient consideration. 4. That the evidence, set out in the case, warranted a finding that defendant's promise was made to the plaintiffs. *Trustees of Toronto Berkeley Street Church* v. *Stevens*, 37 U. C. R. 9.

Corporate Capacity.]—Where a bill was filed in the name of "The Trustees of the Franklin Congregation of the Methodist Church of Canada" against persons claiming under a deed from their grantor, for the purpose of setting aside such deed as a cloud upon the title of the plaintiffs:—Held, that the suit was properly instituted by the trustees as such; and that neither their grantor nor the Attorney-General was a necessary party thereto; and semble, that the effect of the statute was to constitute the trustees a corporation; but at all events they had a right to sue in their collective name in the same manner as a corporate body would sue. *Trustees of the Franklin Church* v. *Maguire*, 23 Gr. 102.

Covenant — *Personal Liability.*] — The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage with

the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually. *Beaty* v. *Gregory*, 28 O. R. 60; 24 A. R. 325.

Incumbent's Salary.] — The plaintiff sued five defendants, describing them as the committee of the Presbyterian church at P., for his salary as minister from January, 1857, to August, 1858. It was proved by verbal evidence of different members of the congregation, that the committee usually consisted of eight persons chosen annually; and that a record of their proceedings was kept, that at a meeting of the congregation in 1856, it was agreed to give the plaintiff a call, and afterwards, at another meeting, that he should receive £100 a year, to be paid to him from the pew rents, which it was customary for the committee to collect half-yearly. It was not shewn who composed the committee in 1856, or that all the defendants were members of it in 1857 or 1858:—Held, that the action could not be maintained. *Stewart* v. *Martin*, 18 U. C. R. 477.

Property Vesting in Successors.]—In a deed conveying land to trustees for a dwelling house for the use of the Methodist minister for the time being, there was provision made for a new appointment in the case of a trustee ceasing to belong to the Methodist Episcopal Church:—Held, that upon the happening of that event in the case of the last surviving trustee, the estate did not ipso facto become divested, but the intention of the grantor plainly being that it should go over to new trustees, this could only be effected by the surviving grantee conveying to them. *Hambly* v. *Fuller*, 22 C. P. 141.

Removal — *Appointment.*]—The land in question was conveyed to five persons as trustees of the Coloured Wesleyan Methodist Church in Canada, to hold to them and their successors according to the rules and discipline of the said church. The deed provided that when any of the trustees should die or cease to be a member of said church, a successor should be nominated by the Coloured Wesleyan minister or preacher having charge of the station in which the land was, and thereupon appointed by the surviving trustee or trustees, if they should think proper to appoint the person so nominated; and that if it should happen at any time that there should be no surviving trustee, then it should be lawful for the coloured minister in charge of the station to nominate, and for the quarterly meeting of the station, if they should approve of the nomination, to appoint, the requisite number of trustees; and the persons so appointed should be the legal successors of those named in the deed. The Wesleyan Methodist Church assumed control over this church, alleging that the deed was intended for the coloured members of their church, there being no such body as the Coloured Wesleyan Methodist Church. Four of the original trustees were living, but two were absent, having left this congregation, by which, according to the rules of the Wesleyan Methodist Church, they ceased to be trustees; one had joined another body; and the fourth, one of the defendants, had been expelled from that church. The plaintiffs were then nominated as trustees by one W., a minister appointed by the Wesleyan Church to take charge of this chapel, but not a coloured man, and their appointment was confirmed at a quarterly meeting. They thereupon brought ejectment against A., one of the original trustees named in the deed, and a person who had taken possession under him:—Held, that they could not recover, for the expulsion of A. from the Wesleyan Methodist Church could not deprive him of his character of trustee under the deed; and the plaintiffs were not properly appointed, not having been nominated by the coloured minister in charge of the church, as required by the deed. *Smallwood* v. *Abbott*, 18 U. C. R. 564.

Removal — *Appointment.*] — 36 Vict. c. 135, ss. 10-12 (O.), respecting the property of religious institutions, authorizes only the appointment of successors to trustees dead or legally removed, and does not empower the congregation to remove trustees competent and willing to act. The three plaintiffs in this case claimed title under a conveyance to two of them, and to H., one of the defendants, as a trustee of a congregation named, alleging that H. had been since removed from the office of trustee, and the plaintiff T. appointed in his stead. Defendants denied the plaintiffs' title. The conveyance contained no clause for the removal of trustees or the appointment of new ones, and the congregation, under the statute above mentioned, had assumed to appoint the plaintiff T. in place of H.:—Held, that the plaintiffs must wholly succeed or wholly fail as to the title alleged, and that the appointment of T. being invalid, a nonsuit must be entered. *Lage* v. *Mackenson*, 40 U. C. R. 388.

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4. *Miscellaneous Cases.*

Disturbance in Place of Worship.]—Defendant, a justice of the peace, convicted the plaintiff under C. S. U. C. c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to the defendant, and a boy living with his parents, and having no property:—Held, that the action would not lie, for defendant was authorized by C. S. C. c. 103, s. 59, to commit in the first instance, that statute applying to this conviction. *Moffat* v. *Barnard*, 24 U. C. R. 498.

Disturbance in Place of Worship.]—Action for assault and battery against fourteen defendants. Special plea of justification on the ground that defendants were committing a disturbance in church. *Reid* v. *Inglis*, 12 C. P. 191.

1 Will. & M. c. 18, relating to disturbances in church, &c., is in force in this Province, and not superseded by C. S. U. C. c. 92. *Ib.*

Power to Hold Land.]—As to power to hold land. See *London and Canadian Loan and Agency Co.* v. *Graham*, 16 O. R. 329; *McDiarmid* v. *Hughes*, 16 O. R. 570.

Religious Denominations—*Marriage.*]—"The Reorganized Church of Jesus Christ of Latter Day Saints" is a religious denomination within the meaning of R. S. O. 1887 c. 131, s. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage. Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed. Semble,

the words of the statute "church and religious denomination" should not be construed so as to confine them to Christian bodies. *Regina* v. *Dickout*, 24 O. R. 250.

Expulsion of Minister — *Domestic Forum.*]—The court cannot interfere with the action taken by the duly constituted tribunals of a church in expelling a minister, when these tribunals have proceeded in accordance with the rules, regulations and discipline of the church, and the accused has had the opportunity of defending himself. *Ash* v. *Methodist Church*, 27 A. R. 602.

Pew-holder's Rights—*Refusal to Continue Lease.*]—Plaintiff, an elder and member of the congregation of St. Andrew's Church, Montreal, had been a pew-holder in the church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and received for the rental of 1872 a receipt in the following words: "Montreal, January 9th, 1872. $6[illegible]50. Received from James Johnston the sum of sixty-six dollars and fifty cents, being rent of first-class pew No. 68 in St. Andrew's Church, Beaver Hall, for the year 1872. For the trustees, J. Clements." On the 7th December, 1872, the trustees notified plaintiff that they would not let him a pew for the following year. Plaintiff thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68 by the respondents, the pew having been placarded "for strangers," strangers seated in it, his books and cushions removed, &c. For these torts he brought an action against respondents, claiming $10,000 damages:—Held, that plaintiff being an elder and member of the congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage, and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1873, and that reasonable but not vindictive damages should be allowed, viz., $300. *Johnston* v. *St. Andrew's Church*, 1 S. C. R. 235.

Revoking Appropriation.] — An order in council was made after 7 Will. IV. c. 118, and before 4 & 5 Vict. c. 100, appropriating land to certain religious purposes:—Held, that under s. 27 of the latter statute, the governor in council had power to revoke such appropriation. *Simpson* v. *Grant*, 5 Gr. 267.

Subscription — *Change of Plan.*]—The plaintiff had subscribed to aid in the erection of a parish church in Toronto, with a view of enabling the churchwardens to erect it on the old site, so as to avoid leasing off portions of the land about it used as a burying ground. Subsequently, at a meeting of the vestry, the plan of the building was changed, by reason of which, in excavating for the foundation of the church, the graves of several members of the plaintiff's family were disturbed. Thereupon the plaintiff wrote to the vestry clerk annulling his subscription, and being sued in the division court for such subscription, he moved for an injunction to stay such action. The court, under the circumstances, refused the application, with costs. *Heward* v. *Harris*, 5 Gr. 226.

Subscription—*Pew.*]—The church of St. James having been destroyed by fire, it was agreed that the pew-holders who had purchased the right to their pews, subject to a ground rent, should pay a certain sum and be reinstated as nearly as circumstances would permit in their pews in a new church, to be built on the site of that destroyed After the new church was built, one of such pew-holders refused to pay the sum of £25, agreed to be subscribed by him towards rebuilding the church, and for which he had given his note; whereupon the churchwardens, in pursuance of a resolution of the vestry, removed the door from the pew claimed by him, and the holder thereof instituted an action on the case against the churchwardens for the disturbance of his easement:—Held, that he was not entitled to recover. *Brunskill* v. *Harris*, 1 E. & A. 322.

See NUISANCE, V.

CHURCH OF ENGLAND.

See CHURCH, I.

CHURCH OF ROME.

See CHURCH, II.

CHURCHWARDENS.

See CHURCH, I.

CIVIL SERVANTS.

See CROWN, IV.

CLANDESTINE REMOVAL OF GOODS.

See CRIMINAL LAW, IX. 23.

CLEARING LAND.

See FIRE, III.—LANDLORD AND TENANT, IX. 1 (3)—TIMBER AND TREES.

CLERGY RESERVES.

See CHURCH, I.

CLERK OF THE PEACE.

See COUNTY CROWN ATTORNEY.

CLOSING HIGHWAY.

See WAY, IV. 10.

CLOUD ON TITLE.

See VENDOR AND PURCHASER, III. 2.

CLUB.

Committeemen—*Co-contractors.*]—Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club. Review of English cases on this subject. The liability in such cases is not several, but joint. By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him. In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in chambers, allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties. *Aikins* v. *Dominion Live Stock Association of Canada*, 17 P. R. 303.

Expulsion of Member — *Evidence — Notice.*]—The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which, in the opinion of the board, merits such a course, may be expelled," are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with, because they have admitted as part of the evidence in proof of the charge, the informally sworn statement of one of the persons concerned in the transaction. Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation; a general statement is sufficient. *Guinane* v. *Sunnyside Boating Company of Toronto*, 21 A. R. 49.

See INTOXICATING LIQUORS, IV. 3.

CODICIL.

See WILL.

COGNOVIT.

See FRAUD AND MISREPRESENTATION, IV. 2.

COIN, OFFENCES RELATING TO.

See CRIMINAL LAW, IX. 8.

COLLATERAL SECURITY.

Acceleration of Right of Action.]—Where bonds were given for the payment of a certain sum of money and interest in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds:—Held, that a breach of covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security. *Great Western R. W. Co.* v. *Galt and Guelph R. W. Co.*, 8 Gr. 283.

Assignment Over.]—The plaintiffs had obtained a mortgage from one of defendants as collateral security for a debt, which they had assigned to a bank. The court directed that judgment for a declaration of lien for debt and costs, and sale to realize it, was to be entered for the plaintiffs only on the production of the mortgage, and a reconveyance or discharge thereof to the mortgagor. *Sarnia Agricultural Implement Manufacturing Co.* v. *Hutchinson*, 17 O. R. 676.

Building Society.] — Right of building societies to take collateral securities. See *Freehold Loan and Savings Society* v. *Farrell*, 31 C. P. 453.

Composition — *Non-disclosure.*] — The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any mortgage, hypothec, lien, or collateral security held by any such creditor as security for any of said debts:"—Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at or before executing the deed of extension. *Henderson* v. *Macdonald*, 20 Gr. 334.

Consideration — *Value Arising During Currency.*]—One M. made a note on the 17th November, 1868, payable to T. or order, at three months, at the Quebec Bank, for $4,000, which was indorsed by T. and the plaintiff, and discounted by the bank for T. On the 24th November, 1868, a note for $1,500 made by W. payable to T., and indorsed by M. for T.'s accommodation, was handed to the bank by T. as collateral security for the $4,000 note, and the bank also advanced on it $1,000 to T. This note, when it fell due on the 27th January, 1869, was retired by the note sued on, which was for $1,500, at two months, made by W., payable to T., and indorsed by T. and by M. to bank, and was given, as the bank manager swore, for the same purpose as the previous $1,500 note. The bank received $1,200 from T. on account of the $4,000 note, and the plaintiff said the balance on the understanding that the bank would hold the $1,500 note for his benefit, and they afterwards, at his request, gave it to their solicitor to sue. In an action on this note by the plaintiff against W. and M.:—Held, that he was entitled to recover; for, 1. he was the holder of the note;

2. the note being deposited with the bank as collateral security for the $4,000 note, and not merely for the $1,000 advanced on it, the bank held it for the full amount; 3. if the note could not be said, when taken on the 27th January, 1869, to be a security for value because the $4,000 note had not then matured, it became so when the latter note fell due on the 20th February, 1869, and value arising at any time during the currency of a note is sufficient. *Blake* v. *Walsh*, 20 U. C. R. 541.

Continuing Security.] — A mortgage was given by the maker of certain notes as collateral security to an accommodation indorser, which notes were duly retired by the maker. Subsequently the mortgagor gave other notes to the mortgagee, when it was verbally agreed that the mortgage should be retained by the indorser as an indemnity for such subsequent notes:—Held, that the indorser was entitled to retain such security to the exclusion of other creditors of the mortgagor. *Morrison* v. *Robinson*, 19 Gr. 480.

Crediting Proceeds—*Suspense Account—Banks.*]—A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited:"—Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper. Judgment below, 26 S. C. R. 611, affirmed by the Judicial Committee. *Molsons Bank* v. *Cooper*, 26 A. R. 571.

Discharge.]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note, and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—Held, affirming 20 A. R. 695, which reversed 23 O. R. 288, that the note having been given for the mortgage debt C. could not recover without being prepared upon payment to convey to B. the mortgaged lands, which he had incapacitated himself from doing. Held, also, that by the terms of the dissolution of partnership, the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Discount of Promissory Notes—*Right to Accessory Securities.*]—A tradesman sold goods to customers, taking promissory notes for the price, and also hire receipts, by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing, and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them. In an action to recover the securities, or their proceeds, from the assignee for creditors of the tradesman:—Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs. *Central Bank* v. *Garland*, 20 O. R. 142; 18 A. R. 438.

Double Security.] — B., the holder of £2,000 government debentures, assigned them to defendants, and delivered to them his bond to secure the interest, upon which they passed the full amount to his credit. Subsequently defendants obtained from B. security by mortgage for the principal as well as the interest, and for another debt which he owed them. B., about the same time, assigned his interest in the debentures to G. S. B.; and the defendants afterwards accepted a release of part of the mortgaged property in part payment of the amount secured by the mortgage. The mortgaged property was then sold by defendants for much less than the amount of the debentures, which were afterwards paid in full by the government. It appeared, from the defendants' books, and their communications with the government, that they did not consider themselves entitled to both sums:—Held, that the plaintiff, who was the assignee of G. S. B.'s interest in the debentures, was entitled to the proceeds of the property sold. *Covert* v. *Bank of Upper Canada*, 3 Gr. 246.

Foreclosure—*Consideration.*] — A decree was made for the foreclosure of a mortgage of £100 with interest. It appeared by defendant's evidence in the master's office that no money was advanced by the mortgagees; and the court held, chiefly on the conduct of the parties, and the circumstances of the case, that the mortgage was intended as a security for a note of the mortgagor's indorsed by the mortgagees contemporaneously with the execution of the mortgage, and for any subsequent transactions with the mortgagor growing out of it. *Brownlee* v. *Cunningham*, 13 Gr. 586.

Foreclosure—*Sale.*] — A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default; the only decree to which he is entitled is to sell, allowing the mortgagor the usual time for redemption. *Paton* v. *Wilkes*, 8 Gr. 252.

Insurance—*Action by Assignor.*]—Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party. Where there is separate insurance in different companies in favour of mortgagee and mortgagor, the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between the mortgagee and his insurers although as-

sented to by the mortgagor. *Prittie* v. *Connecticut Fire Insurance Company*, 23 A. R. 449.

Jus Tertii.]—B., as trustee for H. C. & Co., deposited with D. twelve bonds of the M. C. & S. Railway Company, as collateral security, to be availed of only subsequent to the failure of the Government to pay $10,000 subsidy, previously transferred to D., and obtained a receipt from D. that on the subsidy being paid D. would return these bonds to B. The subsidy was paid and B. sued D. to recover back the twelve bonds. H. C. & Co. did not intervene: — Held, that B., being a party personally liable on the bills held by D., which the Government subsidy of $10,000 transferred was intended to pay, and having complied with all the conditions mentioned in the receipt entitling him to recover possession of the bonds, was, as against D., the legal owner of the bonds. *Drummond* v. *Baylis*, 2 S. C. R. 61.

Merger.]—Action on a note for $350. Plea, that the note had been taken as collateral to a mortgage, in satisfaction of which defendant and plaintiff had come to a settlement, and defendant had given a new mortgage for what he owed the plaintiff, in which the note had thus become merged:—Held, that the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover: and that from the evidence stated in the case it appeared that the note was given for a sum quite distinct from the mortgage debt. *Boulton* v. *McNabb*, 14 C. P. 598.

Semble, that defendant's remedy (if any), should be either to have the settlement reopened on the ground of mistake or fraud, and get the amount of the note added to the mortgage debt, and extended for ten years, or to treat the settlement as evidence of everything having been paid, which latter defence would be covered by a plea of payment. *Ib.*

Mortgage — *Redemption by Judgment Creditor—Collaterals.*]—A judgment creditor coming in to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor having effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor:—Held, that the judgment creditor of the mortgagor upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, was entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment. *Gilmour* v. *Cameron*, 6 Gr. 290.

Multiplicity of Actions.]—Mortgagees proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law, in different actions, the same parties on notes held by the plaintiffs, to which the mortgages were collateral: —Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants Bank* v. *Sparkes*, 28 Gr. 108.

Negligence in Realizing.] — Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod* v. *De Blaquiere*, 27 Gr. 536; 550 (n). Affirmed by the supreme court. *Cassels' Dig.* 539.

Negligence in Realizing.]—Sale, at a grossly inadequate price, of timber limits held by a bank as collateral security. See *Prentice* v. *Consolidated Bank*, 13 A. R. 69.

Negligence in Realizing.] — Effect of laches of holder of notes given as collateral security in not proceeding for payment of same or notifying principal debtor. See *Ryan* v. *McConnell*, 18 O. R. 409.

Payment—*Estoppel.*]—An action at law having been brought upon a promissory note, the defendant pleaded that it had been given as collateral security for another debt which had been paid, but adduced no evidence to establish this fact:—Held, in a suit afterwards instituted in the court of chancery to enforce the charge of the judgment against lands, that he was precluded from shewing any payment prior to the time of plea pleaded. *Carpenter* v. *Commercial Bank*, 2 E. & A. 111.

Pledge—*Transfers "In Trust."*] — The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of "margins" certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions, each transfer being made from and to the manager thereof "in trust." An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being then

transferred by the then holders to the defendants:—Held, reversing 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words "in trust" in the transfer meant that the various transferees were holding the shares "in trust" for their respective institutions. *Dueoan* v. *London and Canadian Loan and Agency Co.*, 18 A. R. 305. Reversed by the supreme court, 20 S. C. R. 481, but restored by the judicial committee, [1893] A. C. 506.

Primary Debt Maturing after Security.]—Held, on demurrer to the equitable plea set out in the report of this case, that apart from the objection as to a perpetual injunction not being obtainable, the holder of notes, transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before the liability arises, and that the payee has no control over them so as to enlarge or vary the maker's liability to pay them. *Ross* v. *Tyson*, 19 C. P. 294.

Primary Debt Maturing before Security.]—Defendant indorsed to the plaintiffs a note made by one P. for $125, due 13th May, 1857. On the 13th April P. executed to the plaintiffs a mortgage, payable on the 1st November, 1857, for a sum including the amount of the note; but it was expressly agreed in the mortgage that it should "operate and take effect as a collateral security only:"—Held, that the plaintiffs might sue upon the note when it fell due, although the mortgage was not yet payable. *Shaw* v. *Crawford*, 16 U. C. R. 101.

Proceeding for Breach of Terms of Security before Debt Due.]—Proceeding on a chattel mortgage for breach of its terms before the note is due, for which the mortgage was held as collateral security. See *Cochrane* v. *Bucher*, 3 O. R. 462.

Purchase Money — *Prescription.*] — Where notes have been given as collateral security for the price of sale of a property, and the property has not been paid for, the plea of prescription as to the notes can not avail against an action for the price. *Mitchell* v. *Holland*, 16 S. C. R. 687.

Renewal of Note.]—Where certain securities have been assigned as collateral security for the payment of a promissory note of $1,000, which note has been partly paid and a new note given, such securities may be held until the debt is discharged by payment. *Wiley* v. *Ledyard*, 10 P. R. 182.

Sale — *Damages.*] — Land scrip was deposited with a party as collateral security, who sold the same at a discount:—Held, that if on taking an account it should appear the sale had been effected before any default in payment, he must be charged with the amount of the present value, but if after default, then with the value at the time of the sale. *Hart* v. *Bown*, 7 Gr. 97.

Satisfaction of Security.]—D. J. indorsed a promissory note for the accommodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. J., during the currency of the note, absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M., with whom he had dealings, as D. J. knew, but D. J. had no notice of any wrong doing in connection with the money:—Held, affirming 10 O. R. 1, that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow his money into the note; and was therefore not entitled to stand in the shoes of D. J. as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack* v. *Jack*, 12 A. R. 476.

Security or Satisfaction.]—Held, that the deed as set out in the pleadings in this case shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes sued on. *Bank of British North America* v. *Sherwood*, 6 U. C. R. 552.

Statute Barred Debt.] — Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. *Wiley* v. *Ledyard*, 10 P. R. 182.

Surety.]—Action by H. against M. on a guarantee of a mortgage made by one G., and assigned by M. to H. Plea, on equitable grounds, that the mortgage was given by G. as collateral security for two notes of £100 each, made by G. to one W., and indorsed by him, and that said notes were given to H. (plaintiff) with the mortgage, and that one note having become due H., without notice of presentment and dishonour, and without defendant's consent, gave G. time, for a valuable consideration: — Held, on demurrer, good, and that defendant as surety was therefore discharged. *Howee* v. *Mills*, 10 C. P. 194.

Surety—*Primary Creditor not Realizing Mortgaged Property.*] — To an action on a promissory note, the defendant, an indorser, pleaded, "that he indorsed the note as surety for the makers; that it was agreed that the makers should transfer to the plaintiffs, as security for the payment of the note, by way of mortgage, a certain schooner, and that the plaintiffs agreed to hold the said vessel for the benefit and indemnity of the defendant; that in pursuance of such agreement the vessel was assigned to the plaintiffs, and it thereby became the duty of the plaintiffs, when requested by the defendant, to sell the vessel, under a power of sale contained in the mortgage, for the benefit of the defendant; that the defendant requested plaintiffs to sell said vessel; that the plaintiffs refused and neglected to comply with such request, and that the vessel was subsequently lost, whereby the defendants lost the benefit of the security of the said vessel:—Held, that if the plea intended to assert that wherever a creditor takes a mortgage from a principal debtor with power of sale, accompanied with the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgage creditor, upon the request of the surety at any time, to sell the mortgaged property upon default committed, at the peril, if he does not do so, of losing the benefit of the contract of surefyship, such proposition cannot be sustained in law; and that if the

defendant intended to rely on an express agreement to this effect, the evidence would not sustain such contention. *Bank of Montreal* v. *Davy*, 21 C. P. 179.

Surety—*Assigning Securities.*]—A person who is surety for another, and holds collateral securities, is not bound to wait until he has paid the debt of the principal before he assigns such securities, but may do so at any time to the creditor in discharge of his liability. *Paton* v. *Wilkes*, 8 Gr. 252.

Surety — *Benefit of Collaterals.*] — A debtor gave a mortgage to his creditor as collateral security for a debt for which another person (H.) was surety. The creditor afterwards obtained judgment against the surety (H.) for the debt, and placed an execution in the sheriff's hands against his goods. A creditor of the surety subsequently placed an execution in the same sheriff's hands; and, there not being goods enough to pay both executions, he paid off the first execution and took an assignment of the mortgage:—Held, that he was entitled to hold the mortgage to the extent of such payment, as against the plaintiff, to whom the surety, H., after both executions were delivered to the sheriff, had assigned his interest in the mortgage to secure another debt. *Garrett* v. *Johnstone*, 13 Gr. 36.

Surety.]—Note given as collateral security to secure an indorser. Effect of giving time to maker. See *Healey* v. *Dolson*, 8 O. R. 691.

Surety—*Release of Part of Security.*]—The plaintiffs, who held a number of promissory notes of a customer, indorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as indorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant:—Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event, the application of the moneys from the security could be properly ascertained. Decision in 25 O. R. 503, modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

Surety—*Satisfaction of Principal Debt.*]—A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety. Judgment below, 22 O. R. 235, reversed. *Holliday* v. *Hogan*, 20 A. R. 298.

Affirmed by the supreme court, sub nom. *Holliday* v. *Jackson*, 22 S. C. R. 479.

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

Affirmed by the judicial committee, 26 A. R. 571. See *S. C.*, in the courts below, 26 O. R. 575, and 23 A. R. 146.

Tacking.]—Where R. assigned a certain mortgage to M. to secure payment of two promissory notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a certain judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a reassignment thereof to R., until not only the amount due on the promissory notes, but also the balance due under the said mortgage was paid:—Held, that R. was entitled to a reassignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. 1877 c. 66. Ross v. Simpson, 23 Gr. 553, distinguished. *Rumohr* v. *Marx*, 3 O. R. 167.

Transfer at Debtor's Request.]—Action for converting certain notes, with a special count, alleging in substance that defendants held the notes as collateral security for certain paper in their hands, to which the plaintiff was a party; and after they had collected part of them, and the paper had been retired, they collected and applied to their own use the remaining notes, to which they had ceased to have any claim. Defendants pleaded, on equitable grounds, that after receiving the notes, they were applied to by the plaintiffs to accept in payment of a debt due by him to them the note of one A. D. for $1,147, which they refused to do unless one J. D. would indorse it; and J. D. would not indorse without security, and the plaintiff thereupon got defendants' agent to write to J. D., agreeing to hold the notes in question to apply when collected on the note for $1,147; that J. D. on the faith of this, indorsed said note, which defendants accepted in payment, and which was renewed from time to time by the proceeds of the notes collected, and reduced in July, 1862, to a note for $477, which note J. D. took up, and defendants thereupon transferred to him such of the notes in question as remained, as they lawfully might and were bound to do:—Held, plea good, as shewing a legal defence. Quære, whether it could be supported as an equitable plea, for J. D. would have been a necessary party to a bill by the plaintiff for the recovery and account of the notes. *Maybee* v. *Bank of Toronto*, 29 U. C. R. 566.

Transfer of Note after Maturity.]—The plaintiff sued as bearer of a note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL. being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL. then held by said McD., which said note McD. transferred and delivered to the plaintiffs, and deposited the note in the declaration mentioned with the plaintiffs, after it became due, as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plain-

tiffs as collateral security, and is the lawful holder of said note:—Held, on demurrer, plea bad for, 1. the terms upon which the note was transferred to McD., which formed no part of the original consideration for which it was given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and, 2. that even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant. *Canadian Bank of Commerce* v. *Ross*, 22 C. P. 497.

Transfer of Shares — *Indebtedness of Transferor.*]—A by-law of a building society (appellants') required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for the amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society alleged the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws:—Held, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. *Société Canadienne Francaise de Construction de Montreal* v. *Davelay*, 20 S. C. R. 449.

Trover by Debtor — *Overpayment.*] — Certain sale notes were deposited with defendants as collateral security for the payment of a note indorsed by the plaintiff, for the accommodation of one M., and discounted by defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank, and applied on the note, so that when they were paid, the note also was to be paid, and the plaintiff's liabilities to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals, and refused to give the plaintiff any information as to what had been paid on them, and the plaintiff then paid the note in full, and demanded an assignment of the collaterals. The plaintiff's payment being made by a part payment in cash, and his note for the balance, which he paid at maturity:—Held, that the plaintiff could not maintain trover against defendants for the collaterals; for although under 26 Vict. c. 45, s. 2, he was entitled to the immediate possession of them, he had not, until assignment, any property in them vested in him. *Cornish* v. *Niagara District Bank*, 24 C. P. 262.

Semble, that the plaintiff's remedy would be by a special action on the case for not assigning the notes to him after demand duly made. *Ib.*

Held, however, that the plaintiff was entitled to recover as money had and received to his use, the amount paid to defendant on the collaterals, and the fact of his only paying part of the principal note in cash, and giving his note for the balance, did not take away his right. *Ib.*

Semble, also, that his right would not be affected even if the payment on the collaterals was after his payment. *Ib.*

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   (f) *Set-off*, 1114.

I. CORPORATE NAME AND EXISTENCE.

Annulment of Charter.] — The appellant company by its Act of incorporation, 44 Vict. c. 61 (D.), was authorized to carry on business provided $100,000 of its capital stock was subscribed for, and thirty per cent. paid thereon, within six months after the passing of the Act, and the Attorney-General of Canada having been informed that only $60,500 had been bonâ fide subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought at the instance of a relator by proceedings in the superior court for Lower Canada to have the company's charter set aside and declared forfeited:—Held, 1. That this being a Dominion statutory charter, proceedings to set it aside were properly taken by the Attorney-General of Canada. 2. That such proceedings taken by the Attorney-General of Canada under Articles 997 et seq. C. C. P., if in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a scire facias. 3. That the bonâ fide subscription of $100,000 within six months from date of the passing of the Act of incorporation, and the payment of the thirty per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been bonâ fide and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited. *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S. C. R. 72.

Annulment of Charter.]—Where it appeared that the defendants and others had been incorporated by letters patent, issued under the Great Seal of the Province of Quebec, which letters had been obtained by a fraudulent representation that the defendants and others had petitioned for the same, and a writ of scire facias was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to shew cause why the letters patent should not be declared fraudulent, null and void, "at least in so far as the said defendants were concerned:"—Held, under the C. C. P. 1034 and 1035, that the Code does not authorize a partial annulment of letters patent; that they ought to be entirely annulled; and that the terms of the prayer were wide enough to authorize an order to that effect. *Banque d'Hochelaga* v. *Murray*, 15 App. Cas. 414.

Change of Name.]—Held, that the Act abolishing districts did not take away from defendants the name given to them by their charter. *Hughes* v. *Mutual Fire Insurance Co. of the District of Newcastle*, 9 U. C. R. 387.

Change of Name.]—Where, between the time of obtaining an order for service out of the jurisdiction and the service, the name of a town (before the mayor of which the affidavit of service was directed to be made) had been changed, a certificate of the town clerk sealed with the corporate seal of the town, under its new name, was received as proof of the fact of such change having taken place. *Relph* v. *Cahoon*, 2 Gr. 623.

Change of Name.]—Changing the name of a company by statute does not affect its right to maintain actions in like manner as if the name had not been changed. *Provincial Insurance Co.* v. *Cameron*, 31 C. P. 523.

Change of Name.]—A deed to defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptio personæ to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co.* v. *Midland R. W. Co.*, 7 A. R. 681.

Corporate Existence.]—See *Queen Ins. Co.* v. *Boyd*, 7 P. R. 379.

Evasion of Act—*Payment of Percentage.*]—The Act 22 Vict. c. 122, incorporating the Northwest Transit Company, enacted that it should not be lawful for the company to proceed with their operations under the Act until £50,000 of the capital stock should have been subscribed, and ten per cent. paid thereon. Subsequently, and before £50,000 had been subscribed, or the percentage paid thereon, a proposition was made by one C. to certain stockholders in the enterprise, that C. should sell a steam vessel belonging to him to the company for £5,000, and that in that event he should become a subscriber to the amount of £50,000, and that the steamer should be paid for by taking her as a payment of ten per cent. on the £50,000, which was acceded to, and the subscription and purchase made accordingly, in compliance with a resolution of the company:—Held, that this was an evasion of the statute, and an injunction was granted on motion, restraining the company from proceeding with any of the operations thereof until the conditions pointed out by the statute had been complied with. *Howland* v. *McNab*, 8 Gr. 47.

See Goodwin v. *Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Evidence.]—Action by a joint stock road company, under 12 Vict. c. 84, against stage proprietors, for tolls. The plaintiff proved that defendants had used the road with their stage coaches, and had paid tolls, and had negotiated for settling this claim:—Held, that the incorporation of plaintiffs was sufficiently shewn as against the defendants. *Paris and Dundas Road Company* v. *Weekes*, 11 U. C. R. 56.

Forfeiture of Charter.]—Process was served upon A. as president of a bank, he having been elected in June, 1866, for one year. No election of president or directors had taken place since then, and A. in fact never resigned his office. In September, 1866, the bank suspended specie payments, and before sixty days thereafter assigned their property to trustees, and ceased to do business as a bank. It was provided by the charter that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeiture of the charter, &c.:—Held, that the total annihilation of the bank was not contemplated by these provisions, and it did not follow from the loss of the charter that there must be a dissolution for all purposes: that some formal process was still necessary finally to determine and put an end to all the functions of the corporation: that the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts, and that A. must still be looked upon as president: and an application to set aside the service upon him was discharged with costs. *Brooke* v. *Bank of Upper Canada*, 4 P. R. 162.

Infant Corporator.] — Held, that by reason of the infancy of one of the five subscribers, the company, which was formed for the purchase of a road under R. S. O. 1877 c. 152, had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract. *Hamilton and Flamborough Road Co.* v. *Townsend. Hamilton and Flamborough Road Co.* v. *Flatt*, 13 A. R. 534.

Married Woman Corporator.]—Quære, whether a married woman can legally be one of the five members required by R. S. O. 1877 c. 152, to form a joint stock company for the purpose of purchasing a road. *Hamilton and Flamborough Road Co.* v. *Townsend, Hamilton and Flamborough Road Co.* v. *Flatt*, 13 A. R. 534.

Misnomer—*Pleading.*]—Where, in styling the lessors of the plaintiff,—"The Chancellor, President and Scholars of King's College at York, in the Province of Upper Canada" in the consent rule, appearance, and plea in ejectment,—the words "in the Province of Upper Canada," were omitted, the omission was held not material, or, at all events, not a nullity, and might be cured by laches. *Doe d. Chancellor, &c., of King's College* v. *Roe*, 1 C. L. Ch. 111.

Misnomer—*Pleading.*]—The plaintiffs declared on a bond to "The Beverley Municipal Council," there being no such corporation in existence. Defendants did not deny the making of the bond, but pleaded over. On demurrer,—Held, that by not pleading non est factum, defendants were debarred from taking the objection to the form of the bond as pleaded. *Township of Beverley* v. *Barlow*, 10 C. P. 178.

Misnomer.]—A bond sued upon in the name of "The Trent and Frankford Road Company" was in the name of the president and directors of the Trent and Frankford Road Company:—Held, no objection. *Trent and Frankford Road Co.* v. *Marshall*, 10 C. P. 329.

Misnomer.]—The name of the defendant as a sole corporation by the statute, was "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada." The instruments declared on were in the name of the "Roman Catholic Bishop of Sandwich:" —Held, that the variance was immaterial. *Ruitz* v. *Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 U. C. R. 269.

Misnomer.]—Misnomer of High School Trustees—Acquiescence in erroneous name. See *In re Trustees of Port Rowan High School and Township of Walsingham*, 23 C. P. 11.

Misnomer.]—A bill by a corporation using a wrong name is liable to a demurrer for want of equity. *Cornish Silver Mining Co.* v. *Bull*, 21 Gr. 592.

Misnomer.] — Defendants, a company, were styled in the bill "The Ontario Wood Pavement Co." Certain other defendants alleged to be directors of this company, when brought up to be examined for discovery, denied all connection with it and refused to answer any questions relating to "The Ontario Wood Pavement Company of Toronto." This latter name the plaintiff's solicitor stated to be the true corporate name of the company, intended to be described by the bill; but there being no further evidence of this fact, an application to compel the defendants to answer the questions put to them was refused. *Dickey* v. *Ontario Wood Pavement Co.*, 6 P. R. 93.

Mode of Testing Existence.]—As to the proper mode of testing the existence of a corporation composed of school trustees. See *Askew* v. *Manning*, 38 U. C. R. 345.

Nominal Corporation—*Partners.*] — In the case of a nominal corporation which has no legal status as such, the ostensible corporators are partners; and their liability as partners on the contracts of the company is a joint, and not a joint and several, liability. *Gildersleeve* v. *Balfour*, 15 P. R. 293.

Objection Not Pleaded.] — Where defendant pleads over, and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of British North America* v. *Sherwood*, 6 U. C. R. 213.

"Persons Signing" Bill of Lading.] —Semble, that under the Interpretation Act, 31 Vict. c. 1, s. 7, s-s. 9 (O.), the defendants, though a corporation, would be "persons signing" the bill of lading, if signed by their authorized agent. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

Pleading.]—In an action by the trustees of a church for defendant's subscription towards rebuilding:—Held, that under non assumpsit defendant could not deny that the plaintiffs were a corporation. *Trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada* v. *Stevens*, 37 U. C. R. 9.

Pleading.]—The plaintiff sued "The Commissioners of the Cobourg Town Trust," in whom the harbour at Cobourg is vested in fee by 22 Vict. c. 72, for damages for loss of his vessel, caused by the negligence of defendants, who by their plea merely traversed the negligence. At the trial plaintiff was nonsuited, on the objection that defendants were sued as a corporation, but were not so under the statute:—Held, that this objection should have been raised by plea, and was not open to defendants on this record; and semble, that if open, defendants were a corporation. Leave was granted to amend, if desired, by substituting the names of the commissioners. *McSherry* v. *Commissioners of the Cobourg Town Trust*, 45 U. C. R. 240.

Town Commissioners.]—Held, that the commissioners for the town of Peterborough, appointed by 24 Vict. c. 61, are not a corporation, and cannot be sued as such. Upon this objection to the declaration, the action was held, not sustainable, this court being of opinion that they should be sued by name, adding their statutory designation. *Commissioners of the Peterborough Town Trust* v. *Cochrane*, 13 C. P. 111.

II. Conduct of Business.

By-law Operating Unequally.]—A by-law or resolution of a joint stock company which operates unequally towards the interests of any class of the shareholders is invalid and ultra vires of the company. *North West Electric Co.* v. *Walsh*, 29 S. C. R. 33.

By-law Without Penalty.]—Where a corporation is empowered by statute to enact by-laws and impose a penalty for their infraction, not exceeding a certain amount, a by-law is bad which annexes a penalty to an offence but does not declare its amount. *Peters* v. *President and Board of Police of London*, 2 U. C. R. 543.

Changing Head Office.]—The Act incorporating a company provided that the head office might be changed from Ottawa to such other place as might be determined by the shareholders at any one of the general meetings. At the general annual meeting a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held, the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa:—Held, that the change was effectually made. *Union Fire Ins. Co.* v. *O'Gara*, *Union Fire Ins. Co.* v. *Shoolbred*, 4 O. R. 359.

Discretion.] — A company incorporated for the purpose of improving the navigation of a river, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors. The court will reluctantly interfere with a company's discretion where amongst engineers there may be a difference of opinion; but as it appeared that the damage complained of by the plaintiff might be avoided by certain alterations of the company's works, suggested by an eminent engineer to whom the matter was referred by the court, which alterations the company said they would have made if suggested before suit, the court decreed the mak-

ing thereof. *Moore* v. *Grand River Navigation Co.*, 13 Gr. 560.

Dominion Jurisdiction.] — Held, that 37 Vict. c. 103 (D.), which created a corporation with power to carry on definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province and to local and provincial objects did not affect its status as a corporation or operate to render its original incorporation illegal as ultra vires the said parliament. *Colonial Building and Investment Ass'n* v. *Attorney-General of Quebec*, 9 App. Cas. 157.

Held, that the corporation could not be prohibited generally from acting as such within the Province, nor could it be restrained from doing specified acts in violation of provincial law upon a petition not directed and adapted to that purpose. *Ib.*

Majority—*Ratification.*]—The court will not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if such sanction can be afterwards obtained. *Purdom* v. *Ontario Loan and Debenture Co.*, 22 O. R. 597.

Motions to Amend.]—Semble, that the amendment in question being to strike out a certain canon and substitute another for it, though moved as an amendment to a proposed amendment of such canon, was rather a substantive motion and should have been brought before the synod through the standing committee. *Wright* v. *Incorporated Synod of the Diocese of Huron*, 29 Gr. 348. See *S. C.*, 9 A. R. 411, 11 S. C. R. 95.

Repeal of By-laws.]—As to the right to repeal by-laws to the prejudice of parties who have obtained rights under such by-laws. See *Wright* v. *Incorporated Synod of the Diocese of Huron*, 29 Gr. 348, 9 A. R. 411, 11 S. C. R. 95.

Reserve Fund—*Dissentient Minority.*]—An ordinary trading company can, without special authority, set apart a reserve fund, but the majority of the shareholders cannot, against the wishes of the minority, accumulate out of the profits a reserve fund which is far larger than is required to provide for all liabilities of, and vicissitudes in, the business; and where such a fund had been accumulated and portions of it had from time to time been invested, by the directors elected by the majority, in unauthorized and hazardous investments, the court, at the instance of the minority, ordered a reasonable proportion to be set aside as a reserve fund and the balance to be distributed among the shareholders as undrawn profits. *Earle* v. *Barland*, 27 A. R. 540.

III. DIRECTORS.

1. *Dealings with the Company.*

Debentures to Director.] — The judgment in an action by the Bank of Toronto against the C. Railway Company, directed a reference as to who, other than the plaintiffs, were the holders of bonds of the defendant company of the same class, and an account of what was due to such bondholders, and it appeared before the master that the managing director of the company had issued a great number of debentures of the same class as the plaintiffs' to J. H. S., G. J. S., and J. B., who were themselves directors of the company, at a discount of twenty-five per cent., in satisfaction of their claims against the company. The plaintiffs, who had obtained their debentures subsequently, thereupon contended that these parties could only claim the amount actually advanced by them, and that they could not as directors sell the debentures to themselves at a discount:—Held, that inasmuch as the company did not complain of the transaction, nor any shareholders, and inasmuch as the transaction was not ultra vires, it was not competent for the holders of the debentures of the same class, such as the plaintiffs were, to impugn the position of J. H. S., G. J. S., and J. B. If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its corporators to complain. To permit the plaintiffs to attack them on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive. *Bank of Toronto* v. *Cobourg, Peterborough and Marmora R. W. Co.*, 10 O. R. 376.

Mortgage to Director.]—Where a vote of the shareholders of an incorporated company had authorized the directors to raise money on the security of the company's lands, and one of the directors afterwards, by arrangement with the other directors, advanced money for the use of the company, and took a mortgage on their lands, it was held that a third party, who subsequently became the purchaser of the mortgaged estate, could not resist the claim of the mortgagee, on the ground that a mortgage to a director was invalid. *Greenstreet* v. *Paris Hydraulic Co.*, 21 Gr. 229.

Pledging Credit for Company—*Transfer of Shares in Consideration Thereof—Ratification.*]—In the absence of agreement, there is clearly no duty or obligation on the part of directors to pledge their own credit for the benefit of the company. *Christopher* v. *Noxon*, 4 O. R. 672.

Where certain shares were allotted to one of the directors of a company at par, in consideration of which he offered to supply funds to meet a pressing demand upon the company, and he voted on these shares at a general meeting of the shareholders, and no opposition was at the time made to his so doing:—Held, that the shareholders must be considered to have ratified the transfer, and could not afterwards object to it as improper. *Ib.*

It was alleged that he thus acquired such stock in order to obtain control of the company:—Semble, that this would not be improper, if no improper means were used by him; but that had he made a profit thereby, the company might perhaps have claimed it. *Ib.*

An allotment of shares to a director, if a questionable act, may be ratified by the company, and for this purpose, as for all other acts within the power of the corporation, the approval of a majority of shareholders is sufficient. *Ib.*

Purchase from Company.] — Where a voidable contract, fair in its terms and within

the powers of the company had been entered into by its directors with one of their number as sole vendor:—Held, that such vendor was entitled to exercise his voting power as a shareholder in a general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company. *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589; reversing 6 O. R. 300, and 12 S. C. R. 598, and restoring 11 A. R. 205.

Purchase from Company.]—A director of a joint stock company, having a judgment and execution of his own against the property of the company, acting in good faith, purchased the same at a sale by mortgagees under a power of sale, for $8,400, and sold it in the following year for $23,000:—Held, in winding-up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company and was accountable for any profit received on a resale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust within R. S. C. c. 129, s. 83. *Re Iron Clay Brick Manufacturing Co., Turner's Case*, 19 O. R. 113.

Purchase from Liquidator of Company.]—Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act), if the powers of the directors are not continued as provided by s. 34 of the Act, their fiduciary relations to the company or its shareholders are at an end, and a sale to them by the liquidator of the company is valid. *Chatham National Bank* v. *McKeen*, 24 S. C. R. 348.

Salaried Office.]—Where an Act of incorporation provides that no by-law for the payment of the president or any director, shall be valid or acted on until the same has been confirmed at a general meeting of the shareholders, this applies only to payment for the service of a director quâ director, and for the services of the president as presiding officer of the board. Where a company appoints the directors to various salaried offices without a by-law fixing the amount of the salaries as required by the Act of incorporation, and such appointments are afterwards confirmed by legislation, they are entitled to prove in the winding-up for a quantum meruit for services rendered. *Re Ontario Express and Transportation Co., Directors' Case*, 25 O. R. 587.

Solicitor—*Right to Costs.*]—See *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O. R. 289.

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2. *Election and Appointment.*

Illegal Election—*Effect of Acting.*]—Where an election of directors in a joint stock company was clearly illegal—the voters having been each allowed only one vote, whereas each share should have been given a vote—but the parties chosen had for more than eight months discharged the duties, the court refused to interfere by mandamus for a new election. Quære, whether mandamus or quo warranto would be the proper remedy. *In re Moore and Port Bruce Harbour Co.*, 14 U. C. R. 365.

Purchase of Shares for Voting Purposes.]—An election of officers obtained by a trick or artifice cannot be considered a bonâ fide election, but when shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O. R. 175.

Qualification.]—See *Kiely* v. *Smyth*, 27 Gr. 220.

Scrutineers.]—At a meeting of the shareholders of a company, the capital stock of which was held by a few, a chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders who were also provisional directors, and who were candidates for re-election, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and held a large amount of stock, sufficient with that held by those who were favourable to him to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company, held by the plaintiff as security for his advances, and allowed certain persons to vote as being cestuis que trust of a portion of such shares:—Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered, with costs to be paid by the defendants. *Dickson* v. *McMurray*, 28 Gr. 533.

Setting Aside Election — *Shareholder's Action.*]—The court of chancery has jurisdiction to set aside an election of directors by persons who are subscribers nominally and not bonâ fide. *Davidson* v. *Grange*, 4 Gr. 377.

A suit to set aside an election of directors of a corporation on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself. *Ib.*

Shareholder Succeeding to Office.]—The Act of incorporation of the Toronto Street Railway Company provided that there should not be less than three directors, each of whom should be a shareholder. The corporation consisted of three shareholders, who were the directors. Upon the death of one of them a meeting was called to appoint a new director, when one S., to whom the deceased director had bequeathed his shares, was declared elected by one of the two directors, although the other refused to concur in the appointment:—Held, reversing 25 Gr. 465, that no election was necessary to make S. a director, there being only three shareholders, each of whom was qualified to be a director. *Kiely* v. *Kiely*, 3 A. R. 438.

Special Meeting for Election — *Quorum.*]—The plaintiffs were a company in-

corporated under the Canada Joint Stock Companies Act, 40 Vict. c. 43. By s. 29, the directors were to be elected by the shareholders in general meeting assembled, at such times as the by-laws of the company should prescribe; and by s. 30, in default of other express provision therefor in the letters patent or by-laws, such election should take place yearly, upon notice; that at all general meetings each shareholder who had paid all calls should be entitled to vote on each share held by him; and that all questions should be determined by the majority of votes. By s. 31, the failure to elect directors at the proper time should not dissolve the company; but such election should take place at any general meeting of the company duly called for the purpose, the retiring directors to continue in office until the election of their successors. By s. 32, power is given to the directors to pass by-laws for, amongst other things, the time, &c., of the holding of the annual meeting of the company, the calling of meetings, regular and special, of the directors and of the company, the quorum at such meetings: but every such by-law, unless confirmed at a general meeting of the company, should only be in force until the next annual meeting thereof; one-fourth in value of the shareholders could at all times call a special meeting for the transaction of such business as might be specified in the notice given therefor. By a by-law passed by the directors the last Tuesday in September was fixed as the date of the annual general meeting, and the quorum for such meeting was to consist of five members; but at a special meeting they were required in addition to represent one-third of the capital stock. In 1884 there was no election of directors at the appointed time, owing to the office where the meeting was to have been held therefor being locked up and the defendant refusing to attend the meeting or give up the books, &c.; and in October a special general meeting of the shareholders was held, called on notice, stating the object thereof, on a requisition by one-fourth in value of the shareholders, and directors were elected, who appointed a new secretary. At the meeting there were present three-fourths of the qualified vote and one-third of the subscribed capital, but considerably less than that amount of the nominal capital. In an action by the company against defendant for the non-delivery of the books, &c., to the new secretary, the defendant set up as a defence that he was still secretary, because, as he alleged, the directors who appointed the new secretary were not duly elected, and that there was not a quorum at the meeting to transact business: —Held, under the circumstances, there was authority to call the special general meeting for the election of directors; and that it was duly called by the proper number of shareholders:—Held, also, that the directors could by by-law determine the quorum and all other formal proceedings for the control and conduct of the meeting of the board and shareholders; that there was a proper quorum present at the meeting under the by-law; and if the by-law had required such one-third to be of the whole capital stock it would have been ultra vires as opposed to s. 32:—Held, also, that on the evidence the defendant must be deemed to have unlawfully detained the books, &c., that there was an election of directors de facto, and a suit in the company's name; and an officer of the company could not be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings. *Austin Mining Co. (Limited)* v. *Gemmill*, 10 O. R. 696.

Statutory Provision for Retirement.]—Where in a prior statute the two directors having the smallest number of votes of the five chosen in a former election were declared to be ineligible at any subsequent election, and by a subsequent statute the number of directors was fixed at seven, and the persons named who were to constitute the board until the next election—the court held that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats. *Rex* v. *Welland Canal Co.*, Tay. 300.

Term of Office — *Shortening.*] — At a meeting of the directors of a company a by-law, under s. 37 of R. S. O. 1887 c. 157, was passed, and subsequently confirmed by the shareholders, providing that the directors should hold office for one year and until their successors were appointed:—Held, that the by-law so passed could only be repealed at the next annual general meeting of the company, and therefore a by-law passed during the directors' year of office, by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid. *Stephenson* v. *Vokes*, 27 O. R. 691.

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3. *Liabilities.*

Administration — *Past Directors.*]—A decree was obtained in a suit by a shareholder of a building society, suing on behalf of himself and all other shareholders, for the administration of the assets of the society, and charging the directors with losses which had been sustained:—Held, that persons who had ceased to be directors before the suit was commenced could not be made parties in the master's office. *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275.

Bills and Notes.]—*See* BILLS OF EXCHANGE, VIII. 2.

Corporate Name—"*Limited*"—*Abbreviation in Contract.*]—A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to "The Burford Canning Co.," and accepted by the drawees by the signature "The Burford Canning Co., Ltd." This was a few days after the royal assent had been given to the Ontario Act 60 Vict. c. 28, s. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 Vict. c. 26, s. 2, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act 61 Vict. c. 19, s. 4 of which suspended the operation of the Act of the previous session: —Held, that the use of the abbreviation "Ltd." was not a compliance with 52 Vict. c. 26, s. 2:—Held, also, that the address to

the "Burford Canning Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not disentitle them to recover:—Held, also, that no stay was created by 61 Vict. c. 19, s. 4, of any action but one brought under 60 Vict. c. 28, s. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict. c. 26, s. 2, the plaintiffs were entitled to recover. If, however, the use of the contraction "Ltd." was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict. c. 28, s. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited), became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4 of 61 Vict. c. 19, could not interfere, there being nothing in it which required the court to hold it to be restrospective. *Howell Lithographic Company (Limited)* v. *Brethour*, 30 O. R. 204.

False Reports—*Person Induced to Take Stock.*] — The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, overestimating the assets and underestimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock:—Held, upon the evidence set out in the case, 1. that there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed. 2. That the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by defendant. 3. That if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information. *Parker* v. *McQuesten*, 32 U. C. R. 273.

Fraudulent Acceptance of Transfer.]—When the shareholders of a certain company brought an action against the company and certain of its directors, alleging that the latter, being a majority of the directorate, had negotiated a transfer of a number of their own shares to one C., who subsequently became manager, knowing him to be a man of no sufficient means to pay calls thereon, but wishing to escape liability for certain impending calls; and claimed that the said directors should make good to the company or to them the amount of calls due upon the shares so transferred to C. and unpaid by him; and the said directors alleged acquiescence and laches on the plaintiffs' part in respect of the matters complained of; and the plaintiffs proved the transfer as alleged:—Held, reversing 6 O. R. 291, that the defendant directors in allowing the transfers complained of, were upon the evidence guilty of no fraud towards the shareholders, and that such act was within the scope of the prescribed powers and duties of directors, and as neither fraud nor a breach of trust was proved, the action was dismissed with costs. *Thompson* v. *Canada Fire and Marine Ins. Co.*, 9 O. R. 284.

Guarantee.]—One E. advanced $4,000 to I. and M. on the guarantee of the defendant company, clearly acting ultra vires, who obtained, as security for such guarantee an order from I. and M., on the waterworks company, for the amount. I. and M. afterwards induced the defendants to give up the order on replacing it by orders for half the amount. E. recovered judgment by default against the defendants, and by sci. fa. realized the amount of his loan:—Held, that B., who was one of the directors of the defendant company, and who had been instrumental in procuring the above guarantee, was properly charged with the amount the defendants had lost through the delivery up of the order on the waterworks company; but that he was not liable for the balance of the claim of E., since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced. *Walmsley* v. *Rent Guarantee Co.*, 29 Gr. 484.

Misapplication of Funds — *Action in Company's Name.*]—Where the directors of an incorporated company misappropriate the funds of the corporation, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors: the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1.

Personal Liability — *Ultra Vires Contract.*] — Certain persons, seven in number, defendant being one, were incorporated as the Amherstburgh and St. Thomas Railway Co., with power, among other things, to obtain a certain amount of stock. As soon as it was obtained, a meeting of the stockholders was to be called to organize the company. These seven, acting as provisional directors, passed a resolution authorizing one M. R. to retain counsel to prosecute a suit in chancery on their behalf, and on the same day the board of directors, which had been previously chosen by the stockholders, passed a resolution to the same effect. The plaintiffs were thereupon retained, and proceedings in chancery instituted, for the costs of which this action was brought:—Held, that the resolution being an illegal act, and the responsibility arising therefrom not being removed by the resolution of the general board of direction, the defendant as well as the others who authorized retaining the plaintiffs, was liable personally. *McDonald* v. *Macbeth*, 11 C. P. 224.

Personal or Representative Capacity.]—The plaintiff sued the defendant for lumber furnished on the occasion of the provincial agricultural society's meeting at Hamilton. The defence was, that the society, which was an incorporated body, was liable, and not the defendant personally. The learned Judge at the trial left it to the jury to find upon the evidence whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable; but the jury were told, that if he contracted as only representing or on behalf of the corporation, he would then not be personally liable:—Held, that the ruling was correct. *Simpson* v. *Carr*, 5 U. C. R. 326.

Personal or Representative Capacity.]—Assumpsit for work and labour. The plaintiff put in a paper headed, "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Company of, &c., of the first part, and J. J. (the plaintiff) of," &c. It contained an agreement by the plaintiff to do certain work for specified prices, which "the party of the first part hereby agree to pay," &c., and was signed by defendant, describing himself as "Pres. V. B.," and by the plaintiff. It appeared that the company had been duly incorporated, and that the plaintiff had received £350 from them on account of his work:—Held, that defendant was not personally liable. *Johnson* v. *Hamilton*, 13 U. C. R. 211.

Personal or Representative Capacity — *Guarantee.*]—In consequence of arrangements for uniting the Grand Trunk Telegraph Company with the British North American Association, the superintendent of the former company, on the 19th December, 1854, wrote to its president and directors, expressing his readiness (in order not to embarrass the company in its operations) to cease his connection with it on the 31st December, 1854, on the company guaranteeing to him his salary for six months from the 1st January, 1855. The president replied, "We are in receipt of your favour of this date, upon the subject of your retiring from the office you now hold under us. We will be happy to meet you in the way set forth; and we hereby pledge ourselves to carry out the provisions mentioned in your behalf. (Signed), G. H. Cheney, president, on behalf of myself and the directors of the G. T. T. Co.":—Held, that the president's reply amounted to a personal guarantee. *Boyd* v. *Cheney*, 5 C. P. 494.

Personal or Representative Capacity—*Finding of Fact.*]—Plaintiffs sued defendants for breach of an agreement by which defendants bound themselves to carry lumber for the plaintiffs from Peterborough to Port Hope at a stipulated price. The agreement set out, which was dated in November, 1865, recited that defendants were engaged in running the Port Hope, Lindsay and Beaverton railway, and the Millbrook branch thereof. One of the defendants was president and the other managing director. The jury were asked to find whether the agreement was made by defendants acting as agents for and directors of the company, of which plaintiffs had notice, and having found in the negative and assessed damages in favour of plaintiffs, the court refused to interfere with their verdict, as contrary to law and evidence. *McDougall* v. *Corert*, 18 C. P. 119.

Wages.]—A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and in addition to receiving pay for his own services at the rate of $5 a day, payable fortnightly, is paid for the use of machinery belonging to him and of horses hired by him, is not a labourer, servant or apprentice within the meaning of s. 68 of the Joint Stock Companies Letters Patent Act, R. S. O. 1887 c. 157, and cannot recover against the directors personally. *Welch* v. *Ellis*, 22 A. R. 255.

Wages — "*Labourers, Servants, and Apprentices*" — *Mining Companies Act.*]—The plaintiff, the manager of a mining company, paid out of his own moneys the amount due for wages by the company to certain labourers, and having obtained assignments of their claims, recovered a judgment against the company for the amount, together with a sum of money owed to him by the company for services. After an execution against the company had been returned unsatisfied, he brought this action on behalf of himself and the labourers against two of the directors under s. 8 of R. S. O. 1897 c. 197, the Ontario Mining Companies Corporation Act, to make them personally liable for the amount due on the execution:—Held, that the action brought against the company was not such a one as is contemplated under the section, and there being no dispute as to the facts, this action was dismissed on a motion under Con. Rule 616. The manager of a mining company is not a "labourer, servant, or apprentice" within the meaning of s. 8. *Herman* v. *Wilson*, 32 O. R. 60.

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4. *Meetings.*

Place—*Notice.*]—Five of the nine of the provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such adjournment without advertisement or notice under the statute:—Held, that the meeting of the six directors did not constitute a duly organized meeting of directors, though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment it might have cured the irregularity. *McLaren* v. *Fisken*, 28 Gr. 352.

Quorum—*Casting Vote.*]—R. S. O. 1877 c. 150, requires that companies incorporated thereunder shall have not less than three directors, who shall not be appointed directors unless they are shareholders, and it was provided by the by-laws of the plaintiff company that a director should not only be qualified when elected, but that he should continue to be so. The plaintiff company was managed by three directors, and one of them disposed of his stock:—Held, that he thereupon ceased to be a director, and the directorate then became incomplete and incompetent to manage the affairs of the company. Semble, also, even assuming that a quorum (2) of the directors could manage the business, yet, where neither the statute nor the by-laws gave the president a casting vote, resolutions passed by such vote, at a meeting attended only by the president and one other director, were invalid. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O. R. 175.

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5. *Powers and Rights.*

Assignment for Creditors.] — The directors of a joint stock company incorporated under the Canada Joint Stock Companies Letters Patent Act, 1869, 32 & 33 Vict. c. 13 (D.), and subject to the provisions of the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency. *Donley* v. *Holmwood*, 30 C. P. 240, 4 A. R. 555.

Assignment for Creditors.] — An assignment by the directors of a joint stock

company of all the estate and property of the company to trustees for the benefit of creditors is not ultra vires such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders. *Horsey* v. *Whiting*, 14 S. C. R. 515; *S. C., sub nom. Whiting* v. *Horsey*, 13 A. R. 7.

Borrowing Money.]—Held, that the directors of a mutual insurance company may under R. S. O. 1877 c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *Victoria Mutual Fire Ins. Co.* v. *Thompson*, 32 C. P. 476.

Contract — *Sale of Undertaking.*]—The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company:—Held, that the plaintiff was entitled to recover from the company the value of his work. Mahony v. East Holyford Mining Co., L. R. 7 H. L. 869, followed. Wood v. Ontario and Quebec R. W. Co., 24 C. P. 334, commented on. The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into court under an order in another action, all the provisional directors being parties in the action, and two of them submitting to the order of the court and being willing that the judgment debt should be paid out of the fund in court, an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs, and of the costs of the two directors, out of such fund. *Allen* v. *Ontario and Rainy River R. W. Co.*, 29 O. R. 510.

Covenant in Assignment of Mortgage.]—The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes:—Held, that the covenant was not ultra vires the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold. *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

Delegation.]—A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls. *Re Bolt and Iron Co., Hovenden's Case*, 10 P. R. 434.

Execution — *Sheriff Becoming Director.*]—A writ of fi. fa. against a railway company, which was directed to a sheriff, before he became a director in the company, was held properly returnable by him, and that his becoming a director before the return of the writ, did not invalidate it. *Smith* v. *Spencer*, 12 C. P. 277.

Illegal Payments.]—In a company consisting of seven shareholders, the plaintiffs, four of the shareholders holding twenty-five per cent. of the stock, claimed that there had been mismanagement of the company's funds in the payment out of large sums to the president and secretary, for salaries or services, without any legal authority therefor, and in the failure to declare any dividends though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained though frequently applied for, and that it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed. At a meeting of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made to the president and secretary:—Held, that the resolution and by-laws were invalid, and could not be confirmed by the shareholders, and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm the same. *Waddell* v. *Ontario Canning Co.*, 18 O. R. 41.

Issuing Shares at a Discount.]—Held, that the action of the directors in issuing shares at less than their nominal value was ultra vires. *McIntyre* v. *McCraken*, 1 A. R. 1. *See S. C.*, 1 S. C. R. 479.

Issuing Shares at a Discount.]—The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of the Manitoba Joint Stock Companies Incorporation Act, to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company is invalid. *North-West Electric Co.* v. *Walsh*, 29 S. C. R. 33.

Issuing Shares Without Payment.]—Held, that it was not ultra vires of the directors to take defendant's subscription for stock without at the same time receiving payment of 10 per cent. thereon. *Denison* v. *Lesslie*, 3 A. R. 536.

Payment of Costs—*Collection of Debts.*]—A bank having executions against a railway company in the hands of the sheriff, the secretary of the company, in order to avert a seizure of a quantity of railway iron, signed a letter agreeing that the bank, out of moneys coming to their hands from certain garnishee proceedings taken by the bank against debtors of the company, might retain "a sufficient amount fully to cover all your solicitor's costs, charges, and expenses against you or against you and us, as between attorney and client

or otherwise, as well as the costs, charges, and expenses of your bank, of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the board of directors of the company, although two members of the board were aware of it, and one of them, the vice-president of the company, authorized it:—Held, that this was not such an act as the officers of the company were authorized in the discharge of their duties to perform; and that, although the bank granted the time asked for, they could not enforce payment of the amounts stipulated for. *Hamilton and Port Dover R. W. Co.* v. *Gore Bank*, 20 Gr. 190.

A railway company being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due the company, the costs of which, as between attorney and client, the railway company was to pay:—Held, that the officers of the company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. *Ib.*

Payment of Creditors.] — By the by-laws of an incorporated company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C., and G., the plaintiff, were present, one being the president and the other the secretary of the company, a resolution was passed that "the matter of the compensation of C., the editor, and G., the advertising solicitor, of the company was considered, and the sum of $1,000 each be ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895 in addition to their regular salary, and to be charged to their salary account." C., as a matter of fact, had not been appointed editor, or G. advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the stock, and had made a claim against the company, being paid:—Held, that the resolution could not be sustained, nor could any moneys received under it be retained. *Gardner* v. *Canadian Manufacturing Publishing Co., Limited*, 31 O. R. 488.

Pledge of Assets.]—In a sheriff's interpleader, the Merchants Bank claimed the property in question as security for advances made by them to a certain company incorporated under R. S. O. 1877 c. 150, by virtue of warehouse receipts covering the property, and deposited with them by the said company as security. Under R. S. O. 1877 c. 150, s. 28, "The directors shall have full power in all things to administer the affairs of the company, and may make * * any description of contract which the company may, by law, enter into:" and by s.-s. 2 of s. 30 of that Act express power is given to the directors, under the sanction of a by-law approved of by not less than two-thirds in value of the shareholders, to hypothecate and pledge the real and personal property of the company to secure any sum borrowed, &c. There was no by-law in this case but the board of directors was well aware of the nature and extent of the transaction with the bank and the hypothecation of the goods, and adopted what was done:—Held, that the property in the goods passed to the bank, and inasmuch as the company could not have resumed possession thereof without satisfying the bank's lien, neither could the execution creditors, who had no higher rights as to property seized than the original debtor:—Held, also, that even if a by-law were, strictly speaking, requisite in such a case, yet where no complaint had been made by the company, or any of its shareholders, because of any irregularity or informality in what was done, as was the case here, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense:—Held, however, upon the evidence in this case, the depositing of the goods in a warehouse, and the raising of money upon the security thereof, seemed to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing here. *Merchants Bank of Canada* v. *Hancock*, 6 O. R. 285.

Purchase of Land — *Adoption of Contract.*]—A company was formed in England with a limited liability, for the purpose of carrying on business in Oshawa in this Province. The managing director at Oshawa, without authority, contracted for the purchase of some real estate for the use of the company at Oshawa, and signed the contract as "managing director." For convenience, the conveyance was made to the director personally, and he executed a mortgage for the unpaid purchase money, and went into possession and used the property for the purposes of the company. The purchase was immediately communicated by him to the English directors, and they disapproved thereof, but did no act repudiating the purchase; on the contrary, they directed the buildings to be insured:—Held, that this conduct was an adoption of the contract by the directors; that they had power to adopt it, and had the power of binding the company, and that the company were liable to the vendor for the purchase money. *Conant* v. *Miall*, 17 Gr. 574.

IV. Officers, Agents, and Promoters.

Agent for Proposed Company.]—The plaintiff sued defendant on an alleged agreement, that in consideration that the plaintiff would make a promissory note payable to the defendant's order for $500, and deliver it to defendant to be negotiated, defendant promised that the plaintiff should at any time before the maturity of the note have the option of subscribing for one share of $500, in a company to be incorporated under the Joint Stock Companies Letters Patent Act, 1874, and called the Aldershott Match Company; and that, if the plaintiff should before such maturity decline to take said share, the said company would take up the note and indemnify the plaintiff against it. The declaration averred that the plaintiff delivered the note to defendant, who negotiated it; that before its maturity the plaintiff declined to take the share, and so notified defendant, but that neither the defendant nor the company took up the note, and the plaintiff had to pay it. Defendant pleaded, on equitable grounds, that he was one of the projectors and secretary of said company, and as such before the issue of

the letters patent applied to the plaintiff to take a share, which the plaintiff agreed to do on the terms of the following receipt then given by him to defendant:—"Hamilton, 13th April, 1876. Mr. Thomson has given me his note for $500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and if so, this company will take up the note. C. Feeley, secretary;" that defendant then gave his note accordingly; that afterwards the company was incorporated; that the defendant was a shareholder and the secretary, and in that capacity only indorsed the note to the company, which accepted it on the terms of the receipt and discounted it; that before its maturity the plaintiff notified the company that he declined to take the share, but afterwards withdrew such notice and paid the note at maturity, and was treated as a shareholder, and voted and acted as such at meetings of shareholders; that it was not the intention of either plaintiff or defendant that defendant should be personally bound by the receipt, or in respect of said note or share, but they both intended that the plaintiff should look only to the company in his dealings under the receipt in respect of said share, and defendant was described in the receipt as secretary in order to exempt him from personal liability; and he denied any fraud (which was charged in the second count), and denied that he contracted with the plaintiff as alleged:—Held, that the defendant was primâ facie personally liable, there being at the time when he signed the receipt no company, and therefore no principals whom he could bind. That part of the plea was proved alleging the intention of the parties to have been that defendant should not be personally bound by the receipt, but that the plaintiff should look only to the company. Semble, that this could form no defence, being in contradiction of the written agreement. But the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea. Suggestions as to a form of plea which might shew a good defence. *Thomson* v. *Feeley*, 41 U. C. R. 229.

Agent to Take Investments.]—L. arranged with the Canada Agency Association, an English company investing money in Canada, and having defendant R. as their manager, and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L., and the expenses, &c., the manager sent to his order a cheque for the balance of $89.95, signed by R. and H. the defendants. L. having made a claim for a larger amount, brought an action against R. and H. to recover the amount he claimed to be due him:—Held, that defendants were not liable, as they never received any money to the use of the plaintiff, having no control over the money except as manager and director of the Canada Agency Association, and were in no wise acting as individuals on their own behalf, but solely as officers of the company; that the evidence did not establish any privity between the plaintiff and the defendants in respect of the money claimed, and without such privity the action would not lie. *Howard* v. *Logan*, 14 C. P. 592.

Appointment of Agent.]—The defendants wishing to introduce an ore, called "blue ore," into Pennsylvania, corresponded with the plaintiff at Pittsburg. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st August, 1872, with an option to O. & Co. to order any number of tons, from 10,000 to 30,000, during the five years from the 1st February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of 15 cents per ton would be paid him on the sale, and that he would make him the following offer for the future:—"I will give you a commission of 10 cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of 5 cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania:"—Held, that proof merely that C. was defendants' managing director was not sufficient evidence under 16 Vict. c. 253, ss. 10, 20, of C.'s authority to enter into the contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him:—Held, also that the plaintiff was not an agent within s. 17, so as to require his appointment by by-law. *Taylor* v. *Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 24 C. P. 200.

Appointment of Agent.]—The defendant company was a foreign corporation, whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto, and of its subagencies, giving him power to do everything necessary and requisite to all intents and purposes as fully as the company could do. He appointed the plaintiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid $15 a week and a commission on sales. He was summarily dismissed. Evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will:—Held, that the appointment from year to year was clearly within the authority of the directors, that the general authority was delegated to the general agent, and that the plaintiff had a right to rely upon the authority so given when he entered into the engagement. *Howarth* v. *Singer Manufacturing Co.*, 8 A. R. 264.

Appointment of Officers — *Seal.*]—A resolution passed by defendants, that the plaintiff be engaged for the society's office as a clerk, "for three months, on trial, at a salary of $800 per annum:"—Held, clearly not to support a count alleging his employment for a year. Held, also, looking at the statutes incorporating defendants, C. S. U. C. c. 53, 37 Vict. c. 50 (D.), the duration and character of plaintiff's employment, and the circumstances of his appointment, as set out in the report, that the contract, so far as executory, must be under the defendants' corporate seal. *Hughes* v. *Canada Permanent Loan & Savings Society*, 39 U. C. R. 221.

Bills of Exchange and Promissory Notes.]—See BILLS OF EXCHANGE, VIII. 2.

Bills of Sale.]—See BILLS OF SALE, VIII.

Canvasser for Municipal Aid to Railway.]—Held, under 34 Vict. c. 48, the Act incorporating the Ontario and Quebec R. W. Co., and the Railway Act of 1868, that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or an entry or minute in their record of proceedings, would have been sufficient, without the formality of a by-law or the seal of the company. The plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which the defendants' railway was to pass, and the only evidence of his appointment was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to work up the bonuses, and requesting him to proceed forthwith. It was shewn also that the president had recognized and adopted his services, and partially paid therefor:—Held, that this was not sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company; but a new trial was granted without costs, to enable him to supply proper evidence if possible. *Wood* v. *Ontario and Quebec R. W. Co.*, 24 C. P. 334.

Committee—*Pre-existing Indebtedness.*]—Held, that a member of a committee is not responsible for the salary of a person employed by the committee (under a joint stock banking charter,) before he became a stockholder in the bank and such member. *Mingaye* v. *Burton*, 10 C. P. 60.

Complaint Against Management.]—Bill by shareholder in railway company complaining of managing director's misconduct—Frame of bill—Parties—Demurrer. See *McMurray* v. *Northern R. W. Co.*, 22 Gr. 476; *S. C.*, 23 Gr. 134.

Company not Legally Incorporated—*Costs of Actions.*]—Actions brought in the name of a road company against the present plaintiffs were dismissed with costs, on the ground that the company had never been incorporated according to law. The present actions were brought against four of the corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned nulla bona:—Held, that, in the absence of malice and want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence. *Platt* v. *Waddell, Townsend* v. *Waddell*, 18 O. R. 539.

Contract.]—An agreement was made between defendant and the plaintiff, described as "President of the Port Burwell Harbour Company, on behalf of the said president, directors, and company of Port Burwell Harbour," and under the seals of defendant and plaintiff:—Held, that the plaintiff could sue in his own name. *Saxton* v. *Ridley*, 13 U. C. R. 592.

Conflicting Claimants to Office.]—The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O. R. 175.

Director — *Canvasser—Remuneration.*]—The plaintiff, one of the provisional directors of defendant company, named as such, with his assent, in their Act of incorporation, 36 Vict. c. 70 (O.), was, without resigning this office, appointed at a meeting of the provisional directors "provisional secretary and treasurer," and to act in conjunction with a committee then appointed in procuring municipal aid; and he acted in such capacity, and was chiefly instrumental in procuring the passage of the municipal by-laws for bonuses in aid of the railway. The understanding was that he should be well paid, but no sum was specified:—Held, that the plaintiff continued a director and trustee under the statute for certain specified purposes, and could not recover for services rendered in matters unauthorized thereby, and beyond the powers and duties of the provisional directors:—Held, also, that the employment of the plaintiff for such a purpose was beyond the powers or duties of the provisional directors, who have not the full powers of directors elected by the shareholders. *Michie* v. *Erie and Huron R. W. Co.*, 26 C. P. 566.

Director—*Solicitor—Right to Costs—Set-off.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company:—Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in court conducted by him as solicitor for the company, but not in respect of business done out of court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder. Cradock v. Piper, 1 Macn. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O. R. 289.

Domestic Forum.] — Where an association has a code of laws, as also rules for the government of members, which point out what course a member shall pursue if he finds himself aggrieved, he must exhaust the remedies thus provided before applying to the courts of law for redress; and such rules of the association may require to be more rigidly enforced in the case of a secretary, treasurer, or other officer of the association, than they would be in the case of an ordinary member. *Field* v. *Court Hope of Ancient Order of Foresters*, 26 Gr. 467.

Expenses Before Incorporation.]—A proposed corporator in a joint stock company, who, in advance of the incorporation, takes a practical part in the prosecution of the intended business of the company, or who sanctions or ratifies the conduct of affairs by some act, not being a mere subscription to shares, is liable to contribute, with other subscribers to stock in a like position, to a liability properly incurred in carrying out the objects of the projected company, and the pro-

portionate amount of contribution by each depends on his share subscription irrespective of the amount paid on the shares. *Sandusky Coal Co.* v. *Walker*, 27 O. R. 677.

Expenses Before Incorporation.]—The defendant and one H., in order to utilize an engine in which they were interested, arranged to have a steam vessel built, which was to be the property of the company to be formed under the Ontario Joint Stock Act of 1874, with a capital of $30,000, in shares of $100 each. The vessel was built and registered in defendant's name, and several mortgages given by him upon her. In March, 1876, the plaintiffs, at the solicitation of the defendant and H., and upon their agreement to use the plaintiff's wharf at a wharfage of $300 for the season, agreed to take stock in the projected company, executed a document prepared for intending stockholders, and gave two notes for $250 each, the first of which the plaintiffs paid, but not the second. Some $900 stock was subscribed, and a meeting of intending stockholders held, at which resolutions were passed as to the formation of the company, and appointing trustees to receive a conveyance of the vessel in trust for the company until formed. The company was never formed, and it was admitted that the Ontario Act did not authorize its formation, nor was there ever a conveyance to the trustees. The plaintiffs not having been paid the $300, the wharfage for 1876, which was charged against the vessel, sued defendant as the legal owner:—Held, that they were entitled to recover; that their subscription did not constitute them joint owners or co-partners in the vessel, nor could defendant set off the amount of the unpaid stock note, for not only had the consideration therefor wholly failed, but it could only be a matter between the plaintiffs and the company, if formed. *Sylvester* v. *McCuaig*, 28 C. P. 443.

License to Overflow Land.]—Case for overflowing land of the Canada Company. The defendant produced a letter to one S., under whom he claimed, from the plaintiffs' agent, saying that the land would be sold to him for the purpose of erecting a saw mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, and that he should furnish the company, or their settlers, with lumber at a reasonable rate:—Held, that this letter could not be construed as a license to the defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam was known to and contemplated by the parties at the time:—Held, also, that the plaintiffs, as a corporation, could not be bound with respect to such an injury as was shewn in this case, by any thing done by their ordinary agents without special authority. *Canada Company* v. *Pettis*, 9 U. C. R. 669.

Manager of Club—*Keeping Liquor for Sale.*]—Section 50 of the Liquor License Act, R. S. O. 1887 c. 194, which forbids the keeping or having in any house, &c., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under the Ontario Joint Stock Companies Letters Patent Act who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, &c., being that of the club and not of the manager. Regina v. Charles, 24 O. R. 432, distinguished. *Regina* v. *Slattery*, 26 O. R. 148.

Manager—*Receipt of Premium.*]—By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for himself personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company:—Held, that the company was not bound. *Tiernan* v. *People's Life Insurance Company*, 26 O. R. 596; 23 A. R. 342.

Medical Examiner—*Authority of Agent.*]—The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign, which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance:—Held, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority to contract with L. for any employment other than that specified in his commission; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment. *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 595.

President—*Inspector—Salary.*]—An objection was raised to the president of an insurance company acting as such, because he acted as the inspector of the company for which he was paid a salary:—Held, that no weight could be given to it, because three directors formed a quorum of which the president need not be one, and a quorum may have acted without him; and, moreover, for all that appeared it might be that he only received an additional allowance as president while discharging the duties of inspector.

Victoria Mutual Fire Ins. Co. v. *Thompson*, 32 C. P. 476.

President—*Hiring Master of Steamer.*]—Semble, that a contract made verbally by the president of defendant company with the plaintiff engaging him for "the season," that is early in May, until sometime in November, as master to manage a steamer, might be binding, and that a nonsuit for the want of a corporate seal was properly set aside. *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464.

President—*Promissory Note—Discount.*]—One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, on behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached that made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, and the proceeds were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account, with the consent of S. but without the authority of the directors who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president, depositing therein the proceeds of sales of cheese and drawing upon it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted:—Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it. *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O. R. 327; 23 A. R. 66; 26 S. C. R. 443.

President — *Railway Subsidy.*]—Where money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vict. c. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order-in-council dated 6th August, 1888, the land subsidy was converted into a money subsidy, s. 9 of said c. 91, 51 & 52 Vict., enacting that "it shall be lawful," &c., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order-in-council, and built the railway in accordance with the Act 51 & 52 Vict. c. 91 and the provisions of the Railway Act of Canada, 51 Vict. c. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order-in-council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of $6,500 due on account of the first subsidy:—Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

President — *Salary.*]—The president and vice-president of a company drew for several years, without proper authority but with the acquiescence of their co-directors, elected by, and closely connected with, the majority of the shareholders, large sums, ostensibly as salaries as general manager and managing director respectively:—Held, that the propriety of the payments could be inquired into at the instance of dissatisfied shareholders, although the majority were prepared to ratify them. *Earle* v. *Burland*, 27 A. R. 540.

President—*Secret Profit.*]—The president of a company cannot, unless with the consent of all the shareholders, make a profit by selling to the company a property which he knows the company requires, and which he buys with that knowledge for the express purpose of selling to it. *Earle* v. *Burland*, 27 A. R. 540.

President and Vice-President — *Wages.*]—Claims for arrears of salary, made by persons occupying the position of president and vice-president of a company, such salary being payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. *Fayne* v. *Langley*, 31 O. R. 254.

Promoters — *Fraud and Misrepresentation.*]—A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the government of Ontario for a charter, and at the same time a prospectus was issued, which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false: 1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid up stock, and the

whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed $75,000 will be issued by the company to guarantee eight per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders pro rata. 4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with eight per cent. per annum, on receiving six months' notice in writing. 5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased. The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus: that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued but before stock certificates were granted: that the assets of the old company were not worth $140,000, or any sum over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for repayment of the amount of such stock, and for damages against the directors and promoters for misrepresentation. There was evidence to shew that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets. On the argument three modes of relief were suggested: 1. Rescission of the contract to subscribe for preference stock. 2. Specific performance of the contract to take back the preference stock during the year 1880 at par. 3. Damages against the directors and promoters for misrepresentation. The company having become insolvent the plaintiffs put their case principally on the third ground: —Held, affirming 2 O. R. 218, and 11 A. R. 336, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation:— Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit:— Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued, it could not have been in the prospectus, and, moreover, that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given: and as to the concealment of the embarrassed condition of the old company, the evidence shewed that the old firm did not believe themselves to be insolvent: and in neither case were they liable in an action of this kind. *Petrie* v. *Guelph Lumber Co.*, 11 S. C. R. 450.

Sale of Land.]—Sale of land by manager of bank. See *Dominion Bank* v. *Knowlton*, 25 Gr. 125.

V. Powers.

1. *Amalgamation.*

Bondholders — *Construction of Act.*]— A statute gave the bondholders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this "converted bond stock," and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of eight per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the company was authorized to unite with another company, and it was declared, that the two companies, and those who should become shareholders in the new company under the Acts relating to the Cobourg and Peterborough Railway Company and under the deed of union, should constitute the new company:— Held, that the union did not extinguish the right of the bondholders to elect. *Cayley* v. *Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 14 Gr. 571.

The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act:"— Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary; but did not give them legislative authority over the rights of other persons. *Ib.*

A statute authorized two companies to unite into one company by either a complete or partial union; and either of joint or separate, or absolute or limited liabilities to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies:—Held, that the new company thereby assumed all the liabilities of the old company to third persons. *Ib.*

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2. *Borrowing and Lending.*

Bills of Exchange and Promissory Notes.]—See Bills of Exchange.

Bonds.]—The bond produced acknowledged defendants to be "indebted to the holder hereof in the sum of £——, and do hereby promise to pay the same to such holder at the agency of the Bank of Montreal, at Ottawa, on, &c., on the surrender of this bond, with interest, at the rate of, &c., payable, &c., upon presentation of the several warrants or coupons hereto annexed, at the agency of the Bank of Montreal at the city of Ottawa as aforesaid." The declaration stated that defendants, by their bond, sealed, &c., become bound to the holder thereof, in the sum of, &c., with interest, &c., to be paid to such holder thereof, on, &c., and the plaintiff became holder thereof, &c., yet such sum with interest had not been paid. It was admitted at the trial that the bonds were not presented at the place where they were made payable; and it was proved that if they had been so presented, defendants had not funds there to meet them:—Held, that there was no variance between the bonds declared on and those produced in the former being stated as payable to holders generally, while the latter were payable only on surrender and at a particular place:—Held, also, that it was not necessary for plaintiff, as a

condition precedent to his recovery, to aver and prove presentment at the particular place, and a tender of the surrender of the bonds, or a readiness to surrender them. *Fellowes v. Ottawa Gas Co.*, 19 C. P. 174.

Interest.]—The exception in the last clause of 22 Vict. c. 85, which prevents corporations, &c., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it. *Edinburgh Life Assurance Co. v. Graham*, 19 U. C. R. 581.

The defendants, a life insurance company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of the loan. Semble, that even if the exception above mentioned had applied to them, this would not constitute usury. *Ib.*

Loan Company — *Debenture Holders—Depositors.*]—The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors. The company was formed on the 19th October 1871, under C. S. U. C. c. 53, by s. 38 of which the right of a society formed under it to borrow money, if authorized by its rules to do so, was recognized. By rule 7 of the company, passed under the authority of s. 2 of c. 53 C. S. U. C., the directors were authorized to borrow money for the use and on the assets of the company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution:—Held, that the company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed. Murray v. Scott, 9 App. Cas. 519, followed. And this power to pledge the assets was one which might be delegated to the directors under C. S. U. C. c. 53, s. 5. The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada:"—Held, that these instruments created a charge upon the property of the company. Per Rose and MacMahon, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order. Per Meredith, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors. *Re Farmers' Loan and Savings Company, Debenture Holders' Case*, 30 O. R. 337.

Loan to Company to Pay Debts.]—Where a corporation having a debt to pay, which it was to their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. *Burnham v. Peterborough*, 8 Gr. 366.

Loan to Enable Borrower to Pay Liabilities to Company.]—Held, that the plaintiff was not precluded from recovering money advanced to B. for the liquidation of liabilities by B. to the Niagara Harbour and Dock Co., or from enforcing any security for its repayment, because that company, in such transactions, exceeded the power conferred on it by its charter. *Cayley v. McDonnell*, 8 U. C. R. 454.

Money Received under Ultra Vires Contract.]—The defendants, a street railway company, entered into an agreement on the 29th December, 1874, before their road was in operation, with the Grand Trunk Railway Co., to carry freight for that company between the town of Sarnia and Point Edward, and in April, 1875, their road being still unfinished, they, in order to fulfil their contract, agreed with the plaintiff, a steamboat owner, for the transportation of merchandise by water between these points until their railway should be opened. The plaintiff performed the service, and the defendants received payment from the G. T. Railway Co. therefor. It was objected that the defendants had no power to make the contract with the plaintiff, and that he therefore could not recover; but:—Held, that to the extent to which the defendants had so benefited by the plaintiff's services they were liable to him, and should not be allowed to raise the objection of ultra vires. *Clarke v. Sarnia Street R. W. Co.*, 42 U. C. R. 39.

Money Received under Ultra Vires Contract.]—The defendants desiring to raise money drew a bill and requested the plaintiffs to indorse for their accommodation, which the plaintiffs did, and defendants having discounted and failed to meet it, the plaintiffs paid it to the bank:—Held, that assuming that defendants had no power to draw the bill, they were nevertheless liable to the plaintiffs as for money paid for them. *Brockville and Ottawa R. W. Co. v. Canada Central R. W. Co.*, 41 U. C. R. 451.

Money Received under Ultra Vires Contract.]—A company receiving money on deposit, which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be ultra vires; and if the officers of the company use such money in other ultra vires transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do. *Walmsley v. Rent Guarantee Co.*, 29 Gr. 484.

Mortgage.]—Effect of mortgage not ratified by two-thirds of the shareholders of the company under R. S. C. c. 119, s. 37. See *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247.

Mortgage.]—Under s. 38 of the Ontario Joint Stock Companies Letters Patent Act,

R. S. O. 1887 c. 157, the votes of the "two-thirds in value of the shareholders" who may vote for a by-law authorizing the borrowing of money, &c., on the property of a company, are, where there has been no default after a call, to be computed upon the face value of the number of the shares held, and not upon the amount paid upon such shares. *Purdom* v. *Ontario Loan and Debenture Co.*, 22 O. R. 597.

Mortgage to Secure Purchase Money of Chattel.]—An insurance company was by its charter authorized to hold real estate for the immediate accommodation of the company, "or such as shall have been bonâ fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts;" and having sold and conveyed a vessel, took from their vendee mortgages on real estate to secure the purchase money:—Held, a transaction within the Act of incorporation, the price of the vessel being a debt existing previously to the execution of the mortgages; and, semble, that under these words of the Act it was not, as with banking institutions, necessary to the validity of such a mortgage that any previous indebtedness should exist. *Western Assurance Co.* v. *Taylor*, 9 Gr. 471.

An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a company's incorporation Act, and as was conducive to the attainment of those objects, having been duly carried out:—Held, that the arrangement could not afterwards be declared to have been beyond the powers of the company or its directors, so as to entitle the company to keep for their own use, without compensation to the plaintiff, the whole benefit which the arrangement had afforded the company. *Ib.*

Mortgage to Secure Purchase Money.]—Where a company has power to acquire land for the purposes of its incorporation, it has the power to give a mortgage for, and to bind itself by covenant to pay, the purchase money. Where the power to contract exists, a person contracting with the company need not inquire whether the proper formalities of execution by the company have been complied with in a contract under its corporate seal. *Sheppard* v. *Bonanza Nickel Mining Co.*, 25 O. R. 305.

Railway Aiding Another Railway.]—The Great Western Railway shareholders resolved in 1857, to advance £150,000 stg., to the Detroit and Milwaukee Railway Company, and again, in 1858, a further sum of £100,000 stg. The first loan was expressly sanctioned by parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway Company, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee Company to be deposited with the plaintiffs, and exchange on the Great Western Railway's London board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee Railway account, Great Western Railway," and kept distinct from the Great Western Railway account proper. Large advances were made, and exchange drawn; the business was carried on for two years, and moneys advanced by the G. W. R. Co. to the D. & M. Co., beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. It was proved that of the two loans only about $700,000 was paid to the plaintiffs by exchange or traffic receipts. Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co., or to the individual directors negotiating the arrangement, and the plaintiffs sued for the balance overdrawn, amounting to about $1,000,000. At the trial many objections were taken:—that credit was not given to defendants; that they could not be bound except under seal; and that all advances to the foreign company were ultra vires, as the plaintiffs well knew. Leave was reserved to move for a nonsuit, and it was left to the jury to say (among other things) to whom credit was given, who reaped the benefit of the expenditure of this money, and whether the plaintiffs had any notice of the loans being exceeded. The jury found all these points in favour of the plaintiffs:—Held, that the plaintiffs as bankers could under the special circumstances recover, although there was no evidence of a debt under seal; that the objection of the advances being ultra vires could not prevail under the peculiar facts of the case; that it was a question of fact for the jury whose credit was actually pledged and to whom credit was given; and that there was evidence to support the finding for the plaintiffs. *Commercial Bank* v. *Great Western R. W. Co.*, 22 U. C. R. 233; *Great Western R. W. Co.* v. *Commercial Bank*, 2 E. & A. 287; 3 Moo. P. C. N. S. 295.

Railway Company—*Mortgage.*]—Power of railway company to mortgage their road. See *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. 697.

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3. *Contracts.*

(a) *In General.*

Arbitration.] — Corporations, sole or aggregate, if not disabled, may submit disputes relating to corporate property to arbitration, and their successors will be bound thereby. *In re Townships of Eldon and Ferguson*, 6 L. J. 207.

Executory Contract.] — A corporation may maintain assumpsit on an executory as well as on an executed consideration, where the contract is in the usual course of business. *Kingston Marine R. W. Co.* v. *Phillips*, M. T. 3 Vict.

Fraud and Misrepresentation — *Acquiescence.*]—The plaintiffs, formerly owners of a line of steamers, filed the bill in this cause against the defendants, who were formerly owners of another line of steamers, seeking damages in respect of alleged misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, and whereby the plaintiffs alleged they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and

run the same. The agreement was made in December, 1876, the charter of the company was obtained in March, 1877, and the plaintiffs became aware of the alleged misrepresentations in May, 1877; notwithstanding which they continued to carry on the business, allotted shares, and allowed dividends to be paid until and after the bill was filed, which was not till February, 1881. The cause was not brought to a hearing till May, 1884, and one of the defendants died while it was pending. The evidence as to the alleged misrepresentations was conflicting:—Held, reversing 9 O. R. 385, that this was in effect a common law action of deceit, and the misrepresentations alleged required proof of the clearest kind; and, therefore, that the long delay, the conduct of the plaintiffs, and their dealings with the subject matter disentitled them to relief upon the evidence submitted:—Semble, if the plaintiffs had succeeded, the measure of damages would have been a portion of the profits of the contracts, as represented by the defendants, proportioned to the plaintiffs' shares of the capital stock of the company. Per Hagarty, C.J.O., the action was wrong in its framework; it should have been brought in the name of the company, or on behalf of all its shareholders. Per Burton, J.A., the action could not have been maintained by the company upon representations made to the plaintiffs. *Beatty* v. *Neelon*, 12 A. R. 59; 13 S. C. R. 1.

Fraud and Misrepresentation — *Rescission.*]—The plaintiffs, a company formed for the purpose of colonizing lands in the North-West Territories, represented to defendant, by means of an advertisement issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land" in the said territories, "comprising 2,000,000 acres, for the purpose of settlement, free from the use of intoxicating liquors." The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice, from the odd numbered sections of our lands as procured or to be procured from the Dominion," and paid certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors:—Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreement thereby, was therefore entitled to have them rescinded, and to recover back the money paid by him. *Temperance Colonization Co.* v. *Fairfield*, 16 O. R. 544.

Mining Company — *Compensating Explorer.*]—M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company, under an agreement that he should be compensated for the communication, but the mode of compensation was not determined. The communication having proved valuable to the company, it was held that M. was entitled to compensation in the manner usual in such cases. The usual mode was proved to be by receiving a share or partnership interest in the mine when the patent is procured:—Held, that this mode was not ultra vires of the company or the directors. *McDonald* v. *Upper Canada Mining Co.*, 15 Gr. 179.

Provisional Contract.]—The plaintiffs were the owners of certain boats, docks, &c., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, &c., to a company to be thereafter incorporated as the "Thames River Navigation Co." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to have been paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of $3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned:—Held, reversing 9 O. R. 754, that the defendants were not liable for the balance of the purchase money, as the circumstances shewed there had never been a completed sale and purchase. The only contract proved was a provisional one to take effect upon the incorporation of a new company, and the delivery which had taken place was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected. *Thames Navigation Co.* (*Limited*) v. *Reid*, 13 A. R. 303.

Road Company — *Making Road—Pledging Tolls.*]—Defendants being a joint stock road company under C. S. U. C. c. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorized by the Act (s. 32), but the plaintiff built the road, the defendants accepted it, and levied tolls upon it, and, after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done:—Held, that they were liable upon the common counts. *Thornton* v. *Sandwich Street Plank Road Co.*, 25 U. C. R. 591.

Speculative Purchases.]—An incorporated company, by its charter, was authorized to carry on business in the management of real and personal property; to guarantee rents thereof; to collect rents, etc.; procure loans, to negotiate the sale and purchase of houses, mortgages, stocks and other securities, "and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance:"—Held, that this did not confer any power upon the company to discount notes guaranteed by their indorsement; neither had they the right to speculate in the purchase of mortgages or other securities, although they might have been justified in investing any surplus capital or accumulation of profits until the same was required. *Walmsley* v. *Rent Guarantee Co.*, 29 Gr. 484.

Ultra Vires Contract — *Consent Judgment.*]—A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as

are reasonably incidental thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.—If a company enters into a transaction which is ultra vires and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding upon the parties as one obtained after a contest and will not be set aside because the transaction was beyond the power of the company. *Charlebois* v. *Delap*, 26 S. C. R. 221. See the next case.

Ultra Vires Contract — *Consent Judgment.*]—Where by contract, ex facie legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company irrespective of either actual or estimated cost of construction:—Held, that the contract was ultra vires of the company. Held, further, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of ultra vires not having been raised either in the pleadings or on the facts stated was of no greater validity than the contract. *Great North-West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114.

Wrongdoer Objecting to Frame of Action.] — Defendant being employed by plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labour:—Held, that defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs under their charter could not sue on such a cause of action. *Northern R. W. Co.* v. *Lister*, 27 U. C. R. 57.

(b) *Seal.*

Accepting Benefit—*Architect.*]—Where work done for a corporation is such as was evidently contemplated by their charter, and they have accepted and availed themselves of it, they cannot refuse to pay on the ground that there was no contract under seal:—Held, therefore, that the Hamilton and Gore Mechanics' Institute were liable to the plaintiff for services rendered by him as an architect upon a verbal agreement, in preparing plans and superintending the erection of a hall for their accommodation. *Clark* v. *Hamilton and Gore Mechanics' Institute*, 12 U. C. R. 178.

Action at Law.]—The objection that a corporation cannot be bound unless under the corporate seal, is applicable only to actions at law. *Brewster* v. *Canada Co.*, 4 Gr. 443.

Appointment of Solicitor.]—Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Bank—*Guarantee—Accepting Benefit.*] — D., on the suggestion of R. and the Bank of O. that he should purchase certain lumber held by the bank as security for advances made to R., required a guarantee from the bank that the lumber should be satisfactorily culled and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled previously to shipment:—Held, that no seal was required, and if the bank wished to repudiate it they should repay the money paid to them by D. for the lumber. *Dobell* v. *Ontario Bank*, 3 O. R. 299; 9 A. R. 484.

Building Engine.]—Assumpsit held not maintainable against defendants for the non-performance of a parol agreement to build an engine for a steamboat. *Hamilton* v. *Niagara Harbour and Dock Co.*, 6 O. S. 381.

Building Society—*Authority to Sell.*]—It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell; the entry in the books of the society is sufficient for that purpose. *Osborne* v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326.

Churchwardens.]—In an action against churchwardens for the use and occupation of a house rented by the previous churchwardens for the rector:—Held, no objection that there was no contract under the corporate seal of the churchwardens. *Maynard* v. *Gamble*, 13 C. P. 56.

Executory Contract—*Use and Occupation.*]—There is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or is under its corporate seal. The defendant company, who had occupied certain premises under a verbal agreement and paid rent for a year, continued in possession after the year and then went out paying rent for the time they were actually in possession:—Held, that as there was no lease under seal, the company were not liable as tenants from year to year but only for use and occupation while actually in possession. Finlay v. Bristol and Exeter R. W. Co., 7 Ex. 409, discussed and followed. *Garland Manufacturing Co.* v. *Northumberland Paper and Electric Co.* (*Ltd.*), 31 O. R. 40.

Gas Company.]—A special contract for continuing to supply gas will not be binding on the company unless in writing, under the corporate seal. *Smith* v. *London Gas Co.*, 7 Gr. 112.

Insurance Company — *Arbitration.*] — Held, on demurrer to a plea setting up the absence of the corporate seal, that a parol agreement entered into by "the duly au-

thorized agents" of an incorporated insurance company, to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them and subsequently lost, was not binding upon the company, as not being a contract relating to the purposes for which the company was incorporated. *Calvin* v. *Provincial Insurance Co.*, 29 C. P. 267. See the next case.

Insurance Company—*Contract to Raise Vessel.*]—Declaration, that a certain vessel insured in the Provincial Insurance Company was sunk, and that defendant, who was the agent of the company in effecting settlements on account of vessels lost or damaged, in consideration that the plaintiffs would contract with defendant as and assuming to be the agent of the company, to raise the vessel for $3,100, the question of the liability to pay said sum to be referred to arbitration, promised the plaintiffs that he was authorized by the company to enter into said contract as their agent, as follows, (the contract was then set out, made between the plaintiffs and the company, and signed by the defendant for the company); that the plaintiffs entered into such contract with defendant as and assuming to be the agent of the company, and raised the vessel; yet defendant was not authorized by the company to make such contract, and refused to pay the plaintiffs the $3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the contract against the company, and were put to expense, &c. Plea—that the plaintiffs were unable to enforce the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the company:—Held, on demurrer. 1. That there was no assertion in the declaration of defendant being the agent inconsistent with the allegation of his want of authority. 2. That the plea shewed no defence, for if defendant had been authorized as he represented, the company could have been compelled in equity to affix their seal to the contract. *Calvin* v. *Davidson*, 31 U. C. R. 396.

Insurance—*Restraining Company from Setting up Defence.*]—Held, that the setting up of "the want of a seal" as a defence to an action on an assurance policy which had been treated by all parties as a valid policy was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and, therefore, the respondent was entitled to the relief prayed, as founded on the facts alleged in her equitable replication. *London Life Assurance Co.* v. *Wright*, 5 S. C. R. 466; 5 A. R. 218; 29 C. P. 221.

Insurance—*Mistake.*]—The Acts of incorporation of the Sun Mutual and London Insurance Companies, required insurance contracts to be under seal and signed and countersigned as by the Acts directed. The policies in these cases were not under seal, but were signed and countersigned as required, and on the printed forms of policies issued by these companies for some years previously. The attestation clause of the Sun Company's policy acknowledged it to be under seal, while in the London Company it merely professed to be signed, &c.:—Held, that under the circumstances, more fully set out in the case, the omission to affix seals must be deemed to be through mutual mistake; and that the plaintiffs were entitled to equitable relief, either by a reformation of the policies by the addition of seals, or by debarring the defendants from setting up such defence. An equitable replication setting up the facts was therefore allowed to be added, and a new trial upon it was refused. *Wright* v. *Sun Mutual Ins. Co.*, 29 C. P. 221, 5 A. R. 218.

Lease.]—Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enters and holds thereunder he will be liable for all rents reserved thereby during the time he so holds; and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied, but, before the expiration of the term demised, the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment:—Held, that they were liable for the rent during the residue of the term which had since expired. *Finlayson* v. *Elliott*, 21 Gr. 325.

In such a case the property had been conveyed by the owner to the bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings, and the bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The court, under the circumstances, made a decree for payment of the amount in favour of the party beneficially entitled. *Ib.*

Mining Company—*Commission.*]—M., being aware of a valuable mining location, made it known to defendants, under an agreement that he should be compensated. The mode of compensation was not determined, but the usual mode was found to be by receiving a share or partnership interest in the mine. The agreement was not under the corporate seal. The company received $5,500 for their claim to the property by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors to obtain secretly a grant of the property to himself personally:—Held, that the plaintiff was entitled to share this sum and that the want of a seal was no defence. *McDonald* v. *Upper Canada Mining Co.*, 15 Gr. 179; affirmed on rehearing.

Parol Contract.]—Review of the cases as to the liability of a corporation by parol, both at law and in equity. *Davis* v. *Canada Farmers Mutual Insurance Co.*, 39 U. C. R. 452.

Parol Contract.]—City corporation—Work done in improving a road on parol contract—Liability. See *Gibson* v. *City of Ottawa*, 42 U. C. R. 172.

Performance.]—Contracts not under the corporate seal, made with trading companies, relating to purposes for which they are incorporated, if partly performed, and of such a nature as would induce the court to decree specific performance if made between ordinary individuals will be enforced against them. *Ontario and Western Lumber Co.* v. *Citizens'*

Telephone and Electric Co., 16 C. L. T. Occ. N. 118.

Performance — *Adoption.*] — A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

Railway—*Agreement to Attach Debts.*] — A railway company being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due to the company, the costs of which as between attorney and client the railway company was to pay:—Held, that the officers of the company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. *Hamilton and Port Dover R. W. Co.* v. *Gore Bank*, 20 Gr. 190.

Railway — *Construction of Another Road.* — The defendants being unable to finish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies, and resolutions passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the money expended above the receipts:—Held, not recoverable, for the agreement relied upon, being special in its terms, was invalid for want of a corporate seal. *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

Semble, that defendants, under the circumstances, should have been held to have accepted the work done, if there were not the other objection to the plaintiffs' recovery. *Ib.*

Semble, also, that a valid agreement in the terms of the resolution would not have created a partnership between the parties. *Ib.*

Railway—*Construction of Road.*] — The managing director of a railway company entered into a contract in his own name, adding, "acting on behalf of the company," with a person for the construction of the road, and for keeping it in repair. Under this the contractor completed the greater portion, when the company stopped the works, alleging that they had not been aware of the terms of the contract, which they asserted were most extravagant in respect of the prices agreed to be paid:—Held, that the contract did not require the common seal to render it binding: that the company must be presumed to have had notice of the terms and stipulations of the contract: and that the company were bound to pay for the work at the prices agreed upon. An enquiry was directed as to the damage sustained by the contractor by reason of the stopping of the works, and the loss of the contract. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 7 Gr. 351.

On appeal, the decree made in accordance with the above judgment was varied so far as it allowed damages to the contractor for not being allowed to complete the contract. *S. C.*, 8 Gr. 157.

Railway—*Crossings.*] — The plaintiff declared in assumpsit, setting out that he had brought two actions against defendants, the first for not giving him a crossing with cattle-guards over their road as agreed, and the second, for an alleged injury occasioned by them; that while both actions were pending the plaintiff and defendants, by their said attorney, then duly authorized in such behalf, made an agreement in writing, setting it out, of which the terms were, that the plaintiff was to receive £175 for all claims against the company, the company to pay costs, and to make the cattle-pass and complete the crossing by the 16th July then next; the suits to be withdrawn; the agreement to be carried out by the Messrs. M. (plaintiff's attorneys) on plaintiff's account, and M. R. on behalf of the company, as soon as the court was over (this was signed by M. R. for the company); that in consideration of the premises, and that the plaintiff at defendants' request would perform said agreement on his part, defendants promised to perform on their parts: that confiding in such promise, he withdrew the actions, and did all that was to be done on his part, but that, although defendants in part performance paid £75 and costs, yet they did not make the cattle-pass nor complete the crossing:—Held, on demurrer to the declaration, that it must be assumed from the averments that M. R. had been authorized under the defendants' corporate seal to make the agreement; but that no promise of the corporation, such as was declared upon, could be implied therefrom: that the proper construction of the agreement was, that it required a proper legal covenant by the company to bind them to the terms which they had authorized him to accept, and that they could not be charged as liable through him on a parol agreement to do that which they could only have bound themselves under seal to perform. *Doran* v. *Great Western R. W. Co.*, 14 U. C. R. 403.

Railway—*Fencing Line.*]—To an action on the common counts brought by T. and W. M. against the C. C. R. Co. to recover money claimed to be due for fencing the line of C. C. railway, the C. C. R. Co. pleaded never indebted, and payment. The agreement under which the fencing was made is as follows:—"Memo. of fencing between Muskrat river east to Renfrew. T. and W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for $1.25 per rod, company to furnish cars for lumber. T. & W. M., A. B. F." F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. and W. M. built the fence and the C. C. R. Co. have had the benefit thereof ever since. The jury, in answer to certain questions submitted by the Judge, found that T. and W. M., when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments were made as money which the company owed, not money which they were paying to be charged to F., and a general verdict was found for T. and W. M. for $12.-

218.51:—Held, affirming 7 A. R. 646, that it was properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence. 2. That although the contract entered into by F. for the company was not under seal, the action was maintainable. *Canada Central R. W. Co.* v. *Murray*, 8 S. C. R. 313. Special leave to appeal to Her Majesty in Council refused, 8 App. Cas. 574.

Railway—*Purchase of Material.*]—The plaintiff, acting under a written contract for the delivery of 12 toise of stone for the piers of a bridge which defendants were building over a river on their line of railway, delivered the amount, and was paid by defendants therefor, as well as for an additional toise and a half, and some sand subsequently ordered by the inspector. The inspector then ordered the plaintiff to deliver some more stone and sand, stating that he did not know what quantity of stone was required, but telling plaintiff to go on drawing until told to stop, and the plaintiff then delivered some 26¼ toise of stone and a quantity of sand, defendants having furnished the men and teams to assist the plaintiff in doing so. On observing about 8th May, that defendants had stopped work on the bridge, the plaintiff ceased delivering. About the 12th May, he was paid for what had been delivered up to that time, an account being made up by some one acting for defendants, and the hire of teams and men furnished by them being deducted in it from the price allowed, which was 82 a toise more than that in the written contract On the work being renewed, and on being ordered by the inspector to continue delivering, he delivered 26 further toise and some more sand. The defendants, however, refused to pay for the latter delivery, contending that they were not liable:—Held, 1. that there was sufficient evidence of authority on the part of the inspector to bind the defendants, and of their having adopted his acts: 2. that the contract was not required to be in writing to satisfy the Statute of Frauds; because the stone and sand now in question had been delivered under the order to go on drawing until told to stop, and part of the stone delivered under that order had been accepted and paid for; 3. that the contract did not require to be under the corporate seal, it being one directly connected in its nature with the purposes of defendant company. *O'Brien* v. *Credit Valley R. W. Co.*, 25 C. P. 275.

Retainer.]—Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters:—Held, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out. Town of Barrie v. Weaymouth, 15 P. R. 95, followed. *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33.

Substituted Contract.]—Where a corporation had contracted under seal with the plaintiff for certain work, which was afterwards departed from by their orders, with the plaintiff's consent:—Held, that assumpsit would lie for the value of the work done under the substituted contract. *Davis* v. *Grand River Navgation Co.*, 6 O. S. 59.

Trading Company—*Purchase.*]—A trading company entered into a written contract, but not under its corporate seal, for the purchase of a quantity of barrels:—Held, the contract being executory, that defendants, though a trading corporation, were not liable for refusing to accept barrels not then manufactured, nor for refusing to allow the plaintiff to continue to manufacture barrels according to the agreement. *Wingate* v. *Enniskillen Oil Refining Co.*, 14 C. P. 379.

Trading Company — *Purchase.*]—The defendants, by resolution of the board of directors, authorized their manager to purchase from the plaintiff, on certain terms of credit, a machine necessary for the carrying on of the defendants' business. The defendants' manager bought the machine, but on different terms, the plaintiff having no knowledge of the board's resolution; and the defendants received and used the machine:—Held, that the purchase was within the scope of the manager's authority, and that the defendants were liable for the price of the machine. *Thompson* v. *Brantford Electric and Operating Company (Limited)*, 25 A. R. 340.

Trading Company—*Sale of Products.*]—The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, &c. On the 10th August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that the plaintiffs being a trading corporation, and the contract one specially relating to the objects and purposes of the company, it was binding upon them, though not under seal. *Albert Cheese Co.* v. *Leeming*, 31 C. P. 272.

Trading Company—*Work.*]—To a declaration alleging that the plaintiffs entered into an agreement with the defendants to perform certain stone work, which they partly performed, and averring as a breach that the defendants had prevented them from carrying out and completing the work, whereby, &c., the defendants pleaded the plaintiffs were an association incorporated under R. S. O. 1877 c. 158, and that the agreement was not under the plaintiffs' seal:—Held, on demurrer that the plaintiffs being a trading corporation, enough was not shewn to make the absence of a seal fatal to the validity of the agreement. *Ontario Co-operative Stone Cutters' Association* v. *Clarke*, 31 C. P. 280.

Water Company.] — Assumpsit held maintainable against defendants for the non-

performance of a special parol agreement with plaintiff for the supply of water to the Toronto baths. *Blue* v. *Gas and Water Co.*, 6 U. C. R. 174.

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4. Delegation.

Railway—*Lease.*]—A railway or canal company cannot lease the concern or delegate its powers for a specified term without the sanction of the legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its Act of incorporation. *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Railway—*Lease.*]—The Canada Southern Railway Company, by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years:—Held, reversing the decision below, sub nom. Wealleans v. Canada Southern R. W. Co., 21 A. R. 297, that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Company is itself protected. *Michigan Central R. W. Co.* v. *Wealleans*, 24 S. C. R. 309.

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5. Expulsion of Members.

Domestic Forum.] — Members of charitable and provident societies should not be allowed to litigate their grievances in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Essery* v. *Court Pride of the Dominion*, 2 O. R. 596.

Jurisdiction of Court—*Special Meeting—Notice of Purpose.*]—Where a member of a college council complains that he has been improperly expelled from the council, the court of chancery, under the Administration of Justice Act, has jurisdiction in a proper case to decree relief, that Act giving jurisdiction to the court of chancery "in all matters which would be cognizable in a court of law;" although the remedy in such a case in a court of law would be sought by mandamus. *Marsh* v. *Huron College*, 27 Gr. 605.

One of the by-laws of an incorporated college provided, amongst other things, that special meetings of the council might be convened as the president should deem necessary, or upon the requisition of any three members of the council, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting in addition to that specified in the notice. The plaintiff, as one of the members of the council, having acted in such a manner as in the opinion of the president merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the president, and notices were accordingly sent to all the members of the council stating that a meeting would be held "for special business" but omitting to say what such special business was. At the meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members of the council present, expelling the plaintiff from the council:—Held, that the notice calling such meeting was invalid, because it did not specify the business intended to be brought before the council, and a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed, and that the plaintiff continued to be and was a member of the council. But the court being of opinion that the plaintiff had wittingly and designedly left the members of the council under a false impression, as to his conduct in regard to the matters which had been the subject of inquiry before the council—if he did not designedly produce such impression—refused the plaintiff the costs of the proceedings. *Ib.*

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the council, did not prevent his afterwards filing a bill impeaching the proceedings as irregular and invalid. *Ib.*

The wrong (if any) complained of being a personal wrong on the part of the members of the council who voted for the resolution:—Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Ib.*

The reasons for which alone members of a municipal body may be disfranchised, do not apply to the members of the governing body of an educational institution whether incorporated or not. *Ib.*

Quære, what would form a sufficient ground for the expulsion of a member of such a body as the council of Huron college. *Ib.*

Restraint of Trade—*Illegality—Militia Act.*]—The plaintiff, a musician and a member of the Active Militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death." After the plaintiff had become a member, the defendants adopted and added as part of one of their articles of asso-

ciation, the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. * * *" After the passing of this by-law, the plaintiff and the other members of the regimental band to which he belonged played at a concert, in uniform, under the direction of the bandmaster, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and, in consequence of its not being paid within the time prescribed, he was expelled from membership:—Held, that at the time the plaintiff joined the association, it was a legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages. Rigby v. Connol, 14 Ch. D. 482; Mineral Water Bottle, &c., Society v. Booth, 36 Ch. D. 465; Swaine v. Wilson, 24 Q. B. D. 252; and Chamberlain's Wharf, Limited v. Smith, [1900] 2 Ch. 605, considered. *Parker* v. *Toronto Musical Protective Association*, 32 O. R. 305.

Special Meeting—*Notice of Purpose.*]—By one of the by-laws of the defendants' association they were empowered to expel any member for refusing to submit a question arising between members to arbitration, but it was provided that such expulsion should take place only after the case should have been submitted to a meeting of the association, due notice having first been given to the parties that such a meeting would be held. W. & Co., members of the association, had a claim against the plaintiff, who was also a member, consisting of three items: $1.06 for balance of purchase money of grain; $397.41 for freight on same grain which they had paid under protest; and a sum for costs incurred in an action brought by them to recover back the freight so paid. The plaintiff paid the first item, but disputed the balance of the account, whereupon W. & Co. applied for and obtained a resolution by defendants that there should be an arbitration, to which the plaintiff submitted, and he afterwards admitted his liability for the amount claimed for freight, and offered his note at twelve months for it, which W. & Co. declined. Upon a submission, however, being tendered him covering the three items, he refused to sign it as the first two items were no longer in dispute. In consequence of his refusal, the defendants expelled him at a meeting, called "to receive a report from the committee regarding the conduct of a member":—Held, affirming 27 Gr. 23, that the plaintiff was improperly expelled, and was entitled to be reinstated in his rights of membership. *Cannon* v. *Toronto Corn Exchange*, 5 A. R. 268.

Stock Exchange—*Insolvency.*]—The defendants' Act of incorporation provided for the appointment of a committee of management to manage the affairs, etc., of the corporation, and, under a by-law, the committee were to consider and report on all offences under the by-laws, if submitted to them, and to call a special meeting of the corporation to pass judgment thereon. Power was also given by the Act of incorporation to expel members as by the by-laws should be determined. By by-law 13 all complaints to the committee or corporation were to be in writing. By by-law 21 any member complained against, might have a hearing before the corporation, and if the complaint were proved, a vote should be taken by ballot, by a two-thirds majority of those present, and voting being required, first, for the forfeiture of the seat, and then if lost for suspension. By by-law 24 a member becoming bankrupt or insolvent, should not be entitled to take his seat as a member of the corporation, or be present at any meeting thereof; and such seat should revert to the corporation to be sold by them, if the member be not readmitted within six months from the date of insolvency, and the proceeds applied as directed therein. In November, 1883, without any complaint in writing or notice to the plaintiff or hearing before the corporation, but on the chairman and secretary, whom the committee had instructed to make inquiries, reporting that plaintiff was offering to compromise with his creditors, the secretary, by order of the committee, wrote to plaintiff, calling his attention to by-law 24; and on the same day the list of members was altered by striking out the plaintiff's name. Nothing further was done until March following, when in consequence of a correspondence between the plaintiff's solicitors and the defendants, those members who had previously reported on plaintiff's condition, made a written complaint to the president complaining of the plaintiff having been insolvent in October and November, and of his disqualification thereby under by-law 24, and asking for an investigation by the corporation, which was had, and by an open vote of 15 to 6, the complaint was held to be proved, the two complainants voting with the majority. No steps were taken to declare the seat forfeited or for suspension:—Held, that insolvency under by-law 24, did not refer to a condition of insolvency, but to a definite act of insolvency under a bankrupt or insolvent Act, e.g., by an assignment or the issue of a writ of attachment; and therefore plaintiff did not come within its terms; but apart from this the defendants' proceedings were clearly illegal and void, for in November there was no complaint that gave the committee jurisdiction to interfere; and as the defendants' affairs were to be managed by the committee, they were responsible for the committee's acts; while the complaint made in March was not a bonâ fide one, but merely an attempt to support the previous illegal act; and also the vote should have been by ballot:—Held, also, that though defendants' proceedings were abortive to deprive plaintiff of his seat, the erasure of his name was an act most detrimental to the plaintiff, as it prevented him from carrying on his business as a broker; and he was therefore entitled to recover damages for the loss he had sustained thereby. Remarks as to the impropriety of the two complainants acting as judges on their own complaint; and if deemed present there would not be the requisite two-thirds majority, but otherwise if deemed neither present nor voting. *Temple* v. *Toronto Stock Exchange*, 8 O. R. 705.

Stock Exchange—*Sale of Seat.*]—F. & L., brokers in partnership, were both members

of the Toronto stock exchange, being each the owner of one seat at the board. They assigned to the plaintiff for the general benefit of creditors in December, 1884. The Toronto stock exchange by their by-laws provided that in case of a member becoming insolvent and not procuring a release from his creditors within a named period, the exchange should have power to realize the seats by sale, and the proceeds in such case were to be applied, first, in payment of fines and dues to the exchange; secondly, in payment of claims arising out of stock exchange transactions of creditors, being members of the exchange; and thirdly, the balance, if any, to be paid to the insolvent, or his legal representative. The seats of F. & L. were sold under the by-laws of the exchange and the proceeds remained in the hands of the exchange. Certain members of the Toronto stock exchange claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of stock exchange transactions, filed claims under the by-laws prior to the sale of the seats. The plaintiff, on the other hand, claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors. All parties concurred in the sale of the seats, subject to their respective rights. This action was brought by the plaintiff, as assignee for the benefit of creditors of F. & L., against the Toronto stock exchange for payment to him of the money realized from the sale of the seats:—Held, 1. that it was competent for the Toronto stock exchange to pass the by-laws in question giving the preference to the claims of the exchange, and to claims of members of the exchange for debts arising out of stock exchange transactions. 2. That the plaintiff was the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the said seats after payment of fines and fees due to the exchange and claims of creditors, members of the exchange, arising out of stock exchange transactions. 3. That as the by-laws of the exchange did not provide any means for ascertaining or deciding a contest as to what deductions might properly be made from the proceeds of sale of the said seats that it was proper to refer this matter for inquiry to the master. *Clarkson* v. *Toronto Stock Exchange*, 13 O. R. 213.

Ultra Vires Attempt to Expel—*Damages.*]—The plaintiff being a member and a vice-president of the Commercial Travellers' Association, incorporated by 37 Vict. c. 96 (D.), was charged with using abusive language towards the president and other members, and with improper conduct at a meeting of the directors. A committee of seven was appointed, of whom the plaintiff chose three, to investigate those charges, and four of the committee made a report finding the charges proved. This report was adopted by the association, and the directors afterwards passed a resolution expelling the plaintiff. The plaintiff appealed to the next general monthly meeting, which decided to let the appeal drop, and to sustain the action of the directors; but at a subsequent general meeting the resolution of expulsion was rescinded. The railway companies had been notified by the defendants of the plaintiff's removal, by which he was compelled to pay higher fares than if he had been a member. The plaintiff published a paper purporting to be on behalf of the association, in which the whole matter was discussed in an address from himself, and very offensive and violent language was used towards the president and other members; and the directors, in reference to this, passed a resolution repudiating the publication as being on behalf of the association, and censuring the plaintiff in strong language for its appearance. The plaintiff having sued the association for the expulsion, and for the libel contained in the resolution:—Held, that the plaintiff could not recover; that the expulsion by the directors, without having themselves tried the matter, and without notice to the plaintiff, was informal and void; that the plaintiff therefore was not expelled, as alleged, so that there was no cause of action therefor; that any loss sustained was the loss of his employers, not his own; and that the alleged libel was privileged. *Cuthbert* v. *Commercial Travellers' Association of Canada*, 39 U. C. R. 578.

See CHURCH, I.—INSURANCE, V. 4—LAW SOCIETY OF UPPER CANADA—SCHOOLS, COLLEGES AND UNIVERSITIES, I. 3.

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6. *Holding Land.*

Agreement to Sell.]—The plaintiffs, a loan company, who, by the terms of their charter, were bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner, or his heirs or assigns," acquired the equity of redemption in certain land from a mortgagor by deed, in which was contained a provision against the merger of the legal and equitable estates. By agreement made within the five years the plaintiffs sold to a purchaser, on whose default they resumed possession of the property. In an action for specific performance against a subsequent purchaser who objected to the title on the ground, among others, that the plaintiffs had not sold the land within five years from its acquisition:—Held, that the form of conveyancing by which the plaintiffs acquired the land did not give them greater rights of retention than if they had foreclosed, but:—Held, that any bonâ fide agreement to sell was sufficient to prevent a forfeiture where the sale was not carried out through the default of the purchaser:—Held, also, that it was unnecessary to procure a release from the former purchaser whose contract and the determination thereof should, as a matter of conveyancing, be recited in the deed from the plaintiffs to defendant. *London and Canadian Loan and Agency Co.* v. *Graham*, 16 O. R. 329.

Expiration of Charter.]—Where a corporation, constituted under C. S. C. c. 63, and 29 Vict. c. 21, had purchased lands, and, without having disposed thereof, allowed the period named in the declaration of the shareholders for the continuance of the company to expire, it was—Held, that the corporators ceased to have any interest in the lands, and could not maintain any suit in respect thereof; and that the lands had reverted to the grantors. *Lindsay Petrolcum Co.* v. *Pardee*, 22 Gr. 18.

Forfeiture—*Crown.*]—A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the Statutes of Mortmain, and the

lands can be forfeited by the Crown only. *McDiarmid* v. *Hughes*, 16 O. R. 570.

Where a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of the breach, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute. *Ib.*

Semble, the Dominion parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *Ib.*

VI. Proceedings Against and By Companies.

Account of Dealings.]—The court of chancery will grant a decree for an account of the dealings of an incorporated trading company, at the instance of a shareholder therein, although there is no allegation that the company is insolvent. *Phillips* v. *Royal Niagara Hotel Co.*, 25 Gr. 358.

Acting President — *Use of Company Name.*]—Where there are conflicting claimants to the position of president of a company, and one takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O. R. 175.

Alternative Claim.]—The plaintiff being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants:—Held, that the plaintiff had a right to do so. See *Harvey* v. *Grand Trunk R. W. Co.*, 7 A. R. 715.

Answer—*Seal.*] — A corporation cannot file an answer without seal, except by consent. *Gildersleeve* v. *Wolf Island Railway and Canal Co.*, 3 Ch. Ch. 358.

Where a stay of proceedings was asked to enable defendants to apply at law for a mandamus to compel the head of the corporation to affix the corporate seal, but it was not shewn that the majority of the shareholders approved of the answer, the application was refused with costs. *Ib.*

Assault.]—The plaintiff during his initiation as a member of the defendant lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. Phœnix Lodge, I. O. O. F.*, 7 O. R. 377.

Attachment.]—A debt due by a corporation having its head office in England cannot be attached by service of the attaching order upon an agent of the corporation in Upper Canada. *Bank of British North America* v. *Laughrey*, 2 C. L. J. 44.

Bank—*Double Liability.*] — The trustees of the Bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *Brooke* v. *Bank of Upper Canada*, 17 Gr. 301.

Bill Pro Confesso.] — See *Counter* v. *Commercial Bank*, 4 Gr. 230; *Cameron* v. *Upper Canada Navigation Co.*, 4 C. L. J. 77.

Certiorari.]—A suit brought by an incorporated company will be removed, if it be shewn that difficult questions of law will arise as to the powers conferred by their Act of incorporation. *Cataraqui Cemetery Co.* v. *Burrowes*, 3 L. J. 47.

Conflicting Rights.]—An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an electric light company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated telephone company, also licensees of the corporation, under authority granted two years previously to the defendants' license:—Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights. Held, also, that independently of the provisions of R. S. O. 1877 c. 157, ss. 59 and 70, as extended to electric light companies by 45 Vict. c. 19, s. 3 (O.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted. Quære, whether defendants were liable to indictment. *Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 O. R. 571.

Criminal Liability—*Defamation—Production of Documents—Indictment.*]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person, however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded. The statute, R. S. O. 1887 c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery. In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party. The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to sub-

ject them to a criminal prosecution. Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, specially referred to. Legislation suggested, similar to 32 & 33 Vict. c. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published. *D'Ivry* v. *World Newspaper Co. of Toronto*, 17 P. R. 387.

Criminal Liability—*Lord's Day Act.*]—A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R. S. O. 1887 c. 203, s. 1. Judgment below, 27 O. R. 49, affirmed. *Attorney-General* v. *Hamilton Street Railway Company*, 24 A. R. 170.

Criminal Liability.]—A justice of the peace cannot compel a corporation to appear before him nor can he bind them over to appear and answer to an indictment, and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Re Chapman* v. *City of London*, 19 O. R. 33.

Debentures.]—A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person:—Held, that the company must be presumed to know who the person was: that there was no presumption that the plaintiff knew him; and that, the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside* v. *Toronto Street R. W. Co.*, 14 Gr. 409.

Deceit—*Misrepresentations Inducing Purchase of Stock.*]—An action for deceit will lie against a corporation. *Moore* v. *Ontario Investment Association*, 16 O. R. 269.

Demurrer to a statement of claim for damages against a company, wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports, and in letters written to him by the president, to purchase stock practically from the company, which stock was valueless, overruled with costs. *Ib.*

Semble, that if the plaintiff had been induced to buy the stock from a private holder by the false representations aforesaid, the corporation would not have been liable, but only the individual officers; but that if the vendor of the shares was privy to the representations, the plaintiff could also recover against him. *Ib.*

Deceit — *Misrepresentation Inducing Purchase of Stock—Rescission.*]—In an action by a shareholder of an investment association to have it declared that his subscription for shares had been obtained by fraud and misrepresentation, and that it was not binding upon him, and for other relief, it appeared that in 1882 the said association had amalgamated with a loan society, and under the terms of the amalgamation the shareholders in the latter became entitled, on payment of a premium of seventeen per cent., to an equivalent number of shares of the former. It was thus the plaintiff became entitled to his shares in the association, having previously been a shareholder in, and manager of, the loan society; and he was an assenting party to the amalgamation, which he now attacked as ultra vires, and brought about by misrepresentation and fraud. But it was proved that there were many material misrepresentations, falsely and fraudulently made, in a certain report of the association, dated December 31st, 1888, which had been an important factor in bringing about the assent to the amalgamation by the society, and in inducing the plaintiff to subscribe for the shares in the association, and that the plaintiff had not become aware of their falsity until shortly before bringing this action. After the amalgamation the association borrowed large sums of money upon debentures, &c., on the faith of the apparently existing state of affairs, but it was not shewn that the association was insolvent, or on the eve of insolvency:—Held, that the plaintiff was entitled to a rescission of the contract made by his subscription for stock in the association:—Held, also, that the fact of the plaintiff having sold some of his shares would not prevent rescission as to the remainder of them. *Nelles* v. *Ontario Investment Association*, 17 O. R. 129.

Evidence—*Notice.*]—A corporation aggregate is not bound to appear at the trial as witnesses under a notice served on their attorney under 16 Vict. c. 19, s. 2. *Dunwich School Trustees* v. *McBeath*, 4 C. P. 228.

Examination.]—See as to Examination of Officers of, and Discovery by, Companies: EVIDENCE—JUDGMENT DEBTOR.

False Imprisonment.]—A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority. *Lyden* v. *McGee*, 16 O. R. 105.

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

Forfeiture of Charter—*Estoppel.*]—In an action against a river improvement company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, &c., for which tolls were claimed, were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false re-

turns were made to the commissioner of Crown lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Companies Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the commissioner of Crown lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls: —Held, that the above grounds of impeachment were covered by the consent judgment and were res judicata. Held, further, that the plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited. By R. S. O. 1887 c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the commissioner of public works:" —Semble, the non-completion of the work within two years would not, ipso facto, forfeit the charter, but only afford grounds for proceedings by the attorney-general to have a forfeiture declared. Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a scale of tolls fixed: — Held, that under the statute the schedule could only be allowed or varied by the commissioner and the court could not interfere, especially as no application for relief had been made to the commissioner. *Hardy Lumber Company* v. *Pickerel River Improvement Company*, 29 S. C. R. 211.

Goods Sold.]—For goods supplied to an inchoate company. See *Seiffert* v. *Irving*, 15 O. R. 173.

Information by the Attorney-General.]—See *Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282.

Libel.]—The defendant published of the directors of the plaintiffs, an incorporated building society, in a newspaper, a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul and fraudulent means, and in consequence, all business transacted by them * * * is wholly and entirely contrary to rules and regulations and law:" — Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, and as such it was defamatory of the plaintiffs. *Owen Sound Building and Savings Society* v. *Meir*, 24 O. R. 109.

Libel.] — An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business. South Hetton Coal Co. v. North Eastern News Association, [1894] 1 Q. B. 133, followed. Journal Printing Co. v. MacLean, 25 O. R. 509, approved. *Journal Printing Co.* v. *MacLean*, 23 A. R. 324.

List of Shareholders—*Duplicate—Penalty.*]—A list of shareholders transmitted to the provincial secretary contained the name of a person as holding a certain amount of stock in a joint stock company, while in the list posted up in the head office of the company the shareholder's name was inadvertently deleted:—Held, that the lists were not duplicates within the meaning of R. S. O. 1897 c. 191, s. 79, the Ontario Companies Act, and that the company were liable to a penalty under the Act. Circumstances considered in moderating the amount of penalty. *Towner* v. *Hiawatha Gold Mining and Milling Company of Ontario*, 30 O. R. 547.

Proof of Seal.]—Where a witness stated that he had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself and from the signature of the party attached to it, with which he was acquainted: —Held, sufficient to go to a jury to authenticate the seal. *Doe d. King's College* v. *Kennedy*, 5 U. C. R. 577.

Proof of Seal.]—The seal of a corporation having been proved by satisfactory legal evidence:—Held, that the production of a document within the powers of the corporation, with the seal attached, is sufficient prima facie evidence of its proper execution. *Woodhill* v. *Sullivan*, 14 C. P. 265; *Fell* v. *South*, 24 U. C. R. 196.

Proof of Seal.]—Some of the parties executing a deed were corporate bodies, and the witnessing clause was expressed, "In witness whereof, the said parties hereto have hereunto set their hands and seals," &c., and the seals were all simple wafer seals:—Held, sufficient, in the absence of evidence shewing these not to be the proper corporate seals. *Ontario Salt Co.* v. *Merchants' Salt Co.*, 18 Gr. 551.

See, also, *Hamilton* v. *Dennis*, 12 Gr. 325.

Purchase of Share to Qualify.]—Purchase of one share to enable plaintiff to sue —Locus standi. See *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Realizing Assets—*Foreign Proceedings.*]—The holder of bonds of a joint stock company (limited), after instituting proceedings in chancery in England, for the sale of the partnership property, which was situated in Canada, and after appointment of a receiver in England of the estate in England and Canada, filed a bill in this court for the like purpose, and this court appointed the agent of the receiver receiver here; after which it appeared that the company went into liquidation, the liquidator being the same person as had been appointed receiver in England. The plaintiff, after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of the bill; but the court refused to make such a decree until it was shewn what the position of matters was in England, and the steps about to be taken there, so as to avoid any conflict between the two courts, and mould the order here to give the appro-

priate relief, without interfering with the steps which were being taken in England for the same object. *Louth* v. *Western of Canada Oil Lands and Works Co.*, 22 Gr. 557.

Relators.]—Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill to which the attorney-general was defendant, to have the lease declared void. *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Restraining Payment of Dividends.]—Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. *Montreal Street Railway Co.* v. *Ritchie*, 16 S. C. R. 622.

Shareholders Joining as Plaintiffs.]—Where certain shareholders in a company joined with the company as plaintiffs, as a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or unwilling to sue, the court refused to allow a demurrer for want of equity, as the objection was purely of a formal nature. *City Light and Heating Co. of London* v. *Macfie*, 28 Gr. 363.

A demurrer to a bill filed by shareholders of an incorporated company, on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders including some of the those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *Ib.*

Trespass to Property — *Nova Scotia School Act.*]—See *Trustees of School Section* v. *Cameron*, 2 S. C. R. 690.

Withdrawing from Litigation — *Improper Conduct of Majority.*]—A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve. *International Wrecking Co.* v. *Murphy*, 12 P. R. 423.

The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, shewing no reason why the company has not instituted the proceedings, cannot be sustained. *Ib.*

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property:—Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others, except the defendants, against the company and the majority of the shareholders. *Ib.*

VII. Shares.

1. *Allotment and Subscription.*

Agent's Subscription.]—A bonâ fide subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who had requested such stock to be subscribed for, is valid. *Davidson* v. *Grange*, 4 Gr. 377.

Agent's Subscription.]—In addition to fifty shares personally subscribed by the defendants O. and S., upon which they were held liable, the plaintiffs claimed that they were holders, respectively, of seventy-five and sixty shares, for which they had not subscribed:—Held, on the evidence, set out in the report, that O. was not such holder, but that S. was, and was therefore liable thereon. *Union Fire Ins. Co.* v. *O'Gara*, *Union Fire Ins. Co.* v. *Shoolbred*, 4 O. R. 359.

Authority to Secretary to Subscribe.]—Defendant had taken shares in a road company, for which he subscribed his name, and the secretary called to solicit a further subscription. Defendant told him he would take another £100, and the secretary afterwards, in defendant's absence, put down his name for these shares:—Held, not sufficient to charge defendant. *Ingersoll and Thamesford Gravel Road Co.* v. *McCarthy*, 16 U. C. R. 162.

The authority to take shares should be in writing; but, semble, that a verbal authority would be binding. *Ib.*

Company Subscribing.]—The holding of shares by one trading corporation in another trading corporation is not ultra vires. *Canada Life Assurance Co.* v. *Peel General Manufacturing Co.*, 26 Gr. 477.

Conditional Agreement.]—The plaintiff, suing as assignee of an appeal bond given by the defendants to G. & M. on an appeal, which was dismissed, by S. and the N. R. H. company from a judgment recovered by G. & M., claimed the amount of the judgment with costs and interest, less a sum realized by the sheriff on G. & M.'s fi. fa. goods by the sale to the plaintiff of a mill and fixtures erected by the N. R. H. Co., on Crown lands, which the company occupied under a letter of license from the commissioner of Crown lands. The defendants were shareholders in the company, and after the sheriff's sale they and the plaintiff agreed to take steps to reorganize the company, the plaintiff to accept shares in satisfaction of his claim. This agreement, which the plaintiff had refused to carry out, was relied on as a defence to this action. At the trial the learned Judge held that the agreement was too vague for specific performance, and was therefore no defence; and being of opinion that nothing passed by the sheriff's sale to the plaintiff, he gave judgment for the whole amount of the original judgment of G. & M. with costs and interest, against the wish of the plaintiff, who claimed only the reduced amount. The defendants moved against the judgment respecting the agreement, and a divisional court of two Judges, while agreeing that it was too vague for specific performance, differed as to its affording a defence to the action. The plaintiff also moved to reduce his judgment by deducting the amount of his bid at the sheriff's sale; but that order, by reason of the Judges disagreeing, was not granted:—Held,

that the agreement was only to accept shares in case the company was reorganized, and such agreement afforded no defence to this action; and that the judgment could properly be varied by entering it for the reduced amount. *Brundage* v. *Howard*, 13 A. R. 337.

Conditional Agreement.] — Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares. But where the agreement is collateral the shareholder is liable on such shares, but has a right of action for indemnity or damages against such company. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Conditional Subscription—*Payment in Goods—Acceptance of Stock.*] — Defendants subscribed under seal for certain shares in the capital stock of the plaintiff company, promising and agreeing with each other and with the plaintiffs to pay the full amount of the shares as and when payable:—Held, that the evidence, set out in the report, shewed only a collateral agreement or representation by the president of the provisional board that payment would be accepted in goods, and not a subscription conditional on such acceptance. Semble, that if the evidence had shewn such a condition made verbally, it could not have varied the unqualified subscription under seal, or bound the company. The defendants after such subscription paid ten per cent. on the stock, being advised, as they alleged, by the plaintiffs that it was their best course to get rid of the stock by assignment, which could not be permitted until such payment:—Held, clearly an irrevocable adoption of the stock. *Kingston Street Railway* v. *Foster*, 44 U. C. R. 552.

Formal Acceptance — *Admissions.*] — Shares had been assigned in the company's books by the managing director in his own name, as to twenty shares, and as attorney for another, as to thirty, to the defendant, who did not sign the usual formal acceptance for any of them, but a certificate under the corporate seal of the company and the signature of the president, vice-president, and secretary of the company was sent to him, certifying that he was the registered owner of the twenty shares; and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares, for which he had paid $500, admitted that he had purchased the fifty shares:—Held, that defendant was a shareholder as to these fifty shares. Semble, that if any further formal acts were required to be done on the part of the defendant to constitute him a shareholder he could be directed to perform them. *Ross* v. *Machar*, 8 O. R. 417.

Issue at a Discount.]—Held, that the action of the directors in issuing shares at less than their nominal value was ultra vires. *McIntyre* v. *McCraken*, 1 A. R. 1. See *S. C.*, 1 S. C. R. 479.

New Stock—*Allotment by Shareholders—Right of Directors to Allot.*]—Where a by-law is passed at the annual general meeting of a joint stock company providing for the allotment of certain new stock by the shareholders, the directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves. *Stephenson* v. *Vokes*, 27 O. R. 691.

Notice of Allotment—*Conditional Subscription.*]—The plaintiff, a creditor of a railway company, sued the defendant, as a shareholder therein, for unpaid stock. The defendant had signed the stock-book which was headed with an agreement by the subscribers to become stockholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all further calls. A resolution was subsequently passed by the company instructing their secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for fifty shares," &c., "have allotted you shares amounting to $5,000." These certificates were not sent to the shareholders, but were handed to the company's brokers for delivery to them. The brokers published a notice in a daily paper that these certificates were lying at their office, but did not send written notices to the subscribers. The defendant never called for or received his certificate of allotment and never paid the ten per cent. He swore that he signed upon a verbal agreement with one L., a promoter and a provisional director of the company, that he and another should receive the contract for building the road, which was never awarded to them; and that he never had any notice of the allotment having been made to him. The learned Judge at the trial was unable to say whether the defendant received actual notice of allotment, but found that the company sent notices to him of calls; and that his name was published as a shareholder in a newspaper to which he was a subscriber. The only evidence of the notices being sent to the defendant was the general statement of the secretary, that he directed notices to be sent ten months after the allotment, to those shareholders likely to pay, that their calls were due:—Held, that the defendant was not liable as the evidence was not sufficient to prove notice of allotment to him:—Held, also, that if he had received notice of allotment, the fact that the contract was not awarded, as promised, would have formed no defence, as L. had no power to bind the company by annexing such an agreement to his subscription. *Nasmith* v. *Manning*, 5 A. R. 126, 5 S. C. R. 417.

Preferential Stock.] — The defendants, a company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1877 c. 150, as amended by 41 Vict. c. 8, s. 16, with a capital stock of $300,000, in shares of $1,000 each, acting under s. 17*a* of the Act, which authorized the issue of any part of the capital stock as preference shares, passed a by-law in 1877 for the issue of $75,000 as such preference shares, which were to have preference and priority as respects dividends and otherwise as therein declared, namely: "1. The company guarantees eight per cent. yearly to the extent of the preference stock, up to the year 1880, and over that amount (eight per cent.) the net dividends will be divided among all the shareholders pro rata. 2. Should the holders of preference bonds so desire, the company binds itself to take the stock back during the year 1880, at par, with interest at eight per cent. per annum, on receiving six months' notice in writing, &c." The plaintiff sub-

scribed for and was allotted five shares amounting to $5,000, which he paid up, but contending that the by-law was ultra vires by reason of the above conditions, and the issue of shares therefore void, brought an action to recover back the money paid therefor:—Held, that the first condition of the by-law was not ultra vires, as its proper construction was, not that the interest was to be paid at all events, and so possibly out of capital, but only if there were profits out of which it could be paid; but that the second condition was ultra vires, for that the Act neither expressly nor impliedly authorized the company to accept a surrender or cancel the shares, repaying the amount thereof:—Held, however, that the plaintiff could not recover, for notwithstanding one or both of the conditions were invalid, the shares themselves were valid, there being authority to issue preference shares, and the plaintiff having subscribed for preference shares, and having got them, he became a shareholder of the company. *Long* v. *Guelph Lumber Co.*, 31 C. P. 129.

Substitution of Applicant—*Calls—Set-off.*]—Defendants were an incorporated company, the capital of which was $30,000, in 100 shares of $300 each, ninety of which had been subscribed for, and paid up in full by duly made calls thereon. Subsequently the defendants employed the plaintiff to take charge of their business, and he was appointed president, at a salary of $1,200. He subscribed for seven shares of the unallotted stock, debited himself with the amount thereof, $2,100, in the company's books, and afterwards paid this sum. Afterwards, desiring to obtain control of the company, he arranged with four of the stockholders for the transfer to him of their stock, but one of them, M., to enable him to remain a director, was to, and he did, subscribe for the three remaining shares unallotted. Subsequently the plaintiff wished to withdraw from this arrangement, and the parties agreed to cancel it; but M. was to be relieved of the three shares, and M.'s name was accordingly erased, and the plaintiff's inserted as subscriber for these shares, the substitution being made either by plaintiff himself or by the book-keeper by his direction. It was also arranged between the plaintiff and the other directors, that this stock should be entered in the stock book as paid up in full, but the plaintiff was to be debited with the $900, to be paid out of his salary as president. Accordingly the plaintiff, with his knowledge and assent, was so debited, and from time to time, as his salary became payable, it was set off against the debt, and a balance afterwards struck in the books on this basis. There was no by-law regulating calls or transfers of stock, and no calls were made on the plaintiff for either amounts subscribed by him, and no transfer from M. to plaintiff, except in the manner stated:—Held, that no transfer was necessary, as the plaintiff's subscription must be held to be an original one, nor were any calls required, for the plaintiff by his conduct had impliedly agreed that none need be made, and both he and the company were estopped from denying his ownership of the shares. The plaintiff having sued defendants for his salary:—Held, that defendants were entitled to set off the amount due on this stock. Held, also, that they were entitled to have judgment in their favour for the excess of the set-off over the plaintiff's claim, and that for such purpose no special prayer or conclusion in their plea of set-off was necessary. *Smart* v. *Bowmanville Machine and Implement Co*, 25 C. P. 503.

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2. Calls.

Blank Subscription — *Receipt of Dividends.*]—Held, that the evidence in this case shewed that the appellant never entered into a contract to take fifty shares, that the receipt given for a dividend of ten per cent. on the amount actually paid (montant versé), was not an admission of his liability for the larger amount, and he therefore was not estopped from shewing that he was never in fact holder of fifty shares in the capital stock of the company. *Coté* v. *Stadacona Ins. Co.*, 6 S. C. R. 393.

Capital Not Subscribed — *Allotment Not Made.*]—Defendant subscribed for shares in plaintiff company, incorporated under 27 & 28 Vict. c. 23, and bound himself to pay as required by the board. Somewhat over half the capital stock was thus subscribed:—Held, no answer to plaintiffs' call on defendant, that there had been no allotment of shares, and defendant was not therefore a shareholder. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

The statute provided for the issue of letters patent on half the capital being subscribed, though no express provision was made as to when the company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was in fact elected and acted as a director, and never resigned his position as such:—Held, that he could not set up as a defence that all the stock must be subscribed before calls could be made; and that the directors were warranted by the Act in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor. *Ib.*

Charter Members.]—Persons named in the charter of a company as shareholders are liable as such for calls which may be afterwards made upon the stock stated in the charter to be held by them, and no further act of the directors in allotting such stock or giving them notice of allotment is necessary. In re London Speaker Printing Co., 16 A. R. 508, followed. *In re Haggert Bros. Manufacturing Co., Parker and Runions' Case*, 19 A. R. 582.

Creditor's Right to Have Calls Made.]—Where a trading company, incorporated by statute, became insolvent:—Held, that one of the partners, being also a judgment creditor of the company, was entitled to a decree compelling the directors to make calls upon the stock of subscribers, notwithstanding a clause in the statute declaring the shares of defaulters should be forfeited, the forfeiture being cumulative to all other remedies to which a creditor was entitled. *Harris* v. *Dry Dock Co.*, 7 Gr. 450.

Delay in Incorporation—*Minute as to Forfeiture.*]—Actions for calls under 1 Will. IV. c. 12, incorporating the plaintiffs, against the defendant as one of the stockholders:—Held, that the said Act was not obsolete for nonuser; that the clauses of the said Act requiring the books of subscription to be opened within two months was only directory; that the subscription books subsequently opened

might be considered as in connection with those previously opened, and that all the proceedings from the beginning might be taken together; that the omission in the new books of the name of H., one of the original petitioners the same of the Act, (he being dead) did not render the proceedings of the company invalid, nor was it fatal to the plaintiffs; that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the Act of incorporation was sufficient; that the names of the petitioners in the said Act named need not necessarily be signed to the new subscription books; and that defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29.

Evidence.]—Under the circumstances set out in the report:—Held, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross* v. *Machar*, 8 O. R. 417.

Former Member.]—Assumpsit for calls on shares. Plea, that defendant was not when action brought, nor is, the holder of said shares:—Held, bad, for by 10 & 11 Vict. c. 68, s. 13, incorporating defendants, a person ceasing to be stockholder after the call was made would still be liable. *Montreal Mining Company* v. *Cuthbertson*, 9 U. C. R. 78.

Fraud Inducing Subscription.] — A plea that defendant became holder of the shares by subscription, and was induced to become so by the fraud of the company, and that he has received no benefit from, and has repudiated the shares:—Held, good, on demurrer. *Provincial Ins. Co.* v. *Brown*, *Provincial Ins. Co.* v. *Denroche*, 9 C. P. 286.

Illegal Discount.]—Where shares in the capital stock of a joint stock company have been illegally issued below par the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value. Judgment below, 11 Man. L. R. 629, reversed. *North-West Electric Co.* v. *Walsh*, 29 S. C. R. 33.

Inconsistent Agreement.]—Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement alleged to have been entered into between all the promoters, when the G. L. Company was formed:—Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher* v. *Noxon*, 4 O. R. 672.

Informalities — *Partiality — Excluding Vote.*]—Where a by-law making a call on stock was confirmed at a general meeting of shareholders, purporting to be the annual meeting, but not held on the proper day for such annual meeting, as prescribed by the by-laws of the company:—Held, that one who, as a director, had seconded a resolution of the directorate that the meeting should be held on the day it was held on, was estopped from objecting to the calls on this ground, and so, therefore, were all those who were co-plaintiffs with him in an action to restrain the said call. *Christopher* v. *Noxon*, 4 O. R. 672.

Where shareholders have assisted in making and approved of calls, they cannot afterwards object that the calls were improperly made. *Ib.*

Where a call is made upon all stockholders without discrimination, or partiality, the court will never interfere to determine whether it was necessary, or not. *Ib.*

Semble, however, that if calls were made in such a way as to favour one set of stockholders, and impose an unequal burden upon others, an equity might, perhaps, be found for interference. *Ib.*

Held, that, under R. S. O. 1877 c. 150, ss. 37, 41, a shareholder, who is in arrear for unpaid calls, is absolutely debarred from voting at a shareholders' meeting; and in any subsequent action by him to restrain a call, the by-law for which was ratified at such a meeting, on the ground that his vote was wrongfully excluded, the above objection can be taken advantage of by the company, though that was not the ground assigned at the time for excluding the vote. *Ib.*

Instalments—*Time—Resolutions—Partiality—Interest.*]—The plaintiffs by their Act of incorporation were authorized to call in the stock by instalments as the directors should appoint, subject to a proviso that "no instalment shall exceed ten per cent., or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held;"—Held, per Spragge, C.J.O., and Hagarty, C. J., that the times fixed for the payment of instalments need not be thirty days apart; but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice of the call and the day on which it was payable. Per Burton and Patterson, JJ.A., that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment. *Provincial Ins. Co.* v. *Worts*, 9 A. R. 56; *S. C., sub nom. Provincial Ins. Co.* v. *Cameron*, 31 C. P. 523.

Held, that the resolution of directors and not the notice made the call; and that a variation in the days of payment between the resolution and the notice invalidated the call, but not as to defendant Cameron, or her testator, who had made payments on, or promised to pay, such calls. *S. C.*, 31 C. P. 523.

It was objected that the calls had been rescinded by resolutions subsequently passed, and set out in the case:—Held, that such resolutions referred only to the terms or time of payment. *Ib.*

Held, that upon the facts stated in the case there had been no such preference or discrimination between different classes of shareholders as to invalidate the calls. *Ib.*

Interest was allowed from the time when the last call became due. *Ib.*

Instalments—*By-law — Resolutions.*] — Action to recover calls on stock. The plaintiffs' Act of incorporation enabled the directors to make calls at such times as they might deem requisite, provided that successive calls

should be made at intervals of not less than two months between such calls, that no call should exceed ten per cent., and that thirty days' notice should be given of every such call: —Held, not necessary that the calls should be made by by-law, but that a resolution was sufficient, and that the resolution need not name the place of payment of the calls, but that this could be done in the notice. *Union Fire Ins. Co.* v. *O'Gara, Union Fire Ins. Co.* v. *Shoolbred*, 4 O. R. 359.

A resolution was passed by which a call was made of ten per cent., payable on the 1st March, and it was thereby further resolved that a further call of ten per cent. be made payable on the 1st September:—Held, clearly not a call of twenty per cent. but two calls of ten per cent. each; and that the fact of the second call being illegal did not invalidate the first call, because contained in the same resolution. *Ib.*

An alleged third call was objected to as being a fourth call, in that the illegal call before referred to had not been abandoned, but, held, that the evidence clearly shewed such abandonment. *Ib.*

Insurance Company—*Revocation of License—Receiver.*]—In these cases, which were actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict. c. 25 (O.), had been revoked, but it was shewn that one B. had been appointed receiver, and was especially required by order of the chancery division to prosecute all members in arrears for calls; and that he had adopted these actions, and was prosecuting them as receiver: —Held, that the objection was not tenable. *Union Fire Ins. Co.* v. *Fitzsimmons, Union Fire Ins. Co.* v. *Shields*, 32 C. P. 602.

Irregularity in Incorporation — *Non-payment of Percentage.*] — An instrument under 12 Vict. c. 84, was signed by defendant and others for the formation of a road company, defendant agreeing to take three shares. The directors named met on the 27th May, 1850, and called in four instalments, each of ten per cent. on each share. The six per cent. required by the statute was at the same meeting paid by the promissory note of the directors to the treasurer, who then signed a receipt for the money, and afterwards registered the instrument. By the 20th November, 1850, the treasurer had received, by means of the call, a sum equal to the six per cent., and he then destroyed the note. On the 13th January, 1854, another call was made, payable by six instalments; and this action was brought for the four instalments of the first call, and the first three instalments due on the second: —Held, that the first call could not be recovered, for when it was made the six per cent. had not been in fact paid, but that the plaintiffs might recover the second call, for on the 13th January the six per cent. had been actually paid; and the company having proceeded bonâ fide in the construction of this road, the irregularity in registering the instrument of incorporation before such payment was cured by 16 Vict. c. 190, s. 55. *Nelson and Nassagaweya Road Co.* v. *Bates*, 12 U. C. R. 586; approving as to the first point, *Niagara Falls Road Co.* v. *Benson*, 8 U. C. R. 307.

Limitations Act.]—Under ordinary circumstances there is no liability to pay for shares until a call is made, and notice thereof given to a shareholder, and until that time the Statute of Limitations does not begin to run against the company. Therefore persons named in the charter issued in 1880 as shareholders were in 1891 held liable to pay the amount of their shares, no formal call having in the meantime been made. *In re Haggert Bros. Manufacturing Co., Peaker and Runions' Case*, 19 A. R. 582.

Marmora Foundry Act.]—By the Marmora Foundry Act, 1 Will. IV. c. 11, the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the Act; and in case of non-payment such shares shall be forfeited and sold: — Held, that the company were not restricted to the remedy by forfeiture; but might sue a shareholder for calls. *Marmora Foundry Co.* v. *Jackson*, 9 U. C. R. 509.

Notice.]—The notice of two calls, one payable on the 27th July, the other on the 27th August, was mailed at Montreal, on the 27th June, addressed to the firm at Ottawa, which was received by one of the defendants. There was not any affirmative evidence that it was not communicated by him to his co-partner: —Held, that such notice was insufficient as "not less than thirty days' notice" was required; and, therefore, the mailing of a notice on the 27th June, requiring a call to be paid on the 27th July, was not in time; otherwise the notice was sufficiently established. *National Ins. Co.* v. *Egleson*, 29 Gr. 406.

Notice.]—Per Spragge, C.J.O., and Hagarty, C.J.—Notice of a call published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. Per Burton and Patterson, JJ.A., the enactment as to notice ought to be construed strictly; particularly if by a literal reading of the other provision calls were held valid though payable at shorter intervals than thirty days. *Provincial Insurance Co.* v. *Worts*, 9 A. R. 56; *S. C., sub nom. Provincial Insurance Co.* v. *Cameron*, 31 C. P. 523.

Notice.]—A call was made by resolution of the 3rd August, payable on the 6th September, and notice of it was mailed at Toronto on the 5th August, addressed to the defendants at Ottawa, but not received until the 8th:—Held, sufficient. *Union Fire Insurance Co.* v. *O'Gara, Union Fire Ins. Co.* v. *Shoolbred*, 4 O. R. 359.

Notice.]—The charter of a company, 35 Vict. c. 104 (D.), provided that one month's notice of calls "shall be given:"—Held, that sending such notice by post was not a compliance with this provision. *Ross* v. *Machar*, 8 O. R. 417.

Notice.] — 37 Vict. c. 93, s. 7 (O.), under which the calls sued for were made, provided that thirty days' notice of every call should be given. The resolution making the call, was passed on the 3rd August, 1881, the call to be payable on the 6th September. Notice to the defendants, F. & B., was mailed in Toronto, on the 5th August, and would reach Ottawa post-office, where F. & B. lived, at 7 p.m. on the 6th. The post-office closed at 7.30 p.m., but the letter could not have been

obtained on that evening without personal application to the postmaster. It was received on Monday the 8th August:—Held, that the notice must be deemed to have been given upon the mailing, and therefore it was good. Per Wilson, C.J.—If the thirty days were to be computed from the time when the notice had or should have reached its destination, they should begin on the Monday. *Union Fire Ins. Co.* v. *Fitzsimmons*, 32 C. P. 602.

The defendant, S., it appeared, had made an assignment in insolvency, but the stock had not been returned by him as part of his assets, and the assignee had never accepted it. The notice of call was sent to the assignee, but he directed his bookkeeper to forward it to S., which he stated he had done, but the defendant denied its receipt. The plaintiffs' manager stated that after the call was due, he paid S. a dividend on the stock, and S. then said the call would be paid:—Held, that S. was still a stockholder, and must be deemed to have had notice. *Ib.*

Partners—*Specific Shares.*]—The defendants, as partners, had been appointed agents of the plaintiffs, on condition that they should become holders of 200 shares of the capital stock of the company. In pursuance of this agreement they were entered in the stock register of the company for that number of shares, under the partnership name; and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the first call was accepted and paid, as arranged with one of the defendants. Subsequently E. wrote to the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter as "senior partner," &c.:—Held, in an action for calls, that the defendants were liable, and could not be heard to say that they had not subscribed for the stock:—Held, also, that it was unnecessary to shew that any specific shares had been allotted to the defendants; or that the calls were made by properly constituted directors. *National Insurance Co.* v. *Egleson*, 29 Gr. 406.

Place of Payment.] — The plaintiffs' charter provided that stockholders should pay up their shares "by such instalments and at such times and places as the directors of the said corporation shall appoint." It provided also for the appointment of a managing director, "to whom shall be delegated the special management of the business of the society." The directors passed a resolution, ordering a call, payable in two payments on days specified, and directing the secretary to notify the stockholders according to the Act. A notice signed by the managing director "by order," was published, and a circular signed by him sent to each shareholder, in which the place of payment was mentioned; but there was no meeting of directors between the passing of the resolution and the day named for payment. In an action for this call:—Held, a fatal objection that the directors had appointed no place of payment, the advertisement and circular being the act of the managing director only. *Provident Life Assurance and Investment Co.* v. *Wilson*, 25 U. C. R. 53.

Pleading.]—Sufficiency of declaration for calls under the statute 1 Will. IV. c. 12, incorporating the plaintiffs. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 1; *Marmora Foundry Co.* v. *Boswell*, *ib.* 175; *Marmora Foundry Co.* v. *Dougall*, *ib.* 194.

Procedure — *Action* — *Forum* — *Notice.*] — As to the right of action — the form of declaration in such a case — the defences available — the finality of the order and right of appeal therefrom — the service of notices required to be served by the company upon the subscribers—the liability as past or present member. *Barned's Banking Co.* v. *Reynolds*, 40 U. C. R. 435; 36 U. C. R. 256.

A plea that the defendant was induced to take the shares by the fraud of the plaintiffs, and repudiated them as soon as he discovered the fraud, and derived no benefit from them, was clearly bad, and was not supported. *Ib.*

The statute makes the liability for calls a debt, "in England and Ireland of the nature of a specialty:"—Held, that this did not make it a specialty debt in this country; and that pleas of never indebted, and that the debt did not accrue within six years, were therefore good. *Ib.* Reversed in appeal: 3 A. R. 371; but restored in the supreme court: *Cassels' Dig.* 170.

Proof of Transfer.] — To an action brought for two calls, one made on the 9th December, 1858, and the other on the 17th June, 1859, defendant paid into court the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for, by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced, in which the stock appeared in M.'s name since the 5th February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney:—Held, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer, as agent for both parties, and recognized in their books; that it was unnecessary to produce the bond given by defendant; and that defendant was not estopped by having paid the call made in December, 1858, from denying that he had transferred the stock before the call was made. *Provincial Insurance Co. of Canada* v. *Shaw*, 19 U. C. R. 533.

Quorum of Directors — *Majority.*]—A call of four per cent. on the first instalment of five per cent. on the capital stock, made by a quorum only, and not by a majority of the directors:—Held, a good call, under s. 9 of 12 Vict. c. 166, plaintiffs' Act of incorporation. *Ontario Marine Insurance Co.* v. *Ireland*, 5 C. P. 139.

Shares Vested by Act.]—Claim: calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: by a by-law of the plaintiff company

no subscriber of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made:—Held, on demurrer, bad; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vict. c. 93, s. 2 (O.), the plaintiff company's Act of incorporation. *Union Fire Ins. Co.* v. *Lyman*, 46 U. C. R. 453.

Special Act.]—Held, that the Lake Superior Navigation Company, incorporated under 27 & 28 Vict. c. 23, were entitled to call in all the unpaid stock at one time, as the Act did not prevent their so doing. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

Statutory Action—*Resolution—Notice—Time.*]—The gas company of Toronto sued stockholders in separate actions of debt, founded upon 11 Vict. c. 14. The plaintiffs' charter authorizes actions for calls made by the directors of the company, "under and by virtue of the power and directions of that Act." It was proved that the secretary, acting under a resolution merely of the directors, passed before 11 Vict. c. 14 came into force, notified the stockholders that a call of ten per cent. would be made on the 1st May, June, July, and August:—Held, that the action would not lie. *Gas Company* v. *Russell*, 6 U. C. R. 567.

Semble, that it is not a resolution of the directors to make a call upon the stockholders, which constitutes the call, but the notice or advertisement of the call itself. *Ib.*

Semble, that where an Act says, "that no instalment shall be called for except after the lapse of one calendar month from the time when the last instalment was called for," calls made for 1st May, June, July, and August, would be illegally made. Quære, also, whether the four calls could regularly be made at one time. *Ib.*

Subscription Before Incorporation.]—The defendant with others agreed to apply for a patent for a company for manufacturing purposes, under R. S. O. 1877 c. 150, and signed a stock list subscribing for certain shares, and agreeing to pay therefor as provided by the Act and the by-laws of the company. Subsequently a petition purporting to be by thirteen of the subscribers, but omitting the defendant's name, was presented to the Lieutenant-Governor of Ontario for a patent incorporating the petitioners and "such others as might become shareholders in the company thereby created a body corporate," &c. The stock list, however, subscribed by the defendant, appeared to have been filed in the office of the Provincial Secretary. The petitioners were accordingly incorporated, "and each and all such other person or persons as now is or are, or shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act," &c. The defendant did not subsequently to the incorporation subscribe for stock, but on the contrary repudiated his former subscription:—Held, that the defendant was not a stockholder, and was, therefore, not liable for calls on the shares which he purported to have subscribed for. *Tilsonburg Agricultural Manufacturing Co.* v. *Goodrich*, 8 O. R. 565.

Subscription Before Incorporation.]—P. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 Vict. c. 25 (Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action brought by the company against P. for $10,000 alleged to be due by him on 100 shares in the capital stock of the company it was:—Held, that P. was not liable for calls on stock. *Magog Textile and Print Co.* v. *Price*, *Magog Textile and Print Co.* v. *Dobell*, 14 S. C. R. 664.

Subsequent Act Widening Powers.]—To an action for calls, alleged to be due by defendant to the Canada Car and Manufacturing Co., defendant pleaded, on equitable grounds, that he subscribed for the shares and became a shareholder in a company, called the Canada Car Co., incorporated by letters patent for certain specified purposes and not otherwise; that afterwards, and without the assent and against the will of defendant, that company applied to the Dominion legislature and obtained an Act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Co., the now plaintiffs; that by the said Act greater powers were conferred upon plaintiffs than were possessed by the Canada Car Co., and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Co., or the defendant when he became a shareholder thereof; and that defendant never agreed to become a shareholder of or invest his money in a company possessing the powers of the plaintiffs; whereby defendant is relieved from liability:—Held, plea clearly bad; for the Act was binding on all the shareholders, whether assenting or not to the application for it; and this court had no jurisdiction to relieve defendant from a liability which the statute expressly declared that he should continue to be subject to. *Canada Car and Manufacturing Co.* v. *Harris*, 24 C. P. 380.

Time.]—Where calls on stock were to be made "at periods of not less than three months' interval," and one call was made payable on the 10th August and another on the 10th November:—Held, that an interval of three months had not elapsed between the two calls, and that the second call was therefore bad. *Stadacona Fire and Life Ins. Co.* v. *Mackenzie*, 29 C. P. 10.

Time—*Intervals.*]—Where the directors of a railway company at one meeting made several calls, payable at intervals of two months from each other:—Held, bad, for the calls cannot be made at less intervals than two months; and that a stockholder who had paid the first call thus made, and then transferred his shares, was not responsible for the subsequent calls thus illegally made. *Moore* v. *McLaren*, 11 C. P. 534.

Time — *Notice Inconsistent with Resolution.*]—A gas company incorporated under 16 Vict. c. 173, by resolution of the directors made certain calls to be paid on particular days named, but by the notice published they were made payable on different days. De-

fendant had written to the company, enclosing his note for four of the calls, saying that for the balance he would send his note soon, and requesting them to accept this offer, as he had been absent in Europe, and had no knowledge of any of the calls. The company, however declined: — Held, that the calls were illegal, being unauthorized by the resolution, and that defendant was not estopped from disputing them. *London Gas Company* v. *Campbell*, 14 U. C. R. 143.

What a Call Is.]—A call upon shares under the Joint Stock Companies Act, R. S. O. 1887 c. 157, means a call made by the directors in pursuance of the powers given to them by s. 44 of that Act. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

See the next sub-head.

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3. *Cancellation, Forfeiture, and Surrender.*

Benefit of Shareholders.]—The powers given the directors of a joint stock company under the provisions of "The Companies Act" as to forfeiture of shares for non-payment of calls is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company and cannot be employed for the benefit of the shareholders. *Common* v. *McArthur*, 29 S. C. R. 289.

Board Not Legally Constituted.] — When on the 31st May, 1880, the directors of a company passed a by-law reducing the number of the directorate from five to three, and this was confirmed at an adjourned general meeting of shareholders on the 1st June, 1880, and a new board of three forthwith appointed, but, it appeared, no notice had been given either before the original, or the adjourned meeting of the intention of making any such change in the directorate:—Held, that the appointment of the new board was not a legal one, and a resolution by them to forfeit stock for non-payment of calls was invalid:—Held, also, that the company were properly made parties to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act. *Christopher* v. *Noxon*, 4 O. R. 672.

Conditional Forfeiture.]—In an action for unpaid calls the shares held by the defendant Cameron as executrix and in her own right, were transferred under powers of attorney, which were not produced:—Held, that there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares; and that the evidence also shewed that there had been no forfeiture, as was urged, of such shares, the alleged forfeiture having been conditional and never completed:—Held, also, that the change in the corporate name of the plaintiffs, as set out in the report, could under the circumstances form no objection to their recovery. *Provincial Ins. Co.* v. *Cameron*, 31 C. P. 523.

It was urged that the shares of certain other shareholders had not been legally forfeited, the directors under the original charter not having the power to do so:—Held, that they had such power; but that in any event this could not affect the liability of these defendants. *Ib.*

Death—*No Personal Representative.*]—In January, 1864, a non-borrowing member of a building society died intestate. No one administered until June, 1867. In that interval his shares in the building society ran into arrear, and in consequence the society, in November, 1865, declared them forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up or was supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:—Held, 1. That the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; 2. that the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture and the procuring letters of administration was no answer to the claim. *Glass* v. *Hope*, 14 Gr. 484; 16 Gr. 420.

Default in Payment — *Notice.*] — The plaintiff on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any share so in default. The plaintiff being in default for a year and upwards the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid, on the grounds, (1) that notice of the intention to forfeit had not been given to him; (2) that notice of the forfeiture had not been served on him, so that he had been unable to appeal to the shareholders; (3) that the resolution did not expel the plaintiff from membership; (4) that the plaintiff's name was not set forth in full in such resolution, it did not specify the shares to be forfeited, and other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted; (6) that one of the directors who voted for the forfeiture had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shewn that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and that by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member:"—Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules. *Nellis* v. *Second Mutual Building Society of Ottawa*, 29 Gr. 399.

Misrepresentations.] — The defendant, an original stockholder in a joint stock company, his stock being fully paid up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threat-

ened legal proceedings to compel cancellation of the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called, and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff after such cancellation, issued a writ and obtained a judgment against the company, and then sued defendant for the amount of the new stock unpaid by him:—Held, that the plaintiff could not recover: that there was power to cancel the stock; that the cancellation was duly made; and that the defendant was not guilty of any laches. *Wheeler and Wilson Manufacturing Co.* v. *Wilson*, 6 O. R. 421.

Misrepresentations — *Power to Compromise.*]—A trading corporation has authority as an incident of its existence to compromise all bonâ fide claims made against it, and therefore has power to compromise claims made by a shareholder to be relieved of his shares either by reason of fraud or misrepresentation or any other cause which would enable the court to decree such relief; but as the court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation pro tanto of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of, and by cancelling shares of, its capital stock held by the claimant. *Livingstone* v. *Temperance Colonization Society*, 17 A. R. 379.

Notice in Writing.]—By 54 & 55 Vict. c. 110, s. 4 (D.), power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time. A shareholder, desiring to surrender his stock, transferred it within the time by an ordinary assignment to the president "in trust," both intending the transfer to operate as a surrender: — Held, a valid surrender. *Harte v. Ontario Express and Transportation Company, Kirk and Marling's Case*, 24 O. R. 340.

Optional Remedy.]—Held, that the company were not restricted to the remedy by forfeiture, but might maintain an action against a shareholder upon calls of stock subscribed. *Marmora Foundry Co.* v. *Jackson*, 9 U. C. R. 569.

Shareholder Setting Up Forfeiture.]—To a declaration for calls under s. 10 of plaintiffs' charter, 12 Vict. c. 166, defendant pleaded, that by non-payment of said calls the shares became forfeited in pursuance of the statute, and that defendant acquiesced in such forfeiture, of which plaintiffs had notice:—Held, bad, for defendant could not thus forfeit the shares. *Ontario Marine Ins. Co.* v. *Ireland*, 5 C. P. 135.

Time.]—Under s. 35 of R. S. O. 1897 c. 191, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by the letters patent, or by a by-law of the company. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual. *Armstrong* v. *Merchants' Mantle Manufacturing Co.*, 32 O. R. 387.

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4. *Increasing Capital.*

Conditions — *Subscription for New Stock.*]—The Ontario Wood Pavement Company, incorporated under 27 & 28 Vict. c. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from $130,000 to $250,000 before the original capital stock had been paid in. P. et al., execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of sci. fa. against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized:—Held, affirming 7 A. R. 1, which reversed 30 C. P. 108, that as there was evidence that the original nominal capital of $130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by A. consisted wholly of new unauthorized stock, P. et al. were not entitled to recover. *Page* v. *Austin*, 10 S. C. R. 132.

Notice of Increase — *Provincial Secretary—Mandamus.*]—Held, affirming 11 O. R. 444, that the duty of the provincial secretary of Ontario in issuing the notice of the increase of the capital stock of an incorporated company required to be given under 27 & 28 Vict. c. 23, s. 5, s.-s. 18, is merely ministerial, and that on the requirements of the Act being complied with he has no discretion in the matter, but must issue the notice. *Re Massey Manufacturing Co.*, 13 A. R. 446.

Held, that the power conferred of increasing the capital stock by s.-ss. 16, 17, and 18 of s. 5, is a general power not limited to a single occasion. *Ib.*

Held, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a prerequisite to the right of the company to have the notice published. *Ib.*

Held, that mandamus was the proper mode of enforcing the issue of the notice. *S. C.*, 11 O. R. 444.

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5. *Mortgage, Sale, and Transfer.*

Assignee for Creditors—*Declaration of Trust.*]— The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for the plaintiff to transfer the shares in such way as he should direct. In this action the plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R. S. O. 1897 c. 191, and that he was entitled to pay the balance of calls made thereon:—Held, that he was not entitled to call on the company to account to him for the shares or any dealings

therewith. *Armstrong* v. *Merchants Mantle Manufacturing Co.*, 32 O. R. 387.

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

Certificates—*Estoppel.*]—A company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1887 c. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment indorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate:—Held, that the transfer to the plaintiff, in view of the provisions of s. 52 of the Joint Stock Companies Letters Patent Act, R. S. O. 1887 c. 157, conferred upon him a mere equitable title which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares. *Smith* v. *Walkerville Malleable Iron Company*, 23 A. R. 95.

Deficiency—*Specific Performance.*]—The rule that, in the absence of fraud on the part of a vendor of land, a deficiency in quantity—small in proportion to the quantity sold and not necessary to the enjoyment of what the vendor can make title to—is not a bar to specific performance at the suit of the vendor, with compensation to the purchaser, applies also to sales of stock or shares in a trading company. Therefore, where a contract was entered into for the sale and transfer of 360 (out of 400) shares of stock in such a company, and upon a bill being filed on behalf of the vendors, which in effect was to enforce the sale and purchase, it appeared that the plaintiffs could validly assign 343 out of the 360 shares, the court at the hearing held the vendors entitled to a decree for the sale and payment of the number of shares they could so make a good title to. *Canada Life Assurance Co.* v. *Peel General Manufacturing Co.*, 26 Gr. 477.

Duty to Prepare Transfer.]—Sale of stock in a railway company—Duty to prepare transfer—Note for purchase money, Action on—Plea, refusal to transfer—Practice under A. J. Act, 1873. See *Boulton* v. *Hugel*, 35 U. C. R. 402.

Insolvency of Transferee.]—Held, that the insolvency of the assignee was no objection to the transfer, the only condition for a valid transfer being the payment of all calls. *Moore* v. *McLaren*, 11 C. P. 534.

Marginal Transfer.]—No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer book had been prepared for, and adapted to, the system of marginal transfer. One C. transferred certain shares in blank, subject, by marginal note, initialled by C., to the order of a broker, and subject by a subsequent marginal note, initialled by the broker, to the order of B. B. signed an acceptance of the shares immediately under the transfer in blank signed by C., and was entered in the books of the bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to B., and the acceptance by him, took place within a month of the time of the suspension of the bank:—Held, affirming 16 O. R. 293, that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutory provisions, and that B. became the legal holder of the shares, and was liable as a contributory. *In re Central Bank of Canada, Baines' Case*, 16 A. R. 237.

Negligence of Mortgagee.]—Duty of mortgagee to take proceedings against purchaser of stock sold by him at auction to complete the purchase. See *Daniels* v. *Noxon*, 17 A. R. 206.

Percentage not Paid.]—An otherwise valid transfer of shares allotted to the transferor upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock directed by s. 45 of the Act to be "called in and made payable within one year from the incorporation of the company" has not been paid. The last mentioned section is directory merely. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

Percentage not Paid—*Transfer without Acceptance.*]—Where ten per cent. was not paid at the time of original subscription of bank shares, nor within thirty days thereafter, as required by the Bank Act, R. S. C. c. 120, s. 20, but was paid before the first transfer took place, and was accepted by the bank:—Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings. *In re Central Bank of Canada, Baines' Case, Nasmith's Case*, 16 O. R. 293, 16 A. R. 237.

The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able

to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment. *Ib.*

Where it appeared that in one such case the transferee did not sign the acceptance, but that he subsequently dealt with the shares by selling and transferring them:—Held, that the transferees from him were properly placed upon the list of contributories, notwithstanding anything in the Bank Act, R. S. C. c. 120, s. 29. *Ib.*

Pledge — *Transfers "In Trust."*] — The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company, not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of "margins" certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions, each transfer being made from and to the manager thereof "in trust." An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being then transferred by the then holders to the defendants: — Held, reversing 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words "in trust" in the transfer meant that the various transferees were holding the shares "in trust" for their respective institutions. *Duggan* v. *London and Canadian Loan and Agency Co.*, 18 A. R. 305. Reversed by the supreme court, 20 S. C. R. 481, but restored by the judicial committee, [1893] A. C. 506.

Qualification — *Acquiescence — Formalities.*]—The stock of an incorporated street railway company, consisting of 2,000 shares, was owned exclusively by two brothers (G. and W.). The charter of the company required that there should be a board of directors consisting of not less than three members, each of whom should hold stock to the amount of not less than $100. It having become necessary to raise funds for the purpose of carrying on the business of the company, the two brothers agreed that they should convey to M. (their father) one share each in order to qualify him as a director, which they did accordingly assign; the father from thenceforth acted as the third director, and the funds for the construction and improvement of the road, were obtained and expended thereon. By his will the father bequeathed these two shares to his daughter S., who, after the death of her father, continued to exercise when necessary, the functions of director. After some time G. became dissatisfied with the manner in which S. discharged her duties as director, alleging that she acted simply as the nominee of W., and finally asserted that the shares had been originally assigned to the father for the avowed purpose of qualifying him to act, but in reality as trustee for G. and W., and that he had not power to dispose of them by will, and filed a bill seeking to have it declared that M. during his lifetime, and S. since his death, had held these shares simply as trustee of G. and W., and that S. might be ordered to reassign them. The court, under the circumstances, dismissed the bill, with costs. *Kiely* v. *Smyth*, 27 Gr. 220.

The charter of the company provided that the stock "shall be transferable in such way as the directors shall by by-law direct:"—Held, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth. *Ib.*

Upon the facts stated in the report of this case:—Held, that a transfer was sufficiently shewn. *Ib.*

Semble, that the plaintiff, one of the directors, was estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Ib.*

Held, in this case, that the transfer to M. was not without consideration, the agreement by the two brothers with each other to make it being sufficient. *Ib.*

Refusal to Accept Transfer.]—A company incorporated under 27 & 28 Vict. c. 23, has not power to refuse to allow a transfer of shares of its stock without assigning a sufficient reason therefor. *In re Smith* v. *Canada Car Co.*, 6 P. R. 107.

Refusal to Accept Transfer.]—Bank of L. brought an action against S., the appellant (defendant), as shareholder, to recover a call of ten per cent. on twenty-five shares held by him in that bank. By the 7th plea, and for defence on equitable grounds, the defendant said, "that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in the Bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays, that the said Bank of L. shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and the said Bank of L. be enjoined from further prosecution of this suit." The plaintiffs filed no replication to this plea, but at the trial of the action, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the Bank of L. held on the 26th June, 1875, it was resolved "that, in the opinion of the meeting, the Bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their

shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect." The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the Bank of L. effected a loan of $80,000 from the Bank of S. upon the security of one B., who to secure himself, took bonds to lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney, executed by defendant and the purchasers respectively, were sent to the manager of the Bank of L., in whose favour they were drawn, to enable him to complete the transfer. The directors of the Bank of L. refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution of the 26th June, 1873, and prior to the sale by defendant of his shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the Bank of L. became insolvent, and the Bank of S., the respondents, obtained leave to intervene and carry on the action:—Held, that the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Bank Act to transfer his shares and to have the transfer recorded in the books of the bank; and the 7th plea was therefore a good equitable defence to the action. *Smith* v. *Bank of Nova Scotia*, 8 S. C. R. 558.

Refusal to Register Transfer—*Collateral Claim — Damages.*]—In an action against a harbour company, for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, that although S., being president of the company, might perhaps have registered the assignment himself, yet the refusal of the secretary to do so formed a good ground for an action against the company. *McMurrich* v. *Bond Head Harbour Co.*, 9 U. C. R. 333.

Held, also, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground refuse to register the assignment. *Ib.*

Held, also, as to four shares, of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock book, that the plaintiffs were not entitled to recover in respect of such shares. *Ib.*

Held, also, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *Ib.*

Held, that registration in the books of the company is necessary in order to complete the transfer. *Ib.*

Unregistered Transfer.]—An assignment of stock in the defendant company, duly executed by assignor and assignee, for a good consideration, with proper notice to the company, is valid without further registration, provided the assignor is not indebted to the company and owes no calls. *Crawford* v. *Provincial Insurance Co.*, 8 C. P. 263.

Witness — *Colourable Transfer.*] — See *Bank of Michigan* v. *Gray*, 1 U. C. R. 422.

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6. *Seizure and Sale under Execution.*

Bond Head Harbour Co.]—See *Brock* v. *Ruttan*, 1 C. P. 218.

Building Society.]—Stock in a building society may be taken in execution under 12 Vict. c. 23; but, held, also, that under the circumstances of this case, set out in the report, the stock in question was not property belonging to the execution debtor, which the sheriff was bound to seize. *Robinson* v. *Grange*, 18 U. C. R. 260.

Demand of Transfer—*Form of Writ of Execution—Mandamus.*]—Upon an application to compel a railway company by mandamus to register a transfer of stock, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen, and commonalty of the city of Ottawa," and by C. S. U. C. c. 54, the name of the corporation was changed to "the corporation of the city of Ottawa:"—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given:—Held, also, that a demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company, were sufficient, the court being of opinion that service and demand upon the president were not indispensable. *In re Goodwin and Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Several demands to transfer the stock having been made, and delays and evasive answers given without in direct terms refusing:—Held, that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer. *Ib.*

Held, also, that a mandamus may be directed to the company, without naming the officers. *Ib.*

On application for such a mandamus:—Held, that a demand and refusal after service of the attested copy of execution was essential, under C. S. C. c. 70. The execution debtor was the president of the company, and on shewing cause, he asserted payment of the execution before the sale, &c.:—Held, that this could not justify the company in refusing to transfer, for they had no concern with the transactions between the execution plaintiff and defendant, or between defendant and the sheriff. Quære, as to the effect of a delay in serving the attested copy beyond the ten days after the sale prescribed by the Act. *In re Guillot and Sandwich and Windsor Gravel Road Co.*, 26 U. C. R. 246.

Seizure Before Acceptance.]—Certain stock in the British America Assurance Co. was transferred, and the transfer entered in the stock ledger, so that the shares stood in the name of the transferee, but before any acceptance had been signed the shares were seized under an execution against the transferor:—Held, that the transfer was complete and the seizure illegal. *Woodruff* v. *Harris*, 11 U. C. R. 490.

Service of Copy of Writ.]—In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff as a shareholder:—Held, that C. S. C. c. 70, as well as C. L. P. Act, ss. 255, 256, must be obeyed; and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin* v. *Ottawa and Prescott R. W. Co.*, 22 U. C. R. 186.

Time from which Execution Binds.]—The stock of an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff, under C. S. C. c. 70, ss. 3, 4, and not from the time of the delivery of the writ to the sheriff. *Hatch* v. *Rowland*, 5 P. R. 223.

Unregistered Transfer.] — Defendant, as sheriff, by his deputy, levied under a fi. fa. on twenty-five shares of the stock of the Bond Head Harbour Co., in the books of the said company appearing to be the property of W. H. B. Having written to the plaintiff in this suit to say that he had done so, he afterwards returned the writ nulla bona: — Held, that the shares not having been transferred in the books of the company, were at the time of the levy at the order and disposition of said W. H. B., and liable to execution as being his property, and did not pass to his trustees under a deed of assignment to them. *Brock* v. *Ruttan*, 1 C. P. 218.

Unregistered Transfer.] — A bonâ fide assignment or pledge for value of shares in the capital stock of a company incorporated under R. S. O. 1887 c. 157 is valid between the assignor and the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in the property seized can be sold under execution, the rights of a bonâ fide assignee cannot be cut out by the seizure and sale of the shares, under execution against the assignor, after the assignment. R. S. O. 1887 c. 157, s. 52, considered and construed. Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in s. 16 of the Execution Act, R. S. O. 1887 c. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares. *Morton* v. *Cowan*, 25 O. R. 529.

See also, sub-title X.; sub-head 3.

VIII. Shareholders.

1. *In General.*

Assessing Shareholders.]—As to power of the court of chancery to make an assessment on policy holders in the solvent branches of a mutual insurance company, for the purpose of paying off the liability due to the guarantee stockholders. See *Duff* v. *Canadian Mutual Ins. Co.*, 6 A. R. 238.

Attaching Judgment against Company.]—The court refused to set aside a judgment obtained against a company for a valid claim, at the instance of a shareholder against whom a sci. fa. upon it had been issued, there being no proof of fraud or collusion between the plaintiff and the company in obtaining such judgment. *English* v. *Rent Guarantee Co.*, 7 P. R. 108.

Breach of Trust.]—A bill will lie by a corporator of the Church Society of the diocese of Toronto, on behalf of himself and all other members of the society, to correct and prevent alleged breaches of trust by the corporation. To such a bill the attorney-general is not a necessary party. *Boulton* v. *Church Society of the Diocese of Toronto*, 14 Gr. 123; 15 Gr. 450.

Directors — *Misapplication of Funds.*]—Where the directors of an incorporated company misappropriated the funds of the corporation, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors; the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1.

Where by the Act of incorporation the government is authorized to purchase the corporate estate on payment of its full value, the attorney-general is not a necessary party to a bill by the stockholders against the directors complaining of improper conduct on the part of the latter in dealing with the corporate funds. In such case the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused, but the costs of the motion were reserved. *Ib.*

Individual Liability.] — The declaration, at the suit of a corporation, named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only:—Held, a non pros. might be signed and execution issue against them in their private capacities. *Markland* v. *Dalton*, Tay. 125.

Individual Liability.] — Where four parties described, not by their own names and personal description, but as a collective body not shewn to be corporate, signed and sealed a deed in their own names and seals, they were held to be individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

Inspection of Books.] — A stockholder is not entitled, as a matter of right, to inspect the stock-book or other books of a bank. *In re Bank of Upper Canada* v. *Baldwin*, Dra. 55.

The court will not, although they have the power, grant a mandamus for the inspection of the stock-book or other books of a bank, unless some special grounds be disclosed to warrant it. *Ib.*

Loan of Company Funds.]—A member of a joint stock company, not incorporated, lending with the assent of the company out of the joint fund to another member, and taking from him a promissory note payable to himself individually for repayment, can recover on the note. *Comer* v. *Thompson*, 4 O. S. 256.

Misapplication of Funds.]—A suit will lie by an individual corporator complaining of an illegal diversion of the funds which the corporation holds as trustee, though the plaintiff may himself have no pecuniary interest in the funds so alleged to have been diverted;

but he must sue on behalf of himself and all other corporators. *Armstrong* v. *Church Society of the Diocese of Toronto*, 13 Gr. 552.

Negotiable Instruments—*Admissions.*]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed; and when a company is formed for purposes which do not render the drawing and accepting of bills and notes necessary, it will be sufficient to establish the liability of a partner on bills or notes drawn or accepted in the name of the company by their secretary that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee* v. *McDonald*, 6 O. S. 130.

Proposed Adventure not going On.]—A party contributing to a mining joint stock adventure, which does not go into effect, may recover back his money as money had and received; but the court must see that the circumstances give him a just right: — Held, that in this case no such right was shewn. *Gilpin* v. *Greene*, 7 U. C. R. 580.

Suppressed Notes.]—A partner in a joint stock company, the notes of which are suppressed by 7 Will. IV. c. 13, having retired their notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership. *Hall* v. *Buck*, T. T. 2 & 3 Vict.

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2. *Liability to Creditors of the Company.*

Fictitious Action.]—The defendant, a stockholder in a company against which he had a claim for goods sold, obtained a note from the company, and transferred it to one F. as his trustee: who, after suing the company and obtaining judgment and a return of nulla bona in the usual way, sued defendant, and defendant then paid him the amount of his unpaid stock, which amount F. then held as defendant's trustee: — Held, that the payment to F. was not a payment of defendant's stock, and was no answer therefore to an action brought against defendant by a creditor of the company, who had also obtained judgment and a return of nulla bona. *McGregor* v. *Currie*, 26 C. P. 55.

Foreign Company.]—In an action under 40 Vict. c. 43, s. 47 (D.), brought in Ontario against a shareholder there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company, and execution thereon had been returned unsatisfied: —Held, reversing 7 O. R. 435, that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. *Brice* v. *Munro*, 12 A. R. 453.

Imperial Act.]—Section 68 of the Imperial statute, 7 & 8 Vict. c. 110, provides a summary proceeding whereby a creditor who has obtained a judgment or decree against any company incorporated thereunder, may call on any shareholder, by motion or otherwise, according to the practice of the various courts, to pay his claim. Upon such an application against shareholders resident in this country by a creditor who had obtained a decree:—Held, that the statute did not apply to proceedings in our courts. *Penley* v. *Beacon Assurance Co.*, 10 Gr. 422.

Invalid Transfer.]—Where, without any transfer in writing being executed, certificates of shares issued as paid for by alleged services were surrendered by the original holder to the company, and new certificates were issued at his request by the company to the alleged transferee, it was held, having regard to s. 48 of R. S. C. c. 119, and the by-laws of the company, that the original holder had not divested himelf of liability to a judgment creditor of the company suing under s. 55 of that Act. *Union Bank* v. *Morris, Union Bank* v. *Code*, 27 A. R. 396.

Joint and Several Liability.]—C. S. U. C. c. 63 enacts that the stockholders of any company incorporated thereunder shall be "jointly and severally liable" for all debts and contracts made by the company:—Held, nevertheless, that a creditor might sue one, or any number more than one, of the stockholders. *McKenzie* v. *Dewan*, 36 U. C. R. 512.

Paid-up Stock—*Moneys of Company in Hands of Shareholders.*]—Where the defendants agreed to take stock in a company about to be incorporated, and arranged that their interest in certain land acquired from them by the company should be applied in payment of their stock, and although it appeared that the company took the land over at a price considerably beyond that at which it was acquired by the defendants, yet no fraud being shewn, it was: — Held, that the shares of stock issued to the defendants, pursuant to the arrangement, upon the incorporation of the company, as fully paid-up shares, must be treated as such in an action by an execution creditor of the company seeking to make the defendants liable upon their shares for the amount unpaid thereon. The law upon that subject is the same in this Province as that of England prior to the Companies Act, 30 & 31 Vict. c. 131. The plaintiff sought also to recover from the defendants moneys shewn to be in their hands which were really the property of the company:—Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys; but the company were necessary parties to the action; and their consent to being added as plaintiffs not having being filed as required by Rule 324 (*b*), they should be added as defendants:—Held, also, a proper case, under Rules 324 (*c*) and 326, for dispensing with service upon the company, as the defendants already before the court were directors and the principal shareholders in the company. *Jones* v. *Miller*, 24 O. R. 268.

Payment for Services.]—Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R. S. C. c. 119, were applied for, and the applicants paid to the company an amount equal to the face value of the shares, but at the same time received from the company a portion of the price as alleged consideration for services to be rendered by them to the company at a future date, it was held, in a judgment creditor's action, that the shares, to the extent of the amounts so allowed, must be treated as unpaid shares. *Union Bank* v. *Morris, Union Bank* v. *Code*, 27 A. R. 396.

Payment.]—The plaintiff, a creditor of a company incorporated by letters patent, sued defendant, a shareholder, who pleaded that there was nothing due upon his stock. It appeared that there were nine shareholders, two of whom held a patent right under which the company were to work. The defendant held 85,000 stock, on which he had paid in cash $1,000. It was arranged between the patentees and the other shareholders, that the latter should pay an additional ten per cent. on their stock, making twenty per cent., in consideration of which the patentees, who were said to have a large cash claim against the company for their patent right, were to pay up the balance of the unpaid stock of the seven shareholders, equal to $28,000, out of this claim. In pursuance of this arrangement, each of the seven gave his cheque to the secretary for the balance of his unpaid stock, which the secretary passed on to the patentees, who accepted the cheques and gave receipts to the company for the amount. The patentees then handed back the cheques and receipts to the secretary, who returned the cheques to the shareholders by whom they were given, it having been agreed beforehand that they were to be so returned, and not used:—Held, that this transaction was not a payment in full of the stock, and that defendant was liable. *Scales* v. *Irwin*, 34 U. C. R. 545.

Payment — *Registration of Certificate — Pleading.*]—In an action against defendants as stockholders of a joint stock company incorporated under C. S. C. c. 63, for debts incurred by the company to plaintiffs, the declaration averred that the whole amount of the capital stock had not been paid in, nor a certificate to that effect, signed and sworn to by a majority of the trustees of the company, registered in the registry office of the county, nor had the defendants paid up the full amount of their shares, nor made nor registered a certificate to that effect as required by the Act:—Held, good, for it was unnecessary to negative the registration of a certificate, under s. 46, of the payment in full of the capital stock, and the requirements of s. 35, which were negatived, could not be dispensed with in the case as stated in the declaration. *McKenzie* v. *Kittridge*, 24 C. P. 1.

Quære, as to the application and meaning of s. 46. *Ib.*

The defendants' first plea alleged that they were not, at the respective times when the debts were made or contracted, or at any time from thence until the commencement of this suit, stockholders in the company: — Held, good, not being open to objection as tendering an immaterial issue, whether defendants were stockholders at the commencement of this suit, for the averment as to that could not prejudice or embarrass the plaintiff. *Ib.*

The replication to the first plea alleged, that although the defendants did transfer their shares to other parties, the balance due thereon had not been paid in, as required by the Act:—Held, bad, for under ss. 29 and 30, if all previous calls had been paid, the defendants might transfer; and without such payment they could not transfer, and would remain stockholders. *Ib.*

The second plea alleged that within five years after incorporation defendants paid up their full shares, and thereafter and before suit, namely, 1st October, 1873, a certificate to that effect was signed and sworn to by a majority of the trustees, including the president, before the registrar, and was on the same day duly registered, as prescribed by the Act:—Held, good, without alleging that it was filed within thirty days, for that the limit, prescribed by s. 35, applies to the general payment in full of the stock, not to payment by one individual shareholder; and that it was unnecessary to shew that the defendants paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed before the contracting of the debts sued for. *Ib.*

Under s. 33, as soon as a shareholder has paid up his full shares, and registered the certificate prescribed, his liability ceases, except in the cases specified in the Act; and this notwithstanding s. 34, which, owing to the manner in which the previous statutes have been consolidated, is apparently inconsistent. *Ib.*

Under the C. L. P. Act, s. 97, to make a plea a good plea to the further maintenance of the action, it is sufficient if it disclose on its face matter which arose after the commencement of the action: no formal commencement is necessary. Therefore in an action by creditors against shareholders of a company, a plea setting up the payment of their shares in full by defendants, not saying before the suit, and that a certificate to that effect was drawn up, sworn, and registered after the commencement of the suit, was:—Held a good plea of a defence arising after suit, the defence being incomplete without the registry. *S. C., ib.* 145.

Payment — *Registration of Certificate — Pleading.*]—In an action by the creditors of the company against five of the shareholders, the declaration, after setting out an unsatisfied judgment recovered by the plaintiffs against the company, alleged that the defendants before the debt was contracted, and before this suit, were stockholders, and had not paid up their shares in full, whereby defendants became liable to pay said judgment. Three of the defendants pleaded that they were not stockholders when the contract in respect of which the notes were given was made, nor from thence until, nor at, the commencement of this suit. The plaintiffs replied that these three defendants were trustees of the company, and omitted to make the annual report required by the statute, whereupon they became individually liable for the debts of the company:—Held, that the replication was a departure, in alleging a different ground of liability from that taken in the declaration, and a ground which applied only to three out of the five defendants: and that in this latter respect there was a misjoinder. *McKenzie* v. *Dewan*, 36 U. C. R. 512.

The second plea, by two of the defendants, alleged that within five years from the incorporation of the company they paid up their full shares, and before this suit, to wit, on the 1st October, 1873, a certificate to that effect was made, &c., and was duly registered, &c., "in the manner required by the statute in that behalf:"—Held, following pro formâ the decision in McKenzie v. Kittridge, 24 C. P. 1, that the plea was good, though not shewing that the certificate was registered before the debts on which the judgment was recovered were contracted. This court, however, did not agree with that decision, but considered, taking together ss. 33, 34, and 35, that to protect himself from liability a shareholder must register his certificate of payment; and that if registered within thirty days from the payment the exemption would relate back to the time of payment, but

if not, would begin only with the registry. *Ib.*

The fifth replication to the second plea was, that the defendants were original stockholders; that the whole capital stock had never been paid in; and that the debt in the declaration mentioned was contracted by the company before the payment in full of defendants' shares, and before registration of the certificate:—Held, good; and that under s. 33, a shareholder complying with the requirements is discharged from liability, though the full capital stock is not paid up. *Ib.*

Sixth replication: that the certificate of payment mentioned was not made and sworn to nor registered within thirty days after such payment, as in the said plea alleged, in the manner by the said Act directed:—Held, bad, for the plea did not allege a registration within thirty days, and if before the contracting of the debt it would discharge the defendants, though not within the thirty days. *Ib.*

Another defendant, O., pleaded that he had paid up his shares in full, and had made and registered a certificate as required by the Act, and had done the same in the time and after the manner required by the Act to free him from personal liability for the debts of the company. The third replication to it was the same as the fifth replication to the second plea, and was held good:—Held, also, that both pleas were improper in form, in pleading matter of law—that the certificate was duly registered, &c.—instead of alleging the facts, when it was registered or when he paid up in full, &c., which the jury could try. *Ib.*

The fourth replication to O.'s plea was similar to the sixth replication to the second plea. The defendant O. rejoined, on equitable grounds, that before the debt in the declaration mentioned was contracted, and before this suit, he had paid his shares in full, of which the plaintiffs had notice, and that he registered the certificate of payment as soon as he knew that it was required by the Act:—Held, that the rejoinder was bad, as being a departure from the plea; but that otherwise it shewed a good answer on the merits. *Ib.*

On appeal to the court of appeal, Draper, C.J., and Patterson, J., were of opinion that the judgment of the court of common pleas—namely, that under C. S. U. C. c. 63, ss. 33 and 35, a shareholder, on paying up his shares and registering a certificate thereof, even though after the expiration of the thirty days mentioned, was exempt from all liability for future as well as existing debts—should be affirmed. Blake and Proudfoot, V.CC., were of opinion that to create such exemption it was necessary to register the certificate thereof within the thirty days, and that the judgment therefore should be reversed. The court being equally divided, the appeal was dismissed with costs. *McKenzie* v. *Kittridge*, 27 C. P. 65.

Payment—*Registration of Certificate.*]—In an action brought by McK. under the provisions of the C. S. C. c. 63, against K. et al., as stockholders of a joint stock company incorporated under said Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants, K. et al., pleaded inter alia, that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect:—Held, that under ss. 33, 34, and 35, C. S. C. c. 63, as soon as a shareholder has paid up his full shares and has registered, although not until after the thirty days mentioned in s. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in s. 36. *McKenzie* v. *Kittridge*, 4 S. C. R. 368; 27 C. P. 65; 24 C. P. 1.

Payment on Shares—*Appropriation of Payment by Company.*]—N., a director and shareholder of a railway company, agreed to lend the company $100,000, taking among other securities for the loan 168 shares held by B., which were to be paid up. B. owned 188 shares on which he had paid an amount equal to 40 per cent. of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares, and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B. A judgment creditor of the railway company, whose writ of execution had been returned nulla bona, brought an action against N. for payment of his debt, claiming that only 40 per cent. had been paid on the 75 shares and that the remaining 60 per cent. was still due the company thereon. A judgment in favour of N. was affirmed by the divisional court, 20 O. R. 86, but reversed by the court of appeal, 18 A. R. 658, on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it:—Held, reversing 18 A. R. 658, that the company having got the benefit of the loan by N., were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares, upon the security of which the loan was made, and creditors, not having been prejudiced, were bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to. *Neelon* v. *Town of Thorold*, 22 S. C. R. 390.

Persons Acting as Shareholders.]—In 1872 five persons filed in the registry office a declaration that they were desirous of forming a joint stock company, under C. S. U. C. c. 63, by the name of the Dominion Safety Gas Company, for the object of "the manufacture and (or) sale of the machinery and materials for the manufacture or production of gas from evaporating fluids, and gas fixtures of all kinds, and such other articles as may from time to time be deemed advisable; and also the lighting of cities, towns, villages, streets, capital buildings, steamboats, coaches, and street and railroad cars with gas," with a capital stock of $6,000, in 300 shares of $20 each, and three of the defendants were stated to be trustees. Subsequently these trustees met and passed by-laws as to the government of the company. On 17th February, 1873, a meeting of the shareholders was held, when an agreement was entered into for the purchase of a patent for the manufacture of gas, and a resolution was passed that the shareholders should pay on their stock enough to make a working capital of $1,250. An agreement was made that the stock should be divided up between the five defendants in proportions stated, and these defendants, as shareholders, subsequently met, increased the number of trustees from three to five, and elected themselves such

trustees. No stock was ever subscribed for or anything ever paid thereon, the money required to carry on the business being raised from time to time by contribution. The company, in 1874, put up a gas machine in the plaintiff's residence, which, on 12th February, 1874, exploded, and injured the plaintiff, for which he sued the company and recovered damages, and on 29th February, 1876, judgment was entered, and a fi. fa. goods issued against the company, which was returned nulla bona. This action was then brought against defendants, as shareholders, for the amount of the unpaid stock, and also as trustees on their individual liability under the Act for neglecting to publish within twenty days after the 1st January, 1875, as required by the Act, a report stating the amount of the capital stock actually paid and of the then existing debts of the company, or to insert therein plaintiff's claim as one of such existing debts: — Held, that the company was duly incorporated under C. S. U. C. c. 63, for though the Act did not authorize the formation of a company for lighting cities, &c., with gas, it did for the other objects stated, and the corporation could exist for such objects alone:—Held, also, that the evidence set out in the case was sufficient to shew such incorporation. *Osler* v. *Bowell*, 43 U. C. R. 40.

Held, that the defendants were not liable as shareholders in the company to the plaintiff, as a creditor; for to create such liability, under the statute, there must be a subscription for stock; and the fact that they had acted and been treated as shareholders would not enable a creditor to proceed against them as such. Held, also, that neither were they liable as trustees for neglecting to make the report, for the plaintiff's claim was not an existing debt at the time of such neglect, nor until the entry of his judgment. *Ib.*

Prior Action Pending.]—In an action brought against a stockholder by a creditor of the company to recover amounts due and unpaid on certain shares, the defendant pleaded that prior to the issuing of the writ in this action certain other actions had been commenced against him to enforce payment of the same amounts, and that they were still pending:—Held, no defence, as it did not shew payment to some one or more entitled to it. *Perry* v. *McCraken*, 7 P. R. 32.

Quebec Law—*Payment in Cash—Price of Property Sold.*]—The shares of promoters of a company incorporated under the Revised Statutes of Quebec having been credited as paid in full under an arrangement by which half the amount thereof was paid in cash and half by receipts on account of the purchase price of the property acquired by the company:—Held, that under art. 4722, par. 1 (originally enacted as s. 1 of 47 Vict. c. 73 (Q.), reproducing s. 25 of the English Companies Act, 1867), the shares were rightly so credited; the promoters having acted in good faith and the purchase price being fair. Spargo's Case, L. R. 8 Ch. 407, approved. *Larocque* v. *Beauchemin*, [1897] A. C. 358.

Security — *Shares in Form Paid Up.*]—In an action by way of sci. fa. by plaintiff, a judgment creditor of the Ontario Wood Pavement Company, incorporated under 27 & 28 Vict. c. 23, against defendant as a shareholder thereof for unpaid stock, it appeared by oral evidence that the stock was transferred by one A. to defendant as collateral security for a debt due to defendant by A., but the transfer was on its face absolute, and there was nothing in the books of the company to shew that A. had any interest in it:—Held, that under s. 5, s.-s. 19, the fact of the stock being transferred as collateral security should have appeared in the books of the company; and, semble, also in the transfer itself, and that defendant therefore was not exempt under s.-s. 29:—Held, also that the defendant was liable, although the shares were entered in the company's books and in the certificate as fully paid up, inasmuch as he was informed and knew that they were in fact unpaid. *Page* v. *Austin*, 30 C. P. 108.

Security — *Transfer Absolute in Form.*]—Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock:—Held, that although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. *Page* v. *Austin*, 10 S. C. R. 132; 7 A. R. 1.

Set-off of Debt Due by Company.]—Action against defendant as a shareholder in a company incorporated under 27 & 28 Vict. c. 28, by the plaintiff, a creditor of the company, alleging a judgment recovered and fi. fa. returned nulla bona. Plea, on equitable grounds, a set-off due to defendant by the company, on the common counts, and on a judgment recovered by the defendant against the company, on which a fi. fa. had been returned nulla bona: — Held, that the plea formed no defence, for the plaintiff was not claiming in right of the company, but by virtue of a specific statutory remedy; and the decision in Macbeth v. Smart, 14 Gr. 298, was in principle applicable, notwithstanding the fact of defendant having a judgment and execution. *Benner* v. *Currie*, 36 U. C. R. 411.

Set-off.]—After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company, the sum of $442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company, one B. recovered a judgment against the company for $4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of $500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim:—Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on the defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but semble, if the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise. G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a judgment against defendant for $526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment so recovered against

them to the extent of $500:—Held, that the judgment so recovered, and the payment thereunder, constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial. *Field* v. *Galloway*, 5 O. R. 502.

Shares in Name of Third Person.]—A charging order was made against stock in a railway company to which a party was entitled, but such stock it was shewn had, by his direction, been issued to his son, so that in a suit against the father the sheriff could not dispose of it under execution; whereupon a bill was filed against the father and son stating these facts, and charging that the son gave no consideration for the stock: that the same was issued to him to hold for the use of the father, and was so issued to defeat, hinder, and delay the plaintiffs and other creditors of the father. At the hearing no evidence was given in support of the plaintiffs' case other than the pleadings and proceedings in the suit against the father and in which such charging order had been made; but the depositions of the son, who had been examined in that suit, were not read:—Held, that as the son had not been a party to that cause he was not bound by the evidence therein; the court, therefore, refused to make any decree against him, and as any decree against the father would not give the plaintiffs any greater benefit than they had by the charging order, dismissed the bill with costs. *Allan* v. *Phelps*, 23 Gr. 395.

Shares in Name of Third Person.]—The Imperial statute, 1 & 2 Vict. c. 110, if in force in this province, authorizes the issuing of a charging order against stocks standing in the name of a debtor "in his own right or in the name of any person in trust for him," but does not apply where such stocks have been fraudulently assigned in order to avoid execution. *Caffrey* v. *Phelps*, 24 Gr. 344.

Shares Issued at a Discount—*Purchase in Good Faith as Paid-Up.*]—Certain shares in a company incorporated by letters patent issued under 27 & 28 Vict. c. 23, were allotted by a resolution passed at a special general meeting of the shareholders to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount deducted from their nominal value, and scrip issued for them as fully paid up. G. under this arrangement was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant inquired of the secretary of the company, who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director of the company. The shares appeared as fully paid up in the certificate of transfer, whilst on each counterfoil in the share book the amount mentioned was "Shares, two at $300—$600:"—Held, reversing 1 A. R. 1, which had reversed 37 U. C. R. 422, that a person purchasing shares in good faith without notice from an original shareholder under 27 & 28 Vict. c. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned nulla bona for the amount unpaid upon the shares. *McCraken* v. *McIntyre*, 1 S. C. R. 479.

Shares Taken in Payment.] — The plaintiff performed certain work, amounting to $465, for defendants, a joint stock company, incorporated under R. S. O. 1877 c. 150, under an agreement for payment in shares of the capital stock of the company:—Held, that the agreement was not ultra vires of the company; and that the plaintiff's acceptance of the shares under such agreement would not render him liable to pay the amount thereof to creditors of the company:—Held, also, that the plaintiff could not sue on an implied assumpsit to recover the value of the work so performed in money, unless it was shewn that defendants were unable or had refused to deliver the shares. *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387.

Statutory Liability.]—On sci. fa. to render the individual members of a company formed under the general Act 16 Vict. c. 191, liable for its debts:—Held, that in the absence of any express provision in such Act, they were not so liable, and even if they were, quære, whether they would not have been exempted by the operation of 12 Vict. c. 10, s. 5, s.-s. 24. *Emerson* v. *Flint*, 7 C. P. 161.

Ultra Vires Transaction.]—In an action by way of sci. fa. against a shareholder in an incorporated company, against which the plaintiff had recovered a fruitless judgment, the defendant alleged as defences that the judgment was recovered upon certain promissory notes which the plaintiff procured the company to make to him, without consideration, when insolvent to his knowledge; that the notes were made in fraud of the creditors and contributories, and were ultra vires of the company; and that the company had a good defence to the action on the notes, but allowed the plaintiff to take judgment by default:—Held, that these defences might have been raised in the original action, and were not available in this; and they were struck out. *Sharer* v. *Cotton*, 16 P. R. 278. See 27 O. R. 131, 23 A. R. 426.

Unregistered Transfer — *Statutory Change.*]—Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder, in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the court below gave judgment in favour of G.:—Held, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for, the company, and the only way he could have held shares entitling him to do so was by transfer from G. Held, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit. The company in which G. held stock was incorporated in 1886, and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to Consolidate and Amend" the former Act, but authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before

the latter Act came into force. The judgment against the company was recovered in 1895:—Held, that G. was never a shareholder of the company against whom such judgment was obtained. *Hamilton* v. *Grant*, 30 S. C. R. 596.

Winding-up Act.]—No action maintainable by creditor against shareholder after winding-up order is made. *Shaver* v. *Cotton*, 27 O. R. 131; 23 A. R. 426.

IX. Special Companies and Cases.

1. *Foreign Company.*

Agents.]—The general agents in Canada of a foreign company must be regarded in the same light as the general agents at the head office in the foreign country. *Campbell* v. *National Life Ins. Co.*, 24 C. P. 133.

Attachment.]—A debt due by a foreign corporation to a resident of Upper Canada cannot be attached by service of the order to attach upon the agent of the corporation in this Province. *Lundy* v. *Dickson*, 6 L. J. 92.

Bank.]—A foreign corporation, such as a bank, cannot sue upon notes received and discounted by them in the course of banking business here, although they may maintain an action for money had and received against the person for whom such notes were discounted and to whom money was advanced on them. *Bank of Montreal* v. *Bethune*, 4 O. S. 341.

Bank Shares—*Assets.*]—Held, that Ontario bank shares, though subscribed for at Montreal and at one time registered there, but transferred to Bowmanville during the testator's lifetime, and appearing in the stock register there only, were Ontario assets. *Bloomfield* v. *Brooke*, 8 P. R. 266.

Bond.]—A foreign corporation may sue here on a bond taken to secure the payment to them of premiums received by their agent in conducting an insurance business in this Province. *Washington County Mutual Ins. Co.* v. *Henderson*, 6 C. P. 146.

Contracts.]—Contracts with foreign corporations. See *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.*, 17 S. C. R. 151.

Forum.]—Leave was given to sign final judgment under Rule 80 O. J. Act against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario. *Plummer* v. *Lake Superior Native Copper Co.*, 10 P. R. 527

Goods Sold.]—Action by a foreign corporation, incorporated in the United States, against residents of this Province, on the common counts. Plea, that defendants are subjects of this Province, and the plaintiffs are a foreign corporation, and cannot sue in this Province. On demurrer:—Held, that although the plaintiffs might not sue for goods bargained and sold on a contract made wholly in Upper Canada, they could for goods sold and delivered; and as in this case the plea must be taken to apply distributively to each cause of action stated in the count, that the account stated in Canada must be taken to have been of and concerning dealings which took place in a foreign country, where the right of the corporation to be a party to such proceedings could not be denied. *Union India Rubber Co.* v. *Hibbard*, 6 C. P. 77.

Insurance Company.] — The plaintiffs were a company chartered by the state of New York to carry on mutual insurance in the county of Genesee. Their charter gave them a lien by way of mortgage on the property insured, and upon the title of the insured to the land on which such property stood:—Held, that the company, from the very nature and object of its charter, was incapable of carrying on its business in this Province. *Genesee Mutual Ins. Co.* v. *Westman*, 8 U. C. R. 487.

Quære, whether any foreign corporation can under its foreign charter assume to carry on business here. *Ib.*

Lex Loci.]—The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario and delivered by the agent of the contractor to the contractee in New York is governed by the laws of Ontario. *Clarke* v. *Union Fire Ins. Co.*, 10 P. R. 313.

Personal Property—*Bank Acts.*]—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario, *Commercial National Bank of Chicago* v. *Corcoran*, 6 O. R. 527.

Held, the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Ib.*

Promissory Note.] — A foreign corporation may sue in this country on a promissory note given to them here for goods furnished by them to the maker. *Howe Machine Co.* v. *Walker*, 35 U. C. R. 37.

Review of authorities as to the right of a foreign corporation to contract and carry on business here. *Ib.*

Semble, that they may also, under certain circumstances, maintain an action for breach of an executory contract entered into here in the ordinary course of their business. *Ib.*

Replevin.] — Defendant in writing acknowledged the receipt from the plaintiff, described as assistant manager of the Howe Machine Company, of a sewing machine, on hire for nine months at $5 a month in advance. He agreed to pay $45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be removed by the lessor to be in jeopardy, the plaintiff or the company might resume possession of it; and defendant waived all right of action for trespass, damages, or replevin, by reason of any action taken by the plaintiff or the company in resuming such possession. The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the company, a foreign corporation; and had no property in it except as their agent:—Held, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard* v. *Hunter*, 36 U. C. R. 316.

Service of Process.]—Service on a foreign insurance company doing business in Ontario. See *Wilson* v. *Ætna Life Ins. Co.*, 8 P. R. 131.

Taxation.]—Liability of foreign corporations to municipal assessment. See *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552; *Phœnix Ins. Co. of London* v. *the City of Kingston*, 7 O. R. 343.

Telegraph Company — *Comity of Nations.*]—In 1869 the E. & N. A. Ry. Co., owning the road from St. John, N. B., westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for ninety-nine years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the equity court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1883, leased it to the N. B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co., under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the state of New York, for the purpose of constructing and operating telegraph lines in the state. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the state. In 1888 the C. P. Ry. Co. completed a road from Montreal to St. John, for a portion of it having running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. Ry. Co. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built:—Held, 1. that the agreement made in 1869 between the E. & N. A. Ry. Co. and the W. U. Tel. Co. is binding on the present owners of the road. 2. That the contract made with the W. U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. 3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade. *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.*, 17 S. C. R. 151.

Winding Up in Foreign Court.]—A fire insurance company incorporated in the state of New York and carrying on business in this Province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile, with a view of winding up the affairs of the company, and that irrespective of what the result of the proceedings may be as to solvency or insolvency of the company. *Douglas* v. *Atlantic Mutual Life Ins. Co.*, 25 Gr. 379.

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2. *Special Charters.*

Canada Company.]—Process to compel an appearance by the company could not be served on their attorneys here, the directors and a common seal being in England. *Cooper* v. *Canada Company*, Dra. 413.

Held, 1. that the recitals in the Imperial statute 6 Geo. IV. c. 75, were sufficient proof of the charter of the company; 2. that the company had power to appoint a special seal for the execution of deeds by their commissioners here, and the proof of such seal given in this case was sufficient; 3. that the production of a document within the powers of the corporation, with the seal attached, is sufficient prima facie evidence of its proper execution. *Woodhill* v. *Sullivan*, 14 C. P. 265.

Under 27 & 28 Vict. c. 100, a deed from the company, dated 17th February, 1835, in the form given by the Imperial Act, 9 Geo. IV. c. 51, and under the seal of the attorneys of the company, was held proved by its mere production, and sufficient to pass the fee. *Fell* v. *South*, 24 U. C. R. 196.

The company, by their charter, are not exempted from giving to purchasers of the lands granted to them by the Crown the usual covenants against their own acts; and as to lands purchased from private individuals, the company will be required to give the same covenants as another vendor. *Scarlett* v. *Canada Co.*, 1 Ch. Ch. 90.

Consumers' Gas Company of Montreal—*Right to Stop Supply.*]—By the true construction of the Canadian Act, 12 Vict. c. 183, s. 20, the Montreal Gas Company is authorized to cease supplying a customer with gas at any of his houses on his neglect to pay its bill for any one of them. *Montreal Gas Company* v. *Cadieux*, [1899] A. C. 589, reversing 28 S. C. R. 382.

Consumers' Gas Company of Toronto.]—The defendants, an incorporated company, carrying on business in the city of Toronto as manufacturers and suppliers of gas, in 1887 obtained an Act, 50 Vict. c. 85 (O.), whereby they were empowered to increase their capital stock from $1,000,000 to $2,000,000, such additional stock to be sold by public auction, and the Act provided that the surplus realized over the par value thereof should be added to their reserve fund, which they were thereby authorized to maintain, until the same should equal one-half of their paid-up capital, and that such reserve fund might be invested in Dominion or Provincial stock, municipal debentures, etc.; that a plant and buildings' renewal fund should be created out of the defendants' earnings, to which fund should be placed each year five per cent. on the value of plant and buildings, against which all usual and ordinary renewals and repairs should be charged; and that any surplus of net profit from any source whatever, including premiums on sales of stock after the establishment of the reserve and renewal fund, payment of directors, and a ten per cent. dividend, should be carried to a special account, and on such account becoming equal to five cents per 1,000 cubic feet on the quantity of gas sold in the previous year, the price of gas during the then current year should be reduced by at least that amount. In an action brought by the plaintiffs on behalf of themselves as well as all other consumers of gas:—Held, that defendants were obliged to include in the rest or reserve fund (a) the moneys standing to the credit of the profit and loss account at the time of the passing of

the Act, (b) the moneys to the credit of the contingent account at the same time, (c) and the moneys received from the premiums on the sale of the stock until the fund amounted to fifty per cent. of the paid-up capital; that the provision as to the nature of the investment of the reserve fund was obligatory, and it was ultra vires of the defendants to invest it, or any part of it, in the purchase or construction of plant or buildings, or in the business generally; or to invest the premiums on the sale of stock, or any part thereof, in the erection of buildings until the rest or reserve fund equalled one-half of the paid-up capital:—Held, also, that the five per cent. directed to be carried to the plant and buildings' renewal fund should be so carried, notwithstanding that the usual and ordinary repairs did not amount to that percentage, and no obligation rested on the defendants to invest any unemployed part of this fund:—Held, also, that the defendants had no right to write off sums from profits for depreciation in plant:—Held, lastly, that the plaintiffs could properly maintain the action, and that the Attorney-General was not a necessary party. *Johnston* v. *Consumers' Gas Co.*, 27 O. R. 9. But reversed on the ground that plaintiffs had no locus standi; 23 A. R. 595. See the next case.

Where by an Act extending the powers of the respondent company certain duties and obligations were imposed on it for the benefit of its customers, with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corporation with whose assent the company was originally established:—Held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act as in this case is in the nature of a private legislative bargain, and not one of public and general policy. *Johnston and Toronto Type Foundry Company* v. *Consumers' Gas Company of Toronto*, [1898] A. C. 447.

See also *Watson* v. *Gas Co.*, 5 U. C. R. 262, as to liability for nuisance.

Co-operative Association.]—The plaintiffs supplied goods to a co-operative association, formed under 29 Vict. c. 22, on the order of their manager. The terms of purchase were said to be cash, but it appeared that according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct, the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued:—Held, not a cash transaction within the 14th section of the Act, and that the plaintiffs could not recover. Semble, that the defence should have been specially pleaded, and the plea was allowed to be added. *Fitzgerald* v. *London Co-operative Association, Limited*, 27 U. C. R. 605.

Held, that R. S. O. 1877 c. 158, s. 15, an Act respecting co-operative associations, which requires the business there referred to to be a cash business, does not prevent an association formed to carry on a "labour" or "trade," from entering into contracts on credit necessary for and incidental to such labour or trade—other than contracts of buying or selling—such as contracts for work or services. *Ontario Co-operative Stone Cutters' Association* v. *Clarke*, 31 C. P. 280.

The plaintiff sued the officers and directors of a co-operative association, incorporated under R. S. O. 1887 c. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability:—Held, also, that, although the proceeds of a re-sale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived a personal benefit from the plaintiff's goods, and, therefore, the latter could not recover on this ground:—Held, lastly, that, although one of the defendants accepted, on behalf of the association, the plaintiff's drafts drawn on it for the goods, he was not liable upon an implied representation or warranty of authority in law of the association so to accept. *Struthers* v. *Mackenzie*, 28 O. R. 381.

Gas Company.]—In an action against a gas company for a nuisance, a plea of justification containing the averment that they are now managing their works carefully, and that the vapours complained of unavoidably arise, is bad, as applying the defence to the time of pleading, and not of action brought. *Watson* v. *Gas Co.*, 5 U. C. R. 262.

Semble, that a declaration would be good in charging defendants generally with causing offensive vapours to arise, &c., without assigning the particular cause of the vapours; but the defect would be cured by the plea undertaking to describe the causes, &c., and to justify them. *Ib.*

Quære, can the gas company of the city of Toronto, under their Act of incorporation and their lease from the city, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights, so long as they occasion no nuisance which they could by due care have avoided. *Ib.*

A gas company incorporated under C. S. C. c. 65, having made a charge for a special illumination, which was disputed, refused to supply gas to the same premises for ordinary purposes until their claim had been paid:—Held, that this was not justified, but that a mandamus would not lie, as the statute imposed no duty; and that the only remedy was by action. *In re Commercial Bank of Canada and London Gas Co.*, 20 U. C. R. 233.

A company incorporated under 16 Vict. c. 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which had paid the rent for the preceding quarter. *Smith* v. *London Gas Co.*, 7 Gr. 112.

The declaration represented the plaintiffs and one C. to have individually associated themselves together to procure a charter as a gas company, which they obtained, for which and other services they had acquired a claim against the company; that they in-

dividually owned books, &c., relating to the company; and that they agreed to and did surrender to defendant and one H., at their request, 1, their said claim; 2. the subscription list; 3. the books; 4. as far as they lawfully could their right, title, interest in, or control over, the assets of the company, and the charter, for all of which defendant and H. agreed to pay the plaintiffs $3,000:—Held, declaration good; for the sale alleged was not of the franchise and charter of the company, but of the mere claims of the plaintiffs thereon, and their personal rights and interests in the concern. *Miller* v. *Thompson*, 15 C. P. 186.

Grafton Road Company.]—The Grafton Road Company, under 10 & 11 Vict. c. 93, s. 55, may make contracts by parol. *Turley* v. *Grafton Road Co.*, 8 U. C. R. 579.

Huron College.]—By their Act of incorporation, 26 Vict. c. 31, Huron College is authorized to take, hold, and convey lands sold, given or granted to it, provided that such land so held shall be only such as may be required for the purposes of college buildings, &c.; and provided, also, that it may acquire any other real estate, by gift, devise or bequest, and hold the same for seven years, to revert to the person from whom it was acquired if not disposed of within that time. The plaintiff in ejectment claimed as assignee of a mortgage executed to the college in 1864, and assigned by them to him in the same year; and it was objected that they had no power either to take or assign such mortgage:—Held, that under the first part of the clause the college could take the land; and if prevented from holding it by the first proviso, that the Crown only could take advantage of their disability, and they could convey their defeasible title. *Becher* v. *Woods*, 16 C. P. 29.

Quære, whether they could not also acquire this land under the second proviso, the word "gift" being often confounded with "grant." If they could, they had assigned to the plaintiff within seven years; and in either view, therefore, he was entitled to recover. *Ib.*

International Bridge Company.]—By Acts of the legislature of Canada and the state of New York respectively, a company was incorporated in either country for the purpose of consfructing a suspension bridge across the river Niagara, for railroad and other purposes, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of their charters, to a railway company, to be for their exclusive use, and the use of such other railway companies as the lessees might arrange with:—Held, that such assignment was ultra vires and void. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

The Erie and Niagara Railway Company had, by statute, authority to arrange for the passage over such bridge from Canada into the United States; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon an information by the Attorney-General of Ontario, at the relation of the Erie and Niagara Company, and a bill by that company, were filed against the two bridge companies and their lessees, complaining of such refusal; and praying a declaration, 1, that the lease of the bridge was ultra vires; 2, that the Erie and Niagara Company were entitled to the use of the bridge on paying reasonable tolls; and for an injunction restraining the defendants from preventing the Erie and Niagara Company using the bridge. The evidence shewed that the Erie and Niagara Company had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to the Erie and Niagara Company was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognize their right to use the bridge, the court, at the hearing, dismissed their bill as against all the defendants, and also dismissed the information as against the American Bridge Company with costs; declared the lease of the bridge as regarded the Canadian Bridge Company void, and restrained them from further acting thereunder. And, semble, that even if the Erie and Niagara Company had established a complete title to relief as against the Canadian Bridge Company, still, as this court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of the Erie and Niagara Company to cross as far as the Canadian Bridge Company's charter extended, i. e., to the centre of the bridge, and was thus unable to afford any effectual assistance, the court on this ground also would have refused to interfere. *Ib.*

An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge;" and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the footway of the said bridge at their will and pleasure on the payment of lawful tolls," or preventing them from using in the same manner the footpaths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated in the Act of incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge so far as it was built, and which had been so built in accordance with the provisions of their Act of incorporation, the court allowed a demurrer for want of equity; but, in so far as the information shewed an unlawful exclusion of the public from the use of the footpaths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party. To such an information a railway company who had become lessees of the bridge were held to be proper parties. *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara river, which was to be as well for the passage of persons on foot, and in carriages, and otherwise, as for

the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge owing, it is said, to engineering difficulties, could not be adapted to the use of carriages and foot passengers:—Held, reversing 28 Gr. 65, that the abandonment of that portion of the work relating to foot passengers and carriages did not make the bridge a public nuisance, and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced. *Attorney-General* v. *International Bridge Co.*, 6 A. R. 537.

Held, that the Attorney-General for Ontario, as representing only a limited portion of the public, with whom, if at all, such contract existed, had no locus standi. The work being one within the jurisdiction of the Parliament of Canada, that Parliament, presumably with knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also that the Attorney-General of Ontario was not the proper party to file the information. *Ib.*

Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason also, the court would not interfere. *Ib.*

Held, that the International Bridge Company was under Canadian Act, 20 Vict. c. 227, s. 16, entrusted with a general and unqualified power of making by-laws and regulations as to the use of its bridge and the terms on which it should be used in point of payment; and that there is nothing in s. 2 of the amending Act (22 Vict. c. 124), when read and construed together with the principal Act, which cuts down that power as to the regulation of the use of the bridge and as to the terms on which it may be used by railway trains. As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern R. W. Co.* v. *International Bridge Co.*, 8 App. Cas. 723; 7 A. R. 226; 28 Gr. 114.

Kingston Marine R. W. Co.]—*Kingston Marine R. W. Co.* v. *Gunn*, 3 U. C. R. 368.

Lake Superior Navigation Company.]—Defendant subscribed for certain shares of plaintiffs' stock, an incorporated company under 27 & 28 Vict. c. 23, and bound himself to pay as required by the board of directors. Somewhat over half the capital stock was subscribed for in this way:—Held, no answer to plaintiffs' call on defendant for the amount of his stock, that there had been no allotment of shares, and defendant was not therefore a shareholder:—Held, also, that plaintiffs were entitled to call in all the unpaid stock at one time, as the Act did not prevent their so doing. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

The statute provided for the issue of letters patent on half the capital being subscribed, though no express provision was made as to when the company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was, in fact, elected and acted as a director and never resigned his position as such:—Held, that he could not deny his liability to pay his stock on the ground that all the stock must be subscribed before calls could be made; and that the directors were warranted by the Act in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor. *Ib.*

Marmora Foundry Company.]—Action for calls under 1 Will. IV. c. 11, against the defendant as one of the stockholders:—Held, that the stockholders in the said corporation were admissible as witnesses for the plaintiffs under 12 Vict. c. 70; that the said Act was not obsolete for non-user; that the clauses requiring the books of subscription to be opened within two months was only directory; that the subscription books subsequently opened might be considered as in connection with those previously opened, and that all the proceedings from the beginning might be taken together; that the omission in the new books of the name of H., one of the original petitioners for the Act, (he being dead) did not render the proceedings of the company invalid, nor was it fatal to the plaintiffs; that the sanction for the opening of the new subscription books of the two surviving petitioners to Parliament for the Act of incorporation was sufficient; that the names of the petitioners in the said Act named need not necessarily be signed to the new subscription books; and that defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29.

Sufficiency of declaration for calls under the statute 1 Will. IV. c. 11, incorporating the plaintiffs. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 1; *Marmora Foundry Co.* v. *Boswell*, *ib.* 175; *Marmora Foundry Co.* v. *Dougall*, *ib.* 194.

By the Marmora Foundry Act, 1 Will. IV. c. 11, it is provided that the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the Act; and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold:—Held, that the company were not restricted to the remedy by forfeiture; and that they might maintain an action against a shareholder upon calls of stock subscribed. *Marmora Foundry Co.* v. *Jackson*, 9 U. C. R. 509.

Niagara Harbour Co.]—Quære, whether manufacturing new steam engines for steamboats was within the purposes for which defendants were incorporated. *Hamilton* v. *Niagara Harbour and Dock Co.*, 6 O. S. 381.

Ontario Insurance Company.]—To a declaration for calls under s. 10 of 12 Vict. c. 166, defendant pleaded that by reason of the non-payment of the said calls in the declaration mentioned, the said shares and each of them became forfeited in pursuance of the statute; and that defendant acquiesced in

such forfeiture, of which plaintiffs had notice: —Held, plea bad, in that it did not rest with defendant to forfeit the shares. *Ontario Marine Insurance Co.* v. *Ireland*, 5 C. P. 135.

A call of four per cent. on the first instalment of five per cent. on the capital stock of the company, made by a quorum only, and not by a majority of the directors, is a good call under 12 Vict. c. 166, s. 9, the Act of incorporation. *S. C., ib.* 139.

Provincial Insurance Company.]—Held, that an assignment of stock in the Provincial Insurance Company, duly executed by assignor and assignee, for a good consideration, with proper notice to the company, was valid without further registration, provided the assignor was not indebted to the company and owed no calls. 22 Vict. c. 63 did not affect this case. *Crawford* v. *Provincial Ins. Co.*, 8 C. P. 263.

Trust and Loan Company.] — The Trust and Loan Company, being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual: —Held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest. *Reid* v. *Whitehead*, 10 Gr. 446.

The purchaser of lands in Canada from the company cannot insist upon a conveyance under the corporate seal. *Trust and Loan Company* v. *Monk*, 14 Gr. 385.

But the company should provide and annex to the conveyance executed by the commissioners referred to in 25 Vict. c. 72, a certified copy of the instrument authorizing them to act for the company. *Ib.*

An execution by one of two or more commissioners is not a compliance with the Act. *Ib.*

An assignment to the company of a valid existing mortgage bearing more than eight per cent. interest, is not necessarily void. *Trust and Loan Co. of Canada* v. *Boulton*, 18 Gr. 234.

Welland Canal Company.]—Where in the statute incorporating the Welland Canal Company, 4 Geo. IV. c. 17, s. 29, the two directors having the smallest number of votes of the five chosen in a former election were declared to be ineligible at any subsequent election, and by a subsequent statute the number of directors was fixed at seven, and the persons named who were to constitute the board until the next election—the court held that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats. *Rex* v. *Welland Canal Co.*, Tay. 300.

X. WINDING-UP.

1. *Application of Acts and Making of Order.*

Adverse Proceedings.]—The court will not allow its administration of assets to be interfered with by other proceedings, affecting the estate; and creditors of such estate bring their rights with them into the master's office, which the court substitutes for proceedings at law. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Bank.]—Sections 2 and 3 of the Winding-up Act, 47 Vict. c. 39 (D.), providing for the winding-up of insolvent companies, do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the Winding-up Act, must be wound up with the preliminary proceedings provided for by ss. 99-102 of 45 Vict. c. 23 (D.), as amended by 47 Vict. c. 39 (D.). *Mott* v. *Bank of Nova Scotia, In re Bank of Liverpool*, 14 S. C. R. 650.

Carrying on Business.] — The paramount object of the Ontario Winding-up Act is the division of the company's assets among its creditors and members with all reasonable speed. The power to carry on the business after winding-up proceedings have been commenced, and thus to postpone the final winding-up, is one which is not to be exercised unless a strong case of necessity for doing so exists. That the mortgagees of the company's works, who have foreclosed their mortgage, will be enabled to dispose of the works to greater advantage, and that by affording facilities for procuring repairs to the purchasers of the machinery manufactured by the company, the chances of obtaining payment of outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business. *In re Haggert Brothers Manufacturing Co.*, 20 A. R. 597.

Conduct of Proceedings.]—Under the facts stated in the report an order having been obtained in chambers by one creditor for winding up a company, the conduct of the proceedings was given to three creditors who had also applied for such order. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.

Constitutionality.] — Held, that the Winding-up Act, 45 Vict. c. 23 (D.), is intra vires the Dominion Parliament, and is in the nature of an insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case, though incorporated under a Provincial charter, was subject to its provisions. Re Eldorado Union Store Co., 6 Russ. & Geld. 514, followed. Merchants' Bank of Halifax v. Gillespie, 10 S. C. R. 312, distinguished. *Re Clarke and Union Fire Ins. Co.* (2), 14 O. R. 618; 16 A. R. 161; *sub nom. Shoolbred* v. *Clarke*, 17 S. C. R. 265.

Creditor's Action Against Shareholder.]—After a winding-up order has been made under R. S. C. c. 129, a judgment creditor of the company cannot bring an action under s. 61 R. S. O. 1887 c. 157, against a contributory, for payment of the amount unpaid on his shares. Judgment below, 27 O. R. 131, reversed. *Shaver* v. *Cotton*, 23 A. R. 426.

English Injunction.]—Order by Judge in bankruptcy in England enjoining plaintiffs from proceeding in the high court of justice for Ontario. See *Maritime Bank* v. *Stewart*, 13 P. R. 86.

Evidence of Insolvency—*Allegations in Petition.*]—On an application for an order for the winding-up of the B. company under 45 Vict. c. 23 (D.), and amending Acts, and as evidence of the insolvency of the company,

the applicant shewed that, being entitled to the beneficial interest in a certain policy on the life of her deceased husband, she had demanded payment thereof from the company, but it had been refused; that the suspension of the company had been announced in the papers, and that the manager of the head office in Canada had stated that he was instructed from the head office in England not to make any payments on behalf of the company. It appeared, however, that the policy provided for payment in three months after proof of the death of the insured had been received by the company, while the above demand for payment was made a fortnight after the death, and no other demand had ever been made:—Held, that the debt was not due when the demand was made, and therefore non-payment was not evidence of insolvency within the meaning of 45 Vict. c. 23, ss. 9, 10, 11 (D.), nor would the fact that the company had not paid claims amount to an acknowledgment of insolvency within s. 9 (d) of that Act, nor otherwise was there sufficient evidence here of the insolvency of the company, and the petition must be dismissed:—Held, also, that as a matter of pleading, if it had been intended to rely upon the acknowledgment of insolvency, it should have been stated in the petition. *In re Briton Medical and General Life Association (Limited)*, 11 O. R. 478.

Semble, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it. *Ib.*

Forum.]—An order for the winding-up of a company, upon petition, under R. S. C. c. 129, may be made by a Judge in chambers. *Re Toronto Brass Company (Limited)*, 18 P. R. 248.

Imperial Incorporation.] — The Steel Company of Canada (Limited), incorporated in England under Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in Nova Scotia, and having its principal place of business at Londonderry, Nova Scotia, was, by order of a Judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 Vict. c. 23 (D.):—Held, that 45 Vict. c. 23 was not applicable to such company. *Merchants' Bank of Halifax* v. *Gillespie*, 10 S. C. R. 312.

Imperial Incorporation.]—Section 3 of the Winding-up Act, R. S. C. c. 129, which provides that the Act applies to * * incorporated trading companies doing business in Canada, wheresoever incorporated, is intra vires the Parliament of Canada.—2. A winding-up order by a Canadian court in the matter of a Scotch company, incorporated under the Imperial Acts, doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor, with the consent of the liquidator previously appointed by the court in Scotland, as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. Merchants' Bank of Halifax v. Gillespie, 10 S. C. R. 312, distinguished. *Allen* v. *Hanson, In re Scottish Canadian Asbestos Co.*, 18 S. C. R. 667.

Injunction to Restrain Proceedings in Quebec Court.]—Injunctions granted to restrain proceedings in a Montreal court against a bank in process of being wound up in Ontario, under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding-up for things done in their official capacity, and from attacking the validity of their appointment. *Re Central Bank, Baxter* v. *Central Bank*, 20 O. R. 214.

Insurance Company — *Deposit.*]—Canadian policy holders petitioned for distribution of the deposit made by this company, a foreign corporation, with the Minister of Finance under 31 Vict. c. 48 (D.), and 34 Vict. c. 9 (D.), the company being insolvent:—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. *Re Briton Medical and General Life Association (Limited)* (2), 12 O. R. 441.

Jurisdiction of Court of Chancery.]—This court will not, unless in a very exceptional case, interfere with the jurisdiction of the insolvent court by winding up the affairs of an insolvent company. Therefore, where a bill was filed for the purpose of winding up the affairs of an insolvent insurance company, a demurrer for want of equity was allowed, although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets, and wind up the affairs of the company. *McNeil* v. *Reliance Mutual Fire Ins. Co.*, 26 Gr. 567.

Ontario Incorporation.]—The Act applies to an insurance company incorporated by the Province of Ontario, notwithstanding that R. S. O. 1877 c. 160, provides a separate mode of distributing the deposit made by the company with the Provincial treasurer. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Ontario Incorporation.]—Semble, notwithstanding the Act, 52 Vict. c. 32 (D.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1887 c. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay-Brick Manufacturing Co., Turner's Case*, 19 O. R. 113.

Proceeding Without Leave.] — See *Keating* v. *Graham*, 26 O. R. 361.

Proof of Assets—*Unpaid Stock—Stock Issued as Paid Up—Bonds.*]—A winding-up order will not be granted where there are no assets, and the petitioning creditor would therefore get nothing by the order. Where, however, on a petition for such an order, which was contested on the ground of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partially paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted wind-

ing up the company. In re Chapel House Colliery Co., 24 Ch. D. 259, distinguished. *In re Georgian Bay Ship Canal and Power Aqueduct Co.*, 29 O. R. 358.

Restraining Action.]—After a winding-up order had been made P., a resident of Ontario, brought an action against the company in the State of Michigan, with a view of attaching a steamer wintering there, which was the property of the company. It was shewn that representations that the company was perfectly solvent had been made by both the secretary and managing director to P., and P. swore that but for these representations he would have taken proceedings before he did, which might have enabled him to obtain a judgment before the winding-up order was made. In an action for an injunction to restrain P. from proceeding with his action in Michigan, in which it was shewn that other creditors of the company, who were residents of the United States and so not within the jurisdiction of the court, were also proceeding against the steamer, it was:—Held, that this case could not be distinguished in principle from Ex parte Railway Steel and Plant Co., In re Taylor, 8 Ch. D. 183, and the continuance of the injunction, which had been granted ex parte, was refused. *In re Lake Superior Native Copper Co. (Limited), Re Plummer* 9 O. R. 277.

Retroactive Effect of Act.]—Held, that 45 Vict. c. 23 (D.) is retroactive in the sense of applying to companies which have become insolvent before the date of that Act. *Wyld v. Hamilton Mutual Insurance Co.*, 6 O. R. 118.

Retroactive Effect of Act.]—Held, affirming 10 O. R. 489, that 47 Vict. c. 39, s. 2 (D.), is not limited in its application to companies being wound up at the date of 45 Vict. c. 23 (D.); it applies also to companies in liquidation, i. e., insolvent, though not technically being wound up, and against which proceedings are being taken to realize their assets and pay their debts. *Re Union Fire Ins. Co.*, 13 A. R. 268.

Retroactive Effect of Act.]—J. I., the appellant, gave to one Q. his note for $6,000, which was indorsed to the Bank of P. E. I.; the Union Bank of P. E. I. at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than $200 less than its face value; being sued on the note he set off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The Judge on the trial charged that if the draft was indorsed to the defendant to enable him to use it as a set-off, he could not do so, because he was contributory within the meaning of s. 76 of the Canada Winding-up Act, and that the Act, which came into force on the 12th May, 1882, was retrospective as regards the indorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank:—Held, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vict. c. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this indorsement. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

Shareholder's Application.] — On a petition by certain shareholders of the company praying for a winding-up order under R. S. C. c. 129:—Held, that R. S. C. c. 129, like the Insolvent Act of 1875, which provided for the winding up of incorporated companies, is intended to be put into operation at the instance of creditors only. *In re Union Ranch Co. of Canada (Limited)*, 15 O. R. 307.

Shareholder's Application.]—A shareholder who has fully paid up his shares in a company is a "contributory" within the meaning of s. 5 of R. S. O. 1887 c. 183, so as to entitle him to initiate winding-up proceedings. *Re Macdonald and Noxon Brothers' Manufacturing Co. (Limited)*, 16 O. R. 308.

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

Voluntary Assignment.] — Where the insolvency of a company is admitted, the court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107, not followed. *Re William Lamb Manufacturing Co. of Ottawa*, 32 O.R . 243.

Voluntary Winding-up.]—An order for compulsory winding-up may be made under 41 Vict. c. 5, s. 5 (O.), notwithstanding a resolution has been passed by the shareholders of the company, providing for the voluntary winding-up of the affairs thereof under the supervision of the directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under s. 4, s.-s. 3, under the circumstances appearing in the judgment:—Held, that the discretion of the Judge appealed from had not been improperly exercised. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Voluntary Winding-up — *Compulsory Liquidation—"Doing business in Canada."*]—There is no clashing between s. 3 of the Winding-up Act, R. S. C. c. 129, and s. 3 of the Winding-up Amendment Act, 52 Vict c. 32 (D.); the latter Act provides for the voluntary winding-up of the companies falling within its provisions, and not for their compulsory liquidation, which is provided for by the former. A company incorporated under an Act of the Province of Ontario, and carry-

ing on business in Ontario, is "doing business in Canada" within the meaning of s. 3 of the original Act. *Re Ontario Forge and Bolt Co.*, 25 O. R. 407.

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2. *Claims.*

Auditor—"*Clerk.*"]—An auditor employed in auditing books of a company does not come within the designation of "clerks and other persons having been in the employment of the company in or about its business or trade" so as to entitle him to the special privilege given by s. 56 of the Winding-up Act, R. S. C. c. 129, to be collocated in the dividend sheet for arrears of salary or wages. *Re Ontario Forge and Bolt Co., Townsend's Case*, 27 O. R. 230.

Compromise of Claim — *Minority.*] — There is no power given by the Winding-up Act, R. S. C. c. 129, to enforce a compromise upon dissentient minorities of creditors. Semble, a liquidator cannot be compelled to consent to a compromise, and even when a compromise is recommended by a liquidator, it may be frustrated by an opposing minority. *Re Sun Lithographing Co.*, 24 O. R. 200.

Crown.]—Priority of the Crown over other creditors for payment of moneys deposited in a bank that has become insolvent. See *Regina* v. *Bank of Nova Scotia*, 11 S. C. R. 1; *Liquidator of Maritime Bank* v. *Regina*, 17 S. C. R. 657.

Joint and Several Debtors.] — Held, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor. A person who has realized a portion of his debt upon the insolvent estate of his co-debtors cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable, without first deducting the amount he has previously received from the estate of his co-debtor. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

Loan Company — *Debenture Holders — Depositors — Priorities.*]—See *Re Farmers' Loan and Savings Company, Debenture Holders' Case*, 30 O. R. 337.

Rent.]—The winding up of a company under 45 Vict. c. 23 (D.), commences from the time of the service of the notice under s. 12, and therefore, under s. 69, a landlord's claim to be paid preferentially for overdue rent after such service is invalid. An undertaking by a provisional liquidator in possession to pay such a claim is by ss. 20 and 21 void unless the permission of the court is first obtained. *Fuches* v. *Hamilton Tribune Co.*, 10 P. R. 409.

Rent—*Quebec Law.*]—There is nothing in s. 56 of the Dominion Winding-up Act which alters or interferes with the lex loci contractus in the case of a claim. Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province, Civil Code, Article 1092, on such insolvency the rent not yet exigible by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

Taxation of Costs of Company's Solicitor.]—In proceeding on a judgment for winding-up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him which the master referred to one of the taxing officers to tax:—Held, that the master had authority to direct such reference. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed, and on that opinion the master makes his adjudication. *Ib.*

The taxing officer has a discretion as to the attendance of parties claiming a right to attend at such taxation, and his discretion will not be lightly interfered with. His allocatur is sufficient proof that the business charged for was done by the solicitor. *Ib.*

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months does not apply where the bill has been delivered after the company has been ordered to be wound up. *Ib.*

Taxes and Water Rates.]—The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of the land. Where, therefore, a claim was made for arrears of taxes against a company in liquidation, and it was shewn that before the date of the winding-up order the taxes might have been, but were not, recovered by distress, the claim was disallowed. A board of water commissioners, by s. 11 of 35 Vict. c. 80 (O.), were empowered to fix the water rates payable by the owner or occupant of any house or land, which were to be a charge thereon; and by s. 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for payment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass the necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict. c. 78, and by s. 7, uncollected water rates were made a lien on the premises and collectible by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor:—Held, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors. *In re Ottawa Porcelain and Carbon Company*, 31 O. R. 679.

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3. *Contributories.*

Acquiescence.]—C. purchased shares in a certain company in 1878, but the papers re-

quired to make a formal transfer to him in the books of the company were not furnished to the company till 20th December, 1881. On 11th February, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the board of directors until 10th May, 1883. Before this, however, on 15th November, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action, for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no inquiries from the company subsequently to 20th December, 1881. The company ceased to do business on 13th May, 1883, and the winding-up order was made on 9th October, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding-up proceedings; nor did he shew any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company:—Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding-up proceedings. Sichell's Case, L. R. 3 Ch. 119, distinguished. *Re Cole and Canada Fire and Marine Insurance Co., Close's Case*, 8 O. R. 92.

Amalgamation.]—K. signed a stock-book headed as follows: "We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten per cent. of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions." The Act incorporating the Alliance Company vested the shares of the company in the persons who should subscribe for the same. Before any stock was actually allotted to K. the Alliance Company was amalgamated, by 46 Vict. c. 58 (O.), with the Standard Insurance Company, which company was ordered to be wound up:—Held, that K. was rightly made a contributory. Nesmith v. Manning, 5 S. C. R. 417, distinguished. It was contended that K. never agreed to become a shareholder in the Standard Company, but held, that the statute answered this objection, and that being within the jurisdiction of the local legislature, it could not be objected to as unjust. *Re Standard Fire Ins. Co., Kelly's Case*, 7 O. R. 204. Reversed on appeal, 12 A. R. 486.

Assignment by Company Before Liquidation — *Right to Make Calls.*] — When it appeared that before the insolvency of an incorporated trading company it had assigned the entire balance due and unpaid upon the stock of the company, it was held that such balance now vested in the liquidator as assets of the company and that there was no power in the master-in-ordinary to make a call upon the shareholders in respect of the unpaid portion of their stock. *In re Queen City Refining Co.*, 6 C. L. T. 89.

Bank—*Holders Within a Month.*]—Sections 70 and 77 of R. S. C. c. 120, must be read together, and make liable as contributories all those who hold shares at the time of the suspension of the bank, or who have held shares at any time within one month before the suspension. *In re Central Bank of Canada, Baines' Case*, 16 A. R. 237, 16 O. R. 293.

Bank—*Holders Within a Month—Amendment Without Appeal.*]—H. appealed as to certain of the shares upon the ground that he had acquired them within one month before the suspension of the bank, and also on the ground that those who had transferred these shares to him should also have been placed on the list of contributories, though they themselves had only acquired the shares within the said month:—Held, that H. was rightly on the list as to these shares, but that his transferors should also be placed upon it, and the report was referred back to the master for this purpose, although the liquidators had not excepted to the report. Liquidators are officers of the court, and the matter being brought to the notice of the court on the appeal, it was the duty of the court to protect the interest of the creditors and all parties concerned, and to see that all were charged who were legally chargeable. *Re Central Bank, J. D. Henderson's Case*, 17 O. R. 110.

Bank—*Trafficking in its Own Shares.*]—H., having been placed on the list of contributories in the winding-up proceedings of the Central Bank, appealed on the ground that the transfer of his shares was a fraudulent transaction, in view of R. S. C. c. 120, s. 45, since the bank was trafficking in its own shares for the purpose of keeping up the appearance of bonâ fide sales, and so enhancing the market price of its shares, and took the appellant's notes in payment for his shares, undertaking not to enforce them, but to deliver them up upon a resale being effected, which transactions were ultra vires of the bank:—Held, that this was no defence as against the liquidators, who represented the creditors as well as the bank. *Re Central Bank, J. D. Henderson's Case*, 17 O. R. 110.

Conditional Agreement.]—T. signed a power of attorney to C. to subscribe for twenty shares of stock, and delivered it to him on the understanding that it was not to be used unless he became a director of the company. C. directed the accountant to enter T.'s name in the stock-ledger as a shareholder, which was done. Blotting pads were issued, and an advertisement published in a newspaper, and a return made to the government, with T.'s name inserted as a director in the two former, and as a member in the latter; but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement, or returns, and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call, he at once repudiated all liability:—Held, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder, and that T.'s name must be removed from the list of contributories. *Re Standard Fire Ins. Co., Turner's Case*, 7 O. R. 448.

B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that "the ten per cent. was to be payable in one year from date." He was also notified by the secretary of the company that he was a share-

holder, and a notice of a meeting was sent to him. There was no evidence to shew that he made the formation of the board a condition precedent to his becoming a shareholder; —Held, that the entry by the accountant of B.'s name as a shareholder was equivalent to an entry by C., to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act;—Held, also, following National Insurance Co. v. Egleson, 29 Gr. 406, that it was not material that the name was not entered in the subscription book, nor that there was no specific allotment of stock; and that B. was properly placed on the list. *S. C., Barber's Case*, 7 O. R. 448. Reversed on appeal, 12 A. R. 486.

This case was somewhat similar to the last case, but there was an understanding that the calls were to be paid in work, and $100 worth of work was done and credited in the books of the company; and C. C. & Co. printed the pads, saw the advertisement in the paper, and received notices of the calls:—Held, that they were contributories. *S. C., Copp, Clark & Co.'s Case*, 7 O. R. 448. Reversed on appeal, 12 A. R. 486.

C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years; and he was appointed solicitor under the seal of the company, received notices of meetings and calls, and did not expressly repudiate his liability: —Held, that he was properly made a contributory. *S. C., Caston's Case*, 7 O. R. 448. Affirmed on appeal, 12 A. R. 486, 12 S. C. R. 644.

Conditional Agreement.]—C. subscribed for 100 shares in the H. company, the subscription list being headed: "We subscribe for and agree to take the number of shares of the capital stock of the H. company set opposite our signatures, and to pay on account thereof fifty per cent. to the secretary-treasurer of the company in quarterly payments of 12½ per cent. each of the amounts subscribed for by us respectively, the first of such payments to be made on 1st February, 1882." C. was at the first shareholders' meeting elected a director, and remained so until the final winding-up of the company. One of the by-laws of the company provided for the calling of the second fifty per cent. of the stock subscribed at any time after 1st November, 1882, on thirty days' notice. In August, 1883, the president of the company arranged with C. that he should sign for eighty shares on the terms of a new stock-book which had been opened, and that C.'s original stock was to be treated as cancelled. C. accordingly signed the new book. This arrangement with C. was never communicated to the shareholders of the company. In January, 1884, a winding-up order was made, and C. was subsequently declared a contributory to the amount of 100 shares. C. now appealed, claiming to be a contributory only to the amount of eighty shares, on the ground that the arrangement of August, 1883, was a valid compromise, entered into with him because he subscribed originally on the understanding, (1st) that the company was not to go into operation before all the stock was subscribed for; and (2nd) that only fifty per cent. of his subscription would have to be paid:—Held, that whether directors have inherent power to compromise with shareholders or not, there was nothing to support the compromise here set up. As to (1st) C.'s actions as director were totally at variance with this contention; and as to (2nd) the subscription was unconditional, and though expressly providing for payment of fifty per cent., it was not inconsistent with the balance being paid when required. Moreover the by-laws, at the adoption of which C. was present, recognized the right to call up the whole stock, and C. appeared to have made no dissent. *Fuches v. Hamilton Tribune Printing and Publishing Co., Copp's Case*, 10 O. R. 497.

Illegal Increase of Capital—*Discount—Surrender of Shares.*]—The charter of the company provided that the capital stock might be increased, if and when the original stock had been paid in full. When twenty per cent. had been paid on the latter, a by-law allowing a discount of eighty per cent. was passed, and then another by-law increasing the capital stock. By subsequent Act, 54 & 55 Vict. c. 110 (D.), the "reorganization" of the company was recited, and the company, "as now organized," was declared capable of doing business:—Held, in winding-up proceedings, that though the issue of the increased stock was irregular and illegal, yet the Act last referred to had validated it, and the holders of the new stock were liable as contributories. Section 4 of the said Act provided that any shareholder might surrender his shares within a time limited, and that the said shares should be forfeited, and his liability in respect thereof should cease:—Held, in winding-up proceedings, that those who had thus surrendered their shares were not liable as contributories even to the extent of the ten per cent. which they ought to have paid at the time of subscription, but had not. *In re Ontario Express and Transportation Co.*, 24 O. R. 216. See the next case.

Illegal Increase of Capital—*Discount—Validating Act.*]—To attempt to make partially paid-up shares in the capital stock of a company paid-up shares by an allowance of a discount to the holders thereof, is prima facie illegal, and a proviso in the Act of incorporation "that no by-law for the allotment or sale of stock at any greater discount than what has been previously authorized at a general meeting" is not wide enough to impliedly authorize the allowance of such a discount on shares which were originally subscribed for at their full nominal value. An Act of Parliament reciting that a company had been "duly organized," had ceased its operations, and had been "reorganized;" and declaring that the charter is in force and the company "as now organized" capable of doing business, does not give legislative sanction to an illegal increase of the capital stock so as to make holders of shares of the illegally issued stock liable as contributories in winding-up proceedings. Judgment below, 24 O. R. 216, on these points, reversed. *In re Ontario Express and Transportation Co.*, 21 A. R. 646.

An appeal from this decision was quashed by the supreme court, 24 S. C. R. 716.

Irregular Organization.] — After the issue of the order for the winding-up of a joint stock company incorporated under the Companies Act, a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of

the company; such grounds can be taken only upon direct proceedings at the instance of the attorney-general. *Common* v. *McArthur*, 29 S. C. R. 259.

Issue of Shares at a Discount.]—A joint stock limited liability company being indebted in a small amount, which was afterwards paid off, and having at the time assets worth more than double the amount of its issued stock and all other liabilities, allotted a number of shares to its shareholders, at a discount. Subsequently the company was freshly incorporated with the shares so issued treated as fully paid up, and afterwards falling into difficulties, was put into liquidation under R. S. C. c. 129;—Held, that these shareholders were not liable as contributories. *In re Owen Sound Dry Dock Shipbuilding and Navigation Co.*, 21 O. R. 349.

Offer not Accepted—*No Allotment.*]—A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts; there must be an offer by the one to take shares, and an acceptance of such offer by the company. One H. subscribed for shares in a company, but no shares were formally allotted to him by the directors. Calls were made by the general manager, and notices of such calls were sent by the secretary to, and received by H., but the calls had never been authorized by the directors:—Held, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock, so as to bind the company or prove an acceptance of H.'s subscription for stock. *Re Bolt and Iron Company, Howenden's Case*, 10 P. R. 434.

Payment not Made in Time—*Receipt of Dividends.*] — One B. subscribed for twenty-five shares of capital stock of the Central Bank of Canada, but did not at the time of subscription, nor within thirty days thereafter, make any payment thereon. About eight months later, however, payment was made by B. to the bank, and the bank accepted payment from him, of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the bank in favour of B., were indorsed by him, and were paid. Per Hagarty, C.J.O.:—When B. in fact paid after the prescribed time it could be properly treated as a new subscription, whether he again wrote his name or not. The substantial requirements of the statute are complied with by holding that as soon as the ten per cent. was paid, and not till then, the signature was complete. *In re Central Bank of Canada, Baines' Case*, 16 A. R. 237, 16 O. R. 293.

Per Burton, and Osler, JJ.A.:—Where there is an actually signed subscription contract, an actual receipt by the bank from the subscriber of a payment on account of a number of shares equal to those mentioned therein, and a subsequent receipt by that person of dividends on that number, an acknowledgment of the subscription contract at a time within which a payment could be effectually made thereon, is to be presumed, and under the circumstances B. and the bank were respectively estopped as against each other from denying that his subscription was reacknowledged and that he had been a shareholder. *Ib.*

Per Maclennan, J.A.:—The payment not having been made within the prescribed time the original subscription was void, but the subsequent payment accepted by the bank, and the indorsement by B. of the dividend cheques, operated as a new subscription. *Ib.*

Petition for Incorporation—*Estoppel.*]—Where in winding-up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein it was untruly stated that he had taken 250 shares of the capital stock, whereas the shares he held had, after incorporation, been voted to him by a resolution of the directors as paid-up stock, for services in connection with the formation of the company:—Held, that in view of the provisions of the Ontario Joint Stock Companies Letters Patent Act, he was a contributory in respect of, at the least, the number of shares voted to him. Semble, he was liable for the full number of shares mentioned in the petition. *Re Collingwood Dry Dock Ship Building and Foundry Co., Weddell's Case*, 20 O. R. 107.

Pledgee—*Transfers.*]—After a winding-up order has been made it is too late for holders of shares, entered as such in the books of the bank, to escape liability by shewing irregularities in transfers to more or less remote predecessors in title. A loan company which advances money on the security of shares which are transferred to it, and accepted by it in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower. *In re Central Bank of Canada, Home Savings and Loan Company's Case*, 18 A. R. 489.

Promoter—*Fiduciary Relation.*]—Shares in a joint stock company may be paid for in money or money's worth, and if paid for by a transfer of property they must be treated as fully paid up; in proceedings under the Winding-up Act the master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories. There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed. A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter and if he sells to them must not violate any of the duties devolving upon him in respect of such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him, the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status. There may be cases in which the property may be regarded as being bound by a trust either ab initio or in consequence of ex post facto events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property, such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory. *In re Hess Manufacturing Co., Edgar* v. *Sloan*, 23 S. C. R. 644.

See the judgments below, 23 O. R. 182, 21 A. R. 66.

Purchase by Company of its Own Shares—*Transfer to "Manager in Trust"—Liability of Manager as Contributory.*]—The manager of an insurance company, authorized by the directors, with the moneys of the company purchased from the holder thereof, who was ignorant of the object intended, a number of partly paid-up shares of the company on which calls were in arrear, for the purpose of concellation, taking the transfer to himself as "manager in trust." The company had no power to deal in its own stock. The shares were never cancelled, the dividends thereon being credited to the company:—Held, in liquidation proceedings, that in the absence of knowledge by the transferor that the purchase was for an illegal purpose, the manager was properly placed on the list of contributories. *Re Union Fire Ins. Co., McCord's Case*, 21 O. R. 264.

Qualification Shares.] — Appeal from master's report, which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock. C., having been communicated with by the president of the company, agreed to act as a director, and gave his note for $500, in order to obtain a qualification. The president subscribed for fifty shares for him, on which the $500 would pay ten per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on fifty shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. During this time his note had been carried by the company, and he had paid nothing. The president then absconded, and C. was notified of a five per cent. call, and gave a note for $250 in payment of same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit:—Held, that he was properly placed on the list of contributories. *Re Standard Fire Ins. Co., Chisholm's Case*, 7 O. R. 448.

Repudiation of Shares.] — After the issue of letters patent in 1880 incorporating the company and naming certain persons as shareholders, these persons stated to certain of the directors of the company that they would not accept their stock, and would have nothing more to do with the company, but no proceedings were taken by them to relieve themselves from liability; and no proceedings were taken against them until the company was wound up in 1891:—Held, distinguishing Nicol's Case, 29 Ch. D. 421, that as these persons had not a mere inchoate right to receive shares, but were actually shareholders and members of the company by virtue of the charter, mere statements of this kind, and the lapse of time, and the failure of the directors to enforce payment of the shares, did not relieve them from their liability as shareholders. *In re Haggert Bros. Manufacturing Co., Peaker and Runions' Case*, 19 A. R. 582.

Subscription before Incorporation.] —P. signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock Companies Letters Patent Act, in which he agreed with the company and the signatories thereto, to take the number of shares set opposite to his name. B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated. P. and B. were not corporators named in the letters patent, and no shares were in fact ever allotted to them, but they were entered in the books as shareholders, and notices of meetings and demands for payment of calls were sent to them, and in winding-up proceedings they were placed on the list of contributories:—Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as, without more, to make P. and B. liable as contributories. *In re London Speaker Printing Co., Pearce's Case; In re Speight Manufacturing Co., Boultbee's Case*, 16 A. R. 508.

The shareholders at the date of the issue of the letters patent are those persons only who are named therein and to whom stock is allotted thereby; and it is these persons and others who may afterwards become shareholders who constitute the company. In re Queen City Refining Co., 10 O. R. 264, explained. *Ib.*

Subscription before Incorporation—*Change in Amount of Capital.*]—One D. signed his name as subscriber for a certain number of shares at the foot of a prospectus of a proposed company, in which it was stated that the capital was to be $75,000. Without D.'s knowledge or acquiescence, the company, as afterwards incorporated, had a capital of $150,000. In accordance with the terms of the subscription, and before the incorporation of the company, D. paid up half the amount of his shares. There was no allotment of stock to D., no entry of his name in any stock-book, and no acting on his part as shareholder. The company being in process of liquidation, it was claimed that D. was a contributory:—Held, that the change made in the capital of the company was a material one, and there being no acquiescence or laches on D.'s part, he was not liable as a contributory. Pitchford v. Davis, 5 M. & W. 2, specially referred to. *Stevens v. London Steel Works Co., Delano's Case*, 15 O. R. 75.

Subscription without Allotment.] — In winding-up proceedings, the master placed the subscribers to the stock-book upon the list of contributories. The contributories appealed upon the ground that although they were subscribers for stock still no stock had been allotted to them by the directors:—Held, that the master was right; that the contract signed was an unqualified taking of shares; and that the Act R. S. O. 1877 c. 150, contemplates two modes of acquiring stock, by subscription and by allotment. *In re Queen City Refining Co. of Toronto*, 10 O. R. 264.

Subscription without Allotment.] — C., after the incorporation of a company under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1877 c. 150, signed a share subscription book with the following heading:—"We, the undersigned, do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators, acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder; and we do hereby cove-

nant, promise, and agree, each with the other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act, or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us." No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C., the company was wound up, and he was held liable as a contributory:—Held, reversing 17 O. R. 331, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and ex proprio vigore create the liability contended for. *Re Zoological and Acclimatization Society of Ontario, Cox's Case*, 16 A. R. 543.

Subscription — *Non-payment at Time of Allotment.*]—See *In re Central Bank, Nasmith's Case*, 16 O. R. 293, 18 A. R. 209.

Third Person Using Name.]—The petitioner's father signed her name to a stock subscription book of a bank, paid the calls, and received the dividend cheques, which were indorsed by her at her father's request, the moneys being received by him. The bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made three months before she came of age. A year after the liquidation commenced she took proceedings to have her name removed from the list of contributories:—Held, that she was not liable as a contributory, and that her name must be removed from the list. *Re Central Bank and Hogg*, 19 O. R. 7.

Transfer of Shares.]—The shareholders of a company sold and transferred part of their property, and also contracted that they would, within a year, transfer their charter by assigning all their stock to the purchaser's nominee. Part of the purchase money was paid at once, but the purchaser did not nominate a person to whom the shares should be transferred. After an order for the winding-up of the company had been made, the liquidators brought this action for the balance of the purchase money:—Held, that they were entitled to recover. *Redfern* v. *Polson*, 25 O. R. 321.

Transfer of Shares for a Particular Purpose—*Neglect to Re-transfer.*]—The defendant, at the request of the president of the plaintiff association, accepted from him a transfer of shares, partly paid-up, in the association, for the purpose of attending a meeting of shareholders and forming a quorum, and gave the president a power of attorney to re-transfer the shares after the meeting. No re-transfer was made, and the defendant remained in ignorance that the shares stood in his name until the association became financially embarrassed:—Held, that he was liable as a contributory. *Ontario Investment Association* v. *Leys*, 23 O. R. 496.

Voidable Dealing with Shares.]—Where the shares which had been transferred to a person placed on the list of contributories had been previously held by the cashier of the bank in trust, as alleged, for the bank, which it was objected was thus trafficking in its own shares:—Held, that even if the cashier did hold the shares in trust for the directors of the bank, this would not be necessarily illegal, as he might hold such shares, under s. 45 of the Bank Act, as security for overdue debts; and, besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institution, became of no moment after the rights of creditors represented by the liquidators arose. The matter was not an absolute nullity, but, at most, one which the shareholders could waive as voidable, and it became, by the suspension, of unimpeachable validity as between the appellant and the liquidators. *In re Central Bank of Canada, Baines' Case, Nasmith's Case*, 16 O. R. 293.

See sub-title VII., *ante* col. 1040.

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4. *Liquidator.*

Action in Company's Name.]—Action by plaintiffs to recover the price of an implement manufactured by them. A winding-up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial, after the evidence had been given, that the action should have been brought in the name of the liquidator and with the approval of the court, under s. 31 of R. S. C. c. 129. The order authorizing the liquidator to sue either in his own name or in that of the plaintiffs was put in after the hearing:—Held, that the objection was too late and must be overruled:—Semble, the proper course is to move in chambers to dismiss the action for want of authority to sue; and semble also as the plaintiffs under the statute had power to sue, they could do so without the authority of the court, if they chose to run the risk of costs. *Sarnia Agricultural Implement Manufacturing Co.* v. *Hutchinson*, 17 O. R. 676.

Calls — *Majority.*] — By 41 Vict. c. 58 (D.), the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Company for the purpose of winding-up under 41 Vict. c. 21 (D.). Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd of January, 1879, and made the 4th and 5th calls of ten per cent. each on the stock of the company:—Held, that the assignees must all join in making calls, and that these calls were therefore invalid:—Held, also, that a meeting of the three joint assignees on the 27th January, after notice of the 4th and 5th calls had been mailed on the 13th January, purporting to confirm the action of the two assignees of the 2nd January, had not that effect. *Ross* v. *Machar*, 8 O. R. 417.

Chattel Mortgage.] — Quære, whether the liquidator of a company can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *In re Rainy Lake Lumber Co., Stewart* v. *Union Bank of Lower Canada*, 15 A. R. 749.

Commission — *Set-off.*] — In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators; and in this case a commission of two and a quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commis-

sion of one and a quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set off, was allowed. So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one. *In re Central Bank, Lyc's Claim*, 22 O. R. 247.

Creditors' Choice.]—Under ss. 98 and 99 of the Winding-up Act, R. S. C. c. 129, meetings of shareholders and creditors, respectively, of a bank, were held, at which the shareholders recommended the appointment of C. G. and S. as liquidators, and the creditors C. G. and H. On the application to the court for the appointment of three liquidators it appeared that resort to the double liability of shareholders would be necessary to satisfy the claims of creditors under R. S. C. c. 120, s. 70:—Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, should be adopted. *Re Central Bank of Canada*, 15 O. R. 309.

Preference should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons. *Ib.*

Discovery — *Examination before Statement of Claim.*]—An official liquidator cannot as an officer of the court be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery. Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under Rule 566 for leave to examine one of the liquidators for discovery before statement of claim was refused. *Henderson* v. *Blain*, 14 P. R. 308.

Insolvent Bank—*Right to Appoint Another Bank.*]—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators, and the Judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the Judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank:—Held, affirming 22 N. S. Rep. 97, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that, if any appeal lies from the decision of the Judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case. *Forsythe* v. *Bank of Nova Scotia, In re Bank of Liverpool*, 18 S. C. R. 707.

Liability for Costs.]—Under an order for winding-up an insolvent company under 45 Vict. c. 23 (D.), the proceedings to enforce the liability of shareholders must be taken by the liquidators, and not by the petitioner for the winding-up order. When proceedings are so taken by the liquidator, and are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the company. *Re Bolt and Iron Co., Hovenden's Case*, 10 P. R. 434.

Liability for Costs.]—After the action was at issue, an order was made by a Quebec court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that court to proceed with this action. Afterwards the liquidator obtained an order from that court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally. This court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the court in the Province of Quebec having control of the assets. *Boyd* v. *Dominion Cold Storage Co.*, 17 P. R. 468.

Liability for Costs.]—Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it. *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.*, 17 P. R. 156.

Notice of Appointment.]—It is a substantial objection to a winding-up order appointing a liquidator to the estate of an insolvent company under 45 Vict. c. 23 (D.), that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by s. 24 of the Act, and an order so made was set aside, and the petition therefor referred back to the Judge to be dealt with anew. *Shoolbred* v. *Union Fire Ins. Co.*, 14 S. C. R. 624, reversing *S. C., sub nom. Re Union Fire Ins. Co.*, 13 A. R. 268, and *S. C., sub nom. Re Clarke and Union Fire Ins. Co.*, 10 O. R. 489.

Rules for Choosing.]—Upon a contest for the appointment of liquidator in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The court abstains from laying down any such rule as that the nominee of the petitioning creditor should have a preference. The court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal will act upon their recommendation. *Re Alpha Oil Co.*, 12 P. R. 298.

Where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the company's operations were carried on, and where all its books and assets were, was already de facto liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the court appointed him liquidator. The rule

as to costs suggested in Re Northern Assam Tea Co., L. R. 5 Ch. 644. followed. *Ib.*

Sheriff—*Liquidator.*] — Direction of writ of replevin to sheriff who is also liquidator of plaintiffs. See *Alpha Oil Co.* v. *Donnelly*, 12 P. R. 515.

Three Liquidators—*Commission.*]—The intention of s. 28 of the Winding-up Act is that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them. *Re Central Bank of Canada*, 15 O. R. 360.

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5. Preferential Transactions.

Payment—*Cheque on Third Person's Account.*]—The bank suspended payment 15th September, 1883. Winding-up proceedings were commenced 22nd November, and an order made 5th December. R. & G. H. purchased a stock of hardware held by the bank, on which they owed $14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co. for $5,700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, which were drawn on and accepted by the bank on 31st October. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. & G. H. settled the balance of their debt to the bank. In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques, under 45 Vict. c. 23, s. 75 (D.), it was:—Held, that the plaintiffs could not recover, for the defendant had received no valuable consideration from the bank which he should be ordered to repay. *Exchange Bank of Canada* v. *Stinson*, 8 O. R. 667.

The defendant owed A. H. & Co. a debt, and gave his cheque on the bank for $92 in part payment thereof, which the bank accepted from A. H. & Co. on 23rd October, in retiring an overdue bill:—Held, that the amount could not be recovered back. *Ib.*

On 19th November, defendant sold his cheque for $320 to his uncle, C., who was the local head of the bank, which cheque was negotiated and accepted by the bank on 23rd November, (after winding-up proceedings had commenced):—Held, that, although it probably was an invalid transaction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of s. 75 of the Act. *Ib.*

Payment—*Cheque on Third Person's Account.*]—The bank suspended payment 15th September, 1883. Winding-up proceedings were commenced 23rd November, and an order made 5th December. The defendants C. & S. being depositors in the bank drew a cheque for $4,000 on 1st November, on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on 31st October. The arrangement was all made about 5th October, although the security was not given until the 31st, and the cheque was not presented to the bank until 23rd November, when it was accepted as payment of the maturing notes. In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defendants after the winding-up proceedings were commenced, and being an unjust preference, &c.:—Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute 45 Vict. c. 23, s. 75 (D.). *Exchange Bank of Canada* v. *Counsell*, 8 O. R. 673.

C., who was being sued by the bank, obtained defendants' cheque for $2,118, giving security therefor on 21st November, and retired the notes in suit on 23rd November:—Held, that the defendants could not be ordered to repay the amount of the cheque, as being a wrongful payment under the Act. *Ib.*

Presumption—*Rebuttal.*]—A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings, was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R. S. C. c. 129:—Held, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should, therefore, be set aside, that being the effect of the words "may be set aside:"—Held, also, that the words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court orders," were not applicable to the giving of a mortgage as security for a past debt. Held, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following Lawson v. McGeoch, 22 O. R. 474, 20 A. R. 464, and distinguishing Webster v. Crickmore, 25 A. R. 97, that the presumption referred to in s. 71 is rebuttable. *Kirby* v. *Rathbun Company*, 32 O. R. 9.

Set-off.]—See *Re Central Bank, Cayley's Case*, 17 O. R. 122.

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6. Procedure and Practice.

(a) *Appeal.*

Appointment of Interim Liquidator.]—An order was made in the chancery division of the high court directing the winding up under 45 Vict. c. 23 (D.), of a fire insurance company incorporated by the Legislature of Ontario, and against which proceedings had previously been taken under R. S. O. 1877 c. 160, and the Joint Stock Companies Winding-up Act (O.). This order appointed the receiver in the former proceedings interim liquidator, &c., and further referred it to the master to appoint a liquidator, &c., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the

previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion statute, in so far as they could properly be made applicable:—Held, that this was an order from which an appeal would lie under s. 78 of the Act of 1882. *Re Union Fire Ins. Co.*, 13 A. R. 268.

Divisional Court — *Notice Without Leave.*]—The divisional courts are not constituted appellate courts under the Dominion Winding-up Act and an appeal does not lie to a divisional court from an order of a Judge in chambers in a proceeding under that Act. The master in chambers, or other subordinate judicial officer, has no jurisdiction, unless by delegation, to make an order in a proceeding under that Act. Where a notice of appeal to the court of appeal from an order of a Judge in such a proceeding has been given, but leave to appeal has not been obtained, it is not necessary to have the notice set aside. Donovan v. Haldane, 14 P. R. 106, distinguished. *Re Sarnia Oil Co.*, 15 P. R. 182.

Final Order.]—An order of the county court under the Ontario Winding-up Act approving of the sale of the assets is a "final order," as nothing further remains to be done under it and therefore is the subject of appeal. *In re D. A. Jones Co.*, 19 A. R. 63.

Leave—*Time Extended after Argument.*]—After a case under the Winding-up Act was argued the appellant, with the consent of the respondent, obtained from a Judge of the court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the registrar of the supreme court, sitting as a Judge in chambers, giving him leave to appeal in accordance with s. 76 of the Winding-up Act, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

Leave—*Successive Applications.*]—Where an application for leave to appeal to the court of appeal from a decision in a matter under the Winding-up Act, R. S. C. c. 129, has been made under s. 74, and refused by a Judge, a fresh application will not be entertained by another Judge. The cases in which successive applications to successive Judges have been favoured, are not pertinent to a case where the right to appeal, upon leave, is sought under a special statute. *Re Sarnia Oil Co.*, 15 P. R. 347.

Leave—*Successive Applications.*]—Orders having been made in the matter of the winding-up of an insolvent bank for payment of certain moneys out of court to the executors of the purchaser from the liquidator of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under ss. 40 and 41 of the Winding-up Act, R. S. C. c. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into court of such moneys; or, in the alternative, for leave to appeal from such orders. This petition was dismissed upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out. Upon an application by the petitioner for leave to appeal to the court of appeal from the order dismissing his petition:—Held, that a Judge of the high court had power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out. And, under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one and the amount involved considerable. *Re Central Bank of Canada*, 17 P. R. 370.

Petition.]—The trial of a petition before a Judge at the assizes, praying that a liquidator might be ordered to deliver up certain lumber claimed by a bank, is not the trial of an action, and therefore no appeal lies to the divisional court. *Re Rainy Lake Lumber Co.*, 12 P. R. 27.

Security.]—An appeal under the Act respecting the winding up of Joint Stock Companies, 41 Vict. c. 5, s. 27 (O.), cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Where a bond good in form with proper sureties was filed with the clerk of the county court, on the last of the eight days, though not allowed by the Judge:—Held, to be within the words, "given security before a Judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance risks being deprived of his right of appeal in the event of the bond proving defective. *Ib.*

Setting Aside Order.]—A winding-up order under 45 Vict. c. 23 (D.), winding up a foreign company doing business in Ontario, made by one Judge, will not be set aside by another. An application for that purpose must be made to the divisional court. *In re Lake Superior Native Copper Co., Re Plummer*, 9 O. R. 277.

(b) *Appointment of Solicitor.*

Creditors' Solicitor.]—Upon a reference for the winding-up of a company, the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets:—Held, that this class of order and liability was not favoured by the courts, and should be invoked and attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services. *Re Drury Nickel Co.*, 16 P. R. 525.

Independent Solicitor.]—It is preferable to have the proceedings under an order for winding up a company under 45 Vict. c. 23 (D.), conducted by solicitors who are totally unconnected with the company to be

wound up. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.

Liquidator's Solicitor.]—In a proceeding for the winding-up of a company, a solicitor who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the sanction of the court to his acting also as solicitor for the liquidators. Nor will the court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim. The winding-up must be prosecuted by one disinterested solicitor, whose services will not be divided by the assertion of antagonistic claims. *Re Charles Stark Co.*, 15 P. R. 471.

(c) *Costs.*

Security for Costs.]—A contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company, and a creditor opposing the petition, where it appeared that the contributory, although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs. *Re Rainy Lake Lumber Co.*, 11 P. R. 314.

Security for Costs—*Intervening Shareholder out of the Jurisdiction.*]—An order was made by the court delegating the powers exercisable by the court for the purpose of winding-up a company, to a referee, pursuant to R. S. C. c. 129, s. 77, as amended by 52 Vict. c. 32, s. 20 (D.):—Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened:—Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original applications of the shareholder had been dismissed, and appeals taken; but that the security should be limited to the costs of the appeals. *Re Sarnia Oil Co.*, 14 P. R. 335.

(d) *Jurisdiction of Courts and Officers.*

County Court—*Personal Order against Liquidator for Costs.*]—An order was made by a county court, under R. S. O. 1887 c. 183, for the winding-up of the companies, and a liquidator was appointed, who brought in a list of contributories. The contributories shewed cause to their names being settled upon the list, and the court made an order in the case of each of them, reciting that it appeared there was no jurisdiction to make the winding-up order, and that all proceedings were irregular or null, and ordering that each contributory should have his costs of shewing cause, to be paid by the companies and the liquidator:—Held, that if there was jurisdiction to make the winding-up order, the contributories could not defend themselves by shewing that it was irregular or erroneous; and if there was no jurisdiction all the proceedings were coram non judice, and there was no jurisdiction, the court being an inferior one, to order the liquidator or the companies to pay the costs. And even if there was jurisdiction, in the circumstances of this case it should not have been exercised against the liquidator. Rule 1256 does not apply to proceedings under the Winding-up Act, either by virtue of s. 34 of the Act or otherwise. *Re Cosmopolitan Life Association, Re Cosmopolitan Casualty Association*, 15 P. R. 185.

Delegation of Powers—*Officers of the Court.*]—The Dominion Winding-up Act, 45 Vict. c. 23, as amended by 47 Vict. c. 39, authorizes the master in chambers, the master in ordinary, or any local master or referee to exercise the powers conferred upon the court in Ontario for the purpose of winding-up insolvent companies. The master in chambers made an order for the winding-up of an insolvent company, and referred it to the master in ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and things for the winding-up of the business of the said company:—Held, (1) that the powers vested in the judicial officers named in the Act were conferred upon each of them as persona designata, which they were not authorized to delegate to others or to each other: (2) that the reference was not authorized by the Judicature Act or Rules, or the prior Acts and Rules conferring jurisdiction upon the former judicial officers in chambers; (3) that the jurisdiction of the master in ordinary under the order of reference would be delegated jurisdiction as the substitute or deputy of the master in chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act; (4) that the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on. *In re Queen City Refining Co.*, 10 P. R. 415.

Delegation of Powers—*Officers of the Court.*]—It is not competent for the master in chambers to make an order under s. 77 of 45 Vict. c. 23 (D.), as amended by 47 Vict. c. 39, s. 5 (D.), referring the winding-up to the master in ordinary. That may be done by a Judge, as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the master in chambers to the master in ordinary. The intention of the Act is that the master in chambers, or local master, or master in ordinary, may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.

Delegation of Powers.]—When proceeding under 45 Vict. c. 23, s. 24 (D.), as amended by 47 Vict. c. 39, s. 4 (D.), the court has power to refer the appointment of a liquidator to the master. *Re Clarke and Union Fire Ins. Co.*, 10 O. R. 489, 13 A. R. 268. Reversed by the supreme court, 14 S. C. R. 624. See also *S. C.*, 14 O. R. 618, 16 A. R. 161, 17 S. C. R. 265.

Foreclosure or Sale by Petition.]—On a petition by a mortgagee in the winding-up proceedings of a company, under R. S. C. c. 129, asking for the conveyance to him by the liquidator of the company's equity of re-

demption, the court has jurisdiction to make the usual order for foreclosure or sale. It is a matter of discretion with the court whether an action will be directed or summary proceedings sanctioned. *Re Essex Land and Timber Co., Trout's Case*, 21 O. R. 367.

Illegal Transaction—*Summary Application to Set Aside.*]—Sub-section 17 of s. 23 of R. S. O. 1887 c. 183, which provides for summary proceedings in the course of winding-up a company against directors and other officers in respect of alleged misfeasance or breach of trust, is not wide enough to authorize the setting aside as a breach of trust, on the summary application of the liquidator, of a sale of lands by the company to a director, especially where the lands have, at the director's request, been conveyed by the company to the director's wife. The scope of the sub-section considered. *In re Essex Centre Manufacturing Co.*, 19 A. R. 125.

Master — *Claim for Damages.*] — In proceeding under a judgment for the winding-up of a company, the master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Master—*Fraudulent Preference.*]—In the course of a reference made to the master in ordinary in winding-up proceedings under R. S. C. c. 129, s. 77, s.-s. 2, as amended by 52 Vict. c. 32, s. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—Held, that the master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. c. 129, s. 31, by way of action. *In re Sun Lithographing Co., Farquhar's Claim*, 22 O. R. 57.

Master — *Fraudulent Transfer.*] — The master in ordinary, or other officer of the court, to whom its powers may be delegated, is not a competent tribunal to decide questions of fraudulent transfer arising in the course of a reference in winding-up proceedings under the Dominion Winding-up Act and amending Acts. *Harte* v. *Ontario Express and Transportation Co., Molsons Bank Claim*, 25 O. R. 247.

Master—*Insurance Act of Ontario.*]—A master of the high court has no authority, under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, s.-ss. 5 and 7, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt. *Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416.

Master—*Insurance Act of Ontario.*]—The master has power under that Act to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a company for services to ascertain whether they shall appear as creditors in the schedules, but he cannot adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors. He has also power to settle schedules of contributories, but cannot adjudicate upon the question whether officials of the company have been guilty of such a breach of duty as to make them liable for any loss by reason thereof. Such matters can only be determined by action. *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

Payment Out of Court — *Right of Receiver-General to Compel Repayment.*] — Where the liquidators of an insolvent bank have passed their final accounts and have paid into court the balance in their hands, and that balance is by inadvertence paid out of court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the court for an order for repayment into court of the fund. The court has also inherent jurisdiction to compel the repayment into court of money improperly obtained out of court. *In re Central Bank of Canada, Hogaboom's Case*, 24 A. R. 470. Affirmed sub nom. *Hogaboom* v. *Receiver-General of Canada*, 28 S. C. R. 192.

Reference to Settle Security.]—In assigning to provincial courts or Judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master. *Shoolbred* v. *Clarke, Re Union Fire Ins. Co.*, 17 S. C. R. 265; *S. C., sub nom. Re Clarke and Union Fire Ins. Co.*, 16 A. R. 161.

Scotch Court's Order.] — Order by Scotch court granted in proceedings for winding-up the plaintiff company, ordering defendant, the officer of the court, to deliver up certain books, etc., and in case of default authorizing the liquidator to take proceedings against him in the courts of Ontario. See *British Canadian Lumbering and Timber Co.* v. *Grant*, 12 P. R. 301.

(e) *Sale of Assets.*

County Court.]—The liquidator of a company which was being voluntarily wound up under the Ontario Winding-up Act, sold the assets thereof en bloc, without the sanction of the contributories, to a private individual, and then obtained from the county court an order approving of the sale, and making certain provisions for the disposition of the purchase money:—Held, that the order was made without authority, and that it was a nullity. *In re D. A. Jones Co.*, 19 A. R. 63.

Peremptory Sale.]—The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the court under special and urgent circumstances whether they shall have that meaning or not. A sale by tender (not saying

that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt. In winding-up proceedings of a joint stock company, tenders were advertised for for the purchase of the company's property, to be received by a certain time when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train; one on behalf of the largest beneficiary under the mortgage to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last which was the highest tender:—Held, that he was justified in so doing. *Re Alger and Sarnia Oil Co.*, 21 O. R. 440, 19 A. R. 446.

Procedure.]—The chancery practice in sale cases applies to sales under the Dominion Winding-up Act; and under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered. *Re Bolt and Iron Co.*, 10 P. R. 437.

Purchase by Director.]—Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129, the Winding-up Act, if the powers of the directors are not continued as provided by s. 34 of the Act, their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator of the company is valid. *Chatham National Bank* v. *McKeen*, 24 S. C. R. 348.

Rate on Dollar of Claims.]—The liquidator of an insolvent company brought in for approval an agreement with certain parties for the sale to them of its assets at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company "as may be admitted or adjudicated," in addition to the costs of the liquidation proceedings to be taxed by the taxing officer, and the remuneration of the liquidator to be settled by the Master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it:—Held, 1. that if the creditors' claims were to be admitted by and between the parties the agreement was conditional, and the purchasers by withdrawing before ascertainment left the agreement imperfect; 2. that by not providing a mode of admitting or adjudicating upon the creditors' claims, the agreement was ambiguous, and parol evidence would have to be adduced to explain it; 3. that for these reasons the agreement was incapable of being enforced, and could not be approved:—Quære, whether an agreement to purchase the assets of a company at a certain rate in the dollar of the unascertained claims of the creditors of such company would be valid. *Re Bolt and Iron Co.*, 10 P. R. 437.

(f) *Set-off.*

Contributory.]—A contributory of an insolvent company, who is also a creditor, cannot set off the debt due to him by the company against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Bank Act, R. S. C. c. 120. *Liquidators of the Maritime Bank* v. *Troop*, 16 S. C. R. 456.

Debtor—*Contributory.*]—By ss. 75 and 76 of 45 Vict. c. 23 (D.), it is provided that if a debt due or owing by the company has been transferred within thirty days next before the commencement of the winding-up under that Act, or at any time afterwards, to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements or to be in contemplation of insolvency under the Act, for the purpose of enabling such contributory to set up by way of compensation or set-off the claim so transferred, such debt cannot be set up by way of compensation or set-off against the claim upon such contributory:—Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265.

Debtor—*Contributory.*]—Y. in making a deposit on a government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, which cheque was subsequently cancelled and a deposit receipt issued by the bank, substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on 3rd December, 1887, and on 20th January, 1888, Y. having been required by the government to take up the deposit receipt and replace it with other security, took an assignment of the receipt and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set off the deposit receipt against the note:—Held, following the last case, that Y. as maker of the note to the bank was a mere debtor and not a contributory, and although also a shareholder, and so liable as a contributory, he was not a contributory quoad the debt, which arose out of an independent transaction, and for that reason s. 73 of R. S. C. c. 129 did not apply. *In re Central Bank of Canada, Yorke's Case*, 15 O. R. 625.

Held that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is applicable as if the company was a going concern, and, following Re Moseley, &c., Coke Co., Barrett's Case, 4 D. J. & S. 756, that the right of set-off virtually arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the government, and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior bonâ fide engagement. *Ib.*

Director — *Remuneration — Breach of Trust — Assignment of Claim.*]—By-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision made

at a general meeting was on 27th January, 1883, as follows: "The salary of the managing director was fixed until 31st October, next, as at the rate of $4,000 per annum." L., the managing director, sought to recover for services rendered as such subsequent to 31st October, 1883:—Held, that he could not do so. *Re Holt and Iron Co., Livingstone's Case*, 14 O. R. 211; 16 A. R. 397.

The position of L. as managing director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company, whose rights as to payment were to be measured by the provisions of the charter and by-laws of the company. *Ib.*

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services:—Held, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. c. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L. *Ib.*

Held, also, that the master had jurisdiction under s. 83 of the Act to investigate this transaction in these proceedings, which were for the winding-up of the company, and no formal objection should be allowed to affect the proper operation of that section. *Ib.*

Held, further, that the fact that L. had assigned his claim against the company to his wife, after the winding-up order had been acted on, made no difference, since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order. *Ib.*

English Winding-up—*Action here for Salary.*]—To an action by the plaintiff for salary against a company incorporated under the Imperial Joint Stock Companies Acts, defendants pleaded a set-off. It appeared that the plaintiff and one H. held shares which had been issued as paid up, but that fact not having been registered as required by the statute, they had been placed on the list of contributories under the Winding-up Acts in England, as liable for the debts of the company to the extent of their shares. The plaintiff also held similar shares in his own name:—Held, that under a special equitable plea the defendants might set off the alleged unpaid shares held by the plaintiff, but not those held by the plaintiff and H.; and that their proper remedy, therefore, was to apply to stay the action under the equity of the Imperial Acts, which application might be made to this court. Semble, that the action should be stayed, and all matters concerning the company left to be dealt with under the Winding-up Acts in England. *Howell v. Dominion of Canada Oils Refinery Co.*, 37 U. C. R. 484.

Maker of Cheque.]—On 15th November, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque payable to C., who deposited the same in the Dominion Bank, and obtained an advance upon it, and the Dominion Bank claimed upon it in the winding-up proceedings, having presented it for payment on 17th November, when, however, the Central Bank had suspended payment. On 23rd November, 1887, the Central Bank marked the cheque good, debiting D.'s account and crediting the Dominion Bank with the amount thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the master in ordinary disallowed it. Subsequently, and after the first dividend had been paid, C. heard of this, and filed a claim on the cheque, on 15th September, 1887. The master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set-off:—Held, that there was no right to set off as claimed, and that the allowance of the claim was ex debito justitiæ, and not discretionary. The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to D., shewed conclusively that at that time the Central Bank was not a creditor of D.; nor did the case come within the meaning of any of the clauses in the Winding-up Act relating to fraudulent preferences. *Re Central Bank, Cayley's Case*, 17 O. R. 122.

See BANKS AND BANKING, VII.—BILLS OF EXCHANGE, VIII. 2—DEFAMATION, III.—ESTOPPEL, III. 3—MANDAMUS, II. 5—MINES AND MINERALS, III.—PARTIES, II. 3—PRINCIPAL AND AGENT, VI. 1—SET-OFF, I. 3—WATER AND WATERCOURSES, X. 2—WAY, VII. 16, VIII.

COMPENSATION.

See EXECUTORS AND ADMINISTRATORS, VII. 2—TRUSTS AND TRUSTEES, VII. 2—VENDOR AND PURCHASER, VII. 1.

COMPOSITION AGREEMENT.

See BANKRUPTCY AND INSOLVENCY, II.

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See BANKRUPTCY AND INSOLVENCY, V. 2, VI. 3.

COMPOUNDING.

See PENALTIES AND PENAL ACTIONS, II. 2.

CONCEALMENT OF BIRTH.

See CRIMINAL LAW, IX. 9.

CONCESSION LINES.

See PLANS AND SURVEYS, V. 1.

CONDITIONAL CONTRACT.

See SPECIFIC PERFORMANCE, V. 2.

CONDITIONAL SALE.

See SALE OF GOODS, II. 1.

CONDITION PRECEDENT.

See PLEADING — PLEADING AT LAW BEFORE THE JUDICATURE ACT, I. 4.

CONDITIONS IN INSURANCE POLICIES.

See INSURANCE, III. 3, VI. 3.

CONFESSION..

See CRIMINAL LAW, VI. 3.

CONFLICT OF LAWS.

See FOREIGN LAW.

CONSIDERATION.

See BILLS OF EXCHANGE, VII. 2—BILLS OF SALE, II.—BOND, I.—CONTRACT, II.—DEED, III.—MONEY, II. 1—PRINCIPAL AND SURETY, I. 2 (*b*).

CONSOLIDATION.

See MORTGAGE, XV. 3—REGISTRY LAWS, I. 5—STATUTES, XVI.

CONSOLIDATION OF ACTIONS.

See MORTGAGE, XV. 3—PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, IV.—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, IV.—PRACTICE SINCE THE JUDICATURE ACT, III.

CONSPIRACY.

See CRIMINAL LAW, IX. 10.

CONSTABLE.

Arrest—*Pleading—Protection.*]—It is not necessary to the execution of a warrant of commitment by a constable that he should actually lay hands on or physically interfere with the person to be arrested. It is an arrest if the person to be arrested asks for and peruses the warrant and agrees to accompany the constable; and, semble, it is sufficient if he agrees to accompany the constable on his statement that he has the warrant in his possession. A constable in an action against him for wrongfully arresting the plaintiff without a proper indorsement of the warrant by a magistrate of the county in which the arrest is made, is entitled to plead "not guilty by statute." A constable is not entitled to the protection of 24 Geo. II. c. 44, s. 6, unless there is want of jurisdiction in the magistrate issuing the warrant. *Alderich* v. *Humphrey and Young*, 29 O. R. 427.

Arrest — *Unnecessary Violence.*]—A constable claiming the benefit of a statute in justification of an alleged breach of the law must plead it specially. Clear proof of a warrant to arrest must be given in an action for assault and battery, but its production will not justify gross and unnecessary violence in the execution of it. *Belch* v. *Arnott*, 9 C. P. 68.

Arrest in Civil Proceedings.]—Semble, that a constable in a civil proceeding has no colour or pretence for arresting without authority specially given by some process. *Brown* v. *Shea*, 5 U. C. R. 141.

Attachment of Goods.]—A constable of any town within the county in which a warrant of attachment against goods from the division court is issued under 12 Vict. c. 69, s. 1, has authority to execute such warrant. *Delany* v. *Moore*, 9 U. C. R. 294.

Attachment of Person.] — Quære, 1. is an attachment of privilege within the 9th clause of 2 Geo. IV. c. 1; and, 2. would this doubt, or the want of an affidavit being annexed to a bailable process, deprive the defendant, a constable, of the benefit of 21 Jac. I. on the point of venue. *Brown* v. *Shea*, 5 U. C. R. 141.

Attachment of Person.] — Quære, whether a constable can be compelled to execute a warrant of attachment sued out in a county court from a commissioner, as it is not directed to him but to the sheriff, and the statute gives him no fee. But if he undertake the service and arrest the defendant, he is liable for an escape. *Story* v. *Durham*, 9 U. C. R. 316.

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

Chief Constable—*Paying over Fees.*]—The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as a county constable:—Held, that under 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, the agreement to account for such fees was invalid. *Town of Stratford* v. *Wilson*, 8 O. R. 104.

Quære, whether the plaintiffs or the board of police commissioners, had the power to appoint the defendant; and whether, apart from the statutes above mentioned, it was not ultra vires the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control. *Ib.*

Chief Constable — *Salary.*]—A county council is not liable for the salary of the high constable. *Bryan* v. *County of Ontario*, 15 C. L. J. 288.

Chief Constable—*Salary.*]—Under C. S. U. C. c. 54, s. 402, it is for the city council, not for the commissioners of police, to determine the remuneration to be paid to the police force. Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it. *In re Prince and City of Toronto*, 25 U. C. R. 175.

Chief Constable — *Tenure of Office.*] — Under R. S. O. 1887 c. 184, s. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council. *Vernon* v. *Town of Smith's Falls*, 21 O. R. 331.

Debtor Allowed at Large.] — Semble, that a constable may allow a debtor whom he has arrested to go at large, so long as before the return of the writ he deliver him to the sheriff. *Ross* v. *Webster*, 5 U. C. R. 570.

Defective Warrant.] — Arrest by constable under defective warrant. See *Regina* v. *King*, 18 O. R. 566.

Felony.]—To a declaration for imprisoning the plaintiff, defendant pleaded that when he made the arrest he was a peace officer for the county, and as such was informed that the plaintiff had committed a felony, and was then a fugitive from justice therefor; that, as he lawfully might, he arrested the plaintiff, and immediately caused him to be brought before the nearest justice to answer the said felony, and that the plaintiff was detained in the police station by said magistrate, which is the trespass complained of:—Held, plea, good. *Rogers* v. *VanValkenburgh*, 20 U. C. R. 218.

At the trial it appeared that the plaintiff had committed a gross fraud in Detroit, in the United States; that the defendant having received a telegram from a public officer there, arrested him in this Province, and took him to the police station in London; and that after three days' detention he was discharged, the offence not being within the Ashburton Treaty. Defendant had been chief of police in London, and afterwards appointed, from year to year, constable for the county. He had acted for the present year, and there was some evidence of his having been sworn in, but his name was not upon the list of the clerk of the peace of those appointed for that year. The jury were told that defendant having no warrant, and not being a peace officer at the time, the arrest was not strictly legal, and the plaintiff, therefore, entitled to recover. They found, however, for defendant, and the court refused to disturb the verdict. *S. C., ib.* 220.

Handcuffing.]—Liability in trespass for unjustifiable handcuffing. See *Hamilton* v. *Massie*, 18 O. R. 585.

Illegal Warrant.] — Where defendant justified under a warrant from the president and board of police at Cobourg, under the Cobourg Police Act, for the non-performance of statute labour by the plaintiff, the justification was held bad because the plaintiff was imprisoned after part of the fine had been paid, and the warrant to imprison being for an absolute time, without any reference to the earlier payment of fine and costs, was illegal and void. *Trigerson* v. *Board of Police of Cobourg*, 6 O. S. 405.

Impounding Sheep.] — Liability in replevin for improperly impounding sheep. Notice of action. See *Ibbottson* v. *Henry*, 8 O. R. 625.

Malicious Arrest—*Honest Belief.*]—In an action for malicious arrest the jury found a general verdict for the plaintiff, with $200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned Judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. 1877 c. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it: and the court were of opinion under the facts set out in the case, that there was no evidence on which the special finding of the jury could be supported:—Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with $200 damages as assessed. If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief. *McKay* v. *Cummings*, 6 O. R. 400.

Mesne Process.]—An arrest by a constable on mesne process directed to the sheriff is not legal by 2 Geo. IV. c. 1, s. 9, unless the affidavit of the debt be annexed to the process. *Ross* v. *Webster*, 5 U. C. R. 570.

Pleading in Actions Against Constables.]—To a plea of "son assault demesne," a replication that defendant committed a breach of the peace, and that the plaintiff being a constable, and having view thereof, arrested him, is a good answer. *Fido* v. *Wood*, 5 O. S. 558.

Plea justifying arrest, as a constable, without a warrant, under the Hawkers and Pedlars' Act, 58 Geo. III. c. 5—Requisites of. See *Oviatt* v. *Bell*, 1 U. C. R. 18.

Quære, whether to a declaration for arresting, bruising, beating, and illtreating the plaintiff, a justification of the mere arrest will be sufficient. *Jones* v. *Ross*, 3 U. C. R. 328. Semble, not. *Beamer* v. *Darling*, 4 U. C. R. 211.

Declaration for assault, &c., and false imprisonment. A., one defendant, justified, alleging that upon suspicion that the plaintiff had stolen his goods, he laid his information before a justice of the peace, who granted a warrant to the constable; that B., another defendant, being the constable, searched the plaintiff's house, found the goods, and arrested the plaintiff, and at the request of A. carried her before a magistrate:—Held, plea bad, in assuming to answer the whole injury, and yet not denying nor confessing or avoiding the arrest. *Jones* v. *Ross*, 3 U. C. R. 328.

A defendant in trespass for false imprisonment cannot urge that he arrested as a constable, and that the action was brought in a wrong county, if he has omitted to insert in

the margin of his plea, "by statute," unless the court can say upon the facts proved at the close of the plaintiff's case, that the defendant was acting as constable. *Brown* v. *Shea*, 5 U. C. R. 141.

Production of Warrant.]—Where the plaintiff demanded from the constable the perusal and copy of the warrant:—Held, no excuse for non-compliance, that he had lodged it with the gaoler. On the argument in term, it was urged for the first time that the defendant, the constable, being placed by such non-compliance in the same position as the convicting magistrate, was bound to produce the conviction; but:—Held, that as the conviction could probably have been produced if such objection had been raised at the trial, its non-production could not now be allowed to prejudice the defendant. *Arnott* v. *Bradly*, 23 C. P. 1.

Proof of Warrant.]—The proof by the plaintiff of an admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he acted, is not sufficient evidence as against the justices to entitle the constable to an acquittal under 24 Geo. II. c. 44, s. 6. *Kalar* v. *Cornwall*, 8 U. C. R. 168.

Receiving Payment of Fine.]—A constable executing a warrant issued under the Fishery Act, 31 Vict. c. 60 (D.), directing him to convey plaintiff to gaol, and the gaoler to hold him for 30 days (absolutely, and not until the fine, &c., be sooner paid for the non-payment of which the warrant was issued), has no authority to receive the money and discharge the prisoner. *Arnott* v. *Bradly*, 23 C. P. 1.

Search Warrant.]—Held, that the direction of a search warrant to the constable of Thorold, not naming him, to execute the warrant in the township of Louth, was good. *Jones* v. *Ross*, 3 U. C. R. 328.

Taking Bail.]—A constable who arrests under a commissioner's writ cannot take bail, but if he do, and the sheriff accept the bail, the bond is good. *Price* v. *Sullivan*, 6 O. S. 640.

Witness at Inquest.]—L., the constable to whom the coroner delivered a summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness:—Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him from giving evidence. *Regina* v. *Winegarner*, 17 O. R. 208.

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CONSTITUTIONAL LAW.

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I. APPLICATION OF IMPERIAL ENACTMENTS.

[The Criminal Law of England was established in this Province when forming part of the Province of Quebec, by the Imperial statute, 14 Geo. III. c. 83. By the Provincial statute 32 Geo. III. c. 1, the law of England was adopted in all matters of controversy relative to property and civil rights.]

Accidental Fire.]—The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6 and 7, is in force in the Province of Ontario as part of the law of England introduced by the constitutional Act 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern R. W. Co.* v. *Phelps*, 14 S. C. R. 132.

Affidavits Made in England.] — The statute 5 Geo. II. c. 7, s. 1, respecting affidavits to be made in England for proof of debts sued for in this Province, is not repealed by the Provincial statutes regulating the introduction of the law of England or of evidence. *Gordon* v. *Fuller*, 5 O. S. 174.

Apprenticeship.]—An indenture of apprenticeship is not void, but voidable, when contrary to 5 Eliz. c. 4; and that statute is not in force in this Province. *Fish* v. *Doyle*, Dra. 328; *Dillingham* v. *Wilson*, 6 O. S. 85.

Attorneys Act.]—22 Geo. III. c. 46, which relates, among other things, to attorneys sharing their business with persons not admitted, though repealed in England, is in force in this country. *Dunne* v. *O'Reilly*, 11 C. P. 404.

Bankruptcy.]—Under the 75th clause of our Bankruptcy Act, s. 108 of the British statute 6 Geo. IV. c. 16, is not in force in Upper Canada. *Maulson* v. *Commercial Bank*, 2 U. C. R. 338.

Bankruptcy.]—This action was begun in March, 1887, to recover $220,000 from the de-

fendants. The defendants having become subject to proceedings in bankruptcy, the plaintiffs presented their claim and lodged it with the assignee in bankruptcy in England in September, 1887. The Judge in bankruptcy in England made an order enjoining the plaintiffs from proceeding with this action in the high court of justice for Ontario; and subsequently an order was made in this action by the master in chambers staying the proceedings for ever. Quære, whether there was power under the English Bankruptcy Act, 1883, to grant the injunction referred to? But held, that there was power in this court to make the order, either under s. 10 of the English Act, or by reason of the equity of the case and the power of the court to administer that equity, and the order of the master in chambers staying proceedings was affirmed. Howell v. Dominion of Canada Oils Refinery Co., 37 U. C. R. 484; Regina v. College of Physicians and Surgeons of Ontario, 44 U. C. R. 564; Ellis v. McHenry, L. R. 6 C. P. 228, specially referred to. *Maritime Bank* v. *Stewart*, 13 P. R. 86, 262, 491.

Bubble Acts.]—The Bubble Acts, 6 Geo. I. c. 18, and 14 Geo. II. c. 37, are not in force in this Province, and banks chartered by Act of the Provincial Parliament could not come within the provisions of those Acts. *Bank of Montreal* v. *Bethune*, 4 O. S. 105, 193.

Buying and Selling of Offices—*Sheriff.*]—5 & 6 Edw. VI., against buying and selling of offices, is in force in this country under 40 Geo. III. c. 1, as part of the criminal law of England. Any act done in contravention of that statute is indictable, though not specially made so. Quære, per Robinson, C.J., whether it was also introduced by 32 Geo. III. c. 1, which adopts the law of England "in all matters of controversy relative to property and civil rights." 49 Geo. III. c. 126, clearly extends 5 & 6 Edw. VI. to Upper Canada, and to the office of sheriff. Foot v. Bullock, 4 U. C. R. 480, approved. *Regina* v. *Mercer*, 17 U. C. R. 602; *Regina* v. *Moodie*, 20 U. C. R. 389.

The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500 and an annuity of £300 a year, if he would resign; R. accordingly placed his resignation in defendant's hands. The £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed, that in the event of the resignation being returned, and R. continuing to hold office, the money should be repaid and the land re-conveyed, but R. did not undertake in any way to assist in procuring the appointment for defendant. The defendant having been appointed by the government in ignorance of this agreement, an information was filed against him, and sci. fa. brought to cancel his patent:—Held, an illegal transaction within 5 & 6 Edw. VI., and that an information might be sustained under that Act without reference to 49 Geo. III., which clearly prohibited and made it a misdemeanour. Semble, that the agreement would also have been an offence at common law. The ignorance of the government, which was averred in the information, as to the illegal agreement, was immaterial. *Ib.*

Canada and New Brunswick Boundary.]—Under the Imperial statute, 14 & 15 Vict. c. 63, regulating the boundary line between Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada and the operation of the Fisheries Act, 31 Vict. c. 60. Therefore the act of drifting for salmon inthe Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act, and of the regulations made in virtue thereof. *Mowat* v. *McFee*, 5 S. C. R. 96.

Copyright.]—The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures. All that the B. N. A. Act intended to effect by s. 91, s.-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation. The Imperial Copyright Act, 5 & 6 Vict. c. 45, was in force in Canada at the time of Confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force. *Smiles* v. *Belford*, 1 A. R. 436; 1 Cart. 576.

Declaration of Execution.]—The court refused a mandamus to compel a registrar to register a deed on a declaration of its execution made in England under 5 & 6 Will. IV. c. 62, substituting declarations for oaths, as that Act does not apply to such a case. *In re Lyons*, 6 O. S. 627.

Disturbing Public Worship.]—1 Will. & M. c. 18, relating to disturbances in church, &c., is in force in this Province, and not superseded by C. S. U. C. c. 92. *Reid* v. *Inglis*, 12 C. P. 191.

Escape Warrant.] — The English statutes, 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape warrants, are not in force in this Province. *Hesketh* v. *Ward*, 17 C. P. 667.

Extradition.]—Held, that the Ashburton Treaty contains the whole law of surrender as between Canada and the United States; the statute 3 Will. IV. c. 6, being superseded by the Ashburton Treaty and the Imperial Act 6 & 7 Vict. c. 76, and the Provincial statute 12 Vict. c. 19; though in relation to other foreign powers, with whom no treaty or conventional arrangement existed, the statute 3 Will. IV. c. 6, is still in force. *Regina* v. *Tubbee*, 1 P. R. 98.

Quære, how far the United States, Lower Canada, or England, would respect the statute 3 Will. IV. c. 6, if a fugitive surrendered by Upper Canada to a foreign power were taken through those countries. *Ib.*

Extradition.]—The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding that the B. N. A. Act, previously

passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties. *Ex parte Worms*, 22 L. C. Jur. 109; 2 Cart. 315.

False Entry of Verdict.]—16 Car. I. c. 10, was intended only to apply to the court of star chamber and other courts therein mentioned, and not to such tribunals as the recorder's court for the city of Hamilton. Therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £600 sterling, imposed by the sixth clause of the statute, was held not sustainable; and, at all events, the record being unreversed, would have protected the defendant. *Stark* v. *Ford*, 11 U. C. R. 363.

Foreign Enlistment.] — The Imperial statute 59 Geo. III. c. 69, against procuring and endeavouring to procure enlistments in this country for the army of the United States:—Held, to be in force in this Province, and a conviction under it sustained. *Regina* v. *Schram*, *Regina* v. *Anderson*, 14 C. P. 318.

Imperial Court — *Power to Impose Duties on.*]—The Dominion Parliament has power to confer additional jurisdiction on the Court of Vice-Admiralty at Halifax, although that court was created by an Imperial Act. *Attorney-General of Canada* v. *Flint*, 16 S. C. R. 707; 4 Cart. 288.

Informer.]—Held, that 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. *Garrett* v. *Roberts*, 10 A. R. 650.

Insurance—*Rebuilding.*]—14 Geo. III. c. 78, s. 83, as to rebuilding by insurance companies in case of loss, and s. 86, as to liability for accidental fires, is in force here. *Gaston* v. *Wold*, 19 U. C. R. 586; *Stinson* v. *Pennock*, 14 Gr. 604.

Insurance—*Rebuilding.*]—Held, following Stinson v. Pennock, 14 Gr. 604, that 14 Geo. III. c. 78, s. 83, entitling the mortgagee to have the insurance money expended in rebuilding the burned buildings, is not merely of local application, but extends to this Province and was applicable to the present case. *Carr* v. *Fire Assurance Association*, 14 O. R. 487.

Judge's Conduct in Office—*Commission.*]—Certain charges having been preferred against a county court Judge, a commission was issued under the great seal of Canada, reciting the facts and the provisions of 22 Geo. III. c. 75 (Imp.) and directing the commissioners to examine into the charges, and for that purpose to summon witnesses and require them to give evidence on oath and produce papers; and to report thereupon. The inquiry proceeded, and a motion was made for a prohibition:—Held, that inquiries under the Imperial Act should be made before the Governor-General in council, and the authority could not be delegated, nor inquiry upon oath authorized by commission:—Held, also, that the commission could not be supported at common law, for it created a court for hearing and inquiring into offences without determining. *Re Squier*, 46 U. C. R. 474.

Justices of the Peace.]—The Imperial statute 28 Geo. III. c. 49, s. 4, enabling justices of the peace for counties at large to act as such within any city, being a county of itself, situate therein or adjoining such county, is local in its character, and is not in force in this Province. *Regina* v. *Rose*, 14 C. P. 307.

Lottery.]—The Imperial statute against lotteries, 12 Geo. II. c. 28, is in force in this country. *Cronyn* v. *Widder*, 16 U. C. R. 356; *Corby* v. *McDaniel*, 16 U. C. R. 378; *Marshall* v. *Platt*, 8 C. P. 156; *Loyd* v. *Clark*, 11 C. P. 248; *Cronyn* v. *Griffiths*, 18 U. C. R. 396.

Lunacy.]—The court is bound to take notice that the Imperial Act 11 Geo. IV. and 1 Will. IV. c. 60, enables lands in this Province held in trust by a person of unsound mind, to be conveyed by a committee appointed by the high court of chancery in England. *Thompson* v. *Bennett*, 22 C. P. 393.

Mandamus.]—Held, that in this country there can be no demurrer to a return to a mandamus, the statute allowing it in England, 6 & 7 Vict. c. 67, not being in force here. *Regina* v. *Wells*, 17 U. C. R. 545.

Marriage Act.] — Quære, whether the English Marriage Act, 26 Geo. II. c. 33, is in force in this Province. *Regina* v. *Secker*, 14 U. C. R. 604.

Semble, that it is not. *Regina* v. *Bell*, 15 U. C. R. 287.

Marriage Act.]—26 Geo. II. c. 33, except, perhaps, the 11th clause, is in force in this country. *Hodgins* v. *McNeil*, 9 Gr. 305.

32 Geo. III. c. 1, introduced the law of marriage as it existed in England at that date, except, perhaps, some clauses of 26 Geo. II. c. 33. It introduced 25 Hen. VIII. c. 22, 28 Hen. VIII. c. 7, 28 Hen. VIII. c. 16, and 32 Hen. VIII. c. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England. *Ib.*

5 & 6 Will. IV. c. 54, does not extend to this Province. *Ib.*

Marriage Act.]—Semble, that s. 11 of 26 Geo. II. c. 33, is not in force here, and that a marriage by license where either of the parties is under twenty-one, without consent of parents or guardians, is therefore not void. *Regina* v. *Roblin*, 21 U. C. R. 352.

Marriage of Minor.]—Held, that s. 11 of 26 Geo. II. c. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this Province. *Lawless* v. *Chamberlain*, 18 O. R. 296.

Medical Practitioner—*Registration.*]—The Imperial Parliament having enacted since Confederation that any person registered as a medical practitioner under the English Medical Act (21 & 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which

have a legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education. *Regina* v. *College of Physicians and Surgeons*, 44 U. C. R. 564; 1 Cart. 761.

Military and Naval Service.]—The Parliament of Canada has, under the B. N. A. Act, exclusive jurisdiction in matters relating to militia, military and naval service, and defence, and consequently, the provisions of the Imperial Army Act, 1881, do not apply to Canada, so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the Militia Act of Canada. *Holmes* v. *Temple*, 8 Q. L. R. 351; 2 Cart. 396.

Mortmain.]—The statute 9 Geo. II. c. 36, relating to charitable uses, is in force in this Province. *Doe d. Anderson* v. *Todd*, 2 U. C. R. 82; *Hallock* v. *Wilson*, 7 C. P. 28; *Mercer* v. *Hewston*, 9 C. P. 349; *Davidson* v. *Boomer*, 15 Gr. 1, 218; *Hambly* v. *Fuller*, 22 C. P. 141.

Mutiny Act.]—Per J. Wilson, J., the Imperial Mutiny Act does not override C. S. C. c. 100, but the latter Act was passed in aid of it, and is therefore in force. *Regina* v. *Sherman*, 17 C. P. 167.

Per A. Wilson, J., the punishment by fine and imprisonment imposed by the provincial Act stands abolished so long as the Mutiny Act is in force, and the imprisonment can in no case exceed six calendar months, but the power of trial by the court of oyer and terminer under the provincial Act has not been taken away by the Mutiny Act. *Ib.*

Nullum Tempus Act.]—The Nullum Tempus Act, 9 Geo. III. c. 16, is in force in this Province, but it does not apply to the unsurveyed waste lands of the Crown. *Regina* v. *McCormick*, 18 U. C. R. 151.

Probate.]—The 6th section of 38 Geo. III. c. 87 (Imp.), prohibiting the grant of probate to infants under the age of twenty-one is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. 1877 c. 40, ss. 34 and 35), or as a rule of practice in the Probate Court in England (R. S. O. 1877 c. 46, s. 32). *Merchants' Bank* v. *Monteith*, 10 P. R. 334.

Rectory Lands.]—The Act 29 & 30 Vict. c. 16, being an Act to provide for the sale of the rectory lands of this Province, is intra vires and valid, the Imperial Act 17 & 18 Vict. c. 118, having removed the restrictions upon legislation upon such subject matter formerly existing by force of 31 Geo. III. c. 31, and Imp. Act 3 & 4 Vict. c. 35. *Langtry* v. *Dumoulin*, 7 O. R. 499.

Sale of Land.]—As to Imperial statute, 5 Geo. II. c. 7, authorizing the sale of land in equity for the payment of debts in British colonies, see *Kearney* v. *Creelman*, 14 S. C. R. 33.

Sale of Liquor.]—The British statute 24 Geo. II. c. 46, disallowing the sale of spirituous liquors at one time in quantities of less value than 20s. to be consumed out of the shop, is not in force here. *Heartly* v. *Hearns*, 6 O. S. 452; *Leith* v. *Willis*, 5 O. S. 101.

Sale of Liquor.]—No penalty can now be recovered for selling liquor without a license from the Governor or Lieutenant-Governor, under the Imperial Act 14 Geo. III. c. 88, for since 1 & 2 Will. IV. c. 23, the issue of such licenses has been regulated by the Colonial Legislature, and now depends upon the municipal Act, 22 Vict. c. 99. *Andrew* v. *White*, 18 U. C. R. 179.

Ship—*Loss of Goods by Fire.*]—The Imperial statute 26 Geo. III. c. 86, s. 2, enacting that owners of ships should not be liable for any loss or damage which may happen to any goods shipped on any such vessel by reason or means of any fire happening to such ship, is in force in this Province. *Torrance* v. *Smith*, 3 C. P. 411; *Hearle* v. *Ross*, 15 U. C. R. 259.

Treason.]—The Imperial statute 11 & 12 Vict. c. 12, for the better security of the Crown and government of the United Kingdom, does not override 3 Vict. c. 12, of this Province, to protect the inhabitants against aggression from foreigners, for the latter is re-enacted by the consolidation of the statutes, which took place in 1859. *Regina* v. *Slavin*, 17 C. P. 205.

Treating Act.]—Quære, whether the Treating Act 7 Will. III. c. 4 is in force in this Province. *Dundas Election*, *Cook* v. *Broder*, 1 H. E. C. 265.

Wages of Servants.]—Semble, the statute of 5 Eliz. c. 4, is not in force in Upper Canada, but 20 Geo. II. c. 19, is in force; and under the third and fourth clauses of the latter statute, jurisdiction is given to two or more justices, and cannot be exercised by one, and the party cannot be arrested on the complaint; he must be summoned. *Shea* v. *Choat*, 2 U. C. R. 211.

II. British North America Act.

1. *In General.*

General Rule.]—Sections 91 and 92 of the B. N. A. Act of 1867 must in regard to the classes of subjects generally described in s. 91 be read together, and the language of one interpreted and, where necessary, modified by that of the other so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can without entering more largely than is necessary upon an interpretation of the statute. *Citizens Ins. Co. of Canada* v. *Parsons, Queen Ins. Co.* v. *Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

General Rule.]—The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B. N. A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in s. 92, which states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in

s. 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne. *Dobie* v. *Temporalities Board*, 7 App. Cas. 136; 1 Cart. 351.

General Rule — *Delegation.*] — Subjects which in one aspect and for one purpose fall within s. 92 of the B. N. A. Act, 1867, may in another aspect and for another purpose fall within s. 91. Russell v. The Queen, 7 App. Cas. 829, explained and approved. Held, that the Liquor License Act of 1877, R. S. O. 1877, c. 181, which, in respect of ss. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of these sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of s. 92 of the Act of 1867, and is within the powers of the Provincial Legislature. Held, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a board of commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Hodge* v. *The Queen*, 9 App. Cas. 117; 3 Cart. 144.

General Rule.]—The general power of legislation conferred upon the Dominion Parliament by s. 91 of the B. N. A. Act in supplement of its therein enumerated powers must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion. Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or Provincial Legislature. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348; 5 Cart. 295.

Crown's Priority.]—The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion government. The prerogative privilege of priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court. *Regina* v. *Bank of Nova Scotia*, 11 S. C. R. 1; 4 Cart. 391.

Crown's Priority.]—The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. The prerogative privilege of priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of an insolvent bank. *Maritime Bank* v. *The Queen*, 17 S. C. R. 657, 4 Cart. 409.

Debts Created under Local Legislation.]—Provincial legislatures are not restricted to legislation respecting property, such as bonds, held in the Province, and where debts and other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of a local legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province. *Jones* v. *Canada Central R. W. Co.*, 46 U. C. R. 250; 1 Cart. 777.

Debts of Province of Canada—*Deferred Liabilities — Toll Bridge.*] — A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict, c. 90) of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives, should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award. Held, affirming 6 Ex. C. R. 103, that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late Province of Canada coming within the operation of s. 111 of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. Attorney-General of Canada v. Attorney-General of Ontario, [1897] A. C. 199; 25 S. C. R. 434, followed. Held, also, that the arbitration provided for by the third section of the Act, 8 Vict. c. 90, did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of that Act, (8 Vict. c. 90) was a proper subject for petition of right within the jurisdiction of the exchequer court of Canada. *The Queen* v. *Yule*, 30 S. C. R. 24. The judicial committee of the Privy Council refused leave to appeal from the judgment in this case.

Dissolving Federal Company.] — A Provincial Legislature of Canada has no power to pass an Act transferring to a new company, or otherwise, a federal railway, with its appurtenances, property, rights and powers, or to dissolve a federal company, or to substitute for it a company to be governed by, and subject to, provincial legislation. *Bourgoin* v. *Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental*, 5 App. Cas. 381, 1 Cart. 233.

Dominion Corporation.] — Held, that the Act 37 Vict. c. 103 (D.), which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires the said Parliament:—Held, further, that the cor-

poration could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157.

Executive Councillors.]—The members of the executive council of a Province, under the B. N. A. Act, represent the Sovereign, and cannot be sued in the civil courts of the Province for acts performed by them in the discharge of their official duty. *Molson* v. *Chapleau*, 6 Legal News 222; 3 Cart. 360.

Incidental Subjects.]—The B. N. A. Act in assigning either to the Dominion or Provincial Legislatures, power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned. *Bennett* v. *Pharmaceutical Association of Quebec*, 1 Dorion 336; 2 Cart. 250.

Legislative Power.]—An Act of the Provincial Legislature, if within its powers as defined by the B. N. A. Act, is supreme as to the courts and people of the Province, and cannot be objected to as contrary to reason or justice. *In re Goodhue*, 19 Gr. 366. See also, *Toronto and Lake Huron R. W. Co.* v. *Crookshank*, 4 U. C. R. at p. 318.

Lieutenant-Governor — *Representative of the Queen—Provincial Government.*]—The Lieutenant-Governor of a Province is as much the representative of Her Majesty the Queen for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion government. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458.

Pardoning Power — *Provincial Penal Legislation.*]—The local legislatures have the right and power to impose punishment by fine and imprisonment as sanction for laws which they have power to enact: B. N. A. Act, s. 92, s.-s. 15. The Lieutenant-Governor of a Province is as much the representative of Her Majesty the Queen for all purposes of Provincial government as the Governor-General himself is for all purposes of the Dominion Government. Inasmuch as the Act 51 Vict. c. 5 (O.), declares that in matters within the jurisdiction of the Legislature of the Province all powers, &c., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of that Province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vict. c. 5 (O.), it is impossible to say that the powers to be exercised by the said Act by the Lieutenant-Governor are unconstitutional. Quære: Is the power of conferring by legislation upon the representative of the Crown, such as a colonial governor, the prerogative of pardoning, in the Imperial Parliament only, or, if not, in what legislature does it reside? *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458, 5 Cart. 517; affirming 19 A. R. 31; and 20 O. R. 222.

Powers of Province.] — The British North America Act, 1867, has not severed the connection between the Crown and the Provinces. The relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers, executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the Provinces by ss. 109 and 126 are vested in Her Majesty as sovereign head of each Province. *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437; 5 Cart. 1.

Powers of Province.]—The Government of each Province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the Province. The Queen v. Bank of Nova Scotia, 11 S. C. R. 1, followed. *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, 20 S. C. R. 695.

Provincial Objects.]—The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality. *Clarke* v. *Union Fire Ins. Co.*, 19 P. R. 313.

Provincial Subsidies—*Interest.*]—By s. 111 of the British North America Act Canada is made liable for the debt of each Province existing at the Union. By s. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the Union over $62,500,000 and chargeable with five per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by s. 116, if the debts of these Provinces should be less than said amounts, they are entitled to receive, by half-yearly payments in advance, interest at the rate of five per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several Provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province, but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the Union exceeded the sum mentioned in s. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec:—Held, that the subsidy of the Provinces under s. 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under s. 118. By 36 Vict. c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the Union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 17 Vict. c. 4, in 1884, it was provided that the accounts between the Dominion and the Provinces should be calculated as if the last mentioned Acts had dir-

ected that such increase should be allowed from the coming in force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from 1st July, 1867, to 1st January, 1873, with interest at five per cent. from the day on which it would have been so paid to 1st July, 1884, should be deemed capital owing to the respective Provinces bearing interest at five per cent. and payable after 1st July, 1884, as part of the yearly subsidies:—Held, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the Provinces half-yearly, but leaves such deduction as it was under the British North America Act. *Dominion of Canada* v. *Provinces of Ontario and Quebec*, 24 S. C. R. 498.

Repeal of Statutes.]—The powers conferred by the British North America Act 1867, s. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867:—Held, that 22 Vict. c. 66 (of the Parliament of Canada) which created a corporation, having its corporate existence and rights in the Provinces of Ontario and Quebec, could not be repealed or modified by the Legislature of either Province or by the conjoint operation of both, but only by the Parliament of the Dominion:—Held, further, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation created by the Canadian Parliament and substitute a new one; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was invalid. Citizens' Insurance Company of Canada v. Parsons, 7 App. Cas. 96, approved and distinguished. *Dobie* v. *Temporalities Board*, 7 App. Cas. 136; 1 Cart. 351.

Settlement of Estate.]—A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith: — Held, that such an Act was within the competence of the Provincial Legislature; but the court held further, that the testator's grandchildren not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act. *In re Goodhue*, 19 Gr. 366; 1 Cart. 569.

Statute Before Confederation.]—An Act of Canada passed before 1867, made void any contract referring to or arising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision:—Held, that this provision not having been repealed, was in force in Quebec as respects Dominion elections under ss. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void. *Willett* v. *DeGrosbois*, 17 L. C. Jur. 203, 2 Cart. 332.

Witnesses Before Legislature.]—Provincial Legislatures have, as incident to their express powers under the B. N. A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs. The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right, are valid. *Ex parte Dansereau*, 19 L. C. Jur. 210, 2 Cart. 165.

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2. *Adulteration of Food.*

Act to Prevent Frauds Against Cheese Factories.]—The Act 52 Vict. c. 43 (D.), an Act to provide against frauds in the supplying of milk to cheese factories, &c., is intra vires the Dominion Parliament. *Regina* v. *Stone*, 23 O. R. 46.

See Regina v. *Wason*, 17 A. R. 221.

Regulation of Sale of Articles of Food.]—A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bonâ fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby. *Keefe* v. *McLennan*, 2 Russ. & Ches. 5, 2 Cart. 400.

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3. *Arbitrations Between the Provinces.*

Appointment of Arbitrators.] — The British North America Act provided (s. 142) that "the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec and one by the Government of Canada; and the election of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or Quebec:"—Held, that no appointment once made under this provision could afterwards be revoked by the Government by whom it was made, and that a majority of the arbitrators could continue the proceedings and make a valid award notwithstanding the absence of the third arbitrator, who had affected to resign, and an attempted revocation of his appointment by the Government appointing him. *In re Arbitration between Ontario and Quebec*, 4 Cart. 712.

Majority—*Prohibition of Proceedings.*]—Held, by a majority of the arbitrators, that as the B. N. A. Act, 1867, confers powers on the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and an award by all is there-

fore unnecessary. *In re Arbitration between Ontario and Quebec*, 6 C. L. J. 212.

The jurisdiction of the courts of one of the litigant Provinces to interfere to stay the proceedings on the arbitration by writ of prohibition considered, and held that there is none. *Ib.*

Upper Canada Improvement Fund—*School Fund.*]—The arbitrators appointed in 1879, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the Common School Fund established under 12 Vict. c. 200 (Can.), they directed the principal of the fund to be retained by the Dominion and the income therefrom to be paid to the Provinces:—Held, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore intra vires of the arbitrators. Held, further, that there was a division of the beneficial interest in the fund and a fair adjustment of the rights of the Provinces in it which was a proper exercise of the authority of the arbitrators under the statute. By 12 Vict. c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold and the proceeds applied to the creation of the "Common School Fund," provided for in s. 1. The lands so set apart were all in the present Province of Ontario. Held, that the trust in these lands created by the Act for the Common Schools of Canada did not cease to exist at Confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the Common Schools of the new Provinces of Ontario and Quebec. In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts, questions respecting the Upper Canada Improvement Fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two Provinces up to January, 1889. Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the school lands the amount of which was one of the items in the accounts so rendered. *Ontario and Quebec* v. *Dominion of Canada, In re Common School Fund and Lands*, 28 S. C. R. 609.

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4. *Attorney-General.*

Enforcing Rights of the Public.]—The attorney-general of the Province is the officer of the Crown who is considered as present in the courts of the Province to assert the rights of the Crown, and of those who are under its protection. The attorney-general of the Province, and not the attorney-general of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the government of the Dominion, but of a violation of the rights of the public of the Province, even though such rights are created by an Act of the Parliament of the Dominion. The attorney-general of the Province is the proper person to file an information in respect of a nuisance caused by interference with a railway. Though the power of making criminal laws is vested in the Dominion Parliament, the attorney-general of the Province is the proper officer to enforce those laws by prosecution in the Queen's courts of justice in the Province. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34, 1 Cart. 813.

Enforcing Rights of the Public—*Nuisance.*]—An Act of the Dominion Parliament incorporating a company for the purpose of constructing a bridge across the Niagara river from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only, and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the attorney-general of Ontario, seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance:—Held, reversing 20 Gr. 34, that the bridge as constructed not being a public nuisance, the attorney-general of Ontario was not the proper officer to file the information. *Attorney-General* v. *International Bridge Co.*, 6 A. R. 537, 2 Cart. 559.

Intrusion.]—To an information of intrusion filed by Her Majesty's attorney-general for the Dominion, prosecuting for Her Majesty, the defendant pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada; but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate. Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the Crown, with leave to defendant to move to enter it for him:—Held, that the Crown was clearly entitled to recover, for, among other reasons, the plea set up no title in defendant, and admitted the Crown title by stating the lands to belong to this Province; and the fact of the attorney-general for Canada prosecuting for the Crown did not shew that a Dominion title was necessarily claimed. *Attorney-General* v. *Harris*, 33 U. C. R. 94.

Setting Aside Letters Patent.]—Proceedings in the nature of a scire facias, to set aside letters patent of invention issued under the Dominion statute, 35 Vict. c. 26, cannot be instituted in the name of a provincial attorney-general, and can only be legally brought by the attorney-general of Canada. *Mousseau* v. *Bate*, 27 L. C. Jur. 153, 3 Cart. 341.

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5. *Bankruptcy and Insolvency.*

Bank of Upper Canada.] — Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vict. c. 40 (D.). The Crown then sold them and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this

action being brought to set aside the tax sale:—Held, per Hagarty, C.J.O., and Osler, J.A., that the Act, 32 Vict. c. 40 (D.), was intra vires, as dealing with "Bankruptcy and Insolvency" or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. 1887 c. 193, s. 7, s.-s. 1:—Per Burton, J.A., that the Act was ultra vires as an interference with "property and civil rights in the Province" and that the lands remained in the trustees subject to taxation. That even if the Act was intra vires, still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation:—Per Maclennan, J.A., that the Act was ultra vires and the lands subject to taxation, but that, upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned. Judgment below, 17 O. R. 615, affirmed. *Regina* v. *County of Wellington*, 17 A. R. 421. See the next case.

Bank of Upper Canada.]—In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 Vict. c. 17, the Dominion Parliament incorporated said trustees, giving them authority to carry on the business of the bank so far as was necessary for winding-up the same. By 33 Vict. c. 40, all the property of the bank vested in the trustees was transferred to the Dominion Government, who became seized of all the powers of the trustees:—Held, affirming 17 A. R. 421, sub nom. Regina v. County of Wellington, that these Acts were intra vires the Dominion Parliament. *Quirt* v. *The Queen*, 19 S. C. R. 510, 5 Cart. 456.

Bill of Sale.]—An Act of the Legislature of New Brunswick, providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the Legislature. *In re De Veber*, 21 N. B. Rep. 401, 2 Cart. 552.

Building Societies.]—An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec, whether solvent or not, was held to be beyond the competence of the Dominion Parliament. *McClanaghan* v. *St. Ann's Mutual Building Society*, 24 L. C. Jur. 162, 2 Cart. 237.

Canada Gazette.]—Notice of application for discharge in insolvency in the Canada gazette, and not in the local gazette:—Held, sufficient under the Insolvent Act of 1864, the B. N. A. Act, and 31 Vict. c. 6 (O.). *In re Huffman*, 5 C. L. J. 71.

Debtor's Discharge.] — By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any court was entitled to apply for and obtain his discharge. When this Act was passed there were no county courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the county courts, and this enactment was held to be valid. *Johnston* v. *Poyntz*, 2 Russ. & Geld. 193, 2 Cart. 416.

Debtor's Discharge.] — An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act came into force, and the assent of the governor-general does not make such an enactment valid. *The Queen* v. *Chandler*, 1 Hannay 556, 2 Cart. 421.

Dominion Winding-up Act.] — Held, that the Winding-up Act, 45 Vict. c. 23 (D.), is intra vires the Dominion Parliament, and is in the nature of an insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case, though incorporated under a provincial charter, was subject to its provisions. Re Eldorado Union Store Co., 6 Russ. & Geld. 514, followed. Merchants' Bank of Halifax v. Gillespie, 10 S. C. R. 312, distinguished. *Re Clarke and Union Fire Ins. Co.*, 10 O. R. 489, 14 O. R. 618, 16 A. R. 161.

Affirmed, sub nom. *Shoolbred* v. *Clarke*, 17 S. C. R. 265, 4 Cart. 459.

Dominion Winding-up Act—*Imperial Company.*] — The Dominion Parliament, under its jurisdiction as to bankruptcy and insolvency, has authority to provide for the compulsory liquidation or winding-up of a company incorporated under a statute of the Imperial Parliament. *Allen* v. *Hanson*, 18 S. C. R. 667, 4 Cart. 470.

Fraudulent Debtor's Committal.]—A Provincial Legislature has power to pass an enactment for the imprisonment of a person making default in payment of a sum due on a judgment, in case, (*a*) he has had since the date of the judgment or order, the means to pay the sum in respect of which he has made default and neglects or refuses to pay it; or in case (*b*) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. *Ex parte Ellis*, 1 Pugs. & Burb. 593, 2 Cart. 527.

Fraudulent Purchase of Goods.]—The Dominion Parliament by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiff sued for goods sold and delivered to the defendants, who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act:—Held, by a majority of the judges of the common pleas, by two judges of the court of appeal, and by three judges of the supreme court (the other three giving no opinion on this point), that the enactment is

within the competence of the Dominion Parliament. *Peck* v. *Shields*, 6 A. R. 639, 3 Cart. 266.

Gaol Limits.]—The Legislature of New Brunswick, prior to the Union, passed an Act extending the gaol limits. This Act was not to come into operation until 1st April, 1868, and before that date, but after the Union, it was repealed by a subsequent enactment:—Held, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act ultra vires. *McAlmon* v. *Pine*, 2 Pugs. 44, 2 Cart. 487.

Imprisonment for Debt.]—An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be ultra vires as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act. *Armstrong* v. *McCutchin*, 2 Pugs. 381, 2 Cart. 494.

Insolvent Society.] — The Act of the Legislature of Quebec (33 Vict. c. 58) for the relief of the appellant society, then (as appeared on the face of the Act) in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature. The Act was held to relate to a matter of a "merely local or private nature in the Province," which by s. 92 of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by s. 91 of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada. *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31, 1 Cart. 63.

Insurance Company — *Deposit.*]—The Dominion Parliament provided that insurance companies doing business in Canada should make a deposit with the minister of finance for the security of Canadian policy holders:—Held, that the legislation was valid, and that the Canadian policy holders of an insolvent company were entitled to a distribution of the deposit, although proceedings for the winding-up of the company were pending in the English courts. *Re Briton Medical and General Life Association* (*Limited*), 12 O. R. 441, 4 Cart. 639.

Nova Scotia Railway Arrangement Act.]—An Act of the Nova Scotia Legislature for facilitating arrangements between railway companies and their creditors, provided that a company might propose a scheme of arrangement between the company and its creditors and file the same in court, and that thereafter the court might, on application by the company, restrain any action against the company on such terms as the court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be enforced without leave of the court:—Held, that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legislature. *Murdoch* v. *Windsor and Annapolis R. W. Co.*, Russ. Eq. Rep. 137, 3 Cart. 368.

Nova Scotia Railway Arrangement Act.]—Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between railway companies and their creditors," the Windsor and Annapolis R. W. Co. proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted:—Held, that so much of the Act as was necessary to the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia. *Re Windsor and Annapolis Railway*, 4 Russ. & Geld. 312, 3 Cart. 387.

Nova Scotia Winding-up Act.] — By an Act of the Legislature of Nova Scotia, provision was made for the winding up of companies in general, where a resolution to that effect was passed by the company, or where the court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor:—Held, that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature. *In re Wallace Huestis Grey Stone Co.*, Russ. Eq. Rep. 461, 3 Cart. 374.

Ontario Assignments Act.]—Held, following Broddy v. Stuart, 7 C. L. T. Occ. N. 6, that 48 Vict. c. 26 (O.), is intra vires the Provincial Legislature. *Clarkson* v. *Ontario Bank*, 13 O. R. 666.

Ontario Assignments Act.]—There being no statute of the Dominion on bankruptcy and insolvency, an Act was passed by the Ontario Legislature for the purpose of enabling insolvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after acquired property:—Held, that the Provincial Act was intra vires. *Clarkson* v. *Ontario Bank*, *Edgar* v. *Central Bank*, 15 A. R. 166, 4 Cart. 499.

Ontario Assignments Act.] — Held, that the provisions of s. 9 of the Act respecting Assignments and Preferences, R. S. O. 1887 c. 124, which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the Provincial Legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament. *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A. C. 189, 5 Cart. 266.

Reversing *S. C.*, 20 A. R. 489, sub nom. *In re Assignments and Preferences Act*, and overruling *Union Bank* v. *Neville*, 21 O. R. 152.

Ontario Winding-up Act.] — Semble, notwithstanding the Act, 52 Vict. c. 32 (D.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1887 c. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay Brick Manufacturing Co., Turner's Case*, 19 O. R. 113.

Procedure in Bankruptcy.] — Per Sprague, C.J.O., and Morrison, J.A.: Section 136 of the Insolvent Act, 1875, dealing with matters of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the Parliament of Canada to enact. *Peck* v. *Shields*, 9 A. R. 639; See *S. C. sub nom. Shields* v. *Peak*, 8 S. C. R. 579.

Per Burton, J.A.: Section 136, which gives certain creditors an additional remedy in the provincial courts for the recovery of their debts in full, is ultra vires the Parliament of Canada; but s. 8, s.-s. 7, of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it. *Ib.*

Per Patterson, J.A.: It is immaterial whether s. 136 is ultra vires or not; for if the Parliament of Canada had the power to deal with the subject of that section, it would be binding, but if not, then the same enactment in s. 8, s.-s. 7, of the Act of 1864, is unrepealed and in force. *Ib.*

Procedure in Insolvency.]—The B. N. A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion enactment, 40 Vict. c. 41, s. 38, providing that the judgment of the court of appeal in matters of insolvency should be final, i.e., not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the Provincial Legislatures by s. 92 of the Imperial statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quære, what powers may be possessed by the Parliament of Canada so to do. Cuvillier v. Aylwin, 2 Knapp's P. C. 72, reviewed. *Cushing* v. *Dupuy*, 5 App. Cas. 409; 1 Cart. 252.

Procedure in Insolvency.]—Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the county court or by the county court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869. *Crombie* v. *Jackson*, 34 U. C. R. 575; 1 Cart. 685.

Restricting Execution.]—Section 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor had been assigned or placed in liquidation under that Act:—Held, to be within the competence of the Dominion Parliament. *Kinney* v. *Dudman*, 2 Russ. & Ches. 19; 2 Cart. 412.

Sale by Assignee—*Provincial Tax.*]—An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, may sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a provincial enactment. The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32 & 33 Vict. c. 16, and to restrain the powers of assignees in putting that Act in operation, is invalid. *Cotè* v. *Watson*, 3 Q. L. R. 157; 2 Cart. 343.

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6. *Banks and Banking.*

Warehouse Receipts.] — The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B. N. A. Act. The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct indorsement, is within the powers assigned to the Dominion Parliament and is valid. *Smith* v. *Merchants' Bank*, 28 Gr. 629, 8 A. R. 15, 8 S. C. R. 512, 1 Cart. 828.

Warehouse Receipts.]—The Bank Act is intra vires of the Dominion Parliament. Section 91, s.-s. 15, of the British North America Act, 1867, gives to that Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the Province, and confers upon a bank privileges as a lender which the provincial law does not recognize. The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in s. 91, is of paramount authority, even though it trenches upon the matters assigned to the Provincial Legislature by s. 92. Cushing v. Dupuy, 5 App. Cas. 409, followed. *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31, affirming *S. C.*, 19 A. R. 1; 5 Cart. 244.

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7. *Bills of Lading.*

Action by Consignee—*Evidence.* — A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any bill of lading, or to the indorsee thereof, to whom the property in the goods should be transferred by such consignment or indorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or indorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce. *Beard* v. *Steele*, 34 U. C. R. 43; 1 Cart. 683.

As to validity of R. S. O. 1877 c. 116, s. 5, respecting bills of lading. See *Hately* v. *Merchants' Despatch Co.*, 2 O. R. 385.

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8. Courts and Civil Procedure.

Appeal.]—Quære, can the Dominion Parliament give an appeal in a case in which the Legislature of a Province has expressly denied it. *Danjou* v. *Marquis*, 3 S. C. R. 251.

Appeal to Supreme Court.]—Section 43, O. J. Act (1881), which provides that in cases where the amount in controversy is under $1,000, no appeal shall lie from the decision of the court of appeal to the supreme court of Canada except by leave of a Judge of the former court, is ultra vires of the Ontario Legislature, and not binding on the supreme court. *Clarkson* v. *Ryan*, 17 S. C. R. 251; 4 Cart. 439.

Commissioner to Hold Assize.]—The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the provisional judicial district of Algoma to hold a court of oyer and terminer and general gaol delivery, for trial of felonies, &c.; and such a commission by the deputy of the Governor-General was held to be legal. Per Wilson, J.—The Lieutenant-Governor, as well as the Governor-General, has the power to issue commissions to hold courts of assize. *Regina* v. *Amer*, 42 U. C. R. 391; 1 Cart. 722. *See* also *Amer* v. *Regina*, 2 S. C. R. 592.

Commissioners to Try Small Claims.]—By an Act of the Legislature of New Brunswick since Confederation, 39 Vict. c. 5, it was provided that courts should be established for the trial of civil causes before commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the commissioners was limited to $40 in actions of debt, and $16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtained before a commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid. *Ganong* v. *Bayley*, 1 Pugs. & Burb. 324; 2 Cart. 509.

Costs in Actions Against Justices.]—Quære, whether the Dominion Act, 32 & 33 Vict. c. 29, s. 134, relating to costs in actions against justices, is not ultra vires of the Federal Parliament as relating to procedure in a civil matter. *Whittier* v. *Diblee*, 2 Pugs. 243; 2 Cart. 492.

County Court Judge.]—By the B. N. A. Act, 1867, s. 96, the Governor-General is authorized to appoint the Judges of the county courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of county court Judges by the Lieutenant-Governor for incapacity or misbehaviour and had not power to pass an Act abolishing the court of impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against county court Judges. A county court Judge may be removed by the Governor-General in Council, under the Imperial Act, 22 Geo. III. c. 75, but there is no power under that Act, or C. S. C. c. 13, or under the common law, to issue a commission for a preliminary inquiry under oath with respect to such charges. *Re Squier*, 46 U. C. R. 474; 1 Cart. 789.

County Court Judge.]—An Act of the Ontario Legislature provided that the county Judge of one county might preside at the sessions in a county other than that of which he was Judge:—Held, that this enactment was not within the competence of the Legislature. *Gibson* v. *McDonald*, 7 O. R. 401; 3 Cart. 319.

District Magistrates.]—Under the B. N. A. Act, the right to appoint magistrates, such as district magistrates, in the Province of Quebec, is vested in the Provincial executives; and this right is not affected by the provisions contained in ss. 90 and 130 of that Act. *Regina* v. *Horner*, 2 Stephen's Dig. 450; 2 Cart. 317.

Division Courts.]—Pursuant to the Local Courts Act, R. S. O. 1877 c. 42, s. 16, et seq., the counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a county court district. By s. 17, in such a district the several county courts, division courts, &c., shall be held by the Judges in the district in rotation. By the Division Courts Act, R. S. O. 1877 c. 47, s. 19, the division courts shall be presided over by the county court Judges in their respective counties. An order for the committal of the defendant was made by the Judge of the county court of the county of Lambton, sitting in a division court in the county of Middlesex under the provisions of the Local Courts Act. A motion for prohibition was made on the ground that that enactment was ultra vires:—Held, that the Provincial Legislature has complete jurisdiction over the division courts, including the appointment of officers to preside over them: that the learned Judge acted in the Middlesex division court as one of the persons designated by the Legislature to preside over it, and having regard to the enactment in question, solely in its bearing on division courts, it was not ultra vires. *In re Wilson* v. *McGuire*, 2 O. R. 118; 2 Cart. 665.

Dominion Officer—*Seizure of Salary.*]—A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government. *Evans* v. *Hudon*, 22 L. C. Jur. 268; 2 Cart. 346.

Evidence in Foreign Actions.]—The Dominion Parliament can confer authority upon courts and Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any orders for the examination in the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid. *Ex parte Smith*, 16 L. C. Jur. 140; 2 Cart. 330.

Evidence in Foreign Actions.]—The taking of evidence to be used in an action pending in a foreign tribunal is of extra-provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act, 31 Vict. c. 76, providing for the taking of such evidence by Provincial courts, was therefore held to be valid. *Re Wetherell and Jones*, 4 O. R. 713; 3 Cart. 315.

Inland Revenue.]—So much of s. 156 of the Inland Revenue Act, 1867, 31 Vict. c. 8, as gives the court of vice-admiralty jurisdiction in prosecutions for penalties and forfeitures incurred thereunder, is intra vires, notwithstanding such court is established in Canada by Imperial authority. Valin v. Langlois, 3 S. C. R. 1; 5 App. Cas. 115, discussed and followed. *Attorney-General of Canada* v. *Flint*, 16 S. C. R. 707.

Insurance Act of Ontario—*Powers of Master.*]—The Ontario Legislature has power to confer upon the master the powers given by the Insurance Corporations Act of 1892. *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

Justices of the Peace—*Penalties.*]—By the Act 32 & 33 Vict. c. 31, s. 78 (D.), it is provided that penalties against justices of the peace for the non-return of convictions may be recovered in an action of debt by any person suing for the same in any court of record:—Held, that this provision was within the competence of the Dominion Parliament, and that a Provincial enactment declaring that county courts should not have jurisdiction in such actions was thereby overborne. *Ward* v. *Reed*, 22 N. B. Rep. 279; 3 Cart. 405.

Justices of the Peace.]—The Crown has the prerogative right to appoint justices of the peace within the Dominion of Canada and each of its Provinces, but it derogated from that right by assenting to the B. N. A. Act, which conferred upon either the Parliament of Canada or the Legislatures of the Provinces the power to pass laws providing for the appointment of justices of the peace. Such laws are in relation to the administration of justice, and upon the proper construction of ss. 91 and 92 of the B. N. A. Act are exclusively within the power of the Provincial Legislatures under s. 92, paragraph 14. Additional weight is given to the construction placed upon these sections, by the Parliament of Canada having from time to time since the B. N. A. Act passed laws recognizing the right assumed by the Provincial Legislatures to pass such laws and the appointments made under them. An order nisi to quash a conviction made by a police magistrate appointed by the Lieutenant-Governor of Ontario under 48 Vict. c. 17 (O.), on the ground that such statute is ultra vires, was, therefore, discharged, with costs. *Regina* v. *Bush*, 15 O. R. 398; 4 Cart. 630.

Maritime Court.]—The Act 40 Vict. c. 21 (D.), establishing a maritime court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament. *The Picton*, 4 S. C. R. 648; 1 Cart. 557.

Patent Actions — *Forum.*] — The Dominion Parliament, having in the year 1872 passed an Act respecting patents of invention, which by s. 28 provided that all patents were to be subject to certain conditions non-compliance with which should render them void, and that the minister of agriculture or his deputy should have authority to finally determine any dispute as to whether a patent had or had not become void:—Held, that a court or judicial tribunal for the determination of the matters referred to in the said section was thereby constituted and that the constitution of such a court was within the competence of the Dominion Parliament. *In re Bell Telephone Co.*, 7 O. R. 605; 4 Cart. 618.

Patent Action—*Venue.*]—Held, that s. 24 of 35 Vict. c. 26 (D.), the Patent Act, is not ultra vires the Dominion Parliament. *Aitcheson* v. *Mann*, 9 P. R. 473.

Police Magistrates.]—An Act of the old Province of Canada authorized the Governor to appoint police magistrates; the Act was temporary:—Held, that an Act of the Ontario Legislature, continuing the same in force, was valid. *Regina* v. *Reno*, 4 P. R. 281; 1 Cart. 810.

Police Magistrates.]—The right of the Provincial Legislatures to legislate in relation to the administration of justice, includes a right to make provision for the appointment of police magistrates and justices of the peace by the Lieutenant-Governor. *Regina* v. *Bennett*, 1 O. R. 445; 2 Cart. 634.

Police Magistrates.]—Held, that the appointment of police magistrates is not ultra vires the Legislature of Ontario. Regina v. Bennett, 1 O. R. 445, followed. *Regina* v. *Lee*, 15 O. R. 353.

See, also, *Regina* v. *Richardson*, 8 O. R. 651.

Police Magistrates.] — Held, that the power to appoint police magistrates is vested in the Lieutenant-Governors of the Provinces under s. 92 of the B. N. A. Act. *Richardson* v. *Ransom*, 10 O. R. 387; 4 Cart. 630.

Queen's Counsel.]—A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's counsel, or to grant to any member of the Bar a patent of precedence in the courts of the Province. The question arose on an appeal by Queen's counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the respondent being a Queen's counsel appointed by the Governor-General; and Strong, Fournier, and Taschereau, JJ., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's counsel appointed by the Governor-General; and it was therefore held, per Strong and Fournier, JJ.:—That as this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question. *Lenoir* v. *Ritchie*, 3 S. C. R. 575; 1 Cart. 488.

Queen's Counsel.]—The Lieutenant-Governor in Council has the right to appoint members of the Bar of Ontario to be Her Majesty's counsel, and to give such members the right of pre-audience in the courts of the Province. Lenoir v. Ritchie, 3 S. C. R. 575, has been in effect overruled by later decisions of the judicial committee. Per Burton, J.A.: The Lieutenant-Governor in Council has the exclusive right to make such appointments. Per Street, J.: The Governor-General in Council has the power to appoint Queen's Counsel for Dominion courts, and to regulate the right of pre-audience in those courts. *In re Queen's Counsel*, 23 A. R. 792.

Queen's Counsel.]—According to the true construction of the B. N. A. Act, s. 92, s.-ss.

1, 4, and 14, the Act R. S. O. 1877 c. 139, which empowers the Lieutenant-Governor of the Province to confer precedence by patents upon such members of the Bar of the Province as he may think fit to select, is intra vires of the Provincial Legislature. *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Province of Ontario*, [1898] A. C. 247.

Speedy Trials Act.]—The power given to the Provincial Governments by the B. N. A. Act, s. 92, s.-s. 14, to legislate regarding the constitution, maintenance, and organization of Provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the Judges who constitute such courts. The Acts of the Legislature of British Columbia, C. S. B. C. c. 25, s. 14, authorizing any county court Judge to act as such in certain cases in a district other than that for which he is appointed, and 53 Vict. c. 8, s. 9, which provides that until a county court Judge of Kootenay is appointed the Judge of the county court of Yale shall act as and perform the duties of the county court Judge of Kootenay, are intra vires of the said Legislature under the above section of the B. N. A. Act. The Speedy Trials Act, 51 Vict. c. 47 (D.), is not a statute conferring jurisdiction but is an exercise of the power of Parliament to regulate criminal procedure. By this Act jurisdiction is given to "any Judge of a county court," to try certain criminal offences:—Held, that the expression "any Judge of a county court," in such Act, means any Judge having, by force of the Provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a county court Judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature so to do. Quære, if Parliament had power to pass those sections of the Act 54 & 55 Vict. c. 25, which empower the Governor-General in Council to refer certain matters to this court for an opinion. *In re County Courts of British Columbia*, 21 S. C. R. 446; 5 Cart. 490.

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9. *Criminal Law.*

Appeals from Summary Conviction.]—An Act of the Parliament of Canada provided in regard to appeals from summary convictions made by justices of the peace, that the parties might dispense with a jury if they though fit, and submit themselves to the judgment of the court appealed to without a jury:—Held, that this enactment was not an interference with the "constitution" of the court (in relation to which the Provincial Legislatures have exclusive jurisdiction), but that it related to criminal law and procedure in criminal matters, and therefore was within the jurisdiction of the Dominion Parliament. *Regina* v. *Bradshaw*, 38 U. C. R. 564; 2 Cart. 602.

Assault and Battery — *Bar of Civil Remedy.*]—Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the justice who tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded, shall be released from all further proceedings, civil or criminal, for the same cause, are intra vires the Dominion Parliament. *Flick* v. *Brisbin*, 26 O. R. 423.

Bigamy.]—The Dominion Parliament by R. S. C. c. 161, s. 4, enacts that "Every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere, is guilty of felony and liable to seven years' imprisonment," and that "nothing in this section contained shall extend to (*a*) any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence." The original Act containing in substance this enactment was passed in 1841, and its validity was subsequently affirmed by the court of Queen's bench in Lower Canada:—Held, that the enactment in the Revised Statutes was valid; and that having in substance been in force in Canada for some years prior to the passing of the B. N. A. Act, it was confirmed by s. 129 of that Act if any Imperial confirmation was required. *Regina* v. *Brierly*, 14 O. R. 525; 4 Cart. 665.

Bigamy — *Offence Committed in Foreign Country.*]—Conviction for bigamy quashed where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left there with the intent to commit the offence. The provisions of s. 275 of the Criminal Code making such a marriage an offence are ultra vires the Parliament of Canada. Macleod v. Attorney-General for New South Wales, [1891] A. C. 455, followed. *Regina* v. *Plowman*, 25 O. R. 656.

Bigamy — *Canadian Subject Marrying Abroad.*]—Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are intra vires of the Parliament of Canada. *In re Bigamy Sections of Code*, 27 S. C. R. 461.

Cheese Factory Act—*Appeals in Prosecution.*]—Held, reversing 17 O. R. 58, that the Act to Provide Against Frauds in the Supplying of Milk to Cheese or Butter Manufactories, 51 Vict. c. 32 (O.), though penal in its nature, does not deal with criminal law within the meaning of s. 91, s.-s. 27, of the B. N. A. Act, but merely protects private rights and is intra vires. *Regina* v. *Wason*, 17 A. R. 221; 4 Cart. 578.

So also the Act respecting Appeals on Prosecutions to enforce Penalties and Punish Offences under Provincial Acts, 52 Vict. c. 15 (O.), is not legislation dealing with criminal procedure within the meaning of that sub-section and is intra vires. *Ib.*

Compelling Accused to Testify.]—An information under an Ontario Act for selling intoxicating liquors on Sunday was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself. *Regina* v. *Roddy*, 41 U. C. R. 291; 1 Cart. 709.

Conspiracy to Bribe.]—The legislative assembly of Ontario has no criminal jurisdiction, and therefore has no jurisdiction in case of a conspiracy to bribe members to vote

against the Government considered as a criminal offence. *Regina* v. *Bunting*, 7 O. R. 524.

Enforcement of Provincial Laws—*Liquor License Act.*]—A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction. In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law. Section 57 of the Liquor License Act of Ontario, R. S. O. 1877 c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of $50, was therefore held to be invalid. *Regina* v. *Lawrence*, 43 U. C. R. 164; 1 Cart. 742.

Enforcement of Provincial Laws.]—A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. Breach of a Provincial statute is not a "crime" within the meaning of s. 91, s.-s. 27, of the B. N. A. Act. *Pope* v. *Griffith*, 16 L. C. Jur. 169; 2 Cart. 291.

Enforcement of Provincial Laws.]—A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. A statute of Quebec having provided that no proceedings in civil matters before a district magistrate should be removed to any other court by certiorari or otherwise, it was held that a proceeding before a district magistrate for the enforcement of penalties under the License Law of the Province was a civil proceeding within this enactment, and that the right to certiorari was taken away. *Ex parte Duncan*, 16 L. C. Jur. 188; 2 Cart. 297.

Enforcement of Provincial Laws.]—A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. *Page* v. *Griffith*, 17 L. C. Jur. 302; 2 Cart. 308.

Enforcement of Provincial Laws.]—A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a statute of the Province (41 Vict. c. 3) are to be enforced was held to be valid. *Coté* v. *Chaureau*, 7 Q. L. R. 258; 2 Cart. 311.

Evidence.]—Notwithstanding the reservation of criminal procedure to the Dominion Parliament in s.-s. 27 of s. 91 of the British North America Act, a Provincial Legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, in this case a breach of The Liquor License Act, even though such offences may be termed crimes; and therefore to regulate the giving of evidence by defendants in such cases, which has been done by R. S. O. 1877 c. 62, s. 9, providing that where the proceeding is a crime under the Provincial law, the defendant is neither a competent nor compellable witness. *Regina* v. *Bittle*, 21 O. R. 605.

Fine and Imprisonment.] — Power of Provincial Legislature to authorize punishment of same offence by both modes. *Ex parte Papin*, 15 L. C. Jur. 334; 2 Cart. 320.

Forgery.]—Procedure in criminal matters, which by the B. N. A. Act, s. 91, s.-s. 27, is assigned exclusively to the Parliament of Canada, includes the trial and punishment of the offender; and therefore s. 2 of 53 Vict. c. 18 (O.), which authorizes police magistrates to try and convict persons charged with forgery is ultra vires the Provincial Legislature. *Regina* v. *Toland*, 22 O. R. 505.

Forgery.] — The power granted by the British North America Act, s. 92, s.-s. 14, to the Provincial Legislatures to constitute courts of civil and of criminal jurisdiction, necessarily includes the power of giving jurisdiction to those courts, and impliedly includes the power of enlarging, altering, amending, and diminishing the jurisdiction of such courts. The Act 53 Vict. c. 18, s. 2 (O.), so far as it provides that the courts of general sessions of the peace shall have jurisdiction to try any person for any offence under any of the provisions of ss. 28 to 31 of R. S. C. c. 165, an Act respecting forgery, is within the powers of the Legislature of Ontario, as being in relation to the constitution of a Provincial court of criminal jurisdiction, and does not in any way trench upon the exclusive authority given to the Parliament of Canada by s. 91, s.-s. 27, to make laws in relation to criminal law and criminal procedure. *Regina* v. *Levinger*, 22 O. R. 690.

Habeas Corpus.]—Quære, is s. 51 of the Supreme and Exchequer Courts Act, which confers power on Judges of the supreme court to issue writs of habeas corpus, ultra vires. *In re Sproule*, 12 S. C. R. 140.

Hard Labour.]—A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them. *Regina* v. *Frawley*, 7 A. R. 246; 2 Cart. 576.

Imprisonment—*Hard Labour.*]—Quære, whether under B. N. A. Act, s. 92, s.-s. 14, the Provincial Legislature has power to impose imprisonment at hard labour. *Regina* v. *Black*, 43 U. C. R. 180.

Imprisonment—*Hard Labour.*] — "Imprisonment" in No. 15 of s. 92 of the Act of 1867 (B. N. A. Act) means imprisonment with or without hard labour. *Hodge* v. *The Queen*, 9 App. Cas. 117; 3 Cart. 144.

Jurors—*Attendance.*]—The Acts relating to the attendance of grand and petit jurors at the county courts (courts of criminal jurisdiction over all crimes which are not capital), are within the powers of the Local Legislature, under the B. N. A. Act, 1867, s. 92, as pertaining to the "Administration of Justice," and the "Constitution and organization of Provincial courts," and do not belong to the Parliament of Canada, under s. 91, as "Procedure in criminal matters." *Regina* v. *Foley*, Stevens' Dig. 381; 2 Cart. 653 (*n*).

Jurors—*Mode of Selecting.*]—By the Dominion Act 32 & 33 Vict. c. 29, s. 44, the

selection of jurors in criminal cases is authorized to be in accordance with the Provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By the Provincial Acts 42 Vict. c. 14, and 44 Vict. c. 6, the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts:—Semble, that the 32 & 33 Vict. c. 29 (D.), was not ultra vires the Dominion Parliament as being a delegation of their powers, and that the selection made in accordance with the Provincial Acts was valid. *Regina* v. *O'Rourke*, 32 C. P. 388.

Quære, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.*

Jurors — *Mode of Selecting.*]—By a Dominion statute "for avoiding doubt," it was declared and enacted, "that every person qualified and summoned as a grand juror or as a petit juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before, or be passed after, the coming into force of the B. N. A. Act, 1867, subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act." Acts were afterwards passed by the Ontario Legislature changing the mode of selecting jurors in that Province:—Held, that the Dominion enactment was not an unconstitutional delegation of legislative authority and was not ultra vires, and that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial. *Regina* v. *O'Rourke*, 1 O. R. 464; 2 Cart. 644.

Lottery.] — The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada. *L' Association St. Jean Baptiste* v. *Brault*, 30 S. C. R. 598.

North-West Territories Procedure Act.]—Held, that 34 & 35 Vict. c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order, and good government of any territory, not for the time being included in any Province," vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is intra vires the Legislature. Section 76, s.-s. 7, which prescribes that full notes of evidence be taken, is literally complied with when notes are taken in shorthand. *Riel* v. *The Queen*, 10 App. Cas. 675; 4 Cart. 1.

Provincial Penal Legislation.] — The local Legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458.

Returns of Convictions.] — Semble, that the right to legislate on returns of convictions and fines for criminal offences belongs to the Dominion, and not Provincial, Legislature. *Clemens* q. t. v. *Bemer*, 7 C. L. J. 126.

Returns of convictions and fines for criminal offences being governed by the Dominion statute 32 & 33 Vict. c. 31, s. 76, and not by the Law Reform Act, 1868, are only required to be made semi-annually to the general sessions of the peace. *Ib.*

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10. *Education.*

Separate Schools.]—A Provincial Legislature may legislate in regard to separate schools provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of Confederation are not prejudicially affected by such legislation. The B. N. A. Act provides by s.-s. 3 of s. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:"—Held, that this enactment gives an appeal in respect to those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school. In election matters separate schools have the same right of appeal to a county Judge as public schools have. *Separate School Trustees of Belleville* v. *Grainger*, 25 Gr. 570; 1 Cart. 816.

Separate Schools.]—The provisions contained in s. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," protect those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right. At the Union the law with respect to the schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools; and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid. The constitutionality of the Act 34 Vict. c. 21, cannot be affected by any regulations of the board of education made under its authority; and semble, if the board of education have made regulations which they ought not to have made or have not made regulations which they should have made, the case falls within s.-s. 4 of s. 93 of the B. N. A. Act. *Ex parte Renaud*, 1 Pugs. 273; 2 Cart. 445.

11. *Elections.*

Appeal to Judicial Committee.]—The petitioner having been declared duly elected a member to represent the electoral district of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the superior court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council:—Held, that such application must be refused. Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act. *Theberge* v. *Landry*, 2 App. Cas. 102; 2 Cart. 1.

Bribery at Elections—*Civil Action.*]—The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act 1874, by s. 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's courts in the Province in which the cause of action arose, having competent jurisdiction:—Held, affirming 32 C. P. 632, that this enactment was valid. *Doyle* v. *Bell*, 11 A. R. 326; 3 Cart. 297.

Dominion Controverted Elections—*Forum*—*Procedure.* — Held, that 37 Vict. c. 10 (D.), by which the trial of controverted elections to the House of Commons was referred to the court of common pleas, or any Judge thereof, amongst the other courts named in this Province, was not ultra vires of the Dominion Parliament; and a preliminary objection raising this question was disallowed with costs:—Held, also, that the Dominion Parliament had power to enact the procedure to govern the courts in relation to such trials, and that the Act 37 Vict. c. 10 (D.), in this respect also was not ultra vires. A preliminary objection raising this question was therefore in like manner disallowed. *Re Niagara Election Case, Plumb* v. *Hughes*, 29 C. P. 261. See *Re South Ontario Election Case, McKay* v. *Glen; Re West Hastings Election Case, Wallbridge* v. *Bown*, *ib.* 270.

Dominion Controverted Elections Act.]—The Dominion Controverted Elections Act of 1874, 37 Vict. c. 10 (D.), does not contravene s. 92, s.-s. 14, of the British North America Act, 1867. The said sub-section does not relate to election petitions, while s. 41 of the same Act reserved to the Parliament of Canada the power of creating a jurisdiction to determine them. The Parliament of Canada has power to commit such jurisdiction to existing Provincial courts. *Valin* v. *Langlois*, 5 App. Cas. 115, 3 S. C. R. 1; 1 Cart. 138.

Electoral Franchise Act.]—There is no jurisdiction in the high court of justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act." The legislation in regard to such matters does not trench upon, nor is the question one of "property and civil rights in the Province." Re Simmons and Dalton, 12 O. R. 505, not followed. *Re North Perth, Hessin* v. *Lloyd*, 21 O. R. 538.

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12. *Escheats.*

Land.]—Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion. At the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although s. 102 of the Act vested in the Dominion the general public revenues as then existing in the Provinces; yet by s. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words "lands, mines, minerals and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats. *Attorney-General* v. *O'Reilly; Attorney-General* v. *Mercer*, 8 App. Cas. 767; 5 S. C. R. 538, 6 A. R. 576, 26 Gr. 126, 3 Cart. 1.

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13. *Indians.*

Indian Annuities.] — In 1850 the late Province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts by which the Indian lands were surrendered to the government of the Province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory hereby ceded by the Indians at any future period produce such an amount as will enable the government of this Province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time." By the B. N. A. Act the Dominion of Canada assumed the debts and liabilities of the Province of Canada, and s. 109 of that Act provided that all lands, &c., belonged to the several Provinces in which the same were situate, "subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same." The lands so surrendered are situate in the Province of Ontario, and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874 at the increased amount) and claims to be reimbursed therefor:—Held, that the provision in the treaties as to increased annuities had not the

effect of burdening the lands with a "trust in respect thereof" or "an interest other than that of the Province in the same," within the meaning of said s. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the Province of Canada. *Province of Ontario* v. *Dominion of Canada and Province of Quebec, In re Indian Claims*, 25 S. C. R. 434.

Indian Annuities.] — By treaties in 1850 the Governor of Canada as representing the Crown and the Provincial Government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the Provincial Government, together with the liability to pay to the Indians certain perpetual annuities:—Held, that these lands being within the limits of the Province of Ontario, created by the B. N. A. Act, the beneficial interest therein vested under s. 109 in that Province. The perpetual annuities having been capitalized on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:—Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the Province, under s. 109. They must be paid by the Dominion with recourse to the Provinces of Ontario and Quebec conjointly, under ss. 111, 112, in the same manner as the original annuities. *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario, Attorney-General for Quebec* v. *Attorney-General for Ontario*, [1897] A. C. 199.

Indian Annuities.]—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently, should be taken into account and included in the debt of the late Province of Canada mentioned in the 112th section of the British North America Act, 1867:—Held, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of Attorney-General of Canada v. Attorney-General of Ontario, [1897] A. C. 199, and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec* v. *Dominion of Canada, In re Indian Claims*, 30 S. C. R. 151.

Indian Lands.]—Those "lands reserved for the Indians," which by s. 91, s.-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use, and do not include lands to which the Indian title has been extinguished. The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation. *Church* v. *Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239; 1 Cart. 831.

Indian Lands.]—Section 109 of the B. N. A. Act, of 1867, gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under ss. 108 and 117. Attorney-General of Ontario v. Mercer, 8 App. Cas. 767, followed. By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands "parts of our dominions and territories" as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the Governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the Union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of s. 109. Held, also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of s. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 10 O. R. 196, 13 A. R. 148, 13 S. C. R. 577, 14 App. Cas. 46, 4 Cart. 107.

Surrender of Indian Lands—*Special Provisions in Treaty—Precious Metals.*]—A treaty of surrender of Indian territory to the Dominion of Canada in 1873, provided that certain lesser reserves in the lands surrendered, were to be defined and set apart, and thereafter to be administered and dealt with, and with the consent of the Indians first obtained, sold, leased, or otherwise disposed of by the Dominion for the benefit of the Indians. Part of one of these lesser reserves so set apart, and situate in the Province of Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880, 43 Vict. c. 28 (D.), in trust to sell the same upon such terms as the Dominion might deem most conducive to the welfare of the Indians; and of this, the lands in question were patented by the Dominion to the plaintiffs, including the precious metals therein. The defendants asserted title in fee to the same lands by virtue of an Ontario patent of 1899. It appeared that in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited:—Held, that

after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario. Semble, a Province is not to be held bound by alleged acts of acquiescence of various departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial government, and are not manifested by any order in council or other authentic testimony. *Ontario Mining Co.* v. *Seybold*, 31 O. R. 386, 32 O. R. 301.

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14. *Insurance.*

Deposits.]—The Acts 31 Vict. c. 48 (D.), and 34 Vict. c. 9 (D.), relating to insurance companies are not ultra vires the Dominion Parliament. *Re Briton Medical and General Life Association* (2), 12 O. R. 441.

Dominion Conditions.]—The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vict. c. 40, by s. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void:"—Held, on demurrer, that the matters provided for by the above section were subject matters of the Fire Insurance Policy Act of Ontario, over which the Province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act per se, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained. Citizens' Ins. Co. v. Parsons and Queen Ins. Co. v. Parsons, 7 App. Cas. 96, commented upon. *Goring* v. *London Mutual Fire Ins. Co.*, 11 O. R. 82.

Incorporation before Confederation.]—38 Vict. c. 65 (D.), to amend the law relating to fire insurances, is not ultra vires, so far as it affects companies incorporated by Acts of the Legislature of Canada. As to any such company transacting business in Ontario, on any subject within the powers of the Provincial Legislature, that body may impose what condition it pleases on the operations of the company. *Billington* v. *Provincial Ins. Co.*, 24 Gr. 299; 3 S. C. R. 182; *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553.

Insurance License.]—Held, that the Ontario Act, 39 Vict. c. 24, is not inconsistent with Dominion Act, 38 Vict. c. 20, which requires all insurance companies, whether incorporated by foreign, Dominion or Provincial authority, to obtain a license to be granted only upon compliance with the conditions prescribed by the Act. *Citizens' Insurance Company of Canada* v. *Parsons; Queen Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 4 S. C. R. 215.

Provincial Incorporation.] — A company incorporated by a Provincial Legislature for the business of insurance possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality. *Clarke* v. *Union Fire Ins. Co.*, 10 P. R. 313; 3 Cart. 335.

Statutory Conditions.]—The power to legislate upon the subject of insurance is not vested in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under s. 91 of the B. N. A. Act, but belongs to the Local Legislature. 39 Vict. c. 24 (R. S. O. 1877 c. 162), is not therefore ultra vires of the Ontario Legislature; and it applies to companies incorporated by the Dominion Parliament before Confederation, as well as to those incorporated by the Legislature of Ontario. *Ulrich* v. *National Insurance Co.*, 42 U. C. R. 141; *Parsons* v. *Citizens' Insurance Co.*, 4 A. R. 96; *Parsons* v. *Queen Insurance Co.*, 4 A. R. 103; *Johnston* v. *Western Assurance Co.*, 4 A. R. 281.

Statutory Conditions — *Foreign Companies*]—In No. 2 of s. 91 the words "regulation of trade and commerce," include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade, such as the business of fire insurance in a single Province, and therefore do not conflict with the power of legislating respecting property and civil rights conferred by s. 92, No. 13. *Citizens' Ins. Co.* v. *Parsons; Queen Ins. Co.* v. *Parsons*, 7 App. Cas. 96, 4 S. C. R. 215, 1 Cart. 255.

39 Vict. c. 24 (O.), which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire and prescribes certain conditions which are to form part of such contracts, is a valid Act applicable to the contracts of all such insurers in Ontario, including corporations and companies whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority. *Ib.*

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15. *Interest.*

Percentage on Overdue Taxes.]—The general law having limited the rate of interest, in the absence of agreement between the parties to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest. A municipal corporation was authorized by an Act in force at the time of Confederation to charge ten per cent. on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment, and providing anew for a similar charge:—Held, that the

former enactment was effectually repealed, and that the new enactment as to increase was invalid. *Ross* v. *Torrance*, 2 Legal News 186, 2 Cart. 352.

Percentage on Overdue Taxes.]—The Municipal Act of Manitoba provides that persons paying taxes before 1st December, in cities, and 31st December, in rural municipalities, shall be allowed 10 per cent. discount; that from that date until 1st March, the taxes shall be payable at par; and after 1st March 10 per cent. on the original amount of the tax shall be added:—Held, that the 10 per cent. added on 1st March was only an additional rate or tax imposed as a penalty for non-payment which the local Legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. Ross v. Torrance, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co.*, *South Dufferin* v. *Morden*, *Gibbins* v. *Barber*, 19 S. C. R. 204, 5 Cart. 427.

Rate of Interest.]—The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow. *Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.*, 3 Legal News 155, 2 Cart. 361.

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16. *Intoxicating Liquors.*

Brewer's License.]—A brewer licensed as such by the Government of Canada under 31 Vict. c. 8 (D.), requires no license under the Tavern and Shop License Act of Ontario, 32 Vict. c. 32, s. 1, as amended by 33 Vict. c. 28, for selling ale manufactured at his brewery. Whether the statute, if applicable to licensed brewers, would have been within the power of the Provincial Legislature, was a question raised, but not decided. *Regina* v. *Scott*, 34 U. C. R. 20.

Brewer's License.]—The Dominion authority alone has power to tax and regulate the trade of a brewer, which is a branch of trade and commerce, and having done so, the Ontario Legislature has not the power to restrain it, unless in a qualified manner, and for the mere purposes of police. *Regina* v. *Taylor*, 36 U. C. R. 183.

The prohibition to keep, have, or sell beer, by a brewer, unless under a license and the payment of a tax for a license, is an excess of power by the Provincial authority, and is a restraint and regulation of trade and commerce, and not the exercise of a police power. *Ib.*

The restriction imposed by the Ontario Legislature on brewers not to sell by retail, as defined by the Act of 1874, is not ultra vires, because it is a mere repetition and renewal of the legislation which was in force before and at the time of Confederation. *Ib.*

The right conferred on the Ontario Legislature to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses for the purposes of revenue, does not extend to licenses on brewers and distillers, over which the general government only, and at all times, exercised jurisdiction, and which are of a higher and different class than the licenses of retail dealers which are mentioned; and the "other licenses" have reference to those kind of licenses before stated, such as on billiard tables, livery stables, &c., which are chiefly enumerated in the municipal Acts. *Ib.*

The Ontario Legislature has a right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and the regulation of these institutions required before and at the time of Confederation the exercise of these powers, and because the exercise of such powers, considered in connection with s. 92, s.-s. 16 of the Confederation Act, is now a matter of "a merely local or private nature in the Province." That power is in restraint of trade as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion Government, must be considered to be modified by the powers which the Ontario Legislature, acting in relation to municipal institutions, may properly exercise. *Ib.*

Brewer's License.]—S., after the passing of the Act 37 Vict. c. 32, (O.), intituled "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," then being a brewer licensed by the Government of Canada under 31 Vict. c. 8 (D.), for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer, and did sell by wholesale for consumption within the Province of Ontario a large quantity of said fermented liquors so manufactured by him, without first obtaining a license as required by the said Act of the Legislative Assembly of Ontario. The Attorney-General thereupon filed an information for penalties against S. On demurrer to the information, the special matter for argument was that the Legislature of the Province of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information:—Held, that the Act of the Provincial Legislature of Ontario, 37 Vict. c. 32, is not within the legislative capacity of that Legislature. 2. That the power to tax and regulate the trade of a brewer, being a restraint and regulation of trade and commerce, falls within the class of subjects reserved by s. 91 of the B. N. A. Act for the exclusive legislative authority of the Parliament of Canada; and that the license imposed was a restraint and regulation of trade and commerce, and not the exercise of a police power. 3. That the right conferred on the Ontario Legislature by s.-s. 9, s. 92, of the said Act, to deal exclusively with shop, saloon, tavern, auctioneer, and "other licenses," does not extend to licenses on brewers or "other licenses" which are not of a local or municipal character. Regina v. Taylor, 36 U. C. R. 183, overruled. *Severn* v. *Regina*, 2 S. C. R. 70, 1 Cart. 414.

Brewer's License.]—The inspector of licenses for the revenue district of Montreal, charged a drayman in the employ of certain brewers duly licensed under the Dominion statute, 43 Vict. c. 19, before the court of special sessions of the peace, at Montreal, with having sold beer outside the business premises of the brewers, but within the said revenue district in contravention of the Quebec License Act of 1878. Thereupon the brewers claiming inter alia that being licensed brewers under the Dominion statute they had the right to sell beer by and through their employees and draymen without a Provincial license, and that the Quebec License Act and its amendments were ultra vires, and if constitutional did not authorize the complaint, caused a writ of prohibition to be issued out of the superior court enjoining the court of special sessions of the peace from further proceeding:—Held, per Ritchie, C.J., and Strong, Fournier, and Henry, JJ., that the Quebec License Act and its amendments were intra vires, and that the court of special sessions of the peace at Montreal, having jurisdiction to try the alleged offence, and being the proper tribunal to decide the question of fact and of law involved, a writ of prohibition did not lie. Per Taschereau, and Gwynne, JJ., that the case was one which it was proper for the superior court to deal with by proceedings on prohibition. Per Gwynne, J., the Quebec License Act of 1878 imposes no obligation on brewers to take out a Provincial license to enable them to sell their beer, and therefore the court of special sessions of the peace had no jurisdiction, and prohibition should issue absolutely. Semble, a license from the Dominion Government granting authority to a brewer to manufacture beer, does not confer the right to sell the beer manufactured under such license elsewhere than on the brewer's premises. *Molson* v. *Lambe*, 15 S. C. R. 253, 4 Cart. 334.

Brewer's License.]—Section 51 (2) of the Liquor License Act, R. S. O. 1887 c. 194, which requires brewers licensed by the Government of Canada to take out licenses under that Act, is intra vires Provincial legislation. Severn v. The Queen, 2 S. C. R. 70, has been in effect overruled by more recent decisions of the judicial committee. *Regina* v. *Halliday*, 21 A. R. 42.

Brewer's License.] — The Ontario Act, R. S. O. 1887 c. 194, s. 51, s.-s. 2, requiring every brewer and distiller to obtain a license thereunder to sell wholesale within the Province, is intra vires of the Provincial Legislature, (*a*) as being direct taxation within s. 92, s.-s. 2, of the B. N. A. Act; Bank of Toronto v. Lambe, 12 App. Cas. 575, followed; (*b*) as comprised within the term "other licenses" in s.-s. 9 of the same section. *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*, [1897] A. C. 231.

Canada Temperance Act.]—Held, that the Act of the Parliament of Canada, 41 Vict. c. 16, "An Act respecting the Traffic in Intoxicating Liquors" cited as the "Canada Temperance Act, 1878," is within the legislative capacity of that body. *Mayor, &c., of Fredericton* v. *Regina*, 3 S. C. R. 505.

By the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and they may be exercised either absolutely or conditionally: in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other. *Ib.*

Under s.-s. 2 of s. 91, B. N. A. Act, 1867, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to inquire what motive induced Parliament to exercise its powers. *Ib.*

Canada Temperance Act.]—Held, that the Canada Temperance Act, 1878, which, in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament. *Russell* v. *Regina*, 7 App. Cas. 829, 2 Cart. 12.

The objects and scope of the Act are general, viz.: to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects, "property and civil rights." Provision for the special application of the Act to particular places does not alter its character as general legislation. *Ib.*

Canada Temperance Act.]—Held, that the Ontario legislation, R. S. O. 1877 c. 181, ss. 92, 93, 105, 106; 41 Vict. c. 14, ss. 6, 8; 44 Vict. c. 27, ss. 11, 12, 13, 14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not ultra vires the local Legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F. *License Commissioners for Frontenac* v. *County of Frontenac*, 14 O. R. 741, 4 Cart. 683.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province, within the meaning of B. N. A. Act, s. 92, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid according to provincial legislation under the B. N. A. Act, s. 92, item 4. *Ib.*

The legislation in question might also fall within the scope of B. N. A. Act, s. 92, item 8, as pertaining to municipal institutions in the Province. License Commissioners of Prince Edward v. County of Prince Edward, 26 Gr. 452. License Commissioners of the North Riding of the County of Norfolk v. Corporation of Norfolk, 14 O. R. 749, concurred in. *Ib.*

Compromise of Offence.]—The Legislature of Ontario having passed an Act to regulate tavern and shop licenses, 32 Vict. c. 32, under the power given to them by the B. N. A. Act, 1867, s. 92, s.-ss. 9, 16:—Held,

that they had power under s.-s. 15, to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to s. 91, s.-s. 27, by which the criminal law is assigned exclusively to the Dominion Parliament. *Regina* v. *Boardman*, 30 U. C. R. 553.

Forum.]—Defendant was convicted for selling liquor without license under R. S. O. 1877 c. 181, s. 51, and appealed to the sessions, which dismissed the appeal, on the ground that under s. 71, it should have been made to the county Judge in chambers, without a jury:—Held, refusing an application for a mandamus to the sessions to try the appeal, on the ground that s. 71, R. S. O. 1877 c. 181, was ultra vires the Ontario Legislature, that R. S. O. 1877 c. 75, and c. 181, s. 71, constituted the county Judge, sitting in chambers without a jury, a court of appeal in such cases, within the meaning of 40 Vict. c. 27 (D.). *Regina* v. *Clark*, 44 U. C. R. 385.

Hours of Closing.]—Powers of Provincial Legislature as to restricting the hours within which billiard rooms in taverns may be kept open. See *Regina* v. *Hodge*, 46 U. C. R. 141, 7 A. R. 246, 9 App. Cas. 117.

Liquor License Act of New Brunswick.]—Provincial Legislatures can impose fines and penalties for selling liquor without license. *Regina* v. *McMillan*, 2 Pugs. 110, 2 Cart. 489.

Liquor License Act of New Brunswick.]—By the New Brunswick Liquor License Act, 1887, applications for licenses must be endorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools:—Held, that the Legislature could properly impose these conditions to the obtaining of a license, and the provision is not ultra vires the local Legislature as being a prohibitory measure by reason of the ratepayers being able to prevent any licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor. *Danaher* v. *Peters*, *O'Regan* v. *Peters*, 17 S. C. R. 44, 4 Cart. 425.

Liquor License Act of Ontario.]—Quære, as to the power of the local Legislature to limit or authorize municipalities to limit the number of licenses and as to the effect of the decision of the supreme court in City of Fredericton v. The Queen, 3 S. C. R. 505. *Regina* v. *Howard*, 45 U. C. R. 346.

Liquor License Act of Ontario.]—Section 84 of the Ontario Liquor License Act, R. S. O. 1887 c. 194, is ultra vires the Ontario Legislature. Regina v. Lawrence, 43 U. C. R. 164, followed. *Regina* v. *Holland*, 14 C. L. T. Occ. N. 294.

Liquor License Act of Ontario.]—Subjects which in one aspect and for one purpose fall within s. 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within s. 91. Russell v. The Queen, 7 App. Cas. 829, explained and approved:—Held, that the Liquor License Act, R. S. O. 1877 c. 181, which in respect of ss. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of s. 92 of the Act of 1867, and is within the powers of the Provincial Legislature. *Hodge* v. *Regina*, 9 App. Cas. 117.

Held further, that the local Legislature had power by the said Act of 1867, to entrust to a board of commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Ib.*

Liquor License Act of Quebec.]—The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses includes the right of imposing penalties for violating the provincial laws in relation to those subjects. Provincial enactments by which persons who sell liquor by wholesale are required to take out a license are not invalid as an interference with trade and commerce. *Ex part Leveille*, 2 Stephen's Dig. 445, 2 Cart. 349.

Liquor License Act of Quebec.]—The Quebec License Act, 41 Vict. c. 3, is intra vires of the Legislature of the Province of Quebec. Hodge v. The Queen, 9 App. Cas. 117, followed. *Sulte* v. *City of Three Rivers*, 11 S. C. R. 25.

Local Option.]—By-laws passed by municipal corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine;—Held, valid, as being within the power of the corporation, under 32 Vict. c. 32 (O.); and that it was within the authority of the Provincial Legislature to confer such power, under the exclusive legislative authority given to them with regard to "municipal institutions," and to "matters of a merely local or private nature in the Province," and was not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament. *In re Slavin and Village of Orillia*, 36 U. C. R. 159, 1 Cart. 688.

Local Option.]—The state of things existing in the Confederated Provinces at the time of Confederation, and more particularly that which was recognized by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act. At the time of Confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in s. 92, s.-s. 8, of the B. N. A. Act. The Provincial Legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except

under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion. *Corporation of Three Rivers* v. *Sulte*, 5 Legal News 330, 2 Cart. 280, 11 S. C. R. 25.

Local Option.]—A New Brunswick statute, 36 Vict. c. 10, empowered the general sessions of the peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant. The Legislature of New Brunswick by an Act subsequent to Confederation declared that "no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the sessions or municipal council against issuing any license within such parish or municipality." Prior to Confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the supreme court of that Province to be beyond the competence of the Legislature. *Regina* v. *Justices of Kings*, 2 Pugs. 553, 2 Cart. 499.

Local Option.]—Section 18 of 53 Vict. c. 56 (O.), allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors, is intra vires the Ontario Legislature, as is also s. 1 of 54 Vict. c. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act*, 18 A. R. 572.

Approved in *Huson* v. *Township of South Norwich*, 24 S. C. R. 145. But see the next case.

Local Option.]—1. A Provincial Legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the Province, of spirituous, fermented, or other intoxicating liquors. 2. A Provincial Legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the Province. 3. The Ontario Legislature had not jurisdiction to enact s. 18 of the Act 53 Vict. c. 56 (O.), as explained by 54 Vict. c. 46 (O.). *In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws*, 24 S. C. R. 170.

Prohibition—*Canada Temperance Act.*]—The Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864, 27 & 28 Vict. c. 18, was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial areas, as relating to the peace, order, and good government of Canada: Russell v. Regina, 7 App. Cas. 829, followed. But not as regulating trade and commerce within s. 91, s.-s. 2, of the B. N. A. Act. Citizens Insurance Co. v. Parsons, 7 App. Cas. 98, distinguished, and Municipal Corporation of Toronto v. Virgo, [1896] A. C. 93, followed. Held, also, that the local liquor prohibitions authorized by the Ontario Act, 53 Vict. c. 56, s. 18 (O.), are within the powers of the Provincial Legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348.

Regulation of Sale — *Penalty.*] — The Legislature of Ontario having passed an Act to regulate tavern and shop licenses:—Held, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months; and that such enactment was not opposed to s. 91, s.-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament. *Regina* v. *Boardman*, 30 U. C. R. 553, 1 Cart. 676.

Regulation of Sale.]—Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils. *De St. Aubyn* v. *Lafrance*, 8 Q. L. R. 190, 2 Cart. 392.

Regulation of Sale—*License.*]—A statute of Nova Scotia, passed after Confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the grand jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before Confederation:—Held, that the Act in question was not ultra vires of the Legislature:—Held, further, that if the restrictions were ultra vires, the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or release from the statutory penalty thereby incurred. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bonâ fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby. *Keefe* v. *McLennan*, 2 Russ. & Ches. 5, 2 Cart. 400.

Regulation of Sale.]—The former Province of Canada by an Act incorporating the city of Three Rivers conferred on the council authority to make by-laws for restraining and prohibiting the sale of intoxicating liquors or for authorizing such sale subject to such conditions as might be deemed expedient. In 1875 the Legislature of Quebec by a consolidation Act repealed the above and other Acts relating to Three Rivers and re-enacted the former provisions as to the sale of intoxicating liquors:—Held, that the Act of 1875 was valid. *Sulte v. Corporation of Three Rivers*, 11 S. C. R. 25, 4 Cart. 305.

Revenue.]—The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue. *Regina* v. *Frawley*, 7 A. R. 246, 2 Cart. 576.

Shops Regulation Act.]—Closing shops under the Shops Regulation Act, 51 Vict. c. 33 (O.). See *Regina* v. *Flory*, 17 O. R. 715.

Sunday Closing.]—The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors. The provision of the Quebec statute, 38 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night until five of the clock in the morning is within the competence of a Provincial Legislature. *Blouin* v. *Corporation of Quebec*, 7 Q. L. R. 18, 2 Cart. 368.

Sunday Closing.]—The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at special times. The statute 42 & 43 Vict. c. 4 (Q.), which requires houses in which spirituous liquors, &c., are sold, to be closed during the whole of Sunday, and on every other day between 11 p.m. and 5 a.m., is valid. *Poulin* v. *Corporation of Quebec*, 9 S. C. R. 185, 3 Cart. 230.

Tampering with Witness.]—By s. 57 of R. S. O. 1877 c. 181 (the Liquor License Act), any person who in any prosecution under the Act tampers with a witness either before or after he is summoned or appears as such witness on any trial or proceeding under the Act, or by the offer of money or by threats, or in any other way induces or attempts to induce any such person to absent himself, or swear falsely, shall be guilty of an offence under the Act, and liable to a penalty of $50; and by s. 59, such penalty is recoverable in default of distress by imprisonment not exceeding thirty days:—Held, that this was ultra vires of the local Legislature, for the acts declared by s. 57 to be offences were criminal offences at common law, and within the exclusive jurisdiction of the Dominion Legislature, and were not brought within the jurisdiction of the local Legislature by s.-s. 15 of s. 92 of the B. N. A. Act, either as coming under municipal institutions, or as being enactments to enforce the law as to shop, saloon, &c., licenses, in order to raise a revenue for provincial, local, or municipal purposes. A conviction, therefore, under the Act for inducing a witness to absent himself, &c., was quashed. *Regina* v. *Lawrence*, 43 U. C. R. 164.

Temperance Act of 1864.]—The B. N. A. Act in assigning to the Parliament of Canada the exclusive legislative authority over "the regulation of trade and commerce," did not thereby repeal "The Temperance Act of 1864," of the late Province of Canada, 27 & 28 Vict. c. 18, and did not deprive municipal corporations of the power thereby given to prohibit the sale of intoxicating liquors. *Noel* v. *County of Richmond*, 1 Dorion 333, 2 Cart. 246.

A Provincial Legislature cannot repeal or modify those sections of the Temperance Act of 1864 (27 & 28 Vict. c. 18), which conferred on municipal councils the power to pass by-laws for prohibiting the sale of intoxicating liquors. *Hart* v. *Corporation of the County of Missisquoi*, 3 Q. L. R. 170, 2 Cart. 382; *Covey* v. *Municipality of Brome*, 2 Cart. 385.

The Temperance Act of 1864, of the late Province of Canada, prohibited the sale of liquors by retail wherever the Act was brought into force, and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted that the sale of liquor in such localities should also be a contravention of the Provincial Acts against selling without a license; these Acts provided other punishments and proceedings:—Held, that under the Temperance Act the matter was one of criminal law; and that the legislation of the Provincial Legislature was ultra vires. *Regina* v. *Prittie*, 42 U. C. R. 612, 2 Cart. 606; *Regina* v. *Lake*, 43 U. C. R. 515, 2 Cart. 616.

Acts of the Ontario Legislature provided that local boards of commissioners, and inspectors appointed by the lieutenant-governor, should perform certain duties in their respective localities for the enforcement of the statute of the late Province of Canada, called "The Temperance Act of 1864:" and that a certain proportion of the expenses attending the execution of these duties should be paid by the municipalities concerned. The Temperance Act provided for prosecution by private persons, as well as others, for offences against the Act:—Held, that the Ontario enactments were within the competence of the Legislature. An enactment of an ex post facto character by a Provincial Legislature is not void on that ground. *License Commissioners of Prince Edward* v. *County of Prince Edward*, 26 Gr. 452, 2 Cart. 678.

A Provincial Legislature cannot repeal these sections of the Temperance Act of 1864, which relate to the prohibition of the sale of intoxicating liquors. *Griffith* v. *Rioux*, 6 Legal News 211, 3 Cart. 348.

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17. *Land.*

Land Investment Company.]—Held, that the Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament:—Held, further, that the corporation could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157, 3 Cart. 118, reversing *S. C.*, sub nom. *Loranger* v. *Colonial Building and Investment Association*, 5 Legal News 116, 2 Cart. 275.

Mortmain.]—An Act of the Dominion Parliament, incorporating a company and purporting to enable the company to hold lands, may operate as a license from the Crown for this purpose. Such an Act would not prevent the Province from passing a law preventing altogether or restricting the holding of lands by corporations in the Province. *McDiarmid* v. *Hughes*, 16 O. R. 570, 4 Cart. 701.

Ordnance Lands.]—Where land then forming part of the Ordnance lands of the

old Province of Canada had been granted to the corporation of the city of Toronto in the year 1858, it was held that after the passing of the British North America Act the power to vary the trusts contained in the grant was vested in the Legislature of the Province and not in the Parliament of the Dominion. *Kennedy* v. *City of Toronto*, 12 O. R. 211, 4 Cart. 649.

Ordnance Lands—*Chain Reserve Along Niagara River.*]—The "chain reserve" along the bank of the Niagara river, and the slope between the top of the bank and the water's edge, were not originally set apart for military or ordnance purposes, and on Confederation did not pass to the Dominion Government as "Ordnance Lands," but remained part of the public domain of the Province of Ontario. *Commissioners for the Queen Victoria Niagara Falls Park* v. *Howard*, 23 O. R. 1, 23 A. R. 355.

Ownership of Land.]—So far as abstract competence is concerned the Ontario Legislature has power to change the ownership of land within the Province with or without compensation. Land which had been dedicated by its owner for a public burying ground was used for many years for such purpose. The municipality in which the ground was situate procured an Act of the Ontario Legislature authorizing the closing of the burial ground, and the removal of the dead, thereafter vesting the land in the corporation; the Act providing for compensation for all parties likely to be affected by the carrying out of its provisions, and for payment of the value of the lot to the dedicator or those claiming under him, to be fixed by arbitration:—Held, that the Act was within the competence of the Legislature. *Re McDowell and Town of Palmerston*, 22 O. R. 563.

See also, *Re Goodhue*, 19 Gr. 366.

Precious Metals.]—Held, reversing 14 S. C. R. 245, that a conveyance by the province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under s. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied. *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295, 4 Cart. 241.

Public Land in Railway Belt in British Columbia.]—By s. 11 of the order in council admitting the Province of British Columbia into Confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government, in trust, might deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the Legislature of British Columbia passed the statute 47 Vict. c. 14, by which it was enacted inter alia as follows:—"From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the main land of British Columbia, in trust to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the order in council, s. 11, admitting the Province of British Columbia into Confederation." On the 20th November, 1883, by public notice, the Government of British Columbia reserved a belt of land twenty miles in width along a line by way of Bow River Pass. In November, 1884, the respondent in order to comply with the provisions of the Provincial statutes, filed a survey of a certain parcel of land, situate within the said belt of twenty miles, and the survey having been finally accepted, on 13th January, 1885, letters patent under the great seal of the Province were issued to F. for the land in question. The attorney-general of Canada by information of intrusion sought to recover possession of said land, and it was held that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant and that the title to the same was in the Crown for the use and benefit of Canada. *Regina* v. *Farwell*, 14 S. C. R. 392.

Public Lands in Railway Belt in British Columbia.]—On 10th September, 1883, D. et al. obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20-mile belt south of the Canadian Pacific Railway, reserved on the 29th November, 1883, under an agreement between the two Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vict. c. 14 (B.C.). On 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the great seal of British Columbia were issued to respondents. By the agreement, ratified by 47 Vict. c. 6 (D.), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant:—Held, affirming 3 Ex. C. R. 293, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. et al. being subsequently abandoned or cancelled, the land became the property of the Crown in right of the Province, and not in right of the Dominion. *The Queen* v. *Demers*, 22 S. C. R. 482.

Timber.]—The Act, 61 Vict. c. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is intra vires, and applies to licenses issued after the passing of the Act in renewal of licenses in force

at the time of its passage. The rights acquired under sales and licenses of timber limits under "The Crown Timber Act" considered. Judgment below, 31 O. R. 202, affirmed. *Smylie* v. *The Queen*, 27 A. R. 172.

18. *Local Works and Undertakings.*

Connecting Railway Within Province.]—By an Act of the Province of New Brunswick, passed prior to Confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the city of St. John, in that Province, westward to the boundary of the United States. After Confederation another Act (32 Vict, c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature. The fact of the Legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province. *European and North American R. W. Co.* v. *Thomas*, 1 Pugs. 42, 2 Cart. 439.

Distinct Works in Different Provinces.]—All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of, the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. The Dominion Parliament cannot without such declaration, authorize a company to establish in two or more Provinces, works needing special legislative authority, which are in their nature local in each Province, the jurisdiction in such case to give the needed authority being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several Provinces. A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada, or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns, was invalid. *Regina* v. *Mohr*, 7 Q. L. R. 183, 2 Cart. 257.

19. *Municipal Institutions.*

Fines and Penalties.]—The Provincial Legislatures have the right to appropriate fines to municipal or other corporations. *Bennett* v. *Pharmaceutical Association of Quebec*, 1 Dorion 336, 2 Cart. 250.

Fire Commissioners.]—By the statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 29, fire commissioners or marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause:—Held, that these statutes were within the competency of the Provincial Legislature. *The Queen* v. *Coote*, L. R. 4 P. C. 599, 1 Cart. 57.

Market Licenses.]—An Act which authorized the corporation of the city of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, &c., elsewhere than on the public markets, was held not to be ultra vires of the Provincial Legislature, as an interference with trade and commerce. *Augers* v. *City of Montreal*, 24 L. C. Jur. 259, 2 Cart. 335; *Mallette* v. *City of Montreal*, 24 L. C. Jur. 263, 2 Cart. 340.

Market Licenses.]—The council of the city of Montreal is authorized by s.-ss. 27 and 31 of s. 123 of 37 Vict. c. 51 (Q.), to regulate and license the sale in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets:—Held, that the sub-sections in question are intra vires the Provincial Legislature. Also that a by-law passed by the city council under the authority of the above-named sub-sections fixing the license to sell in a private stall at $200 in addition to the 7½ per cent. business tax, levied upon all traders under another by-law, which the appellant had paid, is not invalid. The words "other licenses" in s.-s. 9 of s. 92 of the B. N. A. Act include such a license as the Provincial Legislature has empowered the city of Montreal to impose by the terms of the statute now under consideration. Bank of Toronto v. Lambe, 12 App. Cas. 575, and Severn v. Regina, 12 S. C. R. 70, distinguished. *Pigeon* v. *Recorder's Court and City of Montreal*, 17 S. C. R. 495, 4 Cart. 442.

Municipal Elections—*Master in Chambers.*]—Held, following the principle of Re Wilson v. McGuire, 2 O. R. 118, that the Provincial Legislature had power to invest the master with authority to try controverted municipal election cases. *Regina* v. *Birkett*, 21 O. R. 162.

Nuisance.]—The power of the Parliament of Canada to enact a general law of nuisance, as incident to its right to legislate as to criminal law, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions. *Ex parte Pillow*, 27 L. C. Jur. 216, 3 Cart. 357.

Peddlers.]—The provision contained in the Municipal Act of Ontario, authorizing city councils to pass by-laws "for preventing criers and vendors of smallwares from practising their calling in the market, public streets and vacant lots adjacent thereto," is not ultra vires of the Ontario Legislature, as being a regulation of trade and commerce. In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of Confederation. *Harris* v. *City of Hamilton*, 44 U. C. R. 641, 1 Cart. 756.

20. *Naturalization and Aliens.*

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

21. *Navigation, Harbours, and Fisheries.*

Booms in Navigable River.]—A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the Parliament of Canada with respect to navigation and shipping under s. 91 of the B. N. A. Act, the words "navigation and shipping" being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c. 58, viz., as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters. *McMillan* v. *Southwest Boom Co.*, 1 Pugs. & Burb. 715, 2 Cart. 542.

Booms in Navigable River.—Professing to act under the powers contained in their Act of incorporation, 45 Vict. c. 100 (N. B.), the Q. R. R. Co. erected booms and piers in the Queddy river which impeded navigation—the locus being in that part of the river which is tidal and navigable:—Held, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 (N. B.), so far as it authorizes the acts done by the company in erecting booms and other works in the Queddy river obstructing its navigation, was ultra vires the New Brunswick Legislature. *Queddy River Driving Boom Co.* v. *Davidson*, 10 S. C. R. 222, 3 Cart. 243.

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

Ferry—*Municipality.*]—By 39 Vict. c. 52, s. 1, s.-s. 3 (Q.), the city of Montreal is authorized to impose an annual tax on "ferrymen or steamboat ferries." Under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of $200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant from the same, and obtained from the recorder's court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of $200 for each steamboat employed by them during the year as ferry-boats between Longueuil and Montreal. In an action brought by the appellant company, claiming that the Provincial statute was ultra vires the Provincial Legislature, and that the by-law was ultra vires the corporation, and asking for an injunction, it was :—Held, that the provincial legislation was intra vires. 2. That the by-law was ultra vires, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked. 3. That the jurisdiction of the harbour commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits. *Longueuil Navigation Co.* v. *City of Montreal*, 15 S. C. R. 566, 4 Cart. 370.

Ferries.]—The authority given to the Legislative Assembly of the North-west Territories, by R. S. C. c. 50, and orders in council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature" (and perhaps as to license for revenue) within the Territories includes the right to legislate as to ferries. The town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N. W. T. c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor in Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary. A club or partnership, styled "The Edmonton Ferry Company," was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares ad infinitum. The club supplied their ferryman with a list of membership and established and operated their ferry,

without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights:—Held, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement. *Dinner* v. *Humberstone*, 26 S. C. R. 252.

Foreshore of Harbour.]—G. (defendant) was in possession of a part of the foreshore of the harbour of Summerside, and had erected thereon a wharf or dock at which vessels might unload. H. et al. (the plaintiffs) brought an action of ejectment to recover possession of the said foreshore. H. et al.'s title consisted of letters patent under the great seal of Prince Edward Island, dated 30th August, 1877, by which the Crown as representing the Province, and assuming to act in exercise of authority conferred by a provincial statute, 25 Vict. c. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action:—Held, that under B. N. A. Act, s. 108, the soil and bed of the foreshore in the harbour of Summerside belonged to the Crown, as representing the Dominion of Canada, and therefore the grant under the great seal of Prince Edward Island to H. et al. was void and inoperative. *Holman* v. *Green*, 6 S. C. R. 707, 2 Cart. 147.

Foreshore of Harbour—*Grant from Local Government.*]—After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot, through the C. B. Coal Co., to the S. & L. Coal Co. S. having died, his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government:—Held, that the company having obtained title to the property from S., they were estopped from saying that the title of S. was defective. After the conveyance to the defendant company an Act was passed by the Legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co.:—Held, that if the Legislature could by statute affect the title to this property which was vested in the Dominion Government, it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by the defendants. *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152.

Foreshore of Harbour.]—The Dominion statute, 44 Vict. c. 1, s. 18, gave the Canadian Pacific Railway Company the right to take and use the land below high water mark in any stream, lake, etc., so far as required for the purposes of the railway:—Held, that the right of the public to have access to a harbour, the foreshore of which had been taken by the company under this Act, was subordinate to the rights given to the company thereby, and the latter could prevent by injunction an interference with the use of the foreshore so taken. *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Harbour Commissioners.]—Held, following the case of Commissioners of the Cobourg Town Trust, 22 Gr. 377, that the commissioners of the Toronto Harbour were entitled to compensation for their services, and this, whether the harbour belonged to the Dominion or Provincial Government, as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the Province in which the trust was to be administered. *Re Toronto Harbour Commissioners*, 28 Gr. 195; 1 Cart. 825.

Interference with Navigation—*Exchequer Court.*]—An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour is a civil and a criminal proceeding, and the exchequer court has concurrent original jurisdiction over the same under 50 & 51 Vict. c. 16, s. 17 (d). (2) A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. (3) The Provincial Legislatures since the Union of the Provinces cannot authorize such an intereference. (4) Wherever by an Act of a Provincial Legislature passed before the Union authority is given to the Crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General and not by the Lieutenant-Governor of the Province. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

Private Harbour—*Navigation or Fishing—Exchequer Court.*]—The harbour of the city of St. John is not one of the public harbours which by virtue of s. 108 and sched. 3 of the British North America Act, 1867, became at the Union the property of Canada. It is vested in the corporation of the city of St. John, who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city. Notwithstanding such ownership of the harbour by the corporation of the city of St. John and their rights therein, the Attorney-General of Canada may file an information in this court to restrain any interference with, or injury to, the public right of navigation or fishing in such harbour. Semble, that while an exemption granted by the Minister of Marine and Fisheries under 31 Vict. s. 60, s. 14, s.-s. 2, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any one from throwing any poisonous or deleterious substance into waters frequented by fish if the act complained of constituted an injury to or interference with some right of fishing existing in such waters. Held, that whilst the Legislature of New Brunswick could not at the time of the passing of the Act of Assembly 40 Vict. c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and so long as the discharge of such refuse water through the drain did not amount to a nuisance there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it. *The Queen* v. *St. John Gas Light Co.*, 4 Ex. C. R. 326.

Provincial Navigation Company.]—The power to incorporate a navigation com-

pany the operations of which are limited to a particular Province, belongs exclusively to the Legislature of such Province. *Macdonald* v. *Union Navigation Co.*, 21 L. C. Jur. 63; 2 Cart. 228.

Public Harbours — *Navigable Waters—Riparian Rights—Fishery Licenses and Regulations.*]—The beds of public harbours not granted before Confederation are the property of the Dominion of Canada. Holman v. Green, 6 S. C. R. 707, followed. The beds of all other waters not so granted belong to the respective Provinces in which they are situate, without any distinction between the various classes of waters. Per Gwynne, J.—The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under British North America Act, s. 92, item 10, and for the administration of the fisheries. R. S. C. c. 92, "An Act respecting certain works constructed in or over Navigable Rivers," is intra vires of the Dominion Parliament. The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters. A Province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92. Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable and in navigable, non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. Robertson v. The Queen, 6 S. C. R. 52, followed. The rule that riparian proprietors own ad medium filum aquæ does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide. Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown in right of the Province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Per Strong, C.J., King, and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the Provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation. The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the Provinces under the British North America Act. The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries, under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally, from fishing. The license as required will, however, be merely personal conferring qualification, and give no exclusive right to fish in a particular locality. Section 4 and other portions of R. S. C. c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are ultra vires. Per Gwynne, J.—Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, s. 91, item 12, including the grant of leases or licenses for exclusive fishing. Per Strong, C.J., Taschereau, King, and Girouard, JJ. —R. S. O. 1887 c. 24, s. 47, and ss. 5 to 13 and 19 to 21 of the Ontario Act of 1892, are intra vires, but may be superseded by Dominion legislation. R. S. Q. Arts. 1375 to 1387 are also intra vires. Per Gwynne, J.—R. S. O. 1887 c. 24, s. 47, is ultra vires so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R. S. Q. Arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are ultra vires. *In re Jurisdiction over Provincial Fisheries*, 26 S. C. R. 444. See the next case.

Public Harbours — *Fisheries.*] — Whatever proprietary rights vested in the Provinces at the date of the B. N. A. Act, remained so unless by its express enactment transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject matter of those proprietary rights. The transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lakes improvements," operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonably and probably in accordance with the intention of the Legislature. The transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed. With regard to fisheries and fishing rights:—Held, (1) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, short of transferring them to others. (2) A tax by way of license as a condition of the right to fish is within the powers conferred by s.-ss. 4 and 12. (3) The same power is conferred on the Provincial Legislatures by s. 92. (4) R. S. C. c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over Provincial property, is ultra vires the Dominion. (5) R .S. O. 1887 c. 24, s. 47, is with a specific exception intra vires the Province. As regards the Ontario Act, 55 Vict. c. 10, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see B. N. A. Act, s. 91, s.-s. 12. Secus with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Lands:"—Held, further, that the Dominion Parliament had power to pass

R. S. C. c. 92, intituled "An Act respecting certain works constructed in or over navigable waters." *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia, Attorney-General for the Province of Ontario* v. *Attorney-General for the Dominion of Canada, Attorneys-General for the Provinces of Quebec and Nova Scotia* v. *Attorney-General for the Dominion of Canada*, [1898] A. C. 700.

Public Harbours.]—Held, that the locus in quo, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid. *McDonald* v. *Lake Simcoe Ice and Cold Storage Company*, 26 A. R. 411.

Riparian Right of Fishing—*Ungranted Lands of Crown.*]—On 1st January, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by s. 2, c. 60, 31 Vict., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the south-west Miramichi river in New Brunswick for the purpose of fly-fishing for salmon therein, the locus in quo being thus described in the special case agreed to by the parties:—"Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow." Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The supreme court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred. By special case certain questions, which are given in the report, were submitted for the decision of the court, and the exchequer court held inter alia that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under s. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river"?—Held, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river. The appellant thereupon appealed to the supreme court of Canada on the main question: whether or not an exclusive right of fishing did so exist:—Held, 1st, the general power of regulating and protecting the fisheries under the British North America Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries of the locus in quo was void because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi river flows. *Regina* v. *Robertson*, 6 S. C. R. 52; 2 Cart. 65.

Although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in Canada, etc., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands ad medium filum aquæ. *Ib.*

The rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority. *Ib.*

Per Ritchie, C.J., Strong, Fournier, and Henry, JJ., ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the Province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal. *Ib.*

River as Boundary.]—The control over navigation conferred on the Dominion Parliament by the B. N. A. Act does not prevent the Provincial Legislatures from exercising municipal and police control on navigable rivers; consequently the Quebec Act, 43 & 44 Vict. c. 62, extending the limits of the town of St. John's to the middle of a navigable river was held to be valid, and to confer the right to tax property within the added limits. *Central Vermont R. W. Co.* v. *St. John's*, 14 S. C. R. 288:14 App. Cas. 590; 4 Cart. 326.

Vice-Admiralty Court.]—The Dominion Parliament can confer on the vice-admiralty courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion. When an Act of the Parliament of Canada is in part repugnant to an Imperial statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment. *The Farewell*, 7 Q. L. R. 380; 2 Cart. 378.

Water Lot.]—The government of the Province of Quebec having by letters patent granted a water lot extending into deep water at the mouth of the river St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby. *Normand* v. *St. Lawrence Navigation Co.*, 5 Q. L. R. 215; 2 Cart. 231.

Water Lots Granted by Crown Prior to Confederation.]—Claimants' title to a water lot at Lévis, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, inter alia, a provision that upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water lot for the purpose of public improvement:—Held, the property being situated in a public harbour, this power of resuming possession for the purpose of public improvement would be exercisable by the Crown as represented by the Government of Canada. Holman v. Green, 6 S. C. R. 707, referred to. (2) Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of the Government Railways Act, the claimants were entitled to recover the fair value of the lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

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22. Property and Civil Rights.

Business and Professional Qualifications.]—A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under Provincial control. The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid. The Provincial Legislatures have the right to appropriate fines to municipal or other corporations. *Bennett* v. *Pharmaceutical Association of Quebec*, 1 Dorion 356; 2 Cart. 250.

Civil Rights—*Contract.*]—In No. 13 of s. 92 the words "property and civil rights in the Province" include rights arising from contract (which are not in express terms included under s. 91), and are not limited to such rights only as flow from the law, e. g., the status of persons. *Citizens Ins. Co.* v. *Parsons; Queen Ins. Co.* v. *Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

Married Women's Property Act.]—The provisions of Ordinance No. 16 of 1889, respecting the personal property of married women, are intra vires of the Legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-west Territories Act."—The provisions of said Ordinance No. 16 are not inconsistent with ss. 36 to 40 inclusive of "The North-west Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.—The words "her personal property" used in the said Ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings," mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted. Brittlebank v. Gray-Jones, 5 Man. L. R. 33, distinguished. *Conger* v. *Kennedy*, 26 S. C. R. 597.

Tolls.]—An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll bridge, for default in making repairs, and to transfer the property to others, was held valid, as the matter related to property and civil rights and was of a merely local nature. *Municipality of Cleveland* v. *Municipality of Melbourne and Brompton Gore*, 4 Legal News 277; 2 Cart. 241.

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23. Railways.

Construction of Road.]—By the true construction of B. N. A. Act, s. 91, s.-s. 29, and s. 92, s.-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the Provincial Legislature has no power to regulate the structure of a ditch forming part of its authorized works. But the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring lands, are intra vires of the Provincial Legislature. *Canadian Pacific R. W. Co.* v. *Corporation of Notre Dame de Bonsecours* [1899] A. C. 367.

Construction of Road.]—The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of "The Railway Act" of Canada. Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. 367, followed. *Grand Trunk R. W. Co.* v. *Therrien*, 30 S. C. R. 485.

Construction of Road.]—The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the Provincial Legislature. Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. 367, distinguished. *Madden* v. *Nelson and Fort Sheppard R. W. Co.*, [1899] A. C. 626.

Crossings—*Railway Committee.*] — The Legislation of the Parliament of Canada with reference to the guarding of the crossings of a railway, which under s.-s. 10 of s. 92 of the British North America Act is under the exclusive legislative authority of Parliament, is within the scope of necessary legislation. Under ss. 11, 18, 21, 187, and 188 of the Railway Act of 1888, Parliament conferred upon the railway committee the power to order that

gates and watchmen should be provided and maintained by such a railway at crossings of highways traversing different adjacent municipalities; to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested, and to re-adjust the proportion of the cost; and the decision of the committee cannot be reviewed by the court. Municipalities are subject to such legislation and the orders of the committee in the same way as private individuals. *Re Canadian Pacific R. W. Co. and County and Township of York*, 27 O. R. 559. See next case.

Crossings — *Railway Committee.*] — The Railway Committee of the Privy Council, on the application of the city of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in equal proportions by the railway company and the city. On a subsequent application by the city representing that the township was equally interested and asking for contribution from the township, the township brought in the county, and an order was made by the railway committee that the county and township should contribute in certain proportions:—Held, per Burton, C.J.O., and Maclennan, J.A.—That, assuming the validity of legislation conferring jurisdiction on the railway committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county. Per Osler, J.A.—That the legislation was intra vires, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the railway committee. Per Meredith, J.—That the legislation was intra vires, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question. Per Curiam.—That the decision of the railway committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the court. In the result the judgment below, 27 O. R. 559, was reversed as to the county of York, and affirmed as to the township of York. *In re Canadian Pacific R. W. Co. and County and Township of York*, 25 A. R. 65.

Crossings — *Railway Committee.*]—Sections 4, 306, and 307 of the Railway Act, 51 Vict. c. 29 (D.), enacting that the plaintiffs and other railways, and any railways whatever crossing them, are works for the general advantage of Canada, and are to be subject thereafter to the legislative authority of Parliament, and 56 Vict. c. 27, s. 1, (D.) enacting that no railway shall be crossed by any electric railway whatever unless with the approval of the railway committee, are intra vires, and therefore the committee could empower the defendant railway, contrary to the provisions of its Provincial Act of incorporation, to cross the plaintiff railway at grade, against the will of the latter. *Grand Trunk R. W. Co.* v. *Hamilton Radial Electric R. W. Co.*, 29 O. R. 143.

Crossings—*Railway Committee.*]—In an action to restrain the defendants from acting upon an order of the railway committee of the privy council, made under s. 14 of the Railway Act of Canada, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions upon the subject:—Held, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question. 2. It has conferred such capacity. 3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made. 4. But that power is subject to the supervention of federal legislation respecting works and undertakings such as the railway in question. 5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation. 6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not ultra vires. 7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the railway committee, under s. 14, in such a case as this. 8. Such legislation has not conferred upon the committee power to give the temporary foot-way in question. 9. Nor any authority to delegate its powers. 10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the committee. 11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so. *Grand Trunk R. W. Co.* v. *City of Toronto*, 32 O. R. 120.

Crown Lands.]—Rights of railways to enter Crown lands. See *Booth* v. *McIntyre*, 31 C. P. 183.

Expropriation — *Reviewing Award.*]—Quære, the land having been taken under an Act of the Dominion Parliament, whether the finding of the arbitrators could be reviewed under 38 Vict. c. 15 (O.) *Norrall* v. *Canada Southern R. W. Co.*, 5 A. R. 13.

Limitation of Actions.]—The Dominion Parliament having by a general railway Act, applicable to all railway companies over which the Parliament had jurisdiction, limited to six months the time for bringing actions against railway companies for any injury caused by reason of the railway:—Held, by a

division of opinion, affirming the court below, that this enactment was valid. *McArthur* v. *Northern and Pacific Junction R. W. Co.*, 17 A. R. 86; 4 Cart. 559.

Negligence.]—The legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negligence is not ultra vires. *Vogel* v. *Grand Trunk R. W. Co.*, 10 A. R. 162.

Nova Scotia Railway.]—Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province. The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd September, 1871. Quære, whether it was ultra vires of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement. But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellants, it did not enact such transfer in derogation of the respondents' rights under the agreement of the 22nd September, 1871, or otherwise. *Western Counties R. W. Co.* v. *Windsor and Annapolis R. W. Co.*, 7 App. Cas. 178; 1 Cart. 397.

Packing Frogs.]—The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, &c. Per Spragge, C.J.O., a Provincial Legislature has no power to pass such a law with reference to a Dominion railway situate locally within the Province. The other Judges of the court of appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion railways, and for that reason did not apply to the Dominion railway company in question. *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637; 3 Cart. 289.

Prohibited Contract.]—See *Macdonald* v. *Riordon*, 30 S. C. R. 619.

Provincial Railway Crossing Dominion Railway.]—Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the commissioner of public works for Ontario, as well as the approval of the railway committee of the privy council of the Dominion; and the railway companies cannot by agreement waive this provision. *Credit Valley R. W. Co.* v. *Great Western R. W. Co.*, 25 Gr. 507; 1 Cart. 822.

Workmen's Compensation for Injuries Act.]—The Ontario Legislature by R. S. O. 1887 c. 141, gave to workmen injured in the course of their employment, the right, under certain conditions, to recover compensation therefor from their employers:—Held, that this enactment was valid and applied to the defendant company as well as other railways under the legislative control of the Dominion Parliament. *Canada Southern R. W. Co.* v. *Jackson*, 17 S. C. R. 316; 4 Cart. 451.

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

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24. *Taxation.*

Bank Reserve.]—The Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as portion of its cash reserve under the Dominion Act relating to "Banks and Banking" (34 Vict. c. 5, s. 14.) *Windsor* v. *Commercial Bank of Windsor*, 3 Russ. & Geld. 420; 3 Cart. 377.

Business Tax.]—Held, that the Quebec Act, 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the Province, is intra vires the Provincial Legislature. A tax imposed upon banks which carry on business within the Province varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the Province, is direct taxation within clause 2 of s. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15 of s. 91. Similarly with regard to insurance companies taxed in a sum specified by the Act. *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; 4 Cart. 7.

Dominion Official's Income.] — Held, reversing 40 U. C. R. 478, that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. Semble, that the Legislature of Ontario did not intend to include such an income in the exemptions mentioned in 32 Vict. c. 36, s. 9, s.-s. 12 (O.), as one derived "elsewhere out of this Province." *Leprohon* v. *City of Ottawa*, 2 A. R. 522; 1 Cart. 592.

Filing Exhibits.]—The Quebec Act, 43 & 44 Vict. c. 9, which imposes a duty of ten cents upon every exhibit filed in court in any action depending therein, is ultra vires the Provincial Legislature. *Attorney-General for Quebec* v. *Reed*, 10 App. Cas. 141; 3 Cart. 190.

Foreign Companies.]—Section 3 of 43 Vict. c. 27 (O.), amending the Assessment Act, is not ultra vires the Ontario Legislature. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.

Indian Lands.]—It was contended that the Ontario Legislature, having repealed the

Act of 1866, had, after Confederation, no power to levy the taxes in question, the land having been withdrawn from their jurisdiction being Indian land; but:—Held, that s. 91, clause 24, of the B. N. A. Act, applied only to Indian lands not surrendered and reserved for their use; and, moreover, that this land being ratable and assessed at the time of Confederation, such liability was not affected thereby. *Church v. Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239; 1 Cart. 831.

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

Penalty for not Paying Taxes.]—The Municipal Act of Manitoba provides that persons paying taxes before 1st December in cities and 31st December in rural municipalities shall be allowed ten per cent. discount; that from that date until 1st March the taxes shall be payable at par; and after 1st March ten per cent. on the original amount of the tax shall be added:—Held, that the ten per cent. added on 1st March is only an additional rate or tax imposed as a penalty for non-payment which the local Legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. Ross v. Torrance, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co., South Dufferin* v. *Morden, Gibbins* v. *Barber*, 19 S. C. R. 204.

Railway Aid.]—An Act of the Provincial Legislature of New Brunswick, 33 Vict. c. 47, intituled "An Act to authorize the issuing of debentures on the credit of the lower district of the parish of St. Stephen, in the county of Charlotte," which empowered the majority of the inhabitants of that parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of the Legislature. A Provincial Legislature can, under the B. N. A. Act, s. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province. The Act in question was held to relate to a matter of "a merely local or private nature in the Province," which, by s. 92 of the B. N. A. Act, is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, s.-s. (a) of the said section. L'Union St. Jacques de Montreal v. Belisle, L. R. 6 P. C. 31, approved. *Dow* v. *Black*, L. R. 6 P. C. 272; 1 Cart. 95.

Registration Fees.]—The plaintiffs sued the defendant for the portion of fees received by the defendant as registrar, to which they were entitled under R. S. O. 1877 c. 111, ss. 98 to 103. The defendant demurred to the declaration on the ground that these sections were ultra vires the local Legislature, as they imposed an indirect tax and not a tax for raising a revenue for Provincial purposes:—Held, that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided:—Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *County of Hastings* v. *Ponton*, 5 A. R. 543.

Stamp Act—*Licenses.*]—The clauses of the Act, 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts and renewals, are not authorized by the B. N. A. Act, 1867, s. 92, s.-ss. 2, 9. A license Act by which a licensee is compelled neither to take out, nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a stamp Act and not a license Act. The imposition of a stamp duty on policies, renewals, and receipts with provisions for avoiding the policy, renewal, or receipt in a court of law, if the stamp is not affixed, is not warranted by the terms of an Act which authorizes the imposition of direct taxation. *Attorney-General for Quebec* v. *Queen Insurance* Co., 3 App. Cas. 1090; 1 Cart. 117.

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25. *Trade and Commerce.*

Protection of Game—*Selling Game no Matter Where Procured.*]—An order to remove the summary conviction of the defendant by a police magistrate for exposing game for sale, such sale being prohibited by the statute 55 Vict. c. 58, s. 6, s.-s. 2 (O.), on the ground that being procured outside of and imported into Ontario, the prohibition was ultra vires the Ontario Legislature as an interference with trade and commerce, was refused. *Regina* v. *Cleghorn*, 13 C. L. T. Occ. N. 11.

III. Manitoba Schools.

Denominational Schools.]—According to the true construction of the Constitutional Act of Manitoba, 33 Vict. c. 3 (D.), having regard to the state of things which existed in Manitoba at the date thereof, the Legislature of the Province did not exceed its powers in passing the Public Schools Act, 1890. Section 22 of the Act of 1870 authorizes the Provincial Legislature, exclusively, to make laws in relation to education so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the Province, at the Union:"—Held, that the Act of 1890, which abolished the denominational system of public education established by law since the Union, but which did not compel the attendance of any child at a public

school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain, and conduct its own schools, did not contravene the above proviso; and that, accordingly, certain by-laws of a municipal corporation which authorized assessments under the Act were valid. *City of Winnipeg* v. *Barrett, City of Winnipeg* v. *Logan*, [1892] A. C. 445, 5 Cart. 32, reversing 19 S. C. R. 374.

Governor-General in Council.] — Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby:—Held, reversing 22 S. C. R. 577, sub nom. In re Certain Statutes of the Province of Manitoba Relating to Education: (*a*) That such appeal lay under s. 22, s-s. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the Province after the date thereof; (*b*) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the Province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which state aid was withdrawn from their schools, while they themselves remain liable to local assessment in support of non-sectarian schools, to which they conscientiously object; (*c*) That the Governor-General in Council has power to make remedial orders in the premises within the scope of s-s. 3 of s. 22, e. g., by supplemental rather than repealing legislation. *Brophy* v. *Attorney-General of Manitoba*, [1895] A. C. 202; 5 Cart. 156.

IV. Miscellaneous Cases.

Abdication of Sovereignty.]—It would be unconstitutional for the Parliament of Canada to pass an Act rendering Canadian subjects and Canadian corporations subject to such laws as might be passed by the Congress of the United States; in fact an abdication of sovereignty inconsistent with the relations of Canada to the empire of which it forms a part. *International Bridge Co.* v. *Canada Southern R. W. Co.*, 28 Gr. 114.

Asylum — *Agreement before Confederation.*]—A petition of right set out an agreement made in 1866, between the petitioners and the Queen, represented by the commissioner of public works of Canada, for the performance and completion by the 1st September, 1868, of the carpenter's work required on certain additions to the provincial lunatic asylum at Toronto, and complained that owing to the delay in proceeding with other work, which the said commissioner promised to have done in time, they were delayed and unable to finish their work before July, 1870, and thereby put to great expense. They then alleged that their work was performed under the superintendence and control of the commissioner of public works for Ontario, and for the sole benefit of, and paid for by, that Province; and that by an arbitration held under s. 142 of the B. N. A. Act in 1870, the said asylum became the property of Ontario: —Held, that the Province of Ontario was not liable. *Macdonald* v. *The Queen*, 44 U. C. R. 239.

Case Stated by Governor-in-Council.] See *In re County Courts of British Columbia*, 21 S. C. R. 446.

Case Stated — *Certificate of Attorney-General.*]—The Attorney-General certified his opinion, pursuant to s. 3 of R. S. O. 1897 c. 91, that the decision of the high court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the court of appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the court below not having been brought before him, the appeal was quashed and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a qui tam action. *Regina* v. *Reid*, 26 A. R. 181.

Case Stated — *Justice of the Peace.*] —A case can be stated by a justice of the peace under 52 Vict. c. 15, s. 5 (O.), for the judgment of the court of appeal, only when the constitutional validity of the statute under which he has acted is called in question, and not when the constitutional validity of some other statute, such as a statute regulating procedure or evidence, is collaterally attacked. *Regina* v. *Edwards*, *Regina* v. *Lynch*, 19 A. R. 706.

Case Stated—*Justice of the Peace.*]—A case can be stated by a justice of the peace under R. S. O. 1897 c. 91 s. 5, for the judgment of the court of appeal only when the constitutional validity of a statute is involved and not when the decision depends merely upon whether the statute is or is not applicable to the defendants. It was held, therefore, that an appeal by way of stated case, would not lie from the decision of the police magistrate of the city of Toronto that the Toronto Railway Company were bound by a by-law of the corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulation. *Regina* v. *Toronto Railway Co.*, 26 A. R. 491.

Escheat—*Trust Estate.*] — Whether trust estates escheat, considered. *Re Adams*, 4 Ch. Ch. 29.

Executive Councillors—*Letter of Credit —Ratification by Legislature.*]—The provincial secretary of Quebec wrote the following letter to D. with the assent of his colleagues, but not being authorized by order-in-council: —J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'acompte sur l' impression de la 'Liste des terres de la

Couronne, concédées depuis 1763 jusqu'au 31 decembre 1890,' dont je vous ai confié l'impression dans une lettre en date du 14 janvier 1891. Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement." D. indorsed the letter to a bank as security for advances to enable him to do the work:—Held that the letter constituted no contract between D. and the government; that the provincial secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the Legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the government not being obliged to expend the money though authorized to do so and the vote containing no reference to the contract with D. nor to the said letter of credit. *Jacques-Cartier Bank* v. *The Queen*, 25 S. C. R. 84.

Extra-territorial Legislation.]—The legislative enactments of a country have no binding force proprio vigore in another country, and a legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a legislature assumes so to do, such authority is only a legislative sanction to the agreement of the corporators to transact their business abroad as well as at home. *Clarke* v. *Union Fire Ins. Co.*, 10 P. R. 313.

Governor-in-Council—*Statutory Power of Approval—Minister of the Crown.*]—By the sixth section of the Liquor License Act, 1883, the boards of license commissioners for the various license districts in the Dominion, were empowered to fix the salaries of license inspectors, subject to the approval of the Governor-in-Council:—Held, that such approval could not be given by a minister of the Crown. *Burroughs* v. *The Queen*, 2 Ex. C. R. 293; 20 S.C. R. 420.

Legislative Assembly — *Contempt.*] — The House of Assembly has the power of imprisoning persons guilty of contempt in answering or refusing to answer questions before a select committee. *McNab* v. *Bidwell*, Dra. 144.

Legislative Power.]—Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the high court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the high court, and is in its general scope within the legislative power of the Governor-General-in-Council. The 9th section of that Act, which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. *Regina* v. *Burah*, 3 App. Cas. 889; 3 Cart. 409.

Legislative Power.]—A colonial legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted. Held, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (scheduled to 18 & 19 Vict. c. 54, ss. 1 and 45). Held, further, that duties levied by an order-in-council issued under s. 133, are really levied by authority of the legislature and not of the executive. Also that under s. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor. *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282; 3 Cart. 432.

New Zealand — *Proceedings against Absentees.*]—Held, that 15 & 16 Vict. c. 72, on its true construction, empowers the Legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the colony:—Held, further, that a law of the local legislature authorizing the local courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant is intra vires and reasonable. Whether a judgment against an absentee without service of the writ will be enforced by the courts of another country is a matter for those courts to determine, and does not affect the validity of the local law. *Ashbury* v. *Ellis*, [1893] A. C. 339; 5 Cart. 636.

Notice to Attorney-General.] — The questions arising in this case as to the conditions of a mutual fire insurance policy were held, not to be of such a constitutional character as to require notice to the Attorney-General of the Province, or the Minister of Justice of the Dominion. *Goring* v. *London Mutual Fire Ins. Co.*, 11 O. R. 82.

See Hately v. *Merchants' Despatch Co.*, 2 O. R. 385.

Nova Scotia Legislative Assembly—*Power of Punishing for Contempt—Removal of a Member.*]—W., a member of the House of Assembly of the Province of Nova Scotia, on the 16th April, 1874, charged the then provincial secretary—without being called to order for doing so—with having falsified a record. The charge was subsequently investigated by a committee of the House, who reported that it was unfounded. Two days after the House resolved that in preferring the charge without sufficient evidence to sustain it, W. was guilty of a breach of privilege. On the 30th April, W. was ordered to make an apology dictated by the House, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. W. declined to withdraw, and thereupon another resolution was passed ordering the removal of the said W. from the House, by the sergeant-at-arms, who, with his assistant, enforced such order and removed W. W. brought an action of trespass for assault against the speaker and certain members of the House, and obtained a verdict of $500 damages. Held, that the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House, and W. having been removed from his seat, not because he was obstructing the business of

the House, but because he would not repeat the apology required, the defendants were liable. Kielly v. Carson, 4 Moo. P. C. C. 63, and Doyle v. Falconer, L. R. 1 P. C. 328, commented on and followed. *Landers* v. *Woodworth*, 2 S. C. R. 158.

Nova Scotia Legislative Assembly—*Immunities of its Members.*]—The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment. In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—Held, that the sections of the local Revised Statutes, 5th series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the local Legislature, as relating to the constitution of the Province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognized by the Act of 1867, s. 88. Barton v. Taylor, 11 App. Cas. 197, distinguished. *Fielding* v. *Thomas*, [1896] A. C. 600; 5 Cart. 398.

Quebec Turnpike Debentures.]—Held, that the debentures in suit which had been issued under the authority of the Canadian Act (16 Vict. c. 235), by the trustees of the Quebec turnpike roads, appointed under Ordinance, 4 Vict. c. 17, and empowered thereby to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed, and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the Ordinance, and not to be paid out of or chargeable against the general revenue of this Province," did not create a liability on the part of the Province, in respect of either the principal or interest thereof. *Regina* v. *Belleau*, 7 App. Cas. 473; 7 S. C. R. 53.

Held, further, that the Province of Canada had not by its conduct and legislation recognized its liability to pay the same. The 7th section of the Act, 16 Vict., expressly took away the power which had been conferred by the 27th section of the Ordinance to make advances out of provincial funds for the payment of interest, and by its proviso distinguished these debentures from those which had a provincial guarantee. *Ib.*

Railway Grant before Confederation.]—The Legislature of Canada, by an Act set apart a certain quantity of land along the line of a projected railway running through Quebec and Ontario, to be granted to the company on completion of the railway; and a proportionate part of such lands on the completion of 20 miles of the railway. The company having completed a portion of the line of railway in Ontario to an extent of more than 20 miles, applied for a grant of the proportion to which, under the Act, they claimed to be entitled, which was refused. The company thereupon presented a petition of right against the Province of Ontario. It was alleged that the Province of Ontario had not along the line of the road sufficient lands to make the grant desired:—Held, that this formed no ground for the Province of Ontario insisting that the Province of Quebec should have been made a party to the proceeding. *Canada Central R. W. Co.* v. *Regina*, 20 Gr. 273.

Right of Action Against Imperial Department.]—Can the Provincial Legislature constitutionally give a right of action against a board of ordnance, a military department of the Imperial government? *Tully* v. *Principal Officers of Her Majesty's Ordnance*, 5 U. C. R. 6.

Senate — *Divorce — Alimony—Costs.*]—Counsel in this Province have the right to maintain an action for their fees. Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if the plaintiff would not insist on defendant so paying his fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proven, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application:—Held, that the Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose. *McDougall* v. *Campbell*, 41 U. C. R. 332.

Supreme Court Deciding Questions of Constitutionality.] — The supreme court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute. *Lenoir* v. *Ritchie*, 3 S. C. R. 575.

Territorial Rights — *Great Seal — Exchequer Court.*]—The Crown, in right of the Dominion, has a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights. The rights of the Crown, territorial or prerogative, are to be passed under the great seal of the Dominion or Province (as the case may be), in which is vested the beneficial interest therein. The Parliament of Canada has the right to enact that all actions and suits of a civil nature, at common law or equity, in which the Crown, in right of the Dominion, is plaintiff or petitioner, may be brought in the exchequer court. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Victoria—*Chinese Act—Aliens.*]—By s. 3 of the Victorian Chinese Act, 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him. Where the master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into a port of the colony than the Act allows:—Held, that the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant:—Held, further, that apart from the Act, an alien has not a legal right enforceable by action to enter British territory. *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272, 5 Cart. 556.

CONSTRUCTIVE NOTICE.

See REGISTRY LAWS, I. 2 (d)—TRUSTS AND TRUSTEES, III.

CONTEMPT OF COURT.

Appeal.]—A rule nisi of the supreme court of New Brunswick calling upon E. to shew cause why an attachment should not issue against him for contempt in publishing certain articles in a newspaper was made absolute and a writ of attachment was issued. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court where he might be ordered to answer interrogations, and by his answers, if he could, purge his contempt. If unable to do so the court would pronounce sentence. E. appealed from the judgment making the rule absolute:—Held, that the judgment appealed from was not a final judgment from which an appeal would lie under the Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 24 (a). *Ellis* v. *Baird*, 16 S. C. R. 147.

Appeal.]—The adjudication that the appellant, a solicitor and officer of the court, and moved against in that quality, has been guilty of a contempt, is by itself an appealable judgment. Although no sentence for the contempt has been pronounced by the court, when the party in contempt has been ordered to pay the costs of the application to commit, the court in effect inflicts a fine for the contempt. *In re O'Brien*, 16 S. C. R. 197.

Appeal.]—Contempt of court is a criminal proceeding and unless it comes within s. 68 of the Supreme Court Act an appeal does not lie to that court from a judgment in proceedings therefor. O'Shea v. O'Shea, 15 P. D. 59, followed; In re O'Brien, 16 S. C. R. 197, referred to. In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought. *Ellis* v. *The Queen*, 22 S. C. R. 7.

By-law Disregarding Judgment.]—By an order of the county Judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law—Held, that the by-law should be quashed, as having been passed in disregard and contempt of the order. Held, also, that as the order shewed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application. *Waldie* v. *Burlington*, 7 O. R. 192, 13 A. R. 104.

Certiorari—*Notice to Magistrate.*]—After the issue of a writ of certiorari for the removal of a conviction for the purpose of quashing it, the writ, though served on the clerk of the peace, did not come to the notice or knowledge of the magistrate, who enforced the conviction by the issue of a distress warrant:—Held, that the magistrate was not guilty of contempt. *Regina* v. *Woodyatt*, 27 O. R. 113.

Comment on Pending Proceedings—*Court of Appeal—Election Cases.*]—All the powers which the court of Queen's bench possessed with respect to controverted elections were transferred by 48 Vict. c. 3, s. 2 (O.), to the court of appeal, which has therefore now the power to punish for contempt in election cases. *Re Lincoln Election*, 2 A. R. 353.

Pending an election scrutiny the publisher of a paper at St. Catharines, where the scrutiny was being carried on, copied a letter which purported to have been written by the respondent to the Mail newspaper of Toronto, commenting very severely on the character and evidence of the petitioner's witnesses, as well as the motives of those prosecuting the petition. Upon a motion to commit the publisher for contempt of court, he filed an affidavit stating that the letter in question was an answer to an editorial which had appeared in the Globe newspaper charging the respondent with having improperly interfered with the voters' lists before the elections, and reflecting on his conduct in such a manner as to do him serious injury in St. Catharines where he lived; and that he, deponent, had altered the address of the letter to his own paper and published the letter as a simple act of justice to, and without the knowledge or consent of, the respondent. He further denied any intention of giving offence to the court, or of interfering with the fair trial of the case:—Held, that the publication contained expressions which amounted to a contempt of court; but under the circumstances the court refused to make any order against the publisher. *Ib.*

Remarks as to the liberty of comment allowed, and the duty of the court in such cases. *Ib.*

Comment on Pending Proceedings—*Apology.*]—While a criminal information for libel was pending against one W., defendant wrote a letter to a newspaper, reflecting upon one of the Judges who had delivered judgment on the application for such information, and stating that W. was "as certain to be convicted as a libeller ever was before his trial:"—Held, that such letter was clearly a contempt of court, but the defendant, on an application to commit him therefor, having made a full and unreserved apology, the proceedings were stayed on payment of costs by him, and no fine was imposed. *Regina* v. *Wilkinson*, *Re Houston*, 41 U. C. R. 42.

Comment on Pending Proceedings—*Procedure—Time.*]—Where leave to file a criminal information for libel had been granted on the 29th June, and one B., on the 8th July, published an article tending to prejudice the fair trial of the person against whom such information was to issue: Per Harrison, C.J., there was a pending litigation, though the information had not been filed, and such publication was a contempt of court. *Regina* v. *Wilkinson*, *Re Brown*, 41 U. C. R. 47.

The information was filed late in Trinity term, and the subpœna served on the applicant (the defendant in the information) on the last day of that term. Per Harrison, C.J., an application in Michaelmas term to attach B. for the publication of the 8th July, was not too late. Quære, whether the motion could have been made before the filing of the information. *Ib.*

Semble, that a Judge sitting out of term under the A. J. Act, does not represent the full court, so as to enable him to punish for contempt of such court. *Ib.*

B., in the article complained of, which appeared in a paper of large circulation and

considerable influence, spoke of the applicant (the defendant) as the author not only of the libels for which the information had been granted, but of scores of others against the same person. Per Harrison, C.J., this was calculated to prejudice the applicant in his trial. *Ib.*

The applicant had, in a newspaper published by him, spoken of the article in contemptuous terms, and as one which he felt certain would fail of its intention to prejudice his case in court in the least. Per Harrison, C.J., the applicant's belief as to the effect of the article was no answer to this application, the question being, whether it was calculated to have the effect of prejudicing his trial. *Ib.*

It was objected also, that the applicant himself had in his paper commented on the judgment of the court, and distorted its meaning, and had himself continually attacked and libelled B. Per Harrison, C.J., this was no answer to the application, for the article in question was one scandalizing the court, not the applicant only, and had been justified by B. in argument, and the defence was therefore not against the applicant, but against the court. *Ib.*

The article, which is set out in the report, was held to be clearly a reckless, intemperate, and unjustifiable attack upon a Judge of this court for a judgment pronounced by him with the other Judges, and a contempt therefore of the court. Morrison, J., was of opinion, 1. that the application, so far as it respected the applicant himself, was too late; 2. that he had failed to sustain the constructive contempt founded on the allegation that the article was calculated to prejudice him on his trial; and, 3. that having so failed, he was not, under the circumstances, entitled to ask the court to punish the author, at his suggestion, for the direct contempt of the court, contained in the article published so long ago, and which the court itself had not deemed worthy of notice. Wilson, J., took no part in the judgment; and the court being equally divided the application dropped. *Ib.*

Comment on Pending Proceedings—*Applicant in Fault.*]—On an application on behalf of the respondent to an election petition, for an order nisi calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper, reflecting on and pre-judging the conduct of the respondent and the returning officer during the currency of an election petition:—Held, on the materials before the court, a primâ facie case of contempt was made out; but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and the motion was refused. *In re Bothwell Election Case*, 4 O. R. 224.

Comment on Pending Proceedings.]—The alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for the defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given, but before the motion was made the notice was countermanded and the appeal abandoned:—Held, reversing 11 O. R. 633, and 14 A. R. 184, that the proceedings in the cause before the master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for contempt he had no locus standi and his application should not have been entertained. *In re O'Brien*, 16 S. C. R. 197.

Committal — *Discharge — Consent.*] — Where a judgment debtor was imprisoned under an order directing his committal for three months for a contumacious refusal to answer questions put to him upon his examination as such judgment debtor: — Held, that an application to the indulgence and discretion of the court for his discharge from custody before the expiry of the term of imprisonment could not be granted, even upon the consent of the judgment creditor upon whose motion the order for committal had been made. *Jones* v. *Macdonald*, 15 P. R. 345.

Committal — *Discharge — Conditions — Inability to Obey Judgment — Penalty — Terms.*]—The defendant was arrested and imprisoned by a sheriff in obedience to a writ of attachment, issued pursuant to an order of the court made at the instance of the plaintiff, on notice to and in the presence of the defendant, which adjudged him guilty of contempt, and ordered that the sheriff should take him into custody and commit him to the common gaol for such contempt, there to be detained and imprisoned until he should have purged his contempt, and that for this purpose a writ of attachment should issue. The writ commanded the sheriff to attach the defendant so as to have him before the chancery division of the high court of justice, there to answer touching his contempt, &c., and further to perform and abide such order as the court should make. The contempt consisted in disobedience of a judgment, made upon consent, ordering the defendant to cause a certain mortgage to be discharged save as to the plaintiff's life estate. Upon motion for the defendant's discharge, upon the return of a habeas corpus:—Held, that the arrest and imprisonment of the defendant under the order and writ were regular and in accordance with the proper practice; it was not necessary that the conditions of the release of the defendant from custody should be expressed in the writ. Owing to the character of the judgment, the plaintiff was entitled to the order and writ, and they could no more be denied to her than could a remedy by way of fi. fa. be denied to a judgment creditor, and the matter of the defendant's continuing in confinement was not a matter resting in the discretion of any court or Judge. Much time having elapsed since the consent judgment, and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not already been presented and dismissed. Upon a petition by the defendant for leave to withdraw his consent and to vacate the judgment entered thereon, the petitioner alleged that there was a mistake in the consent; that it was intended that the mortgage should be ordered to be discharged as to any interest which the plaintiff might have over and above a life estate; and he contended that the plaintiff had no such interest:—Held, that the petition could be dealt with on no other grounds than any other matter of practice, although the peti-

tioner was in custody; and that the matters alleged were not sufficient to induce the court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications. Elsas v. Williams, 54 L. J. Ch. 336, and Peed v. Cussen, 4 Dr. & War. 199, followed. A subsequent application by the defendant for a fiat or order that he be brought before the court for the purpose of moving in person for his discharge from custody was refused. Ford v. Nassau, 9 M. & W. 793, and Ford v. Graham, 10 C. B. 369, followed. Semble, a habeas corpus for the purpose would be refused, and a fortiori a fiat or order; for the sheriff would not be bound to obey it, and if the party were removed from prison under it, he would not in the meantime be in proper and legal custody. The defendant, after he had been for more than three months in gaol, applied again for an order for his release, upon the ground that, being destitute of money, and having no means of procuring or earning it, he was unable to do what was required, and had already been sufficiently punished for his offence:—Held, that the imprisonment suffered by the defendant was not a penalty, but the remedy to which the plaintiff was entitled for execution of her judgment, and no case had been made out entitling the defendant to be discharged. After the enactment of s. 29 of 58 Vict. c. 13 (O.), which was assented to on the 16th April, 1895, and after the defendant had been nearly five months in gaol, an order was made for his release upon the terms of his consenting to a judgment against him for the sum required to pay off the mortgage and all costs for which he was liable to the plaintiff, and upon his undertaking not to bring any action against any one on account of his arrest and imprisonment; such order to be without prejudice to any proceeding or the rights of the plaintiff against any other person. *Roberts* v. *Donovan*, 16 P. R. 456.

County Court — "*Process.*"]—An order made by the Judge of a county court in chambers for the commitment to close custody of a party to an action in that court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, is "process" in an action within the meaning of the exception in s. 1 of the Habeas Corpus Act, R. S. O. 1887 c. 70; and where such a party was confined under such an order, a writ of habeas corpus granted upon his complaint was quashed as having been improvidently issued. *Re Anderson* v. *Vanstone*, 16 P. R. 243.

Enforcing Decree while in Contempt.]—It would seem that a plaintiff prosecuting his decree is entitled to do so, notwithstanding he may have been placed in contempt for disobedience to an order of the court for payment of money. In such a case the defendant must obtain an order staying proceedings until the contempt is purged. *Hurd* v. *Robertson*, 1 Ch. Ch. 3.

Evidence—*Pending Motion—Default.*] — Under rule 578 a party may require the attendance of the opposite party for examination as a witness upon a pending motion; and the consequence of default on the part of the party to be examined is to put him in contempt. And where, upon a motion by the plaintiff to set aside or vary an order staying proceedings until he should give security for costs, he required the attendance of the defendant for examination as a witness, and the defendant attended but refused to be examined, an order suspending the former order until he should submit to be examined, was affirmed. *Clark* v. *Campbell*, 15 P. R. 338.

Evidence—*Destruction of Telegrams.*] — Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness, and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election. The witness stated that he had burnt the telegrams in question with others after being subpœnaed, and while the trial was actually going on, upon instructions received by telegraph from the general manager of the telegraph company in whose service he was; that these telegrams, with others, should have been destroyed before, in accordance with a standing rule of the company, but that he had neglected to do so at the proper time. Upon the return of an order nisi to commit the general manager and the operator for contempt of court, it was objected that no original subpœna had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in court; and it was contended that the making away with the messages was not a contempt unless the witness was duly subpœnaed to produce them:—Held, that the question was not whether there had been a proper service of a subpœna, but whether there had been an interference with evidence, which but for such interference would have been before the court. The documents were in existence at the beginning of the court; during the trial they were destroyed by the deliberate action of the general manager, whereby the court was hindered in the prosecution of an investigation of a public nature; and the manager and operator were guilty of a contempt of court. *Re Dwight and Macklam*, 15 O. R. 148.

Evidence — *Production of Bank Books.*] —Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna:—Held, that a subpœna may properly be issued to compel the attendance of a witness before a master, who has jurisdiction by rule 484. 2. That it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the master to take the evidence at the banking offices after banking hours. 3. That where the head office of the bank is outside of the Province, the local manager is the person in charge and custody of the books, and is the proper person to subpœna to produce them, and should be ordered to do so, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank. Re Dwight and Macklam, 15 O. R. 148, followed. Crowther v. Appleby, L. R. 9 C. P. 23, and Attorney-General v. Wilson, 9 Sim. 526, distinguished. 4. That the witness's objection to produce the books, because the bank was precluded by

law from exhibiting to any one or permitting any one to inspect the account of any person dealing with the bank, was untenable, the evidence sought being as to entries made of financial transactions in which a deceased person was engaged, his representatives desiring to know what moneys the bank received and what disposition was made of them, and all parties interested being willing that the evidence should be given. *Hannum v. McRae*, 17 P. R. 567, 18 P. R. 185.

Examination — *Refusal to Withdraw from Examiner's Room.*] — A refusal by a witness, who is also a party to the suit, to comply with the ruling of an examiner in not withdrawing from the room when ordered to do so, is a contempt of court. *Sadlier v. Smith*, 14 C. L. J. 30.

Examination—*Refusal to be Sworn.*]—Where a judgment debtor attends for examination, but refuses to be sworn, he will be ordered to attend and take the oath and submit to be examined at his own expense; if he makes default, process of contempt may issue on further proof. *Uhrig v. Uhrig*, 15 P. R. 53.

Habeas Corpus.] — An application to commit a person for contempt in disobeying a writ of habeas corpus will not be entertained unless a notice has been served upon him informing him of the consequences of failure to obey, nor unless the writ is signed by the person awarding it, as required by s. 3 of 16 Car. I. c. 10. *In re Hallock*, 15 C. L. T. Occ. N. 9.

Inability to Obey.]—Attachment against the president of a company for disobedience of a writ of mandamus was refused because it appeared that he could not, by himself and without a majority of the board of directors, perform the act required by the writ, and the other directors had not been served. *Demorest v. Midland R. W. Co.*, 10 P. R. 82.

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Ib.*

Inferior Court.]—Every court of record has the power to punish for contempt; but if the court is one of inferior jurisdiction, the superior court may intervene and prevent any usurpation of jurisdiction by it. Where, therefore, a barrister during the sittings of the county court of Carleton used words which might have been and were by the learned Judge considered to have been used to insult the court, on being told that unless he offered some apology he would be fined, replied that he had nothing to say, and he was then adjudged guilty of contempt and fined: upon motion for a certiorari to remove the order:—Held, that there was no excess of jurisdiction, and that this court could not interfere. *Ex parte Lees*, 24 C. P. 214.

Inferior Court.]—An inferior court cannot at common law, nor unless by express legislative enactment, commit for any contempt except for a contempt committed in the face of the court. *Re Pacquette*, 11 P. R. 463.

Insulting Language to Opponent — *Purging Contempt.*] — If a solicitor, who is also a barrister, while in a master's office use improper and insulting language towards another solicitor while acting in the conduct of proceedings under a reference, he will be held guilty of contempt of court, and upon a certificate of the facts from the master the court may preclude the offending party from again appearing before the court, or in the several offices of the several masters of the court. Upon the making of a suitable apology and upon payment of costs the offending party may be again allowed to appear before the court as if such order had not been made. *Nicholls v. McDonald*, 4 L. J. 259.

Judge Acting as Persona Designata.] —A Judge of a county court, acting under the authority of 48 Vict. c. 26, s. 6 (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the Judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the Judge in acting under the statute was not exercising the powers of the county court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Pacquette*, 11 P. R. 463.

Justice of the Peace—*Power to Commit for Contempt.*]—A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court. In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment:—Held, that the justice had no power summarily to punish for contempt in facie curiæ, at any rate without a formal adjudication and a warrant setting out the contempt. Armour v. Boswell, 6 O. S. 153, 352, 450, followed. 2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion. If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course. *Young v. Saylor*, 23 O. R. 513, 20 A. R. 645.

Obstructing Sheriff—*Summary Conviction.*]—The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a police magistrate, and fined, under 32 & 33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt was discharged, but without costs. *Haycood v. Hay*, 46 U. C. R. 562.

Payment of Money.]—A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and

upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that Con. Rule 867 had no application. *Pritchard* v. *Pritchard*, 18 O. R. 173, 178.

Payment of Money.]—Section 6 of R. S. O. 1887 c. 67, which abolishes process of contempt for non-payment of any sum of money payable by a judgment or order, refers to payment of money as between debtor and creditor; and defendants who are, by judgment, directed to procure the discharge of an incumbrance wrongfully placed by them on the plaintiff's lands may be attached for failure to comply with the judgment, although payment of money may become necessary to effect what is required. Male v. Bouchier, 1 Ch. Ch. 359; 2 Ch. Ch. 254, overruled. But where the judgment directs the act to be done within a limited time the defendants can not be attached unless the judgment, with the proper notice of the penalty for default, has been served upon them in time to give them a reasonable opportunity of complying with its terms before the expiration of the prescribed period. Judgment below *sub nom. Roberts* v. *Donovan*, 21 O. R. 535, affirmed on other grounds. *Berry* v. *Donovan*, 21 A. R. 14.

Practice — *Evidence of Refusal to Answer.*]—In support of an application for an attachment of a party for contempt in refusing to answer certain questions on an examination under R S. O. 1877 c. 50, or for his attendance to be examined at his own expense:—Semble, that the copy produced of such examination should be certified under the hand of the examiner, and that a sworn copy is not sufficient. *Clark* v. *Allen*, 43 U. C. R. 242.

Practice—*Motion for Attachment—Court or Chambers.*]—An application to attach a person for contempt of court in publishing in a newspaper while an action is pending, comments upon the matter in question therein, is to be dealt with as a criminal matter, not affected by the practice or procedure under the consolidated rules; and should be made to the court, not to a Judge in chambers. *Southwick* v. *Hare*, 15 P. R. 239, 331.

Practice — *Motion to Quash Appeal.*] — The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way; the contempt is only a bar to his asking the court for an indulgence. And where the defendants received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused. *Ferguson* v. *County of Elgin*, 15 P. R. 399.

Practice — *Security for Costs.*] — Where the plaintiff after the commencement of the action, left the Province to escape arrest under orders of committal for contempt of court in other actions, he was ordered to give security for costs. *Codd* v. *Delap*, 15 P. R. 374.

Proceedings in Chancery after Common Law Reference.]—Semble, that it is a contempt of a court of common law to proceed in the court of chancery after a reference to arbitration under an order of that court, which orders the parties to perform the award. *Pomeroy* v. *Boswell*, 7 Gr. 163.

Purging Contempt.]—Where a party is in prison for contempt, and has apologized, but has not paid the costs of his committal, etc., the proper order to make upon a motion for his discharge is, that he be continued in prison for his contempt for a time certain, unless the costs of the proceedings against him are sooner paid. *Campbell* v. *Martin*, 11 P. R. 509.

Receiver—*Default in Payment.*]—Where an order is made upon a receiver for payment of a sum of money, the court, on default, will commit for a contempt of such order without requiring any further order to be served. *McIntosh* v. *Elliott*, 2 Gr. 396.

Receiver — *Default in Payment.*] — An attachment lies against a receiver as an officer of the court for default in compliance with an order to pay into court money found to be in his hands as receiver. The powers of the court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim inter partes, but for punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R. S. O. 1887 c. 67 are inapplicable. An understanding between the receiver and the solicitor of one of the parties sought not to be accepted as an excuse for non-compliance with the order to pay in, more especially when the authority to waive the order is not admitted, but denied. Nor can the receiver be permitted to discharge himself by setting up claims upon the money which, had they been put forward in the first instance, would probably have prevented his appointment. Where, upon an application in such a case to rescind an order for an attachment, no objections are taken to the regularity of the proceedings, the court of appeal should not be astute to discover them or permit them to be raised for the first time on the argument of the appeal. In this case, a letter written by the receiver, before the order for his attachment was made, stating that he was ready to pay the money into court as soon as a specific order for that purpose was made, was regarded as an answer to his subsequent application for relief against it, as shewing that the grounds urged upon appeal were a mere afterthought. Semble, that a specific order to pay over the balance is the proper course in the first instance. *Fawkes* v. *Griffin*, 18 P. R. 48.

Recount by County Judge—*Disobedience of Injunction*] — The House of Commons of Canada alone has the right to determine all matters not relegated to the courts concerning the election of its own members, and their right to sit and vote in Parliament. The preliminary recount provided for by R. S. C. c. 8, s. 64, is a delegation pro tanto of parliamentary jurisdiction, and the county court Judge, as the presiding officer, is one designated by Parliament, and is responsible to the House for right performance of his duties. On an application to commit for contempt of court a barrister who had in argument, as agent of a candidate, urged a county court Judge to disregard an injunction stay-

ing proceedings granted by the high court of justice for Ontario and to proceed with the recount, and a returning officer who had, under the direction of the county Judge, produced the ballots for the purpose of the recount, notwithstanding that the injunction prohibited him from doing so:—Held, that the plaintiff, the defeated candidate, had no particular specified legal right as applicant for a recount which entitled him to claim a specified legal remedy in the courts:—Held, also, that the high court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under s. 64, R. S. C. c. 8:—Held, also, that a county court Judge having jurisdiction, and having issued his appointment for a recount, the procuring of an injunction from the high court was an unwarrantable attempt to interfere with the due course of the election:—Held, lastly, that the injunction, being one the court had no jurisdiction to grant, was extra-judicial and void, and might properly be disobeyed. *McLeod* v. *Noble*, 28 O. R. 528.

See, also, *S. C.*, 24 A. R. 459.

Reviewing Facts.]—While a power resides in any court or Judge to commit for contempt, it is the power or privilege of such court or Judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke and Heermans*, 7 U. C. R. 223.

Scandalous Allegations in Factum.] The plaintiffs' factum containing reflections on the Judge in equity and the full court of New Brunswick, was ordered to be taken off the files of court as scandalous and impertinent. *Vernon* v. *Oliver*, 11 S. C. R. 156.

Service of Affidavits.]—Where a motion to commit is made, it is not necessary to serve with the notice of motion copies of the affidavits on which it is based. *Hannum* v. *McRae*, 17 P. R. 567, 18 P. R. 185.

Setting Aside Proceedings while in Contempt.]—A writ of attachment for contempt in not obeying the original order of a Judge to deliver up the custody of children, under C. S. U. C. c. 74, was by order of a Judge issued from the court of Queen's bench; and the husband moved against it for irregularity. It was objected that while in contempt for not having surrendered himself under it, he could not be heard; but, held, that he might nevertheless defend himself by objections to the process if irregular. *In re Allen*, 31 U. C. R. 458.

Sheriff's Disobedience.] — A deputy sheriff was arrested under a writ of attachment for default in obeying an order upon his sheriff to deliver up to the claimant, who had succeeded on an interpleader issue, the goods, etc., seized. Upon a motion by the deputy to be discharged from custody, it was shewn that his noncompliance with the order arose from a difficulty in which he found himself by reason of the claim of another person who had succeeded in an issue about the same goods, and not from any deliberate intention to disregard the order; and his discharge was ordered. Semble, that the motion should have been for leave to administer interrogatories to or for the examination of the person committed, and for a habeas corpus. *In re Maitland, Gunther* v. *Cooke*, 9 P. R. 400.

Sheriff's Disobedience.] — Attachment against sheriff for disobedience of interpleader order. See *Maclean* v. *Anthony, Slater* v. *Anthony*, 6 O. R. 339.

Subpoena—*Substituted Service.*]—A witness is not liable to attachment for disobedience to a subpœna served substitutionally pursuant to an order authorizing such service. Mills v. Mercer, 15 P. R. 281, applied and followed. *Barber* v. *Adams*, 16 P. R. 156.

Time Limit—*Service of Order.*]—Where an order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience. *Wagner* v. *Mason*, 6 P. R. 187.

Winding-up Proceedings — *Failure of Receiver to give Security.*]—See *Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416.

Witness — *Production of Bank Books — Disclosure of Bank Accounts.*] — The local manager of a branch in this Province of a chartered bank, when served with a subpœna duces tecum to attend as a witness before the court, or a master upon a reference in an action, is bound, whether the bank is a party or not, to produce the bank books specified in the subpœna, which are in his custody or control, containing any entry relevant to the matters in question in the action, and to give evidence as to such entries; and inconvenience to the bank is no ground for refusing to produce the books, which primâ facie are to be deemed in his custody and control and their production within the scope of his authority. Re Dwight and Macklam, 15 O. R. 148, approved and followed. Evidence as to a customer's account is not privileged at common law, and s. 46 of the Bank Act is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts save by a director. Discussion of the English Bankers' Books Evidence Act, 1879. Decision below, 17 P. R. 567, affirmed. *Hannum* v. *McRae*, 18 P. R. 185.

See SOLICITOR, X. 4.

CONTRACT.

I. FORMATION OF THE CONTRACT.

1. *In General*, 1207.
2. *Letters and Telegrams*, 1209.

II. CONSIDERATION AND VALIDITY.

1. *In General*, 1217.
2. *Illegality*, 1225.
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III. CONSTRUCTION.

1. *In General*, 1238.
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1. *In General*, 1266.

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4. *Procedure in Actions.*

(a) *In General*, 1288.

(b) *Pleading*, 1289.

V. Rescission and Cancellation, 1292.

VI. Substitution and Assignment, 1297.

I. Formation of the Contract.

1. *In General.*

Building Contract — *Specifications.*] — Plans and specifications drawn for the erection of buildings—the specifications being divided under the headings, "notes," "conditions" and "specifications,"—referred to in the contract, and initialled by the parties thereto, all bound up together and forming one document, must be read together as constituting one entire contract. *Ryan* v. *Village of Carleton Place*, 31 O. R. 639.

Conditional Promise.]—After negotiations had taken place for the sale of a farm at $9,500, the following contract was signed by the purchasers:—"We agree to take your farm and pay you $9,000, and if we get along fairly well, we will give you the other $500 as soon as we are able":—Held, that the provision as to the $500 was a conditional promise which might be enforced on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew. *Sylvester* v. *Murray*, 26 O. R. 599, 705.

Conditional Promise—*Renewal of Contract.*]—A written promise by a gas company to a customer that if satisfied with him as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it. *Montreal Gas Company* v. *Vascy*, [1900] A. C. 595.

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

Mining Speculation — *Successive Options.*]—T., being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation. A. agreed, and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but failing to effect a sale within that time the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally T. effected a sale of the mine at a profit and had the necessary transfers made for the purpose, keeping the matter of the sale secret from A. On an action by A. for his share of the profit under the original agreement:—Held, that the sale related back, as between T. and A., to the date of the first agreement, and A. could recover. *Tupper* v. *Annand*, 16 S. C. R. 718.

Offer in Form of Agreement.]—A parcel of land having been placed by the plaintiff in a land agent's hands for sale, the defendant offered to purchase it, and signed a form of agreement for sale and purchase, which was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer:—Held, that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement. *Larkin* v. *Gardiner*, 27 O. R. 125.

Oral Acceptance of Written Offer.] When a proposal is made in writing by one party and accepted ad idem by the other, either verbally or by acting upon it, the contract is a written one. *Ellis* v. *Abell*, 10 A. R. 226.

Ratification by Silence.]—See *Re Monteith, Merchants' Bank* v. *Monteith*, 12 P. R. 288.

Signature by One Party.]—Where an agreement contains the names of two contracting parties, the subject matter of the contract, and the promise, it is binding on the party signing it, although not signed by the other party. *Bank of British North America* v. *Simpson*, 24 C. P. 354.

Tenders.] — The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for $1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B. by whom the tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender by which he was to get seventy-five cents a day for every three meal tickets, and the committee were to charge one dollar, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract. At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection. In an action to recover the amount of the

plaintiff's loss from the defendants:—Held, that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable. *Betts* v. *Smith*, 15 O. R. 413. Reversed, 16 A. R. 421.

Written Agreement to be Executed.]—Where the plaintiff declared in assumpsit on a special agreement for leasing land for ten years, and the agreement, it appeared from the declaration, was to be reduced into writing to make it effectual, and the plaintiff assigned as a breach that the defendant did not execute the agreement although requested, the declaration was held bad on general demurrer, because it did not appear that the agreement was reduced to writing. *Lee* v. *Purdy*, 2 U. C. R. 193.

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2. *Letters and Telegrams.*

Acceptance—*Requisites of—Inspection.*] In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. *Fulton Bros.* v. *Upper Canada Furniture Co.*, 9 A. R. 211.

The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered "we do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection:—Held, reversing 32 C. P. 422, that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties. *Ib.*

Acceptance Qualified.] — On the 26th January, 1882, McI. wrote to H. as follows: "A. McI. agrees to take $35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for $35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22, D. block, as soon as possible, that I may get conveyance and give mortgage:" — Held, that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre* v. *Hood*, 9 S. C. R. 556.

Ambiguous Acceptance.]—After negotiations between B., defendants' managing director, and one H., a verbal agreement was arrived at, the result of which was embodied in a letter written to H. immediately thereafter, dated 21st April, 1876, as follows: "The following I understand to be the arrangement we have made. The company will sell you 2970 tons of scrap consisting of," &c., setting out the particular descriptions; and that H., instead of cash, was to furnish the company with 540 tons of new steel rails, stating the quality and make, &c.; and concluded by requesting an acknowledgment from H. In reply to this H., and the defendant, to whom H. had assigned or was to assign the contract, on 24th April, wrote: "We have the pleasure of acknowledging the receipt of your letter of the 21st inst., containing the terms of the agreement we have made for the sale of 540 tons of new steel rails," repeating as in B.'s letter the terms of the contract, and concluding with a description of the old iron to be delivered, differing in some respects from that contained in B.'s letter, and as plaintiff contended calling for a much better quality of old iron:—Held, that the only contract, if any, on which defendants could be held liable, was that contained in the letter of the 21st April, and that the letter of the 24th must be deemed to be, as defendants understood it, and as the ambiguous manner in which it was written would convey, merely a general acceptance thereof, or else no effect could be given to it, for if looked upon as adding a new term to the contract, then there never was any completed contract between the parties. *Bickford* v. *Great Western R. W. Co.*, 28 C. P. 516.

Condition not Assented to.]—Plaintiff telegraphed to defendant, in answer to an inquiry about price and quantity of butter on hand, that he had 100 kegs at 20 cents, and defendant replied he would take it, if good. Plaintiff did not state, in reply, that it was good, or offer to guarantee that it was, but two days after he again telegraphed to come and ship the butter or send $1,500, to which defendant answered, that he would try and see him the following week. After the lapse of several days, plaintiff inquired whether defendant intended taking the butter or not. In an action by plaintiff against defendant:—Held, that there was no binding contract between the parties, and a nonsuit was therefore directed. *McIntosh* v. *Brill*, 20 C. P. 426.

Correspondence not Specifically Connected—*Parol Evidence to Explain—Sale of Cheese—Inspection.*]—Where a contract is to be made out from letters and telegrams, it is not essential that each should refer in terms to the preceding one, but the connection may be made out even from the subject-matter of the correspondence, so long as it appear that all relate to the same contract. On 30th August, 1879, the plaintiff telegraphed the defendant: "Quote price for August cheese, and number of boxes," to which defendant replied, "six cents." The plaintiff then telegraphed: "Your offer of August cheese at six cents accepted." On 8th September, defendant wrote to plaintiff: "When will you inspect and ship? We will ship at Lucknow and Wingham about 700 August * * Will expect you to inspect and ship in the usual time, say middle of month." On the 11th September, plaintiff replied that he would ship "next week" (which ended on 20th September). On 15th September, plaintiff again wrote, asking defendant "When will it be convenient for you to ship your August cheese, and at what stations? Please let me know at once, as we would not want to ship later than Monday or Tuesday of next week." On the 18th September, defendant replied that he had already informed him of the stations, "and we were expecting to ship this week." On the 19th, plaintiff wrote requesting delivery at the places named on Wednesday

(which would be) the 24th. The defendant afterwards refused to deliver the cheese, and this action was brought for non-delivery:—Held, that from the telegrams and letters, read in the light of the parol evidence, set out in the report, the surrounding circumstances, and the position of the parties, a valid contract was established for the sale of 700 boxes of cheese at six cents per lb.; that the price mentioned was not indefinite, it being shewn that cheese was always put up in boxes, of an average weight, and sold at so much per lb. Held, also, that even though inspection might be a term of the contract, this was chiefly for the plaintiff's protection, and he might waive it, as he did by his letter of the 19th September. Held, also, that in the absence of any joint contract by plaintiff with the several cheese factories, his proceeding against one of them for the amount they had to deliver, and settling with it, did not preclude him from now suing defendants for damages for the residue of the cheese not delivered. *Ballantyne* v. *Watson*, 30 C. P. 529.

Direction as to Shipping.]—Defendant, living at St. Marys, on the 24th September, 1873, telegraphed to the plaintiff at Forest, "Can you ship three cars Treadwell wheat this month at $1.20. Reply." On the same day plaintiff answered, "Will accept your offer, three cars Treadwell one twenty." On the 25th defendant inclosed a shipping bill to plaintiff, asking him to ship the wheat as soon as possible. This bill was a printed form in use on the Grand Trunk railway, filled up for the three cars, addressing them to the Royal Canadian bank, Montreal. On the next day, hearing that the railway company had been inserting the words, "at owner's risk for delay" in their shipping bills, defendant telegraphed on the 26th to the plaintiff that he could not take the wheat if the plaintiff allowed these words to be put in. The agent of the railway, however, insisted on inserting these words in the bill of lading, and the plaintiff sent the wheat forward, and drew upon defendant with the bill of lading attached to the draft, which defendant refused to accept, and the wheat was sold by the bank. The plaintiff thereupon sued for goods bargained and sold:—Held, that the two telegrams of the 24th September did not form a binding contract; that the terms of the shipping note were to be considered as part of the bargain, and that the plaintiff therefore could not recover. *Willing* v. *Currie*, 36 U. C. R. 46.

Direction as to Shipping—*Car-loads.*]—On 5th January, the defendant, at Toronto, wrote to plaintiff at Mount Forest: "Our Mr. P. advises me that you have a car or two of hogs. Please state by telegraph quantity and lowest price for 200 lbs. average and upwards." It did not appear whether there was any reply to this, but on the 19th P. telegraphed plaintiff from Harriston, "Name lowest price for one or two cars hogs. Give average." To which plaintiff immediately replied, "Will take seven ten here, average 200," when P. telegraphed in reply, "Will accept your offer, seven ten, $7.10; order cars, coming to-day:"—Held, that there was a complete contract sufficient to satisfy the Statute of Frauds, for the words, "order cars," merely referred to the utmost number of cars, namely two, mentioned in the first telegram; and did not mean "provided you order the cars." It appeared that there were two sizes of cars, one double the capacity of the other:—Held, that it would be a good contract for at least two cars of the smaller dimensions, capable of being extended by parol evidence to cars of the larger size. *Murphy* v. *Thompson*, 28 C. P. 233.

Direction as to Shipping—*Duty to Provide Cars—Usage.*]—Plaintiff, through his agent at Seaforth, early in September offered defendant ninety-four cents a bushel for his wheat f. o. b. at Clinton, where defendant lived, a station on the same line of railway as Seaforth. This was not then accepted, and on the 9th September defendant offered to take that price, but plaintiff did not then want the wheat. On the 11th September plaintiff telegraphed defendant: "Will take your wheat at ninety-four cents, f. o. b. Answer." On the same day defendant answered: "Will accept your offer, ninety-four. Send directions about shipping:"—Held, that the words, "Send directions about shipping," did not qualify the previous unconditional acceptance, and that there was a complete contract. Held, also, that under such a contract it was the duty of the buyer to provide the cars: that the defendant in this case not having done so within a reasonable time, could not recover for non-delivery of the wheat; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received to vary the contract. Semble, that the explanation of the alleged usage was that the sellers, in providing cars at Clinton under such contracts, were acting as agents for the buyers. *Marshall* v. *Jamieson*, 42 U. C. R. 115.

Effect of Offer by Letter.]—In the construction of a contract arising out of letters and telegraphic communications, the party making the proposal must be considered as renewing his offer every moment, until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer. *Thorne* v. *Barwick*, 16 C. P. 369.

Plaintiff, on the 5th September, 1865, wrote to defendants, asking their price for a certain specified quantity of leather. On the 7th defendants replied through their manager, acknowledging the receipt of plaintiff's letter, and adding, "We are now selling our leather for 22 cents cash, at the tannery. Trusting to receive your order, I remain, &c." On the 13th, plaintiff wrote, "I am in receipt of your favour, offering, &c., at 22 cents cash. In reply, &c., I will take 400 sides No. 1, overweights, though I am paying you one cent more than what I have just purchased at. I will send over Mr. P. to look out what will be most suitable for my trade." On the 15th, one of the defendants telegraphed plaintiff thus: "Wednesday next will be most convenient to attend Mr. P. at tannery:"—Held, that the whole correspondence taken together constituted a binding contract between the parties, and that the plaintiff was therefore entitled to recover against defendants, on their refusal to deliver. *Ib.*

Semble, that the letter and telegram, of the 13th and 15th September, respectively, would of themselves have established a binding contract between plaintiff and defendant. *Ib.*

Quære, whether it is a misdirection to tell the jury that a telegraphic communication is to be taken most strongly against the sender. *Ib.*

Implied Assent—*Direction as to Shipping.*]—In the construction of a contract by

letters it is not necessary that there should be an express assent, but the requisite assent may be collected by implication from the whole terms of the correspondence. In reply to an offer by the defendant for the sale of certain wheat, the plaintiff telegraphed: "Will take your five cars at 85 cents per bushel," to which the defendant replied by postal card on the 25th of July: "Send instructions for the shipment of the five cars spring." On the 26th the plaintiff mailed a postal card with instructions, but this was never received by the defendant. A shipping note mailed on the 27th however reached the defendant on Monday the 29th, but he had sold the wheat on the 27th:—Held, that the postal card sent by defendant on the 25th of July amounted to an absolute acceptance, and not merely a conditional acceptance should the defendant be satisfied with the instructions he might receive as to the mode of shipment. Held, also, that even if the plaintiff did not send instructions till the 27th, the delay would not have enabled the defendant to treat the contract as cancelled. Held, also, that the plaintiff was entitled to recover as damages the amount which he had to pay for additional carriage on wheat which he was forced to buy in a more distant market in consequence of the defendant's breach of contract. *Bruce* v. *Tolton*, 4 A. R. 144.

Intention to Accept.]—M. offered to give J. $1,500 for a certain lot of land containing fifty feet frontage. J. replied that he would take $1,750 for the fifty feet, or $1,500 for thirty-five feet of the fifty feet. Before receiving any answer, J. telegraphed to M: "Coming Monday to accept $1,500. Waiting immediate reply." M. telegraphed back: "Come at once." M. now alleged that these telegrams constituted a contract for the sale of the fifty feet to him for $1,500, and claimed specific performance:—Held, that, the telegrams did not constitute any such contract, for it was ambiguous to which proposal of $1,500 J.'s telegram referred, and moreover the words "coming to accept" did not shew an actual acceptance, but were merely an expression of intention to do something in the future. *McFarren* v. *Johnston*, 6 O. R. 161.

Inquiry on Behalf of Third Person.]—Plaintiff telegraphed to defendant at Lockport: "A party wants to buy wheat on 'Grace Greenwood;' what is your price?" Defendant answered by telegraph, "I will sell for two dollars per bushel." Plaintiff replied, "I will take wheat on 'Grace Greenwood,' at your offer, two dollars per bushel." The wheat was not delivered:—Held, that there was a valid contract. *Bundy* v. *Johnson*, 6 C. P. 221.

Material Terms not Agreed on.]—S., a grain merchant in Truro, N. S., telegraphed to C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day, "White oats 32 half. Truro, bags two cents bushel extra." S. wired same day, "How much less can you do mixed oats for? Might work white at thirty-two, but not any more. Answer." C. answered. "Mixed oats scarce but odd cars obtainable half cent. less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in four bushel bags, Truro." Next day S. wired, "I confirm purchase 20,000 bushels oats, white at thirty-two; mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asked half a cent for bagging. Bags extra." S. replied, "All right: Book order. Will have to pay for bagging." C. wired same day, "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired, "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered and S. brought an action for damages:—Held, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover. *Cole* v. *Sumner*, 30 S. C. R. 379.

Offer Aided by Previous Correspondence.]—The plaintiff was the lessee of an hotel, with a license, and the owner of the furniture, &c. In April, 1876, defendant examined the premises, and negotiated as to the purchase of plaintiff's good-will, license, &c., and furniture at a valuation; but nothing was settled, and defendant left promising to write. On 2nd May, he wrote offering plaintiff $600 for his right, &c., and to take the stuff at a valuation, and pay $150 down, or, if plaintiff greatly desired it, $200. On 4th May, he again wrote, offering $700 for the right, including license, to pay $200 down and balance in October, when certain notes he held fell due. On 8th May, plaintiff telegraphed defendant that he would take $700 for his right, defendant to pay license: "$200 down. Time for balance." On the same day plaintiff telegraphed in reply, "Yours received, will take it. Will be up next week." The defendant refused to carry out the agreement, when plaintiff sold out his right to others for $325, and sold the furniture at a valuation:—Held, that there was a contract completed and sufficient within the Statute of Frauds: that there was no uncertainty in the expression "time for balance," for the previous correspondence shewed that October was intended; and that the meaning of the word "stuff" might be, and was explained by the parol evidence. The plaintiff was therefore held entitled to recover $375, the difference between the $700 and the price for which he afterwards sold the goods. *Johnston* v. *Wilson*, 28 C. P. 432.

Offer Limited by Previous Conversation.]—R. wrote to O. "I have considered the matter of our conversation, and offer you $800 for the property." O. replied: "I have your favour offering $800 for the property (describing it). I have concluded to accept your offer." The evidence shewed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in

their understanding of it. *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182.

Offer "Without Prejudice."]—A letter containing an offer written "without prejudice" means "I make you an offer; if you do not accept it this letter is not to be used against me," but when the offer is accepted the privilege is removed. *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182.

Promise to Write Further.]—To a written offer to sell some flour on certain terms the following telegram was sent:—"Letter received; offer accepted; writing." No letter was written:—Held, that there was a completed contract. *Dalrymple* v. *Scott*, 19 A. R. 477.

Qualified Acceptance—*Delay.*]—In an action for non-delivery of 15 bales of hops, alleged to have been sold by defendant to plaintiffs, the evidence shewed that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at 20 cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, "Will take 15 to 20 bales good new hops at 20 cents cash." On the 21st defendant replied by telegram, "Your offer accepted. Have booked your order for 15 bales new hops for delivery when picked." On the 16th September defendant telegraphed, "Hops picked ready for delivery. Answer back." On the 21st September plaintiffs telegraphed, "Our man will be there ready to receive hops early next week," and on the 26th of September, "Ship the 15 bales hops to us Galt to-day, and draw at three days' sight;" and on the 27th, "If hops not shipped will send team and money for them to-morrow. Answer quick." On the same day defendant replied, "Cannot have hops." A tender of the price was subsequently made and refused:—Held, that there was no binding contract at any time between the parties, for the defendant's answer of the 21st August was not a simple acceptance of the plaintiffs' offer of the 17th, but qualified it both as to quality (by leaving out the word good) and as to time of delivery; and assuming defendant's telegram of the 16th September to be a renewal of such acceptance, the plaintiffs' subsequent telegrams did not shew an assent to it. *Carter* v. *Bingham*, 32 U. C. R. 615.

Held, also, that if there had been a previous binding contract the plaintiffs' delay, while the market was rising, in not answering the telegram of the 16th September, until the 21st, justified the jury in finding, as they did, that the plaintiffs were not ready and willing to accept and pay for the hops within a reasonable time. *Ib.*

Quotation of Prices — *Acceptance.*] — The defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, and quoting prices and terms for specified kinds of flour, adding a suggestion that the plaintiffs should "use the wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday." The defendants did not deliver the flour, and the plaintiffs sued for damages for non-delivery:—Held, that there was no contract. Harty v. Gooderham, 31 U. C. R. 18, distinguished. *Johnston Brothers* v. *Rogers Brothers*, 30 O R. 159.

Telegram not Delivered—*Evidence.*]—On the 1st September, the plaintiff, living at Kingston, received a telegram from C., at Oswego: "Will give you eighty cents for rye," and on the next day he took to defendants' office the following reply: "Do accept your offer; ship to-morrow fifteen or twenty hundred." He paid defendants sixty cents, namely, thirty cents for sending the message to Ogdensburg, and thirty cents from thence to Oswego. His answer was not received by C., who swore that if it had been the bargain would have been closed at eighty cents; but that, after waiting for two or three days, the party for whom he was acting would not take it. The price fell on the 5th or 6th, and it appeared the plaintiff might before that time have communicated with C. by letter. In an action for negligence in not transmitting the message:—Held, that no damages could be recovered, for even if it had been received by C., there would have been no complete contract binding him to take the rye. Quære, whether any and what damages could otherwise have been recovered from defendants. *Kinghorne* v. *Montreal Telegraph Co.*, 18 U. C. R. 60.

When a contract is attempted to be made out through telegrams, if that can be done at all, the messages signed by the parties must be produced, not the transcript taken from the wire. *Ib.*

Time for Acceptance—*Change in Price.*] The plaintiff, on the 14th June, by telegraph, asked defendants their prices for high wines and whiskey. On the 16th, defendants wrote, specifying the prices for quantities not less than a car-load, and requesting an order, which they said should receive prompt attention. On the 17th, the plaintiff telegraphed, "Send three car-loads high-wines." Defendants answered that the price had advanced, and refused to deliver at the price first named. It was admitted that the order was reasonable in point of quantity, and that defendants had the goods on hand:—Held, that there was a complete contract, and that defendants were liable for not delivering. *Harty* v. *Gooderham*, 31 U. C. R. 18.

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

Withdrawal of Offer—*Qualification.*]—One of the plaintiffs, W., of New York, and his agent, C., of Ingersoll, saw defendant at his cheese factory at Stratford, and talked of the price of cheese. W., in leaving, said any

correspondence would be through C., from whom defendant would probably hear on plaintiffs' behalf, when the cheese was ready for sale. Subsequently, the plaintiffs authorized C. to buy cheese from defendant, and on the 20th August, at 4 p.m., C. telegraphed defendant, "Name lowest price for your cheese, stating the number of boxes," which defendant received on the 21st. On the evening of the 21st, defendant telegraphed C., "will sell 250 cheeses 10½ cents," which C. received at 9.25 a.m. on the 22nd, and immediately answered by telegraph, "I accept your offer. When will you box? Answer," which was received at the Stratford office at 10 a.m., and by defendant on the same day. On the evening of the 21st, defendant had left a telegram to be sent to C. on receipt at the telegraph office of C.'s answer to defendant's telegram naming the price. It read "I have sold in Stratford, did not get your answer in time." This was sent on the 22nd to C., on the receipt of C.'s telegram accepting, and C. answered at once that the plaintiffs would claim the cheese. The defendant in his evidence stated that he did not understand that C. was plaintiffs' agent when they came to his factory:—Held, that the telegrams shewed a complete contract. *Webb* v. *Sharman*, 34 U. C. R. 410.

Held, also, that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to shew that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiffs' agent. *Ib.*

See the following cases, turning on the special wording of the correspondence: *McPherson* v. *Cameron*, 15 U. C. R. 48; *Clark* v. *Waddell*, 16 U. C. R. 352; *McGiverin* v. *James*, 33 U. C. R. 203; *Riley* v. *Spotswood*, 23 C. P. 318.

II. Consideration and Validity.

1. *In General.*

Account Stated.]—In support of an account stated as set out in the declaration, the following memorandum was put in evidence: "$300—Good to T. T. to the amount of $300, to be paid to him, or his order at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber at cash price.—Signed, J. C. sen., J. C.:"—Held, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration. *Tyke* v. *Cosford*, 14 C. P. 64.

Agreement to Saw Logs—*Use of Mill.*]—The third count of a declaration stated that plaintiff being possessed of a saw mill, &c., and of a large stock of logs on hand ready to be sawed and cut up, it was agreed between plaintiff and defendants that defendants should take and convert the logs into lumber and shingles at the mill; hire and employ the men required for the purpose, and advance and pay their wages, and the expenses of converting the logs, &c., and of forwarding them to market, and of disposing of the same; and that defendants should first be repaid out of the proceeds of such sale, and the residue be expended in payment of the moneys due to the workmen at the time of agreement, and of any debts then due by plaintiff to defendants; and that for the purpose aforesaid the mill should be run under defendants' direction with the moneys supplied by them, but under plaintiff's superintendence. The count then alleged, that in pursuance of such agreement the plaintiff allowed defendants to have possession of the mill and premises and they employed the workmen to work the mill, under plaintiff's superintendence, and commenced to perform and carry out the agreement; and all things happened, &c.; yet defendants neglected and refused to hire men, pay wages, or convert the logs, &c.; but, on the contrary, dismantled the mill, and took and carried away the saws, belting, &c., and stopped and closed up the mill, and kept plaintiff out of possession, whereby, &c.:—Held, declaration good, as it shewed a sufficient consideration for the performance of defendants' promise, i. e., the use of the mill, in order to saw and convert the logs. *Dunn* v. *Irwin*, 25 C. P. 111.

Bailiff's Seizure — *Indemnity.*] — The plaintiff declared on a special agreement, not under seal, that in consideration that the plaintiff, then a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty:—Held, that sufficient consideration appeared for the promise. *Robertson* v. *Broadfoot*, 11 U. C. R. 407.

Charitable Subscription.] — Defendant with others signed the following, his subscription being $100:—"We the undersigned do hereby severally promise and agree to pay to F. W. T., Esq., (the plaintiff,) agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal Church and rectory in the town of Goderich." The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums for the purpose, &c., and that plaintiff would pay $100 for the same purpose, defendant promised to pay plaintiff $100 therefor; that W. and others did promise and pay accordingly, and the plaintiff paid $100, yet defendant had not paid. At the trial the plaintiff's promise to contribute $100 was not proved:—Held, that on this ground defendant was entitled to succeed. Held, also, that the instrument was the several promissory note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs. *Thomas* v. *Grace*, 15 C. P. 462.

Charitable Subscription.]—Action for subscription towards rebuilding church—Sufficiency of consideration. See *Berkeley Street Church* v. *Stevens*, 37 U. C. R. 9.

Consideration not Enforceable — "*Value Received.*"]—The words, "value received," in a stock note import primâ facie a consideration; and a consideration which cannot legally be enforced may be sufficient to sustain a promise. *Waddel* v. *McCabe*, 4 O. S. 191. See *S. C.*, 3 O. S. 502.

Continuing Debt.]—A special assumpsit to pay in grain, or in any particular manner, or at a future time, a continuing debt in respect to which the law had raised an implied

assumpsit to pay in money on request, is a binding promise supported by a good consideration. *Belcher* v. *Cook*, 4 U. C. R. 401.

Debt or Assumpsit.]—To support an action of debt on a simple contract it must appear that the contract has been entered into for a consideration moving to the debtor himself, and not, as in assumpsit, for a consideration moving from the plaintiff to a third party. *McLean* v. *Tinsley*, 7 U. C. R. 40.

Debt Discharged by Insolvency.]—An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it. *Austin* v. *Gordon*, 32 U. C. R. 621.

Delaying Judgment — *Deposit of Money.*]—A deposit of money by the plaintiff with a third party for a limited time, during which defendants would ascertain facts:—Held, a sufficient consideration to support a promise by defendants to delay entering a judgment and issuing execution. *Reed* v. *Carrall*, 7 C. P. 283.

Evidence — "*Value Received.*"] — The words "value received" in an agreement to the following effect:—"I promise to pay to A. or bearer £25, value received, to be paid in merchantable wheat at market price," import a debt due, and are primâ facie evidence of a consideration; and such an agreement may be shewn under the counts for money had and received and the account stated. *Waddel* v. *McCabe*, 3 O. S. 502. As to what consideration will suffice, see *S. C.*, 4 O. S. 191.

Giving Time.]—C. had contracted with defendants to carry their lumber from Collingwood to Chicago, and had chartered plaintiff's vessel for that purpose. C. being indebted to plaintiff gave him two orders on defendants for £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. Plaintiff drew accordingly, but defendants then told him that C. had been overpaid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel:—Held, that the plaintiff was entitled to recover, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendants' promise. Quære, whether plaintiff's forbearing to detain defendants' lumber as he had threatened, would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberly* v. *Baines*, 15 U. C. R. 25.

Investing Money.]—Agreement to invest money—Sufficiency of consideration. See *Holmes* v. *Thompson*, 38 U. C. R. 292.

Married Woman's Promise.]—Where a married woman procured the plaintiff to indorse for her a bill of exchange, promising to indemnify him, and after her husband's death renewed the promise:—Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use. Lee v. Muggeridge, 5 Taunt. 36, held to be in effect overruled. *Dixie* v. *Worthy*, 11 U. C. R. 328.

Mortgage without Covenant — *Forbearing to Sue.*]—Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt, and a mere promise to pay such money in consideration of forbearance to sue would not be binding, though, if in consideration of forbearing to sell or eject, it would be. *Jackson* v. *Yeomans*, 28 U. C. R. 307.

Mutual Obligations.]—On 27th May, 1885, certain individuals forming a cigar manufacturers' association, amongst whom was the defendant, considering themselves aggrieved by the members of the cigar makers' union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas, for the mutual advantage and protection of the parties hereto * * * it has been agreed that the parties of the first part shall become severally bound to S. in the sum of $500 liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked * * with the labels of the cigar makers' union, or shall use * * in connection with the manufacture of cigars by him any cigar makers' union label. * * or shall permit * * any cigar makers' union, or any union or set of men, to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, * * the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations (setting them out) immediately pay to S. the sum of $500; the intention being that in case of a violation of all or any of the stipulations * * aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of $500, * * because of his so offending, as liquidated and ascertained damages (and not as a penalty), to be by S. applied, etc. * * The intention also being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever of any of the stipulations * * aforesaid on the part of any one of the parties of the first part." The defendant having broken the above agreement in all respects, S. brought this action against him to recover $500 as liquidated damages:—Held, that the mutual obligations imposed by the contract constituted a sufficient consideration for it:—Held, also, that the agreement was not invalid, on grounds of public policy, and as in undue restraint of trade. Collins v. Locke, 6 App. Cas. 674; and Hornby v. Close, L. R. 2 Q. B. 153, distinguished. *Schrader* v. *Lillis*, 10 O. R. 358.

Original Consideration Supporting Substituted Agreement.]—While an

agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it, postponing the period for performance, and the original consideration will be regarded as imported into such new agreement, and will support it. *Hurlburt* v. *Thomas*, 3 U. C. R. 258; *O'Donnell* v. *Hugill*, 11 U. C. R. 441.

Past Consideration.]—Declaration, that it was amongst other things agreed that in consideration that the plaintiff had leased from the defendant certain land at 5s. per acre, defendant promised to build a house and barn on the premises, &c.:—Held, bad, as shewing no legal consideration for the agreement, the whole promise being grounded upon a past consideration. *Cunningham* v. *Richardson*, 7 U. C. R. 163.

Past Consideration.]—Declaration, that in consideration that the plaintiff, at defendant's request, had consigned and shipped certain wheat to Messrs. C. & B. at Oswego, defendants promised to advance him a certain sum thereon, and to sell it for him within thirty days, and to pay over the proceeds, less the advance and charges, &c.; that the defendants did make the advance, but did not sell the wheat:—Held, bad, as shewing only a past and therefore not a sufficient consideration. *Marlatt* v. *Goderham*, 14 U. C. R. 221.

Past Consideration.]—Declaration, that in consideration that plaintiff, at defendant's request, had sold to defendant a certain portion of plaintiff's lot, defendant then promised the plaintiff, &c.:—Held, bad on general demurrer, for that the executed consideration, though laid with a request, would not support the promise. *Rees* v. *Howcutt*, 4 C. P. 284.

Past Consideration.] — Covenant by lessee against lessor on a covenant to deliver possession of the demised premises to plaintiff on 20th March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff and had deprived him of the use of the land and premises. Defendant pleaded, on equitable grounds, that plaintiff, by an agreement in writing, executed contemporaneously with the lease, in consideration that defendant had leased to him the premises mentioned in the declaration, which were then in the possession of one J. Y., who had agreed to surrender possession by the said 20th March, agreed not to bring any claim for damages against defendant if possession could not be obtained on the day, as provided in the deed, averring that on the 20th March Y. was and continued in possession of the premises, and refused to deliver them up to defendant, who consequently could not obtain possession thereof on the said day, and could not by reason thereof deliver possession on 20th March to plaintiff. Plaintiff new assigned that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises on 21st March:—Held, on demurrer to both plea and new assignment, that the plea was bad as a legal and equitable defence for want of a good consideration, alleging as it did a past consideration as that on which the agreement was based. *Wilson* v. *Keys*, 15 C. P. 32.

Prepayment of Promissory Note—*Usury.*]—Defendant on the 12th March, 1835, gave his promissory note to the plaintiff for £265, payable in twelve months, and immediately after gave him the following letter:—"Sir,—I have this day received from you the sum of £265, and for which sum I have given my promissory note to you, payable in twelve months from this date, the original sum being £250, and six per cent. interest makes up the amount to £265; and notwithstanding that you have accepted of my promissory note at the above date, it is perfectly understood between us that should you require the money before the expiry of the said period, I shall instantly repay the whole amount:"—Held, that no action would lie on this letter, 1. from the want of consideration; 2. because the contract was usurious on the face of it. *Stewart* v. *Rennie*, 5 O. S. 151.

Purchase of Plaintiff's Goods under Agreement to Reconvey.]—The plaintiff's goods being about to be sold under a distress for rent, it was agreed between the plaintiff and defendant that if defendant would go to the sale and purchase the goods, the plaintiff would at a future day repay him the price and interest, when defendant was to give him the goods. Defendant went to the sale and purchased the goods; but, though some months afterwards the plaintiff tendered the amount and interest, defendant did not deliver the goods:—Held, that there was no contract on which the defendant could be held liable for damages; and that the plaintiff's remedy if any, was by an action for deceit, or by a proceeding in equity to have defendant declared a trustee for him. *Timmins* v. *Surples*, 26 C. P. 49.

Relinquishing Right to Cut Timber.]—Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the 1st May, 1871; any timber or logs left, standing or cut, after that date to be the property of the defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant verbally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or two after that. Subsequently, and after the 1st May, the plaintiff was forbidden to take such made timber off by one K., who said he had bought it, and by defendant who, as one witness said, claimed it as his own, and the plaintiff thereupon brought trover:—Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping said lot before the 1st May was a sufficient consideration for the parol agreement. *Hedley* v. *Scissons*, 33 U. C. R. 215.

Rent Payable to Third Person.]—The plaintiff declared that on the 12th December, 1857, one T. mortgaged certain lands to defendant for £300, and defendant by a memorandum in writing, signed by said T. and defendant, then agreed with T. to lease said land from him (T.) for two years at £40 a year, which said rent defendant and T. then agreed should be indorsed on and taken in part payment of the mortgage so soon as the two years should have elapsed: that afterwards, in April, 1858, defendant sold and assigned said mortgage to the plaintiff, and

then promised the plaintiff to pay him the said £80 at the end of said two years, but did not pay the same:—Held, on demurrer, that the declaration was insufficient, for the agreement between the defendant and plaintiff would be without consideration, as they could not without T.'s privity compromise his right to the rent. *Murdiff* v. *Ware*, 21 U C. R. 68.

Sale of Railway Ties—*Excess Credited to another Contractor.*]—The defendant, having delivered ties to a railway company in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiff paid the defendant $1,000, and brought this action to recover the same, alleging that he never was able to procure returns or payment from the railway company and that the consideration for the $1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, included 3,200 delivered by the defendant, and that, the railway company disputing such claim, a settlement had been effected, the plaintiff accepting $1,000 in full of his claim, and giving the company a formal release of all demands:—Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account, the latter could not, in view of the circumstances, allege failure of consideration; but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed. The objection, that the Judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone* v. *VanAllen*, 12 A. R. 133.

Sale to Third Person—*Promise to Pay Mortgage.*]—Where defendant promised that if plaintiff would sell land to Mrs. A. B., and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day:—Held, that assumpsit would lie against the defendant on the non-payment of the mortgage, and that a plea of Mrs. A. B.'s coverture was a bad plea. Semble, however, that such a plea would be a good defence where a promise of the defendant is set up in the declaration, as founded on a consideration of the plaintiff's forbearance to sue a married woman for a debt alleged to be previously due by her. *Nichols* v. *McGill*, 7 U. C. R. 233.

Statutory Restrictions — *Evasion of Statute.*]—The waterworks system of the city of Windsor is, by 37 Vict. c. 79 (O.), placed under the management of a board of commissioners who are authorized to collect the revenue, paying to the city any surplus over expenditure for maintenance, and to initiate works for the improvement of the system, the necessary funds in that event to be supplied by the city. The total expenditure is limited to $300,000, to be provided from time to time by by-law of the council, and not more than $20,000 to be expended in any one year without the assent of the ratepayers. A majority of the commissioners wished to make certain improvements, but on finding that the cost would be over $40,000, decided to carry out at the time only one-half the proposed scheme, and they entered into a contract with the plaintiffs to do work of the value of $20,000. No by-law had been passed by the council, and at the time more than $280,000 had been expended by the city for waterworks purposes, and the plaintiffs knew these facts. After a small portion of the work had been done a ratepayer threatened litigation, and the commissioners instructed their engineer not to issue a progress certificate, and the plaintiffs brought this action to recover the value of the work done:—Held, that the commissioners had in good faith divided the work; that there was, therefore, no illegal evasion of the statutory restrictions, and that the contract was not invalid on this ground. But held also that the commissioners were mere statutory agents of the city, and that as there was no by-law of the council, and the statutory limit of expenditure was to be exceeded, the contract was not binding. *McDougall* v. *Windsor Water Commissioners*, 27 A. R. 566.

Suretyship — *Indorsement of Note — Right to Commission for Indorsing.*]—M., by agreement in writing, agreed to become surety for McD. & S. by indorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such security to protect M. against any loss or expense in regard thereto, or in connection with the note, to pay him a commission for indorsing, and to retire said note within six months from the date of the agreement. The note was made and indorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used:—Held, that M. having done everything on his part to be done to earn his commission, and having no control over the note after he indorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission. *McDonald* v. *Manning*, 19 S. C. R. 112.

Taking Over Forfeited Contract—*Failure to Obtain Restoration.*]—The defendants, who had had a contract with the Government of British Columbia for the performance of a public work, but had forfeited it after a part of the work had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully known by all the parties, that at the time of making the agreement the contract had been forfeited, and the Government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the Government, and understood as well as the defendants the exact position of affairs; but all trusted to the possession of certain influence by which they hoped to get back the contract, and resume work upon it:—Held, that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking. Cunningham v. Dunn, 8 C. P. D. 443, applied and

followed. *McKenna v. McNamee*, 14 A. R. 339.

Value to Promisee the Test.]—If the plaintiff part with anything that is of value to himself, though it may be of no legal value in defendant's hands, to obtain defendant's promise, that forms a valid consideration for the promise. *Bradford* v. *O'Brien*, 6 U. C. R. 417.

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2. Illegality.

Agreement not to Bid.]—An agreement to pay money on a party's not bidding at a sheriff's sale, is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land. *Waddell* v. *McCabe*, 4 O. S. 191.

Bond to Bailiff Making Seizure.]—Plaintiff declared on a special agreement not under seal, that in consideration that the plaintiff, then a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on the farm of one K, on account of a certain judgment obtained by the defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty: that he did afterwards sell, and that several persons claimed the goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay, yet that defendant refused to indemnify. A verdict having been found for the plaintiff:—Held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out to be a legal execution of the process, and therefore that the agreement was not illegal. *Robertson v. Broadfoot*, 11 U. C. R. 407.

Bond to Magistrate by Supposed Owner of Stolen Goods.]—A party suspected of stealing a horse, was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner (the prosecutor), but before doing so took a bond of indemnity:—Held, that such bond was not necessarily void, as contrary to the general policy of the law. *Ballard* v. *Pope*, 3 U. C. R. 317.

Bond to Sheriff for Salary.]—A bond given to secure a sheriff a certain fixed salary or otherwise, to be paid by his deputy, is void. *Foott* v. *Bullock*, 4 U. C. R. 480.

Boundaries — *Arbitration.*] — See, as to law of Quebec, *McGoey* v. *Leamy*, 27 S. C. R. 545.

Combination to Regulate Sale.]—Several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement stipulating that the several parties agreed to combine and amalgamate under the name of "The Canadian Salt Association," for the purpose of successfully working the business of salt manufacturing and to develop and extend the same, and which provided that all the parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees:—Held, on demurrer, that this agreement was not void as contrary to public policy, or as tending to a monopoly or being in undue restraint of trade; and that it was not ultra vires of such of the contracting parties as were incorporated companies, but was such in its nature as the court would enforce. *Ontario Salt Co.* v. *Merchants' Salt Co.*, 18 Gr. 540.

Composition — *Secret Benefit.*] — See BANKRUPTCY AND INSOLVENCY, II., ante col. 499.

Conveyance to Qualify Bail.]—Held, that a conveyance made for the purpose of enabling an irresponsible person to justify as special bail was a transaction against good conscience and morality. *Langlois* v. *Baby*, 11 Gr. 21.

Costs of Seizure Proceedings.]—The plaintiffs having a judgment against B. & P., agreed with defendant that if such judgment, or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one-third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if unsuccessful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized, were found, on an interpleader issue, to be the claimant's. The plaintiffs thereupon sued defendant on the agreement for their costs of defence in the interpleader, &c.:—Held, that if such agreement extended to those costs, it was illegal, as being contrary to public policy, if not within the definition of champerty; and if it did not so extend, the plaintiffs could not recover. *Kerr* v. *Brunton*, 24 U. C. R. 390.

Fraudulent Sale of Oats — *Public Policy.*] — The plaintiff purchased from an alleged company fifteen bushels of hulless oats paying therefor $10 a bushel and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats and the plaintiff's oats were sold to him and the defendant's notes for $300 were transferred to the plaintiff, the defendant getting the company's bond to sell sixty bushels for him at the same price. This was but one of a very large number of similar transactions and both the plaintiff and the defendant were aware of this, and that these transactions could not be carried out without some one else being induced to enter into a similar transaction by which their own would be completed and a loss probably suffered by their successors. The oats were not worth more than ordinary oats and the transactions were in fact speculative and fraudulent:—Held, that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at; that the tendency of that scheme was clearly contrary to the general well-being of the public and therefore that the transaction in question forming part of that scheme was against public policy and illegal, and that the plaintiff could not recover the amount of the notes given by the defendant. *Bonisteel* v. *Saylor*, 17 A. R. 505.

Immoral Consideration.] — In ejectment the defendant set up a claim to the land

under an agreement, which was based upon the immoral consideration of his marriage with the daughter of the plaintiff's testator, who, as he was aware, was already married, praying specific performance of the agreement, and for the execution of a conveyance of the land, or for a lien for the improvements made by him on the faith of such agreement:—Held, the agreement could not be enforced, nor could there be any lien for the improvements so made. *Moon* v. *Clarke*, 30 C. P. 417.

Immoral Consideration.]—A contract for transfer of property with intent by the transferor, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not void the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended. Judgment below, 20 A. R. 198, sub nom. Hager v. O'Neil, affirming 21 O. R. 27, affirmed. *Clark* v. *Hagar*, 22 S. C. R. 510.

Medical Practice—*Purchase by Apothecary.*]—The plaintiffs, S. and W.—S. being a licensed medical practitioner, and W. an apothecary—purchased the goodwill of the defendant's practice as a medical man at L., defendant agreeing not to practise within eight miles of that place. In an action on this agreement:—Held, that there was nothing illegal in the plaintiffs entering into partnership; that no intention could be inferred that W. should practise physic contrary to the statute; and that the fact of his not being licensed could therefore form no defence. *Swan* v. *Scott*, 23 U. C. R. 434.

No Notice of Illegality.]—Courts of equity cannot, any more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which on principles of the common law and under Acts of Parliament, are utterly void. *Gardiner* v. *Juson*, 2 E. & A. 188.

Partial Illegality — *Stifling Prosecution.*]—The manager of the business of an insolvent firm was arrested and imprisoned on a charge of having procured the firm, while in insolvent circumstances, to transfer certain of its property to another person with intent to defraud the creditors of the firm. After he had been released on bail an offer was made in writing by his wife and her son to the creditors of the firm to pay a certain percentage of their claims, in addition to the dividend to be paid by the estate of the firm, and to withdraw certain actions and procure the abandonment of certain claims, upon conditions set out in the offer, one of which was that any creditor accepting the offer should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. This offer was accepted by the plaintiff and a number of the other creditors. After it was made, the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage. In an action by one of the creditors upon some of the notes:—Held, that, although not stated in express terms, one object of the defendants in making their offer was to procure the stifling of the prosecution of the charge made against the husband; that it was in accordance with the concluded agreement made by the defendants with the plaintiff and the other creditors that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given on the illegal agreement thus entered into, could not be enforced. Rawlings v. Coal Consumers' Association, 43 L. J. M. C. 111; Windhill Local Board of Health v. Vint, 45 Ch. D. 351; and Jones v. Merionethshire Permanent Benefit Building Society, [1891] 2 Ch. 587, followed. Held, also, that as part of the consideration for the agreement was illegal, the whole was bad. Lound v. Grimwade, 39 Ch. D. at p. 613, followed. *Leggatt* v. *Brown*, 29 O. R. 530, 30 O. R. 225.

Partial Illegality.]—The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law. *Kitching* v. *Hicks*, 6 O. R. 739.

Railway Rates.]—Lowering rates by railways. See *Owen Sound Steamship Co.* v. *Canadian Pacific R. W. Co.*, 17 O. R. 691; *Langdon* v. *Robertson*, 13 O. R. 497.

Sale of Franchise.]—The declaration represented the plaintiffs and one C. to have individually associated themselves together for the purpose of procuring an Act of incorporation as a gas company, which they succeeded in obtaining; that for this and other services rendered they had acquired a claim against the company to a certain amount; that they were individually possessed of certain books, &c., belonging to themselves relating to the company, and that, at the request of the defendant and one H., they agreed to surrender and did surrender to defendant and H.: 1. All their said claim against the company; 2. the subscription lists; 3. the books, &c., of the plaintiffs; 4. as far as they lawfully could, their right to the interest in or control over the assets of the company and the charter of incorporation; for all of which defendant and H. jointly and severally bound themselves to pay the plaintiffs $3,000:—Held, on demurrer, that the declaration was good, for the sale alleged was not of the franchise and charter of the company, but of the mere claims of the plaintiffs therein, and their personal rights and interests in the concern. Held, also, at the trial, that evidence was admissible to shew that the subject of the sale was not the franchise itself, but a mere claim against or right in the company capable of being legally sold, and that the plaintiffs, on the evidence set out in the report, were entitled to hold their verdict. *Miller* v. *Thompson*, 15 C. P. 186; 16 C. P. 513.

Sale of Liquors for Use in County where Canada Temperance Act in Force—*Repeal of Act.*]—In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to a vote for the repeal of the Act, and the remainder

subsequent to a successful vote for its repeal, but before the order-in-council bringing the Act into force had been revoked:—Held, that the price of the liquors sold before was not, but that of those sold after the successful vote was, recoverable. Pearce v. Brooks, L. R. 1 Ex. 217, followed. *Smith* v. *Benton*, 20 O. R. 344.

Securing Dower.]—A. being about to sell a certain property, in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. and B. and their family:"—Held, a valid agreement, and not opposed to public policy. *Lavin* v. *Lavin*, 2 O. R. 187.

Stifling Prosecution.] — In an action on a bond executed by J., to secure an indebtedness of L. to plaintiff bank the evidence showed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute:—Held, that the consideration for said bond was illegal and J. was not liable thereon. *People's Bank of Halifax* v. *Johnson*, 20 S. C. R. 541.

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3. *Restraint of Trade.*

Breach — *Action—Parties.*]—A covenant not to engage or be interested directly or indirectly either by himself, or with, by, or through any other person or persons whomsoever, either as principal or agent, or otherwise howsoever, in the business of a baker within a fixed radius for a certain time is broken by the covenantor assisting the owners of a similar business without remuneration. One of several joint covenantees, in a covenant in restraint of trade, or an incorporated company to whom the interests of the covenantees in the business has been transferred, may, if interested in the goodwill, maintain an action for an injunction against the covenantor for breach of the covenant, notwithstanding that the other covenantees have ceased to be interested in the business. *Parnell* v. *Dean*, 31 O. R. 517.

Breach—*Assignment of Interest Pendente Lite—Right to Continue Action.*]—Upon the plaintiffs becoming the holders of shares in an incorporated trading company, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business, and given a right to repurchase the shares, and by which he covenanted, among other things, that if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations," in the same municipality. The agreement was terminated about six months later, and about a year after its termination the defendant's son began to carry on a similar business in the same municipality. The defendant, without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced him to customers of the company, and solicited orders for him from them:—Held, that, in order to establish a breach of the covenant, a legal contract of some sort between the defendant and his son must be shewn, and, failing such a contract, it could not be said that the defendant was "connected in any way" with his son's business within the meaning of the covenant. Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial:—Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant. Semble, that the benefit of the covenant would be assignable along with the shares. *Roper* v. *Hopkins*, 29 O. R. 580.

Certainty—*Reasonableness.*] — The male defendant sold his business of a wholesale and retail confectioner to the plaintiff, and covenanted that he would not during a limited period, either by himself alone or jointly with or as agent for any other person, carry on or be employed in carrying on the business of a retail confectioner in the same city, which should in any way interfere with the business sold to the plaintiff, and that he would, to the utmost of his power, endeavour to promote the interest of the plaintiff amongst his (the defendant's) customers. This defendant had carried on his wholesale business in the basement of his premises, and his retail business in the shop above, of which latter his wife, the other defendant, had the management. The business carried on in the shop included the sale of cakes, candy, &c., and the serving of lunches. In the sale to the plaintiff were included an assignment of the lease of these premises and all the chattels and fixtures, as well those used in the serving of lunches as in other ways. During the period limited by the covenant, and while the plaintiff was carrying on the business in the same way as the male defendant had previously carried it on and upon the same premises, the defendants began a precisely similar business in a shop in the same street, the shop being leased and the retail business carried on in the name of the wife, and that branch of the business conducted by her as theretofore, while the husband carried on the wholesale business in the basement. The jury found that the retail business was in fact that of the husband:—Held, that the serving of lunches was part of the business of a retail confectioner according to the meaning to be ascribed to those words in the covenant. 2. That the covenant was reasonable and sufficiently certain to be enforced by the court. 3. That general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business. Ratcliffe v. Evans, [1892] 2 Q. B. 524, applied, and followed. 4. That damages were properly assessed up to the date of the judgment. Stalker v. Dunwich, 15 O. R. 342, followed. *Turner* v. *Burns*, 24 O. R. 28.

Consideration.]—The plaintiff sued defendant on a bond conditioned not to commence business as an hotelkeeper within three years in a certain township. At the assizes the cause and all matters in difference be-

tween the parties in connection with it were referred. A verdict was taken for the penalty, subject to a reference. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract; but held, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract having been in restraint of trade it was necessary to shew a consideration, and none appeared in the declaration. *Dawes* v. *Wilkinson*, 19 U. C. R. 604.

General Restraint for Ten Years.]—The defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London, in this Province:—Held, that a covenant in the agreement that the vendor should pay $4,000 in the event of his carrying on business as an innkeeper within ten years, was void as an undue restraint of trade. *Mossop* v. *Mason*, 18 Gr. 453. See *S. C.*, 16 Gr. 302; 17 Gr. 360.

Intending Shareholders — *Right of Shareholders to Enforce after Incorporation.*] A mutual covenant with each other by persons engaged in the same trade throughout Canada, not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, is good. Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant. Breach of such a covenant may be restrained by injunction in an action by one or more of the other parties thereto though no actual damage is proved to have resulted from the breach. An agreement by a company, incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, &c., &c., for the sale of its stock of plate glass to a company to be formed with a covenant not to compete in the plate glass business with that company for twenty years, is valid and is not an ultra vires abandonment of its powers. One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company. *McCausland* v. *Hill*, 23 A. R. 738.

Limited Time—*Reasonableness — Public Policy.*]—On the purchase of a manufacturing business by the plaintiff from the defendants, the latter entered into a covenant with the plaintiff which was part of the terms of sale, that they would not engage directly or indirectly in the manufacture or sale of "bamboo ware and fancy furniture, either as principal, agent, or employee, at any place in the Dominion of Canada for the term of ten years from the date hereof. This clause does not prevent" (defendants) "from engaging in the retail business of furniture and bamboo ware selling. It covers wholesale or jobbing business:"—Held, that as the restraint of trade was partial only, being confined to manufacturing certain articles and to selling them by wholesale or by jobbing and for a limited time, and as there was no evidence on which it could be held to be unreasonable, and the interests of the public were not interfered with, the agreement was not contrary to public policy. *Cook* v. *Shaw*, 25 O. R. 124.

Purchasing Exclusively from Named Person.]—On sale of goods upon credit to a trader, the purchaser covenanted by deed with one E. F., a clerk of the vendors, to buy all his goods from them, and that E. F. should be at liberty, at any time while such business was carried on, to enter into the place of business and take possession of the goods and premises, and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount under the agreement:—Held, that the covenant not to purchase elsewhere was not binding on the purchaser; but that as he had received goods under the agreement, there was a sufficient consideration for the covenant, so as to entitle them to the remedies given by the deed; and that this was not such an agreement as required to be registered under the Chattel Mortgage Act, to enable the vendors to hold as against subsequent purchasers with notice. *Fisken* v. *Rutherford*, 8 Gr. 9.

Reference to Take Account.]—E., carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell by retail in Toronto, on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The court being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the master, although the answer professed to state the actual amount of sales, and on the motion for decree the answer had been read as evidence by the plaintiff. *Williamson* v. *Ewing*, 27 Gr. 596.

Selling Agent.]—D., on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person, for at least two years after leaving W.'s employ. W. moved for an injunction to restrain D., who had left her employ, from violating the above covenant:—Held, that the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate:—Held, also, that the above covenant was not invalid on grounds of public policy. A covenant in restraint of trade is not invalid unless

the restraint is larger and wider than the protection of the covenantee can possibly require. *Wicker* v. *Darling*, 9 O. R. 311.

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4. Statute of Frauds.

General Rule.]—The position of a defendant resisting a claim is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds. *Lawrence* v. *Errington*, 21 Gr. 261.

Agreement for Settlement.] — Quære, whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing signed by the agent of the party to be charged. *Gillespie* v. *Grover*, 3 Gr. 558.

Ante-Nuptial Contract—*Signature by Notaries.*] — An ante-nuptial contract not signed by the parties but by notaries in their own names, they having full authority to do so, was held sufficiently signed within the Statute of Frauds. *Taillifer* v. *Taillifer*, 21 O. R. 337.

Auction Sale — *Subsequent Correspondence.*]—Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. * * Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please receive deed for approval:" and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract;" —Held, affirming 8 A. R. 161, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe* v. *Stammers*, 11 S. C. R. 358.

Board for Life.]—An agreement to provide the plaintiff with board and lodging, during the term of his natural life:—Held, not within the statute, as it would not necessarily endure beyond a year. *Slater* v. *Smith*, 10 U. C. R. 630.

Book Canvasser—*Territory Taking More Than a Year to Cover.*]—The plaintiff entered into a verbal agreement with the defendants to canvass Canada for subscribers to a certain book, and on completing Canada to go to Liverpool and canvass for subscribers in England; the plaintiff to be paid $3 for each subscriber he should obtain in Canada, and $8 in England. In an action for terminating this agreement it was stated by the plaintiff in his evidence that the agreement as to Canada and England was all one; and that it would take from eight to twelve months to complete Canada and over two years to do the work in England:—Held, a contract not to be performed within a year, that being the intention of the parties and apparent from the nature of the employment; and that the plaintiff therefore could not recover:—Held, also, that the agreement was only to pay the plaintiff for every subscriber he should obtain, either party having the right to terminate the engagement, and the only claim the plaintiff could have against the defendants was for subscribers obtained before his dismissal, which the evidence here shewed that the plaintiff had been paid for. *Davies* v. *Appleton*, 25 C. P. 376.

Consideration Executed.] — The court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed. *Halleran* v. *Moon*, 28 Gr. 319.

Delivery — *Acceptance.*]—The defendants agreed orally to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f. o. b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading describing him as the consignor, and in it, under the heading "consignees," was written "Order of Bank of Montreal, advise Melady & McNairn" (defendants). A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft:—Held, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price:—Held, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute. *Scott* v. *Melady*, 27 A. R. 193.

Guarantee.]—As a written memorandum of an oral guarantee is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice. A letter shewing the terms, written by the guarantor partly on his own behalf and partly on behalf of a firm of debtors, and signed by him in the firm name and in his own name for them per proc., is sufficient to bind him. *Thomson* v. *Eede*, 22 A. R. 105.

Guarantee of Quality for Five Years.] —Plaintiff agreed with defendant for the purchase of a piano at a certain price, and upon certain terms of payment, defendant agreeing to guarantee that the instrument was then free from defect, and should so continue for five years; and that in case of its becoming defective within that period defendant would, upon plaintiff's returning it within that time, refund the purchase money:—Held, a contract not to be performed within a year. *Nicholls* v. *Nordheimer*, 22 C. P. 48.

Hiring for Year from Future Date.] —In an action on a verbal agreement made in

November, for the hiring of plaintiff by defendant for a year from the 1st December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper* v. *Davies*, 45 U. C. R. 442.

Hiring for Year or More.]—Held, that a contract for hiring for a year or more, defeasible within the year, is within s. 4 of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of $500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence, on the 3rd March then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon:—Held, clearly within the statute. *Booth* v. *Prittie*, 6 A. R. 680.

Marriage Engagement for a Year.]—To an action for a breach of promise of marriage, the plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August:"—Held, that this was not an agreement not to be performed within a year and was, therefore, not void under the statute, although not in writing. *Smith* v. *Jamieson*, 17 O. R. 62.

Memorandum in Writing.]—An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer. *McIntosh* v. *Moynihan*, 18 A. R. 237.

Memorandum Repudiating Contract.]—A letter referring to the terms of a contract made by an agent, but denying the authority of the agent to make it, is a sufficient memorandum within the Statute of Frauds. *Haubner* v. *Martin*, 22 A. R. 468, 26 S. C. R. 142.

Mine—*Agreement to Transfer Portion of Proceeds of Sale.*]—An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it was sold, is not a contract for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Partnership.]—A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. *Archibald* v. *McNerhanie*, 29 S. C. R. 564.

Part Performance.]—Held, that the staying of an action relating to the land in question, was a sufficient part performance to take the case out of the Statute of Frauds. *Coates* v. *Coates*, 14 O. R. 195.

Performance on One Side within the Year.]—M. being owner of the equity of redemption, verbally assented to an arrangement that "In consideration of the said M. having promised to give his personal covenant for the payment of the said balance of £300 (due on the mortgage), in three years from 10th February last, with interest to be paid half yearly as a collateral security, I will procure him an extension of time, as aforesaid, on receiving said covenant from him," which was embodied in a memorandum signed by the solicitor of the mortgagee, but without his authority. Proceedings were accordingly delayed on the mortgage for three years, on the faith of this promise; and the mortgagee subsequently instituted proceedings in this court to obtain a sale of the premises, and that M. might be ordered to pay any deficiency arising on such sale. Quære, as part of the agreement (that as to giving the covenant) was to be performed within a year, but the mortgagee's part embraced a period of three years, (as did also M.'s in regard to the time for payment), whether the Statute of Frauds would stand in the way of the plaintiff's recovery. Had M. performed his part by delivering his covenant, the mortgagee could have been compelled to execute his. *Christie* v. *Dowker*, 10 Gr. 199.

Performance on One Side within the Year.]—Plaintiff contracted with defendant for the sale to defendant of the goodwill of a business. Plaintiff's part of the agreement was to be performed within a year, though the execution of defendant's portion was to extend beyond that limit. In an action for non-payment of the purchase money:—Held, that the Statute of Frauds did not apply. *Christie* v. *Clark*, 27 U. C. R. 21; *S. C.*, 16 C. P. 544.

Performance on One Side within the Year.]—The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side. And, therefore, where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant under which the latter was to deliver double the number to the plaintiff at the expiration of three years:—Held, that the contract was not within the statute. *Trimble* v. *Lanktree*, 25 O. R. 109.

Performance Optional.]—Plaintiff contracted to clear 20 acres of defendant's land, receiving for his labour all the wood cut there, and he was to be allowed 14 months to perform his contract:—Held, not within the statute, as it might be performed within the year. *Hamilton* v. *McDonell*, 5 O. S. 720.

Printing Debentures — *Work, Labour, and Materials.*]—A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work, labour and materials, and is within the Statute of Frauds. *Canada Bank Note Co.* v. *Toronto R. W. Co.*, 22 A. R. 462.

Sale by Sheriff Acting as Assignee for the Benefit of Creditors.]—See *McIntyre* v. *Faubert*, 26 O. R. 427.

Service for a Year from Future Date.]—The plaintiff, on the 29th July,

agreed with defendants verbally to enter their service as book-keeper on the 1st September following, for a year from that day:—Held, a contract not to be performed within a year from the making thereof. *Dickson* v. *Jacques*, 31 U. C. R. 141.

Special Facts.]—Semble, that under the facts of this case the objection that the agreement upon which the plaintiff claimed a right to the use of defendant's cattle was not to be performed within a year, was not tenable. *Scouler* v. *Haley*, 8 U. C. R. 255.

Timber—*License to Cut.*]—As a general rule a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land. Upon a parol sale of timber for valuable consideration, with a parol license to enter upon the land during such time as should be necessary for the purpose of cutting and removing the timber, the defendant during the period allowed by the contract continued to cut and remove, notwithstanding he was notified not to do so:—Held, in an action of trespass and for damages for timber cut after the notice, that he was at liberty to shew the existence of the parol agreement in justification of what he had done, and under which no right of revocation existed, and to shew the part performance as an answer to the objection founded on the Statute of Frauds. *Handy* v. *Carruthers*, 25 O. R. 279.

Trust.]—L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, etc., to be arranged by the 1st May next." On the day that these papers were signed L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following: "Terms, $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the six thousand five hundred dollars are paid, when the deed of the entire property will be executed." The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500 and demanded a deed of the Parker property, which was refused. In an action against L. for the specific performance of the above agreement, the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds:—Held, that there was no completed agreement in writing to satisfy the Statute of Frauds. *Williston* v. *Lawson*, 19 S. C. R. 673.

Trust—*Deed in Name of Third Party.*]—M. agreed by written contract to give to B. an absolute deed of property as security for a loan the same to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name. The daughter having claimed that she purchased the property absolutely, and for her own benefit, an action was brought by M. against her and B. for specific performance of the contract with B. and for a declaration that the daughter was a trustee only subject to repayment of the loan. The defendants denied the allegation of collusion and conspiracy made in the statement of claim and pleaded the Statute of Frauds:—Held, that the evidence shewed that the daughter was aware of the agreement made with B. and the Statute of Frauds did not prevent parol evidence being given of such agreement. *Barton* v. *McMillan*, 20 S. C. R. 404.

III. Construction.

1. *In General.*

Advertisement—*Price.*]—S. & C., the proprietors of a weekly newspaper, seeing in another paper an advertisement of the defendants inviting subscriptions for stock, and stating that the share lists would close on the 10th December, 1874, on the 3rd November telegraphed H., the defendants' managing director, to ask if they might insert it in their paper, to which H. replied, "Yes. In the meantime send terms, must be low." The advertisement accordingly appeared in the paper on the 5th November, and was continued till 21st January, 1875, with an alteration made on the 26th November by B., defendants' agent at Toronto, being twelve insertions, for which plaintiff claimed at the rate of ten cents per line, or $32 for each insertion. On the 10th December S. & C. drew on defendants for $160, the sum then due at that rate, at 30 days, which was paid; and this action was brought to recover the balance, $224. There was no express contract to pay at such rate, but S. said that, in answer to H.'s telegram, he wrote to him that their charge was ten cents a line; and a notice to that effect also appeared in the paper. H. denied the receipt of the letter. In an action by plaintiff, as assignee of S. & C.:—Held, that the plaintiff could not recover, for that, even if the whole twelve insertions were allowed, the amount paid was, upon the evidence set out in the case, a fair remuneration therefor. *Sinclair* v. *Ottawa Iron and Steel Mfg. Co.*, 27 C. P. 410.

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

Agreement to Discontinue Business.]—B., a manufacturer of glassware, entered into a contract with two companies in the same trade by which, in consideration of cer-

tain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace" and the payments to B. should then cease unless he could shew "that said furnace or furnaces at the time said notice was given could not have a production of more than $100 per day:" — Held, that under this agreement B. was only required to shew that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period and that the words "could not have a production of more than $100 per day" did not mean mere capacity to produce that quantity whether it was actually produced or not. *North American Glass Co.* v. *Barsalou*, 24 S. C. R. 490.

Agreement to Supply Goods — *Property in Goods Supplied.*]—By an agreement between H., of the one part, and W. and wife of the other, the latter were to provide and furnish a shop and H. to supply stock and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns of stock, etc., on hand, and to remit weekly proceeds of sales with certain deductions. H. had a right at any time to examine the books and have an account of the stock, &c.; the net profits were to be shared between the parties; the agreement could be determined at any time by H. or by W. and wife on a month's notice:—Held, that the goods supplied by H. under this agreement as the stock of the business were not sold to W. and wife but remained the property of H. until sold in the ordinary course; such goods, therefore were not liable to seizure under execution against H. at the suit of a creditor. *Ames-Holden Co.* v. *Hatfield*, 29 S. C. R. 95.

Building Contract.] — The contract, based upon the separate tenders by the different tradesmen signing it, was as follows; "We the undersigned hereby agree to build, erect, complete, and finish the dwelling house, &c., mentioned in the foregoing specifications, for the respective sums hereinafter specified, by the time mentioned in the condition of said specifications, and according to the following trades." The trades with the contract price for each were then set out, a space being left after each for the respective contractors to sign their names; and the plaintiff thus contracted for the carpenter and joiner's work: — Held, a several contract between each tradesman and the defendant, not a joint contract with all. *Lee* v. *Bothwell*, 24 C. P. 109.

Building Contract—*Dismissal of Contractor—Right to Remove Material and Plant.*]—By a contract for the erection of certain buildings, the contractor was to supply all labour, material, apparatus, scaffolding, utensils and cartage of every description needful for the performance of the work; and was to deliver up to the owner the work in proper repair, &c., when complete, and was not to sub-let any part of the works without the architect's consent; and all work and material as delivered on the premises were to form part of the works and be considered the property of the owner, and not to be removed without his consent, the contractor to have the right to remove all surplus material after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with the plaintiff for the excavation, brick, and masonry work, and the plaintiff commenced work under his sub-contract and continued to work for some time when he was ordered to discontinue by the architect:—Held, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such), material placed there after he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, &c., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings; but that plaintiff was not entitled to remove any material placed there before he was ordered to discontinue; and that no demand was necessary, it appearing that the owner was using the same, and thus committing an act of conversion. *Ashfield* v. *Edgell*, 21 O. R. 195.

Building Hoist.] — On a contract to put up hoists to be "capable of raising a weight of 2,000 lbs. without risk:"—Held, that the contract required the hoists to be capable of working in the ordinary way with a weight of 2,000 lbs. *Hamilton* v. *Myles*, 23 C. P. 293.

But see *S. C.*, in appeal, 24 C. P. 309.

Change in Plans and Specifications.] —The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became necessary. The appellants were then given new plans and specifications by the chief engineer of public works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge. Under the provisions of the written contract, the chief engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the official arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate. On appeal from this award:—Held, (1) that s. 7 of 31 Vict. c. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the department [of public works], or shall be held to be acts of the minister [of public works] unless signed and sealed by him or his deputy, and countersigned by the secretary," only refers to executory contracts, and does not affect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him. (2) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim

before the arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants. *Starrs* v. *The Queen*, 1 Ex. C. R. 301.

Charter of Tug—*Demise or Hiring.*]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug * * * * to tow two barges from * * * for which I agree to pay * * * owner to supply engineer and captain * * * *." The tug on the voyage was run on a rock through the negligence of the captain:—Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage. *Thompson* v. *Fowler*, 23 O. R. 644.

Construction of a Public Work.]—It was a term in suppliant's contract with the Crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the department of railways and canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant. The suppliant, immediately after entering upon the execution of his contract, notified A., the proper officer of the department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place. The inspector was not appointed until a considerable time afterwards, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavourable weather and at greater cost, for which he claimed damages:—Held, that the Crown was not bound under the contract to have the inspection made at any particular place; and that in view of s. 98 of the Government Railways Act, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the Crown by any new promise. The suppliant's contract contained the following clause:—"The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the minister:"—Held, that the clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss. *Mayes* v. *The Queen*, 2 Ex. C. R. 403, 23 S. C. R. 454.

Cutting Ice.]—An agreement by which M. undertook to cut and store ice, provided that the ice houses and all implements were to be the property of P., who, after completion of the contract, was to convey same to M., and that M. was to deliver said ice to vessels to be sent by P., who was to be obliged to accept only good merchantable ice so delivered and stored:—Held, that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. under the agreement, and not the ice, which was at M.'s risk and shipped by him. *North British and Mercantile Insurance Co.* v. *McLellan*, 21 S. C. R. 288.

Delivery of Lumber when Able.]—An agreement that A. shall saw certain logs, and deliver the lumber at his mill to B. as soon as he is able, such sawing to be paid for immediately on delivery, is not void for uncertainty. *O'Donnell* v. *Hugill*, 11 U. C. R. 441.

Employers' Liability Policy—*Defence of Actions.*]—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor:"—Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counterclaim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendants' solicitor, a sufficient compliance with the condition. *Wythe* v. *Manufacturers' Accident Insurance Co.*, 26 O. R. 153.

Furnishing Material — *Freight.*] — Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk Railway, and furnish the iron, "same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between the freight and insurance by steamships and first-class sailing ships:"—Held, that they were bound to pay such difference on all shipments, not merely on those made at a time when sailing vessels could be procured. *Coulson* v. *Gzowski*, 22 U. C. R. 33.

Inconsistent Conditions—*Dismissal of Contractor — Architect's Powers.*] — A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: In case the works from the

want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the court house committee, or commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor:"—Held, that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee. *Neelon* v. *City of Toronto*, 25 S. C. R. 579.

Insurance—*Agreement to Assign or Prosecute.*]—Declaration on a fire policy for $1,000: plea, on equitable grounds, stated that by the policy whenever the defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants if requested:—Semble, that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute. *Recsor* v. *Provincial Insurance Co.*, 33 U. C. R. 357. See also *Provincial Insurance Co.* v. *Recsor*, 21 Gr. 296.

Kingston Waterworks.] — Held, that under the agreement between the company and the corporation set out in this case, the company were not bound to supply water gratuitously to the city for any purpose at more than twenty hydrants. *City of Kingston* v. *City of Kingston Water Works Co.*, 19 U. C. R. 490.

Lease—*Assignment.*]—Articles of agreement made on, &c., between O. of the first part, and S. of the second part, witnesseth that the said O. hath agreed to sell, and by these presents doth bargain and sell unto said S., all and singular that certain leasehold property and premises, being composed of, &c., for the price of £250, to be paid as follows: £50 down, and the remainder in four equal annual instalments. Then followed a covenant by O. that if S. should duly pay the said sums, and should pay and save harmless said O. from the rent due by the leases under which O. held, then the said O. would assign and convey the aforesaid leasehold, and the appurtenances thereof, by said S.:—Held, an agreement to assign only, not an assignment of O.'s interest. *Taylor* v. *Sutton*, 18 U. C. R. 615.

Maintenance—*Place of Residence.*]—The plaintiff conveyed his farm to the defendant, his son, subject to the payment of an annuity of $60 a year; and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm, and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, &c., but becoming dissatisfied left:—Held, that the plaintiff was not bound to reside with defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year. At the trial, the defendant's counsel raised the objection that the amount if any, was only payable at the end of the year. The trial Judge overruled the objection, and decreed that plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the Judge acceded, and gave judgment accordingly:—Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney* v. *Sweeney*, 16 O. R. 92.

Managing Vessel.] — Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in England, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent. On the trial it appeared that E. V., a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shewn that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at Liverpool, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to New Orleans, of which appellant disapproved. Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the Atlantic. A correspondence ensued, and on the 17th November, 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then reasserted his right to control the vessel, stated in detail his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200 in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant:—Held, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction, the contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name. *Weldon* v. *Vaughan*, 5 S. C. R. 35.

Manufacturing Wheat into Flour.] —Semble, that if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recover the value of the wheat delivered to defendant, the latter cannot recover for goods sold for part of the wheat which had, in point of fact, been re-de-

livered to the plaintiff; and that such re-delivery should have been proved in mitigation of damages; and that an action upon the common counts could not at any rate be sustained. *Andrus* v. *Burwell*, Tay. 382.

Manufacturing Wheat into Flour.]—In consideration that the plaintiff would deliver to defendant 2,000 bushels of wheat; defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour:—Held, that "therefrom" must be construed thereafter, and not that the flour was to be made from the identical wheat delivered. It was therefore clearly no defence to plead that the defendant's mill, containing the wheat, was burnt down without any negligence on his part; though he would have been excused in that case on the other construction of the agreement. *Tilt* v. *Silverthorne*, 11 U. C. R. 619.

Manufacturing Wheat into Flour.]—The plaintiff, having purchased a quantity of wheat, defendant agreed that, on condition of the plaintiff delivering to defendant wheat of the same quality as the sample previously shewn to defendant, to be ground into flour, the defendant would manufacture the said wheat into flour, and for every four bushels and forty pounds of wheat, of the quality and according to the sample received, he would deliver one barrel of flour which should pass inspection as superfine at Montreal:—Held, that the contract was not a contract for the sale of the wheat but an agreement to manufacture for the plaintiff the identical wheat delivered into flour; that it was a condition precedent, on the plaintiff's part, that the wheat delivered should be of the same quality as the sample; that an acceptance of the wheat by defendant, and his manufacturing it into flour, did not cause the rules prevailing between vendor and vendee to apply with equal force in this case as in the case of an absolute sale, to conclude the defendant from afterwards disputing the correspondence of the wheat delivered with the sample. *Stephenson* v. *Ranney*, 2 C. P. 196.

Mercantile Contract—*General Rule.*]—The construction of a mercantile contract is for the court, unless it contains words of a technical or conventional use in the trade to which the contract relates. *Nordheimer* v. *Robinson*, 2 A. R. 305.

Mining Agreement.]—The plaintiffs and defendant entered into a joint venture to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the mineral right in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under s. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. The defendant obtained an Act incorporating a company to work the mine and issued stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued the defendant for not forming the joint stock company, or carrying on mining operations, and having obtained a verdict for $400:—Held, that the verdict must be reduced to nominal damages. *Johns* v. *Beck*, 24 C. P. 219.

Held, also, that the conveyance by the municipality of the mineral rights, under s. 442, was sufficient, and that s. 441 for stopping of a road allowance did not apply. *Ib.*

Held, also, that although the conveyance of the mineral rights was to R. B. J., the defendant could not urge that he could not be compelled to convey, owing to the absence of any writing; and that the plaintiffs having control of the title, were in a position to aver and prove their readiness to perform the agreement. *Ib.*

Mineral Rights—*Right to Possession.*]—By an agreement made on the 13th January, 1897, in consideration of one dollar, the owner of certain lands agreed "to lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery and conveniences for mining, quarrying and boring on said premises, and to erect buildings thereon for said tools and machinery, and for housing employees, and also to drain said premises and to build necessary railroad thereon." "Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before 1st August, 1897." "Unless said (plaintiff) utilizes said premises for said purposes on or before 1st August, 1897, this lease shall be null and void:"—Held, that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords. *Haven* v. *Hughes*, 27 A. R. 1.

Newspaper—*Engagement of Editor—Dismissal.*]—A. B. and C. B. who had published a newspaper as partners or joint owners entered into a new agreement by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. the agreement provided that: "3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, &c., qu'en argent jusqu' au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger." The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of

A. B., wrote editorials violently opposing the candidate of that party at an election and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "rédacteur et directeur" of the newspaper and claiming damages:—Held, that C. B. by the agreement had become the employee of A. B. the owner of the paper; that he had no right to change the political colour of the paper without the owner's consent and that he was rightly dismissed for so doing. *Bélanger* v. *Bélanger*, 24 S. C. R. 678.

Partnership—*Business Sold—New Business by One.*]—S. and H., trading as partners, sold out their business to E. under a written agreement, as follows:—"S. and H. do hereby bind themselves to E. under a penalty of $2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.:—Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt. *Elliott* v. *Stanley*, 7 O. R. 350.

Penalty.]—Upon a contract to do certain work within a specified time, with a penalty of £4 per week in case of default as rent of the premises:—Held, that an action would lie at the suit of the plaintiff to recover this sum from defendant, though by the agreement it was to be deducted from the last payment. *Gaskin* v. *Wales*, 9 C. P. 314.

"Plant" — *"Horses."*] — By one of the clauses of a railway contract for excavation, "all machinery and other plant, materials and things whatsoever," provided by the contractor were until the completion of the work to be the property of the company, when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words "teams and horses" were respectively used as well as the word "plant:"—Held, under the contract, that horses were not included in the word "plant:" and that expert evidence was not admissible to explain its meaning. *Middleton* v. *Flanagan*, 25 O. R. 417.

Printing Contract.]—On the 2nd July, 1869, the plaintiff contracted with one H. as clerk of the joint committee of both Houses of Parliament to do the printing, &c., for both Houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, to be specified in requisitions to be made upon him by the departments respectively, including the post-master-general's department, at scheduled prices; which were lower than under the first contract, and so tendered for as alleged by plaintiff, because he expected in cases where similar matter was required under both contracts, to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of and paid for by such departments, and the copies required for Parliament were ordered and paid for separately through the clerk of the joint committee on printing; but afterwards, by resolution of the committee, concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments, with which the departments should be charged. The reports of the postmaster-general having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department:—Held, that he had no such right. *Taylor* v. *Campbell*, 33 U. C. R. 264.

Printing—*Exclusive Right.*]—Under 32 & 33 Vict. c. 7 (D.), which provides that the printing, binding, and other like work required for the several departments of the government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under-Secretary of State advertised for tenders for the printing "required by the several departments of the government." The suppliants tendered for such printing, the specifications annexed to the tender, which were supplied by the government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and Her Majesty, by which the suppliants agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, &c., of every description and kind soever coming within the denomination of departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing:—Held, that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance, and the contract, there was a clear intention shewn that the contractors should have all the printing that should be required by the several departments of the government, and that the contract was not an unilateral contract, but a binding mutual agreement. *Regina* v. *MacLean*, 8 S. C. R. 210.

Raising Vessel.]—Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company: that the vessel was lost: that by the policy defendants were allowed in certain cases to interpose, recover and repair the vessel: that the vessel sank while towed by plaintiff's tug: that defendants and the other company, being desirous of recovering the vessel, by their respective duly authorized agents in that behalf entered into an agreement in writing with plaintiff, reciting the loss, and that plaintiff should raise the vessel for $3,000, and the plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators, one to be chosen by the plaintiff, another by the defendants and the other company, and the third by the two so chosen, the question by whom said money and other expenses should be paid, &c.: that the plaintiff raised the vessel: had always been willing to appoint, and did appoint,

an arbitrator, and was willing to submit such question, &c., of which the two companies had notice, and although the plaintiff requested them, &c., yet the defendants always since wrongfully refused, either in concert with the other company or otherwise, to appoint an arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf and that of the other company, and by reason of such wrongful refusal, &c., &c.: — Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was by an agent duly authorized, it could not be assumed that the authority was not full and sufficient:—Held, also, that the contract disclosed was joint; that defendants could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and that, there being no plea in abatement, the declaration was good against the demurrer. *Calvin* v. *Provincial Insurance Co.*, 20 C. P. 21.

Sale—*Special Letter.*]—Held, that the defendant by his letter set out in the case agreed to deliver to the plaintiff a billiard table made by the English maker mentioned in the letter, and having failed to do so he was liable to pay the full price of the table obtained from the plaintiff in exchange. *May* v. *McDougall*, 18 S. C. R. 700.

Sale of Goods—*Quantity—Description—"Car-load."*]—The defendants agreed to buy from the plaintiff a car-load of hogs at a rate per pound, live weight. The plaintiff shipped a "double-decked" car-load, and the defendants refused to accept this, contending that a "single-decked" car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car-load of hogs," and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other:—Held, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car-load, the defendants were bound to accept. *Hanley* v. *Canadian Packing Co.*, 21 A. R. 119.

Sale of Iron Works—"*Tools.*"]—On a sale of malleable iron works "and all machinery and tools in and about the said works connected therewith:" — Quære, whether annealing pots used in the manufacture of iron would pass under the word "tools;" but held, that this was a question for the jury. *Filschie* v. *Hogg*, 35 U. C. R. 94.

Sale of Timber—*Removal.*]—One of the conditions of sale was, that the timber was to be removed by T. within two years:—Held, that the effect of the condition was that T. was only to have the right to cut and remove the timber within two years from the date of the agreement. *Steinhoff* v. *McRae*, 13 O. R. 546.

Sale of Timber—*Time for Payment.*]—By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted. . . . Settlement to be finally made inside of thirty days in cash less 2 per cent. for the dimension timber which is at John's Island:"—Held, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co.* v. *Irwin*, 24 S. C. R. 697.

Sale—*Security — Contre Lettre — Law of Quebec.*]—See *Hunt* v. *Taplin*, 24 S. C. R. 36.

Service—*Arbitrary Right of Dismissal.*]—By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation. By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal but to have no claim whatever against his employer. M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders:—Held, reversing 17 A. R. 139, and 16 O. R. 495, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal, but that such dismissal did not deprive M. of his claim for a share of the profits of the business. *McRae* v. *Marshall*, 19 S. C. R. 10.

Sewer—*Extension of Time—Power to Employ Labour to Hasten Work.*]—A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices, provided for its completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams, and procure such materials, as might be deemed necessary to complete the work by the day named for completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers

above conferred:—Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications. *Mangan* v. *Town of Windsor*, 24 O. R. 675.

Special Award.]—Under the award and declaration, as given in the statement of this case, the court held that the amount of £500 awarded to be paid by quarterly instalments, was stated with sufficient certainty. *Watson* v. *Sutherland*, 1 U. C. R. 229.

Supply of Gas—*Montreal Gas Company—Right to Stop Supply.*]—See *Montreal Gas Company* v. *Cadieux*, [1899] A. C. 589, reversing 28 S. C. R. 382.

Telephone Company—*Orders for Messengers.*]—The defendants were a company carrying on a general telephone business with a central office to connect subscribers' telephones, and in addition carried on a messenger business for the purpose of delivering letters, messages, &c. By an agreement the defendants assigned their messenger business to the plaintiffs and covenanted that they would not transmit or give directly or indirectly any messenger order to any person, except the plaintiffs, and that they would cease to do such business. The G. N. W. Telegraph Co., (one of the defendants' telephone subscribers), subsequently opened an office for a messenger business, and applied for a telephone in the usual way, which the defendants supplied them with, and by means of it the G. N. W. Telegraph Co. received orders for messengers, &c.:—Held, that the defendants did not transmit or give messenger orders when they placed a subscriber in communication (through the central office) with the G. N. W. Telegraph Co., that they only afforded him a medium by which to transmit or give his own order, which was a case not provided for by the agreement, and the action for an injunction to restrain defendants was dismissed with costs. *Electric Despatch Co.* v. *Bell Telephone Co.*, 17 O. R. 495, 501, 17 A. R. 292, 28 S. C. R. 83.

Timber—*Removal of.*]—The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land, "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber:—Held, affirming 19 A. R. 176, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendants' right, under the general grant of the trees, to remove the trees across the cleared land. *Stephens* v. *Gordon*, 22 S. C. R. 61.

Timber Slides—*Safe Passage.*]—An express or implied contract for safe transport is not created with the Crown because an individual pays tolls, imposed by statute for the use of a public work, such as slide dues, for passing his logs through government slides. *Regina* v. *McFarlane*, 7 S. C. R. 216.

Time for Payment.]—"For value received I promise to pay J. M., and M., or their order, the sum of £102 15s. cy., to be paid in yearly proportions:"—Held, to give two years for payment. *McQueen* v. *McQueen*, 9 U. C. R. 536.

Time.]—Where under a building contract work was to be completed by "November 31st" under penalty of damages:—Held, that this must be construed to mean 30th November. *McBean* v. *Kinnear*, 23 O. R. 313.

Toronto Street Railway—*Liability to Keep Pavements in Repair—Local Rates.*]—See *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

Waterworks—*Extension of Works—Repairs.*]—By a resolution of the council of the town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q. art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council:—Held, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town:—Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *Ville de Chicoutimi* v. *Légaré*, 27 S. C. R. 329.

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2. *Conditions.*

Agreement Conditional on Verdict.]—In trespass for mesne profits, before the verdict was taken, the plaintiff's attorney and the defendant signed a paper, by which it was agreed the costs in the suit should be left to be taxed by, &c., and the value of the mesne profits should be decided by, &c., in case a verdict

should be given for the plaintiff:—Held, that the words, "in case a verdict shall be given for the plaintiff," left it open to defendant to contend against a verdict at the trial upon any grounds in law, or upon the merits. *Patterson* v. *Prince*, 7 U. C. R. 528.

Certificate of Engineer.]—O. D. & Co. contracted with the government to complete certain telegraph works, and M. afterwards contracted with O. D. & Co. to construct part of the said works, in which latter contract O. D. & Co. covenanted to pay M. at the rate mentioned therein per mile, but the contract was expressed to be subject to the condition that the said payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the minister of public works, and service of a copy of such estimate on O. D. & Co.:—Held, that this alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof a condition precedent to M.'s right to recover for work done under his contract. *McDonald* v. *Oliver*, 3 O. R. 310.

By a third contract T. M. and G. M. contracted with both M. and O. D. & Co. to make advances to M., and to become security for M.'s due completion of the work, it being agreed therein that "upon the completion of the contract O. D. & Co. should pay T. M. and G. M. the amount due them by M. for supplies, before paying M. anything:"—Held, that there must be an amount owing by O. D. & Co. to M., for which M. could recover against them, before O. D. & Co. were liable under the above contract to pay T. M. and G. M. anything, and that the intention was only to enable T. M. and G. M. to intercept payment by O. D. & Co. to M. of money due from them to M. *Ib.*

Certificate of Engineer.]—In 1879 the respondent filed a petition of right for the sum of $608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F., who held at the time the position of chief engineer. In 1880, F. having resigned, F. S. was appointed chief engineer of the Intercolonial Railway, and investigated, amongst others, the respondent's claim, and reported a balance in his favour of $120,371. Thereupon the respondent amended his petition and made a special claim for the $120,371, alleging that F. S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the court by special case. This report was never approved of by the Intercolonial Railway commissioners or by the minister of railways and canals under 31 Vict. c. 13, s. 18:—Held, reversing 1 Ex. C. R. 321, (1) per Ritchie, C.J., and Gwynne, J., that the report of F. S., assuming him to have been the chief engineer to give the final certificate under the contract, cannot be construed to be a certificate of the chief engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the government be founded thereon. (2) Per Ritchie, C.J., that the contractor was not entitled to be paid anything until the final certificate of the chief engineer was approved of by the commissioners or minister of railways and canals: 31 Vict. c. 13, s. 18, and 37 Vict. c. 15. Jones v. The Queen, 7 S. C. R. 570. (3) Per Patterson, J., that although F. S. was duly appointed chief engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the eleventh clause of the contract, yet as it is provided by the fourth clause of the contract that any allowance for increased work is to be decided by the commissioners and not by the engineer, the suppliant is not entitled to recover on F. S.'s certificate. Per Strong, Taschereau, and Patterson, JJ., that the office of commissioners having been abolished by 37 Vict. c. 15, and their duties and powers transferred generally to the minister of railways and canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificates of the chief engineer. *The Queen* v. *McGreevy*, 18 S. C. R. 371.

Certificate of Engineer.]—A sub-contract for the construction of a part of the North Shore Railway provided inter alia, that, "the said works shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials which in his opinion do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his engineer that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled." Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at $79,142.65, and after deducting the money paid to and received by the sub-contractor, and correcting a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the sub-contractor. Held, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover. *Guilbault* v. *McGreevy*, 18 S. C. R. 609.

Certificate of Engineer — *Bulk Sum Contract—Interest.*]—In a bulk sum contract for various works and materials, executed, performed and furnished on the Quebec harbour works, the contractors were allowed by

the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for $181, 241 for alleged balance of contract price and extra work:—Held, (1) that the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and, therefore, the certificate in this case should be corrected in that respect. (2) That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886. Strong and Gwynne, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs. *Peters* v. *Quebec Harbour Commissioners*, 19 S. C. R. 685.

Certificate of Engineer — *Extras.*]—A contract entered into between Her Majesty the Queen, in right of the Province of Quebec, and S. X. Cimon for the construction of three of the departmental buildings at Quebec, contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered, shewing the total amount of work done, and materials furnished, and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the commissioner of public works in matters in dispute upon the taking over or settling for the works. The commissioner of public works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate declared that a balance of $31.36 was due upon the contract price and $42.84 on extras. The suppliants by their petition of right claimed, inter alia, $70,000, due on extras. The Crown pleaded general denial and payment:—Held, that the suppliants were bound by the final certificate given by the engineer, under the terms of the contract. *The Queen* v. *Cimon*, 23 S. C. R. 62.

Certificate of Engineer.]—By s. 18 of 31 Vict. c. 13 (The Intercolonial Railway Act, 1867), it was enacted that no money should be paid to any contractor until the chief engineer should have certified that the work for or on account of which the same should be claimed had been duly executed, nor until such a certificate should have been approved by the commissioners appointed under such Act. By 37 Vict. c. 15 the duties and powers of the commissioners were transferred to the minister of public works, and their office abolished. By 42 Vict. c. 7 the department of railways and canals was created, and the minister thereof became in respect of railways and canals the successor in office of the minister of public works, with all the powers and duties incident thereto. The suppliants claimed certain extras under two contracts made in pursuance of the statute first mentioned for the construction of portions of the railway, but had never obtained any certificate as required by such statute from the chief engineer of the railway at the time of the execution of the work. After the resignation of F., the original chief engineer, S. was appointed to such office for the purpose of investigating "the unsettled claims which had arisen in connection with the undertaking, upon which no judicial decision had been given, and to report on each case to the department of railways and canals." S. investigated the suppliants' claims amongst others, and made a report thereon recommending the payment of a certain sum to the suppliants. This report was not approved by the minister of railways and canals, as representing the commissioners, nor was it ever acted upon by the government:—Held, following The Queen v. McGreevy, 18 S. C. R. 371, that the report of S. was not such a certificate as was contemplated by the statute and the contracts made thereunder. *Ross* v. *The Queen*, 4 Ex. C. R. 390.

Certificate of Engineer—*Refusal to Give.*]—By their contract with the Crown for the construction of certain works on the Galops Canal the claimants agreed, inter alia, that cash payments, equal to 90 per cent. of the work done, approximately made up from returns of progress measurements and computed at contract prices, should be made to them monthly on the written certificate of the engineer, stating that the work so certified by him had been executed to his satisfaction and amounted to a sum computed as above mentioned. This certificate was to be approved by the minister of railways and canals, and to constitute "a condition precedent to the right of the contractors to be paid the said 90 per cent. or any part thereof." It was further agreed that the remaining 10 per cent. "should be retained until the final completion of the whole work to the satisfaction of the chief engineer for the time being having control over the work, and that within two months after such completion, the remaining 10 per cent. would be paid." It was also agreed that the written certificate of the engineer certifying to the final completion of said works to his satisfaction should be a condition precedent to the right of the contractors to be paid the remaining 10 per cent. or any part thereof:—Held, that as the parties had agreed to be bound by the judgment of the engineer, the court had no power to alter or correct any certificate given by him in pursuance of the terms of the contract. (2) That in the absence of fraud on the part of the engineer in declining to give a certificate for a claim put forward by the contractors, the court will not review his decision. *Murray* v. *The Queen*, 5 Ex. C. R. 19. See the next case.

Certificate of Engineer — *Revision by Succeeding Engineer — Progress Estimate.*]—A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the minister of railways and canals, that the work certified for had been executed to his satisfaction; the certificate so approved was to be a condition

precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient:—Held, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer. Held, also, that the contractors could proceed by action if payment on a monthly certificate was withheld and were not obliged to wait the final completion of the work before suing. *Murray* v. *The Queen*, 26 S. C. R. 203.

Certificate of Engineer — *Amendment —Progress Estimates.*]—The eighth and twenty-fifth clauses of the appellant's contract for the construction of certain public works were as follows:—"8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications, and drawings, shall be final, and no works or extra or additional works or charges shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;"—but, before the contract was signed by the parties, the words "as to the meaning or intention of this contract, and the plans, specifications and drawings" were struck out. "25. Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned and upon approval of such certificate by the minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof." A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water-tight" embankment under the provisions of the contract and specifications relating to the works and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the minister of justice by the minister of railways and canals, and an opinion favourable to the contention of the contractor given by the minister of justice, made a certificate upon a progress estimate for the amount thus in dispute in the usual form but added after his signature the following words:—"Certified as regards item 5 (the item in dispute), in accordance with the letter of deputy minister of justice, dated 15th January, 1896." The estimate thus certified was forwarded for payment, but the auditor-general refused to issue a cheque therefor:—Held, that, under the circumstances of the case, the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer, adopted the construction placed upon the contract in the legal opinion given by the minister of justice, was properly granted within the meaning of the twenty-fifth clause of the contract. Murray v. The Queen, 26 S. C. R. 203, distinguished. Judgment in 5 Ex. C. R. 293, reversed. *Goodwin* v. *The Queen*, 28 S .C. R. 273.

Certificate of Engineer.] — The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a third person. *Good* v. *Toronto, Hamilton and Buffalo R. W. Co.*, 26 A. R. 133. Affirmed 30 S. C. R. 114, sub nom. *Dominion Construction Co.* v. *Good*.

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

Certificate of Named Person—*Effect of Part Payment.*]—Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part performance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming full performance, and to the satisfaction, &c., as a condition precedent, the contract being in consideration of performance, and not in consideration of the covenant to perform. *Coatsworth* v. *City of Toronto*, 10 C. P. 73.

Certificate of Superintendent.]—By a contract between plaintiff and a city municipality for additions and improvements to its system of waterworks, it was provided that all differences, &c., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work:—Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator; and on the evidence that no cause existed to restrain him from proceeding with the reference. *McNamee* v. *City of Toronto*, 24 O. R. 313.

Conditional Promise.]—After negotiations had taken place for the sale of a farm at $9,500, the following contract was signed by the purchasers:—"We agree to take your farm and pay you $9,000, and if we get along fairly well we will give you the other $500 as soon as we are able:"—Held, that the provision as to the $500 was a conditional promise which might be enforced on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew. *Sylvester* v. *Murray*, 26 O. R. 599, 705.

Extras.]—The contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects:—Held, that extras could not be allowed unless a writing was proved. *Wood* v. *Stringer*, 20 O. R. 148.

Moneys Intrusted for Investment—*Transfer*—*Prête-nom*—*Condition Precedent*—*Law of Quebec.*]—See *Moodie* v. *Jones*, 19 S. C. R. 266.

Notes Payable in Work.]—Where an action was brought on notes payable in work:—Held, that the plaintiff could recover without proving a demand and refusal to do some specific work, it being incumbent on the defendant to offer to perform work for the plaintiff. *Teal* v. *Clarkson*, 4 O. S. 372.

Payment.]—Where payment is to be a condition precedent or a concurrent act, and is to be made in a certain manner, the plaintiff must aver a readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everardo*, 3 U. C. R. 154.

Payment.]—Defendant agreed to saw for plaintiff a certain quantity of logs, which plaintiff was to deliver at his mill, at specified rates, which would have amounted in all to £500, and it was stipulated that the money should be paid "in cash, or by a negotiable note, at three months, at the end of each month's work." To an action for not sawing logs so delivered, defendant pleaded that he had sawn some of the logs, but the plaintiff refused to pay him therefor, and that he had recovered judgment for such default, which judgment was still unsatisfied:—Semble, a good defence. *Buchanan* v. *Anderson*, 16 U. C. R. 331.

Payment.]—The declaration claimed damages for breach of a contract between plaintiff and defendant for sawing timber, containing an agreement by defendant to supply the plaintiff with such a portion of the price as would enable the plaintiff to carry out the contract, but did not aver any demand on or refusal by the defendant to supply such moneys:—Held, bad on demurrer, for the payment was not a condition precedent to plaintiff's performance. *Tullock* v. *Wells*, 7 C. P. 47.

Payment—*Waiver.*]—Defendant agreed to sell to plaintiff certain American currency or "greenbacks" in four specified sums, amounting in all to $57,000 of that currency, plaintiff giving him with each transaction his note in Canadian currency, the four notes being payable at different times and for different amounts, and also depositing with each of the first two notes a certain sum of the latter currency, while with the fourth he deposited $400 in American currency, as collateral security. Defendant then delivered to plaintiff four of the usual broker's notes, in this form, "Sold to * * deliverable on payment of his note due * * the sum of * * in American currency." After the maturity of the first note plaintiff asked defendant if it was necessary to renew it, when defendant said not, as it drew interest; but, after the others had fallen due, defendant wrote to plaintiff that his notes being still unpaid, he could not carry the amount of American currency longer, and had therefore converted it at that day's rate of exchange, charging his account with the same. After this, plaintiff applied to defendant and his solicitors for the notes, tendering in payment a certain sum, which was short by some $10 or more, and the cheque of one M.; but the solicitors refused to give up the notes, stating that they had been practically paid (by the conversion of the greenbacks). It further appeared that the plaintiff had drawn out of defendant's hands all his money but the $400 deposit in greenbacks. Plaintiff sued defendant on his agreement to deliver the American currency, alleging his readiness and willingness to pay the notes, but that defendant waived the payment on the days they became due, and that within a reasonable time afterwards, and before action, he tendered their amount to defendant, who refused to accept it:—Held, that the payment of the notes was a condition precedent to delivery of the "greenbacks;" that in the absence of any justification for the non-payment, plaintiff could not recover; and that there was no evidence of plaintiff's readiness to pay the notes, or of the waiver. *Walsh* v. *Brown*, 18 C. P. 60.

Period of Credit.]—Plaintiff agreed to do certain work for defendant for which he was to be paid half in cash on completion of the work, and half by a bankable note at three months, defendant to pay the bank charges and interest, and the note to be renewed, if required, for two months longer. Plaintiff, on the 30th July, 1862, sued for the work done. The evidence shewed the work was not completed until 2nd May:—Held, that the action was brought too soon, and that the payment of the bank charges by defendant was not a condition precedent to his right to the credit. *Fee* v. *Whyte*, 13 C. P. 83.

Purchase Money in Instalments—*Prior Mortgage.*]—W. entered into a contract for the purchase of property, the price being payable by instalments; and there being a mortgage on the property to the Trust and Loan Company which was not due, the vendor was to give the vendee W. a bond of indemnity in respect of the mortgage. A decree was made at the suit of the vendor for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a re-

lease or discharge of the mortgage; and the overdue instalments were ordered to be paid into the bank subject to the further order of the court. On a question subsequently arising as to the effect of this undertaking, it was:—Held, that the performance of the undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out. *Robson* v. *Wride*, 13 Gr. 419.

Railway—*Bonus.*]—Performance of conditions by railway company before receiving the debentures voted them by a municipality as a bonus. See *Bickford* v. *Town of Chatham*, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235.

Sale of Hides—*Quality—Inspection.*]—Upon a sale of hides by weight, of specified qualities according to inspection, i.e., "cured and inspected No. 1 hides," &c.:—Held, that the weight as ascertained and marked by the inspector, under 27 & 28 Vict. c. 21, and 29 & 30 Vict. c. 24, were binding upon the parties in the absence of anything in the agreement to the contrary. *Macklem* v. *Thorne*, 30 U. C. R. 464.

Held, that the seller must pay the inspector's fees, the agreement not providing otherwise. *Ib.*

Held, that upon the evidence set out in the report of this case the defendants were acting as principals, not as agents of the plaintiffs, the purchasers, and therefore could not charge commission. *Ib.*

Selling Agents—*Failure to Account—Cross-claim.*]—In an action on a judgment recovered in Scotland for breach of the defendant's agreement to deliver sewing machines to the plaintiffs, the defendant pleaded that by virtue of the agreement made between the parties, the plaintiffs were to be the defendant's sole agent for the sale of his sewing machines in Great Britain, and the defendant was to be paid for all machines sent to the plaintiffs after the plaintiffs had sold and received payment for the same; that the defendant was to furnish a specified number of machines per month, and the plaintiffs were to furnish the defendant with a monthly statement of the machines sold by them, and to remit therewith the price of the machines so sold and paid for, at a certain rate, which the defendant guaranteed; and the defendant averred that he delivered the machines in accordance with the agreement, and in all things performed it, until the plaintiffs neglected and refused to furnish such statement and remit the moneys received by them as aforesaid; and that the defendant's refusal to send any further machines was caused solely by reason of the plaintiffs' said breach of the agreement:—Held, plea bad, as not shewing either that the performance of the plaintiffs' covenant was a condition precedent to performance by the defendant, or shewing any facts from which it might be inferred that the plaintiffs' breach entitled the defendant to consider the contract as abandoned and to rescind it; and that the defendant's remedy was by cross-action. There was no necessity to aver in the plea that the defence was one which might have been set up to the original suit, so long as it formed a good defence according to our law. *Auchterlonie* v. *Arms*, 25 C. P. 403.

Written Condition on Policy.]—Held, that the condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it. *Meagher* v. *Home Insurance Co.*, 11 C. P. 328; *Meagher* v. *Ætna Insurance Co.*, 20 U. C. R. 607.

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3. *Implying Terms.*

Agreement Not to Practise Medicine.]—By an agreement under seal the defendant sold to the plaintiff a house and the goodwill of his medical practice for $2,100, and the defendant "(bound) himself in the sum of $400, to be paid to the (plaintiff) in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village:"—Held, that there was an implied agreement by the vendor not to resume practice; that the sum of $400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both. Judgment below, 31 O. R. 91, varied. *Snider* v. *McKelvey*, 27 A. R. 339.

Agreement to Sell—*Implied Covenant to Buy.*]—An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows:—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same in the centre of the road bed * * * and the company agree to pay me at the rate of $2.40 per cord. * * * And it is further agreed that my tolls * * * shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of $1 * * * I do * * * discharge all claims I hold against the company. * * * And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. * * * :"—Held, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement:—Held, also, that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal. *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.*, 32 O. R. 194.

Agreement to Work—*Implied Stipulation to Employ.*]—Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work, it was held that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld. *The Queen* v. *Demers*, [1900] A. C. 103.

Agreement to Work—*Implied Stipulation to Employ.*]—When one contracts to do work for another the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where from circumstances known to, and in the contemplation of, both parties at the date of the agreement to do the work it was, and continued to be, beyond the power of the party to carry out such implied agreement. *McKenna* v. *McNamee*, 15 S. C. R. 311.

Bill of Sale — *Promise to Pay.*] — The plaintiff gave to defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300, and interest, on a day named, and it was added, "but if default be made in payment of said £300 in part or in whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue:"—Held, on demurrer, that debt would not lie, the deed not sufficiently importing a promise to pay. *McLaughlin* v. *Brouse*, 11 U. C. R. 609.

Building Contract—*One Contractor Delayed by Another.*]—The specifications for a dwelling house to be built stated the work to be done under different heads, mason, carpenter, &c.; and contained a condition that the building must be completed by the 15th June, under a penalty of $20 per week as liquidated damages:—Held, that there was an implied contract by defendant with each contractor that he should not be wrongfully or unreasonably delayed in carrying out his contract: but that where the brick work was necessarily delayed by reason of the frost, and the plaintiff's work was thereby impeded, defendant was not responsible. *Lee* v. *Bothwell*, 24 C. P. 109.

Contract to Carry Mails.]—The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a government railway the Crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the minister of railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been:—Held, that such an undertaking could not be read into the contract by implication. *Archibald* v. *The Queen*, 2 Ex. C. R. 374.

Contract to Carry Rails—*Employment of Persons other than Contractor to do Work Covered by Contract.*]—On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from seagoing vessels upon the wharves in the harbour of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine Canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Some time in the month of September, and when the suppliant had only carried a small quantity of rails, the Government without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract. It was alleged by suppliant that M., who had acted on behalf of the Government in making the contract with the suppliant, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination:—Held, (1.) The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract. (2.) That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875 for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Contract to Supply Printing paper.]—On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may be required or desired from time to time for the printing and publishing of the Canada gazette, of the statutes of Canada, and of such official and departmental and other reports, forms, documents and other papers as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf." Attached to the contract, and made part thereof, was a schedule and specification shewing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing:—Held, that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing. *Clarke* v. *The Queen*, 2 Ex. C. R. 141.

Implied Authority to Pledge Credit.]—On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff bank, who on the faith of it discounted a sight bill drawn

by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so redrawn:—Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal* v. *Thomas*, 16 O. R. 503.

Loan—*Promise to Repay.*]—Where there is evidence of a loan or debt, a promise to repay it will be implied. *Hall* v. *Morley*, 8 U. C. R. 584.

Sale of Goods—*Inspection.*]—Agreement to buy lumber by inspection of S.—Inspection held a condition precedent to the obligation to accept. See *Aitcheson* v. *Cook*, 37 U. C. R. 480.

Sale of Goods—*Note of Third Person—No Implied Right to Sue.*]—Defendant gave a note made by one K. to the plaintiffs in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiffs sued the defendant on the common counts for the price, alleging that he had induced them to take the note by fraudulent representations:—Held, that the plaintiffs could not recover, for there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud. *Auger* v. *Thompson*, 3 A. R. 19.

Sale on Commission—*Absence of Express Contract to Manufacture.*]—In a written contract of agency the principal agreed to pay to the agent a fixed commission on all sales of goods manufactured by the former effected by or through the latter. The contract was made terminable at the end of a year on a month's notice by either party; but it contained no express agreement by the principal to employ for any period or to manufacture any goods:—Held, that these terms could not be imported into the contract by implication. *Morris* v. *Dinnick*, 25 O. R. 291.

Sale by Sample—*Objections to Invoice.*] If a merchant receive an invoice and retain it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. *Kearney* v. *Letellier*, 27 S. C. R. 1.

Time of Essence—*Intention.*] — Time may be of the essence of a contract even without any express stipulation if it appears that such was the intention. *Oldfield* v. *Dickson*, 18 O. R. 188.

Time of Essence — *Lease — Delivery of Possession.*]—The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th January applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of $250, agreeing to give up possession on the 1st February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the nondelivery of possession on the day named:—Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid. *Dainty* v. *Vidal*, 11 A. R. 47.

Time of Essence—*Timber.*]—On a sale of timber limits. See *Crossfield* v. *Gould*, 9 A. R. 218.

Tramway Company—*Use of Steam.*]—The defendant company, who were empowered by statute to run a traction engine over certain highways in the county of York, and who by the charter were allowed to construct a tramway in the county to be worked by horses or steam power, upon such terms as might be agreed on with the municipalities through which the road might pass, entered into an agreement with the county, whereby it was agreed that the company should be at liberty to lay down a tramway along a certain road; that the tolls to be collected should not exceed certain specified rates on one and two horse vehicles; that the company, if required, should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh; that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that "so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine, upon or along such public highways." The company insisted that they were at liberty, under the agreement, to run a steam motor upon the said tramway. Thereupon an action was instituted by the corporation to restrain the use of steam power on the tramway, which relief the court below, 3 O. R. 584, granted. Upon appeal, this court being equally divided, the appeal was dismissed, with costs. *County of York* v. *Toronto Gravel Road and Concrete Co.*, 11 A. R. 765.

Appeal to supreme court dismissed, 12 S. C. R. 517.

IV. Performance.

1. *In General.*

Accident to Subject Matter.] — The suppliants entered into a contract with the Crown to "place a second-hand compound screw surface condensing engine" in a certain steamship belonging to the Dominion Government; and to convert the vessel from a paddle-steamer into a screw-propeller. By the specifications annexed to and forming part of the contract it was stipulated, inter alia, that the old engine and paddle-wheels were to be broken and taken out of the steamer at the contractors' expense, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery although not named in the specifications, which might be required by

the minister, &c., the whole to be completed and ready for sea, on a full steam pressure of 95 lbs. per square inch, ready to commence running on a certain date,—the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuilding, were to be executed and furnished at the cost of the contractors. It was also provided that the steamer was to have a satisfactory trial trip of at least four hours' duration, steaming full speed, before being handed over to the department. The vessel was built of iron and very old. The suppliants had taken the old engine out of the hull, and had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way and was broken in when she grounded. It was established that the accident did not occur through the negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications:—Held, that there was nothing to shew by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order" was intended to apply only to work the suppliants had expressly agreed to do, and should not be extended to other works or things which they did not agree to do or to repiace or renew. (2) That in such a contract as this, neither by the law of England nor by that of the Province of Quebec is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for. *Lainé* v. *The Queen*, 5 Ex. C. R. 103.

Advertising — *Partial Performance.*] — Agreement by plaintiffs, advertising agents, to place defendant's cards in railway stations, as specified—Incomplete performance—Right to recover on a quantum meruit. See *Foster* v. *Wilson*, 27 C. P. 543.

Agreement to Erect Factory—*Abandonment of Business.*]—Declaration, that the plaintiff agreed to sell and defendant to buy certain land in Oshawa, adjoining the lands of the plaintiff, which would be thereby enhanced in value to the plaintiff, for $325, upon the following terms; the money to be paid and the conveyances executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware; and that in case he should not do this he would at the expiration of said eighteen months reconvey the land and receive back the purchase money; and all things happened and all times elapsed, &c., and plaintiff was ready to convey, yet defendant did not pay the plaintiff, nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c. Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement; and before any demand by the plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to the plaintiff and that they would not require said land, and that the plaintiff was released; and defendant did not otherwise abandon said agreement:—Held, following Hochster v. De La Tour, 2 E. & B. 678, that the declaration was good, and the plea no answer to it. *Dallea* v. *Taylor*, 34 U. C. R. 12.

Agreement to Make Flour — *Mill Burnt.*]—In consideration that the plaintiff would deliver to the defendant 2,000 bushels of wheat, the defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour:—Held, that the word "therefrom" must be construed to mean thereafter, and not that the flour was to be made from the identical wheat delivered. This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill, containing the wheat, was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted. *Tilt* v. *Silverthorne*, 11 U. C. R. 619.

Agreement to Remunerate by Legacy.]—Where services are rendered, not on a contract of hiring, nor gratuitously, but upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise. The plaintiff brought the action against the executors of her grandfather's estate, alleging that for several years she had worked for her grandfather in consideration of his agreement to leave her by his will as much as any of his daughters. He left her by his will $400, while to his daughters he left $1,000 each, and she claimed specific performance, or, in the alternative, wages:—Held, per Hagarty, C.J.O., and Burton, J.A.—That the plaintiff could not recover wages, but that the agreement being proved, she was entitled to recover damages for its breach, which would be, if the assets were sufficient, $600. Per Osler, J.A.—That no more specific agreement was proved, than that the plaintiff was to be remembered by the testator in his will, and therefore she was entitled to nothing beyond the sum left her by the will. Per Maclennan, J.A.—That the agreement was proved, and that the plaintiff was entitled to recover as damages for its breach a sum equal to the amount given to the least favoured daughter, to be ascertained in due course of administration. In the result the judgment below in the plaintiff's favour, was affirmed with a variation. *Smith* v. *McGugan*, 21 A. R. 542. See the next case.

Agreement to Remunerate by Legacy.]—S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She

lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses:—Held, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance, but:—Held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263.

Agreement to Bequeath Estate.]—Where a father enters into a contract whereby he parts with the custody and control of his child, with the bonâ fide intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although where such a contract is executory on both sides the court cannot decree specific performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their status has become altered, the court will, if possible, enforce in specie the performance of the contract by the other party to it. Where, therefore, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was bonâ fide intended by the father for the ultimate benefit of the plaintiff and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will:—Held, that the agreement could be enforced against H.'s representative. Held, also, that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would have been trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts* v. *Hall*, 1 O. R. 388.

Agreement to Bequeath Estate.]—Where a contract on the part of a testator founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but although he made his daughters residuary devisees, left the plaintiff nothing by his will and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule, the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, whilst they form part of the household. *Walker* v. *Boughner*, 18 O. R. 448.

Agreement to Bequeath Estate.]—M., on his father's death, at the age of three years, went to live with his grandfather, W., who sent him to school until he was sixteen years old and then took him into his store where he continued as the sole clerk for eight or nine years, when W. died, and M. died a few days later. Both having died intestate the administratrix of M.'s estate brought an action against the representatives of W. for the value of such services rendered by M. and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will, M. would have good wages, and if he made a will he would leave the business and some other property to M.:—Held, that there was sufficient evidence of an agreement between M. and W. that the services of the latter were not to be gratuitous but were to be remunerated by payment of wages or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood in loco parentis towards M. There having been no gift by will, the estate of W. was therefore liable for the value of the services as estimated by the jury. McGugan v. Smith, 21 S. C. R. 263, followed. *Murdoch* v. *West*, 24 S. C. R. 305.

Agreement to Bequeath Estate.]—The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons:—Held, that, apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the court as little doubt as if a properly executed will had been produced and proved before it. Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross* v. *Cleary*, 29 O. R. 542.

Bond for Delivery of Goods—*Destruction of Goods by Fire.*]—The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods; which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on this bond, he pleaded the fact of such destruction without any default on his part:—Held, bad on demurrer, for not negativing any default on the part of P. *Boswell* v. *Sutherland*, 8 A. R. 233, 32 C. P. 131.

Boundaries—*Running Lines.*]—R., who held a license from the government of New Brunswick to cut timber on certain lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to have been so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under the said license (of R.) shall be surveyed and established by (naming the surveyors) and the stumps counted, &c.:—Held, reversing 26 N. B. Rep. 258, that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. *Snowball* v. *Ritchie*, 14 S. C. R. 741.

Building Contract—*Change in Plans—Acceptance.*]—Declaration on a contract by testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished, and not according to the specifications, &c. Defendants pleaded, 3rdly, that testator, and defendants since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of plaintiff and his agent:—Held, bad, among other reasons, because leave and license cannot be pleaded to a breach of contract. Fifth plea, as to so much of the declaration referring to alleged imperfections of material and workmanship, that after the occurrence thereof, and before suit, said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable in damages in respect of the causes of action to which the plea was pleaded:—Held, good. *Leonard* v. *Northey*, 22 C. P. 11.

Building Contract — *Failure to Complete—Faulty Construction — Premature Action.*]—See *Bender* v. *Carrier*, 15 S. C. R. 19.

Building Contract — *Subsequent Bylaw.*]—S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of New Brunswick, 41 Vict. c. 7) two days after the contract was signed:—Held, that the by-law of the city of St. John made the contract illegal, and, therefore, the plaintiffs could not recover. Walker v. McMillan, 6 S. C. R. 241, followed. *Spears* v. *Walker*, 11 S. C. R. 113.

Declaration of Intention not to Complete.]—Where before the time for the completion of a contract for the sale of goods one party notifies the other that he does not intend to complete, that notification may be treated as a breach and at once acted on; but if, as he may, the other party waits till the time for completion and then brings his action he must shew that at this time he had himself fulfilled all conditions precedent on his part. *Dalrymple* v. *Scott*, 19 A. R. 477.

Declaration of Intention not to Perform.]—Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue. *Dullea* v. *Taylor*, 34 U. C. R. 12.

Defendant Preventing Performance.]—Performance prevented by defendant, when a defence. See *Steen* v. *Swalwell*, 25 C. P. 356.

Defendant Putting it Out of His Power to Perform.]—By deed of the 18th June, 1847, defendant agreed to sell to plaintiff the net profits for two years from the date of the agreement of certain shares in a mining company for £375. On the 25th November, 1847, the company sold and assigned to the Montreal Mining Company certain tracts of land therein described, and all tools, engines, &c., for £33,250, to which sale defendant assented:—Held, that the defendant having disposed of his stock, which represented his interest in the mines, before the time at which he was to sell the profits to the plaintiff, he had placed it out of his power to fulfil his agreement, and so broke his contract; and the plaintiff became immediately entitled to sue for the breach thereof, upon the ground that the contract was at an end, and that the consideration had failed. *Sanders* v. *Baby*, 5 C. P. 441.

Delivery of Conveyance.]—A promise to deliver a conveyance includes a promise to execute it. *Whittier* v. *McLennan*, 13 U. C. R. 638.

Delivery of Timber—*Cutting Logs.*]—Defendants were taken by the plaintiff to a quantity of timber already made upon the ground, and having seen it they contracted to draw it out and deliver it to the plaintiff on the bank of a river:—Held, that the timber cut in two by defendants to suit their convenience, without plaintiff's permission, and drawn out to the river in that altered state, was not a delivery within the contract. *Reynolds* v. *Shuter*, 3 U. C. R. 377.

Editing Magazine—*Ceasing to Publish.*]—The first count alleged that the defendant agreed under seal with the plaintiff to edit a magazine owned by her, on certain terms specified, but that he refused to continue as such editor, whereby she was forced to discontinue the publication. Defendant pleaded that before any breach of his agreement the plaintiff, finding the magazine did not pay,

ceased to publish it, whereby he was prevented from acting as editor, although he was ready to do so:—Held, clearly a good defence. *Elmore* v. *Hind*, 24 U. C. R. 136.

Executory Contract — *Destruction of Subject Matter.*]—Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God or vis major, over which neither party has any control, and without either party's default, the parties are relieved. *McKenna* v. *McNamee*, 14 A. R. 339.

Expropriation for Government Railway — *Performance of Contract Rendered Impossible by Expropriation.*]—The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them:—Held, that as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Half-breed's Claim.] — Action for not transferring to plaintiff a claim of a half-breed in Manitoba, or returning the price paid therefor. See *Burns* v. *Young*, 10 A. R. 215.

Hire of Ship—*Plaintiff Resuming Possession.*]—Where defendant had agreed to return a steamer chartered on a certain day in good repair, dangers of the lake excepted, a plea "that before the day arrived the plaintiff took the boat from defendant without his consent, and kept her," was held sufficient, though not in express terms confessing and avoiding the fact of not returning the boat. *Larned* v. *McRae*, 1 U. C. R. 99.

Illegality of Contract.]—The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on bons in blank signed by one of the defendants only:—Held, to be no answer to the breach of contract alleged. *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Imperfect Performance — *Quantum Meruit.*] — Imperfect performance — Knowledge thereof by defendant without notice to discontinue—Right to recover on a quantum meruit. See *Foster* v. *Wilson*, 27 C. P. 543.

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

Lease—*Covenant to Renew—Impossibility.*]—To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *Town of Brantford*, 19 U. C. R. 207.

Master of Ship—*Destruction of Ship by Fire.*]—Where the plaintiff was engaged by the defendants for "the season," *i.e.*, from early in May till some time in November, as master to manage the steamer Idyl-Wyld for $1,000, and he continued so employed until September, when the steamer was burnt:—Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendant. Semble, that such a contract made verbally with the president of the defendant company might be binding; and that a nonsuit for want of the corporate seal was properly set aside. *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464.

Merger of Contract in Conveyance.]—The defendant, an assignee for creditors, agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated March 24th, the houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, *i.e.*, by 24th May, but as a matter of fact they were executed and exchanged about 9th May. The plaintiff subsequently in the present action claimed damages for non-completion and defects in the finishing of the houses. The deed from the defendants contained no covenants covering the matters complained of:—Held, nevertheless, that the plaintiff was entitled to recover on the original contract. A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance. Held, also, that the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

Municipal Corporations—*Disqualification of Councillor.*] — The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick

and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract on the ground that the defendant's services would be of value in the oversight of the contract:—Held, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent. Semble: If the sub-contract had taken effect the defendant would have been, under s. 80 (1) of the Municipal Act, R. S. O. 1897 c. 223, disqualified. Judgment below, 30 O. R. 411, reversed. *Ryan* v. *Willoughby*, 27 A. R. 135.

Partial Performance — *Quantum Meruit.*]—Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit. *Sherlock* v. *Powell*, 26 A. R. 407.

Principal and Agent—*Sale by Agent—Commission.*]—The appellant company deal in electrical supplies at Halifax and have at times sold goods on commission for the defendant, a company manufacturing electric machinery in Montreal. In 1897 the appellant telegraphed the respondent as follows:—"Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was:—"Can furnish Windsor 180 Killovatt Stanley two phase, complete exciter and switchboard, $4,900, including commission for you. Transformers, large size, 75 cents per light." * * * The manager of appellant company went to Windsor but could not effect a sale of this machinery. Shortly after a travelling agent of the defendant company came to Halifax and saw the manager and they worked together for a time trying to make a sale but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants claimed a commission on this sale and on its being refused brought an action therefor:—Held, that the appellants were not employed to effect the sale actually made; that the Montreal company offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission. *Starr* v. *Royal Electric Co.*, 30 S. C. R. 384.

Purchase of Ship.]—Declaration on a bond conditioned to convey to the plaintiffs within three months a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1. not conveying within three months; 2. an eviction by one O. S. G. under the power in a mortgage derived from the defendants. Pleas, to the first breach, that said steamboat was mortgaged to J. H. C. at the time of the execution of the bond, for the same amount as plaintiffs had agreed to pay defendants, and that defendants had handed him the notes given by plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiffs thereupon discharged defendants from procuring such conveyance. Plea to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an incumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corby* v. *Cotton*, 7 C. P. 209.

Sale to Firm—*Dissolution of Firm.*]—The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract. In an action brought in the individual names of the three partners, for damages for non-delivery:—Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract. *McCraney* v. *McCool*, 19 O. R. 470, 18 A. R. 217.

Sale of Goods—*Inspection.*]—A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final:"—Held, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties. *Thomson* v. *Matheson*, 30 S. C. R. 357.

Sale of Machine — *Inspection.*] — An agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine was delivered, but the inventor refusing to go, the vendors sent another competent person to set it up:—Held, that the vendors were nevertheless entitled to recover the price on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent but as a distinct covenant, the breach of which could be satisfied by damages. *Cowan* v. *Fisher*, 31 O. R. 426.

Towing—*Tug Frozen in.*]—Semble, that it is no defence to an action against the commander of a steamboat for not towing, &c., that he could not perform his contract by reason of his tow-boat being unavoidably

frozen in the ice. *Dorland* v. *Bonter*, 5 U. C. R. 583.

Trade Combination.]—Several proprietors of salt wells entered into an undertaking to sell their products through trustees, and in no other way; and a written agreement to this effect was executed by all the parties, except one, who was resident in England, and carried on his business here through an agent. The business was carried on under the agreement, notwithstanding his non-execution; and one of the other parties having subsequently attempted to act in contravention of the agreement, it was—Held, that the delay of the absent party to sign the contract, was no answer to a motion for an injunction restraining the contravention. *Ontario Salt Co.* v. *Merchants Salt Co.*, 18 Gr. 551.

Work and Labour—*Willingness to Perform.*]—In order to recover in an action for non-performance of a contract to do work, the plaintiff must shew a willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal absolute refusal, and that such refusal was treated and acted upon by the plaintiff; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end. *McLellan* v. *Winston*, 12 O. R. 431.

In this case the plaintiff set up a contract made with defendants, to cut and lay down on the defendants' limits a quantity of ties; that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and way of forwarding same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur, and claimed that defendants neglected and refused to give such instructions and refused to carry out the contract whereby the plaintiff was damnified:—Held, that the evidence disclosed that the plaintiff himself was not ready and willing to perform the contract; and further, if a refusal to perform by defendants was proved, that it was not treated and acted upon by plaintiff as such, but thereafter he continued to treat the contract as still subsisting. Held, therefore, the action failed. *Ib.*

Sale of Patent—*Future Improvements.*] By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account:—Held, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that as the evidence showed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover:—Held, further, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *Bingham* v. *McMurray*, 30 S. C. R. 159.

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2. Place and Time.

Acceleration Clause.]—Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor, in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside. The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties. Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. 1887 c. 107, schedule B., s. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

Building Contract — *Extras—Arbitration Clause.*]—The Royal Electric Company having sued the city of Three Rivers for the contract price of the installation of a complete electric plant, which, under the terms of the contract, was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed:—Held, that it being found that the appellants had not fulfilled their contract within the delay specified, they could not recover. Held, also, that when a contract provides that no payment shall be due until the work has been satisfactorily completed a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract. Quære: Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. Quebec Street R. W. Co. v. City of Quebec, 10 Q. L. R. 205, referred to. *Royal Electric Co.* v. *City of Three Rivers*, 23 S. C. R. 289.

Extension of Time—*Necessity of Application for.*]—Under a building contract, in writing, the contractor agreed that, subject to any extension of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, &c., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike. The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract. Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for and he did not grant any extension

of time:—Held, that the contract must govern, and that the defendants were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages. *McNamara* v. *Skain*, 23 O. R. 103.

Hiring.]—The defendants, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to a contract of hiring entered into in Quebec between the parties:—Held, in an action for wrongful dismissal, that the breach of the contract occurred in Quebec, the receipt of the letter by the plaintiff not being the breach, but only evidence of it; and service of the writ of summons on the defendant in Quebec could not be allowed under Rule 271 (*e*). Cherry v. Thomson, L. R. 7 Q. B. 573, followed. *Offord* v. *Bresse*, 16 P. R. 332.

Hiring.]—Where a contract of hiring is made within the Province of Ontario, and the work thereunder is to be done there, the commission therefor will be payable there. Hoerler v. Hanover, &c., Works, 10 Times L. R. 22, and Robey v. Snaefell Mining Co., 20 Q. B. D. 152, referred to. If the contract is ended by a letter sent from another Province, quære whether this indicates that the breach complained of was out of the Province. And where, upon a motion to set aside service of a writ of summons on defendants resident out of the jurisdiction in an action for breach of such contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the Province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within Rule 271 (*e*). *Bell* v. *Villeneuve*, 16 P. R. 413.

Loan — *Repayable when Able—Evidence.*]—Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience. *Re Ross*, 29 Gr. 385.

See Sylvester v. *Murray*, 26 O. R. 599, 765.

Sale of Goods—*Inspection of Bulk.*]—The defendants in British Columbia by letter offered to sell the plaintiff in Ontario a carload of lumber, according to a sample previously furnished, at a certain price, free on board cars at Toronto. The plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, upon which being done the price was to be paid by means of a draft. When the lumber arrived at Toronto the plaintiff inspected it and refused to accept it or the draft on the ground that it was not up to sample. He then brought this action for damages for breach of the contract:—Held, that the plaintiff had the right to make inspection of the bulk at Toronto before accepting or paying; and the contract was one which, according to its terms, ought to be performed within Ontario; and therefore service out of the jurisdiction of the writ of summons ought to be allowed under Rule 271 (*e*.) *Fisher* v. *Cassidy*, 14 P. R. 577.

Sale of Goods.]—The plaintiff, in London, Ontario, wrote to the defendant in Quebec, offering to take a quantity of empty oil barrels. The defendant, by letter posted in Quebec, accepted the offer, saying he would ship them, but some time afterwards wrote again, refusing to do so:—Held, that this contract was made in Quebec, and, in the absence of an express agreement to the contrary, was to be performed there by delivery of the goods to carriers to be carried to London; and the cause of action was, therefore, not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under Rule 271 (*e*). *Empire Oil Company* v. *Vallerand*, 17 P. R. 27.

Sale of Goods.]—The plaintiff gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship via G. T. R." at a certain named date. The goods were not so shipped, and a correspondence ensued, ending in the defendants refusing to supply the goods:—Held, that the breach was the non-shipment via Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and, as the whole cause of action did not arise where the order was given, a mandamus to a division court Judge to try the action was refused. *Re Diamond* v. *Waldron*, 28 O. R. 478.

Time not Limited — *Request.*]—Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request should be averred. *Daily* v. *Stevenson*, 5 O. S. 737.

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3. *Privity and Parties Liable.*

Action en Garantie — *Connexité—Law of Quebec.*]—See *Royal Electric Co.* v. *Leonard*, 23 S. C. R. 298.

Agent of Incorporated Body.] — The plaintiff sued the defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at Hamilton. The defence was, that the society, which was an incorporated body, was liable, and not the defendant personally. The learned Judge at the trial left it to the jury to find upon the evidence whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable; but the jury were told that if he contracted only as representing or on behalf of the corporation, then he would not be personally liable:—Held, on motion for a new trial, the verdict being for the plaintiff, that the ruling was correct. *Simpson* v. *Carr*, 5 U. C. R. 326.

Agent—*Partnership—Election.*]—The defendant D. after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into the same. A contract had been drawn up by plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Devlin, Toronto, Union Medicine Advertising Contract." The first and second payments were made by D., but on the third payment coming due, he stated his desire not to make it as it might prejudice a claim he had against G., his partner, with

whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D.'s business to pay this account, the plaintiffs sued D. and moved for judgment under Rule 80, stating in their affidavit in support of the motion that "the claim was under an agreement made between the parties," &c., and that "the defendant" D. "was and still is, justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial:—Held, that, on the evidence, the credit under the contract was given to D. alone; but, even treating D. as an agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D. *Mail Printing Co.* v. *Declin*, 17 O. R. 15.

Agreement Signed by Person not Mentioned in It.]—Where an agreement under seal, for the completion of certain work, had been entered into by one of two plaintiffs, and the other, who was not mentioned in it, signed and sealed it also, and afterwards assisted in the work, and was recognized and paid by defendant, for whose benefit the work was done, as a joint contractor with the plaintiff mentioned in the instrument:—Held, that assumpsit was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal. *Ross* v. *Tait*, H. T. 7 Will. IV.

Agreement Waiving Liability for Negligence.]—Declaration under C. S. U. C. c. 78, by the administrator of A., alleging that A. was lawfully on the platform of a station on defendants' railway, and the defendants so negligently managed and drove an engine and carriages loaded with timber along the line near said station that a piece of timber projecting from said carriages, struck and killed the said A. Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement with C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise:—Held, plea good, without alleging that A. was a party to, or aware of the agreement. Quære, if such contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant. *Alexander* v. *Toronto and Nipissing Railway Co.*, 33 U. C. R. 474; 34 U. C. R. 453.

Assignees of Lease Paying to Lessee Amount Due for Rent.]—Defendant had contracted to supply the Buffalo and Lake Huron R. W. Co. with wood. In 1858, by instrument under seal between them, in consideration of $22,000, defendant released the company from the contract, and the company covenanted to indemnify defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land; one in South Easthope, which had been leased by plaintiffs to defendant, the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the company stating that the plaintiffs had claimed from him rent in arrear on these two lots amounting to $2,000, and offering, if the company would pay him that sum, and re-convey the leases, to assume them for the future. The company assented, paid him the $2,000, transferred to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant after receiving this money paid the rent on the South Easthope lot. The plaintiffs having recovered from defendant as for money received to their use:—Held, that the verdict was wrong, for though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiffs' money, but as the price of the railway company's discharge, and there was no privity between plaintiffs and defendant. *Canada Company* v. *McDonald*, 25 U. C. R. 384.

Building Contract—*Surety — Sub-contract.*]—A. contracts with a company to make a highway, and B. becomes his security to them. A. then employs C. to cut out certain timber for him, and while C. is thus engaged A. fails in his contract with the company. B., the surety, tells C. to go on and he will see him paid. Upon completing his work C. sues A. and B. jointly:—Held, that there was no joint contract by A. and B. with C., but that A. was primarily liable on his contract, and B. as a guarantor. *Nicholas* v. *King*, 5 U. C. R. 324.

Canal Commissioners.]—Assumpsit does not lie against the commissioners of the St. Lawrence canal, under 3 Will. IV. c. 17, for the work done on the canal on a contract made with them, unless it can be specially shewn that they made themselves personally liable, as they must be considered merely as agents of the government. *Tait* v. *Hamilton*, 6 O. S. 89.

Cheese Factory—*Sale of Cheese by Committee.*]—Cheese factory—Agreement by the patrons to send milk and to receive cheese in return, or its price—Sale by managing committee to the plaintiff of cheese made during the season—Parties liable on such contract. *Gill* v. *Morrison*, 26 C. P. 124.

Churchwardens — *Minister's Salary.*]—Plaintiff sued defendants, as churchwardens, for his stipend as the incumbent or minister of a church. It appeared that several resolutions were adopted in vestry as to the salary of the clergyman, but only one subsequent to defendants' acceptance of office, which related to an old balance:—Held, that as plaintiff's claim rested on a voluntary undertaking of the vestry, not founded upon a consideration moving from plaintiff or upon any executed consideration of services rendered, and the evidence shewed no contract between plaintiff and defendants founded upon a consideration between them, defendants were entitled to judgment. *Carry* v. *Wallace*, 12 C. P. 372.

Collective Description.] — Where four parties described, not by their own names and personal descriptions, but as a collective body not shewn to be corporate, signed and sealed a deed with their own names and seals:—

Held, that they were individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

Committee of Church.]—The plaintiff sued five defendants, describing them as the committee of the Presbyterian Church at P., for his salary as minister from January, 1857, to August, 1858. It was proved by verbal evidence of different members of the congregation, that the committee usually consisted of eight persons chosen annually, and that a record of their proceedings was kept; that at a meeting of the congregation in 1856, it was agreed to give the plaintiff a call, and afterwards, at another meeting, that he should receive £100 a year, to be paid to him from the pew rents, which it was customary for the committee to collect half-yearly. It was not shewn who composed the committee in 1856, or that all the defendants were members of it in 1857 or 1858:—Held, that the action could not be maintained. *Stewart* v. *Martin*, 18 U. C. R. 477.

Committee of Council.] — Defendants were a committee of the city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee that there should be a ceremony on the occasion of laying the corner stone, and a luncheon given in the St. Lawrence Hall; and one of the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, to be sent to the St. Lawrence Hall, directing him to render his account to the board of gaol inspectors. The plaintiff sent his bill to the chamberlain's office, headed "K. T., chairman board of gaol inspectors, bought of G. Thomas, agent." The council, however, refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given:—Held, that they were personally liable, and that the plaintiff might sue in his own name. One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee:—Held, not sufficient to exempt him from liability with the others. *Thomas* v. *Wilson*, 20 U. C. R. 331.

Contractor for Water — *Liability for Loss by Fire.*]—A contractor with a corporation to supply hydrants at certain points with water for public use, in the event of fires, is not liable for damages occasioned to the property of an individual ratepayer of the city by fire, owing to there not being a sufficient supply of water; there being no sufficient privity between such ratepayer and the contractor. *Cunningham* v. *Furniss*, 4 C. P. 514.

Contractor not Named.]—Two of three plaintiffs contracted under seal to do certain work, which was done by three, but not according to the agreement. The three having sued were nonsuited on production of the contract. The nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused. *Bricker* v. *Ancell*, 23 U. C. R. 481.

Implied Assumpsit.]—A. contracts by deed with B. to sell him certain timber off his lot, to be paid for by B. at certain fixed times. B. being in default, A., supposing C. to have a joint interest in the timber with B., sues B. and C. on an implied assumpsit:—Held, that though A. might sue B. alone on an implied assumpsit, yet that, being concluded by the deed as to the parties liable on the contract, he could not sue B. and C. jointly. *Armstrong* v. *Anderson*, 4 U. C. R. 113.

Joint Contracts.] — In an action for work and labour against the executors of Z., it appeared that the work was done under two sealed contracts, entered into originally by Z. with one R. who had sublet one of these contracts to the plaintiff and D. The plaintiff had, by subsequent agreement with M. and D., respectively, acquired the sole interest in each of these contracts; but after he had done so, on each contract between R. and his sub-contractors an agreement under seal was indorsed, by which R. assigned all his interest in these contracts respectively to Z.; and the sub-contractors (the plaintiff and M. in the one case, and the plaintiff and D. in the other) agreed to accept Z. in place of R., and Z. agreed to assume the contracts, as if originally made by him with the sub-contractors. The agreement indorsed on the contract between R. and the plaintiff and D. was not executed by D.:—Held, that the plaintiff could not recover alone, the liability being to himself jointly with A. and D. respectively on the respective contracts. *Zimmerman* v. *Woodruff*, 17 U. C. R. 584.

Joint Agreement.]—Agreement with two plaintiffs; separate actions by each:—Held, not maintainable. *Pew* v. *Buffalo and Lake Huron R. W. Co.*, 17 U. C. R. 282.

Joint Contractors.]—*Judgment Against One.*]—The plaintiff having sued one of two joint contractors, the other being out of the jurisdiction, and having recovered judgment against him, cannot afterwards sue the other. *Harris* v. *Dunn*, 18 U. C. R. 352.

Joint Liability — *Separate Benefit.*]—Contract to build two stores for defendants, one store being for each defendant. Defendants held jointly liable. See *Herbert* v. *Park*, 25 C. P. 57.

Joint Liability—*Failure Against One.*]—Held, that this action being on a joint promise against K. and M., and there being no evidence to bind K., and no application to strike out his name, which if asked might have been refused, the plaintiff must fail upon this ground. *Macklin* v. *Kerr*, 28 C. P. 90.

Lease—*Covenant—Omission.*]—An indenture of lease was made between three parties; plaintiff of the first part, one A. of second part, and defendant of third part. The party of the first part leased to the party of the second part a certain hotel, with certain goods and chattels; and the party of the second part covenanted, among other things, at the expiration or other sooner determination of the lease, to pay the party of the first part the difference between £550 and the value of such goods, which value should be ascertained by, &c. Then it proceeded as follows:—"The said party of the third part (defendant) covenants with the said party of the first part that the said party of the second part (lessee) shall

pay the difference between the said sum of £350 and the value of such of said goods and chattels," &c., not containing the words, "to be ascertained as aforesaid:"—Held, that notwithstanding such omission, upon non-performance by the lessee, plaintiff could recover against defendant. *Hayes* v. *Addy*, 3 C. P. 262.

Maintenance—*Beneficiaries not Parties.*]—In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 17 O. R. 344.

Married Woman as Co-Contractor.]—A married woman having separate estate may enter into a contract along with others. Semble, if she having no separate estate is not liable under such a contract the other contractors are liable without her. *Dingman* v. *Harris*, 26 O. R. 84.

Misjoinder.]—Declaration by A., B., and C., plaintiffs. First count, that A. and B. agreed to perform certain work on a railway for defendant, and having associated C. with them as co-partner commenced the same; that defendant became desirous of discontinuing and suspending said work, and it was then agreed between plaintiffs and defendant in writing that it should be suspended, and at the option of defendant entirely abandoned, and if abandoned, that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. The second count alleged an agreement with all the plaintiffs to do the work, and charged that defendant refused to allow them to go on with it:—Held, that the second count was good, and that there was clearly no misjoinder, both being on agreements with all the plaintiffs. *Gould* v. *Gzowski*, 17 U. C. R. 52.

Officer of Company.]—Assumpsit for work and labour. The plaintiff put in a paper headed, "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Co. of, &c., of the first part, and James Johnson, (the plaintiff,) of," &c. It contained an agreement by the plaintiff to do certain work for specified prices, which "the parties of the first part hereby agree to pay," &c., and was signed by defendant, describing himself as "Pres. V. B." and by the plaintiff. It appeared that the company had been duly incorporated, and that the plaintiff had received £350 from them on account of this work:—Held, that defendant was not personally liable. *Johnson* v. *Hamilton*, 13 U. C. R. 211.

Personal Promise to Pay.]—Held, that the following receipt, "Received of B. & C. a note they held against A. L., on which there was a balance due, September 1st, 1842, of $400.33, which is to be paid to them in Michigan treasury warrants; also a balance of accounts of $57.17, which is to be paid in current money if enough is collected; if not, in warrants, D. O'B." could not be considered on the face of it evidence of a promise by O'B. personally to pay these debts. *Bradford* v. *O'Brien*, 7 U. C. R. 562.

Plaintiff's Barn Removed to Defendant's Land.]—Plaintiff brought ejectment against D., and hearing that D. was about to remove a barn upon the lot in dispute to other land which he had leased from defendant, he went to defendant and told him that it was his. D. afterwards took the barn there, though defendant forbade him; and the plaintiff then sued defendant for it as goods sold and delivered:—Held, that even assuming the barn to be a chattel, he could not recover, for there was no contract or privity between them. *Best* v. *Boice*, 22 U. C. R. 439.

Railways — *Successors in Title.*] — The second count of the declaration alleged that the plaintiff was seised for his life of certain land, and one R. owned the reversion; and that by an agreement between them and the Buffalo, Brantford, and Goderich Railway Co., they granted to the said company the two first ridges of gravel next the lake; and the company thereby agreed to leave the ground two and a half feet in depth above the level of the lake, and the surface even and level; that afterwards, and after the passing of the Act, 19 Vict. c. 21, the said company, under that Act, delivered over their railway to defendants, and defendants completed the same under the agreement set forth in the statute; that defendants chose to enforce the said agreement with the plaintiffs, and removed the gravel, but dug pits below the stipulated depth, thereby injuring the land. R. brought a separate action as reversioner for the same injury. The agreement, when produced, appeared to be with both plaintiffs jointly:—Held that the plaintiff could not recover, for defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions. *Pew* v. *Buffalo & Lake Huron R. W. Co.*, 17 U. C. R. 282.

Rent-charge—*Debt.*]—Debt does not lie by the grantee of a rent-charge to issue out of lands, where there is no express covenant to pay. *Dougall* v. *Turnbull*, 10 U. C. R. 121.

Sale of Land—*Payment by Purchaser to Mortgagee.*] — S. having mortgaged certain land to F. agreed to sell it to the plaintiff, and went to the office of defendant, who acted as agent for F., where S. executed a bond to convey to the plaintiff on payment of £200 down and the balance by instalments, and at the request of S. the plaintiff paid this £200 to defendant for F. on account of the mortgage. Afterwards, at their joint request, defendant returned £50 to the plaintiff, and S. having released to F. his equity of redemption, the plaintiff sued defendant to recover back the £150 remaining, as money paid to his use. Some evidence was given at the trial to shew that the title was defective:—Held, that the plaintiff clearly could not recover, for the money was not paid to defendant on any contract between him and the plaintiff, but was a payment by S. of his debt due to F. Semble, that the evidence, set out in the case, was not sufficient to shew a failure of title, but

that if it had been, F., under the circumstances, could at most have been liable only, on receiving payment of his mortgage, to convey to the plaintiff such title as he had derived from S. *Branigan* v. *Cartwright*, 23 U. C. R. 264.

Sale of Logs—*Purchaser's Promise to Pay Rafting Charges.*]—Held, that where there was an express agreement between the owner of certain logs and the plaintiff, that he would sell the logs subject to plaintiff's charges thereon for rafting, which agreement was communicated to defendants, the purchasers, who promised the plaintiff, before the delivery by him to them of the whole of the logs, to pay said charges, the plaintiff was entitled to maintain an action against defendants for non-payment of the same. *Jackson* v. *Evans*, 21 C. P. 33.

Sale of Ship—*Vendor's Covenant not to Compete.*]—The owner of several steamers, carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburgh at any time thereafter: and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburgh. Upon a bill filed for that purpose, the court held the owners bound by the covenant entered into by the original proprietors, and granted an injunction restraining them from navigating the river below Ogdensburgh with those vessels. *Holcomb* v. *Nixon*, 5 Gr. 278, 373.

School Trustees.]—School trustees acting under 9 Vict. c. 20 cannot be sued as individuals upon any contract made by them under the statute as trustees. *Sheriff* v. *Patterson*, 5 U. C. R. 620.

Sub-contractor Against Employer.]—One T. contracted with defendants, a corporation, to construct certain work for them, and on the same day the plaintiff agreed with T. to do a portion of it for $800, subject to the same conditions which bound T. in his contract with defendants. T. on the same day by letter authorized defendants to pay the plaintiff for his work to the amount of T.'s contract with him, and defendants in answer agreed to this. Defendants paid the plaintiff all but 20 per cent. as the work progressed, but their manager refused to certify as the contract required, complaining that it was improperly performed. He, however, had verbally agreed to pay the plaintiff's men $100 if they would discharge the company:—Held, that the plaintiff had no right of action against defendants, for there was no contract between them. *Standing* v. *London Gas Co.*, 21 U. C. R. 209.

Substitution of Debts.]—A. being indebted to B., and C. to A., B. and C. without the assent or knowledge of A., agree that C. shall pay to B. the debt due to him by A., on condition that B. shall discharge A. from his debt:—Held, that such agreement is binding on C., and that B. may sue him for its non-performance. *Tyrill* v. *Annis*, 1 U. C. R. 299.

Superintendent of Schools.]—A county superintendent of common schools, signing, together with trustees, a contract with a teacher, will be considered to have signed the same only as approving of the appointment, and in pursuance of the direction of the statute, and not as a party contracting with the teacher. *Campbell* v. *Elliott*, 3 U. C. R. 241.

Surety for Advances by Individual—*Advances made Jointly.*]—A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period, B. with D., a stranger to A., make advances to C.:—Held, that B. individually could not recover from A. the amount of the advances so made. *Stevenson* v. *McLean*, 11 C. P. 208.

Surety in Fact Principal.]—A. contracted with defendants to perform work, and B. executed a bond as his surety. It appeared that B. was in fact the principal, and did the work, and that A. had tendered and taken the contract for him, and had in writing assigned to him all his interest in the proceeds:—Held, that B. could have no right of action against defendants. *Ferris* v. *Township of Kingston*, 12 U. C. R. 436.

Treasurer of Turf Club—*Liability to Prize Winner.*]—Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made:—Held, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Denison*, 28 U. C. R. 323.

Trust Assignment—*Personal Liability of Trustees.*]—The declaration charged that the plaintiff, having recovered judgment against A. & Co., was about to sell their goods under a fi. fa., and in consideration that the plaintiff would withdraw his writ defendants promised to pay the amount. It appeared that A. & Co. made an assignment to the defendants of all their goods, in trust out of the proceeds to pay rent and certain executions, of which this was one, according to their legal priority, then to pay the preferential creditors named; and lastly, to divide the surplus money among the other creditors executing the assignment. This assignment was executed by the defendants, but not by the plaintiff. It was put in at the trial by the plaintiff, and it was proved that the defendants had received moneys under it, but no promise was shewn by them except what was in the deed, which recited that defendants had agreed to pay these claims out of the proceeds of the property assigned, if sufficient:—Held, that the plaintiffs could not recover, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods. *Harris* v. *Buntin*, 16 U. C. R. 59.

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4. Procedure in Actions.

(a) *In General.*

Joint Liability—*Proof.*]—In assumpsit against joint contractors it is still necessary to prove a joint contract by all the defendants. *Bochus* v. *Shaw*, 8 C. P. 391.

Municipal Contract—*Proof of By-law.*]—An objection as to the want of proof of a by-law authorizing a contract for the erection of municipal buildings, raised for the first time at the close of a reference of the action to recover a balance alleged to be due, was overruled, where the existence of the contract was alleged in the statement of claim and defence, and the contract was identified by the mayor on the application for the reference by the defendants and made part of the defendants' material, and treated as the contract throughout the whole reference, and on which large sums of money had been paid under by-laws passed therefor. Leave to amend so as to set up such objection refused. *Ryan* v. *Village of Carleton Place*, 31 O. R. 659.

Striking Out Name of Defendant.]—An action on contract having been referred at nisi prius, and the arbitrator having found that defendants were not co-partners, the court refused to strike out the name of one defendant. *Tulloch* v. *Wells*, 8 C. P. 394.

The statute, C. L. P. Act, 1856, was intended to meet the case of a defendant erroneously joined, not a case where he has been joined intentionally, to try and fix him with liability. *Ib.*

(b) *Pleading.*

In an action for the non-delivery of wood according to contract, the declaration was held bad on special demurrer, for not stating the price to be paid, nor that the wood was to be paid for either on delivery or on a certain day, nor that the plaintiff was ready and willing to pay for it. *Maddock* v. *Stock*, 4 U. C. R. 118.

Where defendant is sued upon a promise to continue a former agreement then about expiring, the declaration should state the precise terms of the former agreement, and aver that such terms composed the whole of it. *Barnes* v. *McKay*, 5 U. C. R. 246.

The plaintiff charged defendants upon a special agreement stated to have been made by them as trustees, to furnish with fuel, when required, the plaintiff, a school teacher, under 9 Vict. c. 29. Declaration held bad, because no request with time and place had been alleged to furnish fuel. *Anderson* v. *Vansittart*, 5 U. C. R. 335.

Upon an agreement to deliver wheat for the plaintiff at the mill of a third party, naming him, the plaintiff averred "that he was always willing to accept the wheat at the place aforesaid, whereof defendant had notice:"—Held, on motion in arrest of judgment, declaration good. *Wright* v. *Weed*, 6 U. C. R. 149.

An uncertainty in the statement of a part of the consideration for the defendant's promise, with respect to a part only of the plaintiff's demand, does not make the declaration bad on general demurrer. *Bradford* v. *O'Brien*, 6 U. C. R. 417.

In debt for goods found and provided for one M. at defendant's request, not alleging by plaintiff:—Held, declaration sufficient, on motion to arrest judgment. *Kendrick* v. *Maxwell*, 7 U. C. R. 94.

An averment that in consideration that the plaintiff, at the defendant's request, "would agree" not to put the said A. B. to costs in respect of his debt, the defendant promised, &c., is a sufficient allegation of plaintiff's promise. *Noad* v. *Brown*, 8 U. C. R. 154.

Special assumpsit for not accepting a schooner, the consideration being that the plaintiff would send defendant the schooner "together with all and singular the apparel, tackle and furniture, boats, oars and appurtenances to the said schooner belonging or appertaining, and convey and assure the same to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances." Upon special demurrer the declaration was held bad, for not alleging that the conveyance tendered embraced the "apparel, tackle and furniture," and because it was not inconsistent with all the averments that the "apparel, tackle and furniture" might not be free from incumbrances. *Phillips* v. *Merritt*, 2 C. P. 299.

Quære, whether when a contract is to pay at a particular place named in a declaration, the general averment that the defendant did not pay is not sufficient, and any statement as to the plaintiff not being at the place named to receive the money, or that the defendant was there ready to pay it, must not arise by way of defence. *Becher* v. *Town of Amherstburgh*, 23 C. P. 602.

Assumpsit against a miller for not delivering flour ground by him from wheat sent to him by plaintiff, on an agreement that he would grind and deliver the flour at one of two prices named, depending upon whether the barrels were furnished by him or the plaintiff:—Held, 1. That it was unnecessary to aver that there was any mark to distinguish the plaintiff's wheat, as required by 31 Geo. III. c. 7, s. 3; 2. that readiness to pay either one price or the other, and notice to the defendant or a tender of payment must be averred, but that the former was sufficient. The agreement as set out in the third count, was to grind 10,000 bushels of wheat, alleged to have been delivered by the plaintiff. In the 4th count, it was averred that under the said agreement set out in the third count, the plaintiff delivered 10,000 other bushels:—Held, bad. *Counter* v. *Jones*, 6 O. S. 37.

Plaintiff sued on an agreement, and at the trial his witnesses failed to prove a part of it, which was struck out of the declaration. The plaintiff was then called for the defence, and stated the agreement as at first set out. His counsel did not amend again, and the jury found for the plaintiff, adding that they believed the part struck out to be in the contract. The court in term allowed the declaration to be restored to its original form, and refused a new trial. *Petrie* v. *Tannahill*, 22 U. C. R. 608.

Declaration on special agreement, amended by averring excuse from performance, instead of performance, of contract. *Clarke* v. *McKay*, 32 U. C. R. 583.

Declaration upon the common counts. The defendant, after setting out an agreement, by which he was to build a mill for plaintiff, averred that he had built and finished the mill as he had contracted to do, and that the plaintiff was indebted to him in the price agreed

upon to be paid. In reply, the plaintiff merely traversed that the defendant had so built and finished the mill, without shewing in what respect he had not performed the contract, and the replication was held bad. *Brown* v. *Taggart*, 10 U. C. R. 183.

Declaration upon an agreement, by which defendant undertook to commence certain work, "so soon after the opening of navigation this spring as he can remove a steam dredge and working apparatus to Port Burwell:"—Held, insufficient to allege only that the spring had elapsed; but that it was necessary to aver that since the opening of navigation defendant could have removed the dredge. *Saxton* v. *Ridley*, 13 U. C. R. 522.

Assumpsit on a contract to make and furnish a steam-engine and boiler. Breach, that the boiler furnished was not made of good and sufficient materials, and was not reasonably fit and proper for the said engine. Plea, that the said boiler was made of good and sufficient materials:—Held, bad, as not answering the whole breach. *Abel* v. *Leonard*, 12 U. C. R. 192.

Declaration charging the defendant with the non-performance of a certain contract. Plea, that the said contract was not duly performed by the said parties, to wit, the plaintiff and defendant, in manner, &c.:—Held, bad, in leaving it uncertain by which of the said parties and in what particular it had not been performed. *Jones* v. *Hamilton*, 3 U. C. R. 170.

In declaring on a special agreement, quære, what must be averred in the declaration to have been done; or what may be left to be set up as matter of defence. Semble, that the intention of the parties, to be reasonably collected from the whole instrument, must govern. *Ewart* v. *Bowes*, 5 U. C. R. 445.

Declaration by A., B., and C., plaintiffs. First count, that A. and B. agreed to perform certain work on a railway for defendant, and having associated C. with them as a copartner, commenced the same; that defendant became desirous of discontinuing and suspending said work, and it was then agreed between the plaintiffs and defendant in writing that it should be suspended, and at the option of defendant entirely abandoned, and if abandoned, that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. Breach, that defendant wholly refused to allow the plaintiffs to resume said work, and hindered and prevented them from so doing, and neglected to give the plaintiffs another contract, and took said work into his own hands, and gave it to other persons:—Held, on demurrer to the whole declaration, that the first count was bad, as not shewing a breach of the agreement declared upon, which was only to give a new contract if the first should be abandoned, and it was not abandoned, but gone on with. *Gould* v. *Gzowski*, 17 U. C. R. 52.

Declaration, that the plaintiff having an agreement for a lease of a certain mill-privilege from A. B., defendant offered for the plaintiff's right to such privilege certain lands and notes, or the assignment of a mortgage for £500; and "that the plaintiff agreed to accept one of said offers on or before 18th March, 1851, and to pay the water rent of the said privilege up to the 1st January, 1851; and that it was further agreed that the lease should be made to defendant from the said A. B.; and that the plaintiff did, "afterwards, on the 18th March, 1851, accept an assignment of the said mortgage," yet defendant would not assign the mortgage:—Held, that as the onus of procuring a lease was assumed by the plaintiff, the payment of rent up to the 1st January, 1851, was of no consequence to defendant, and not material, if the plaintiff obtained the lease; and that therefore a traverse of such payment was an immaterial issue. *Benns* v. *Raymond*, 3 C. P. 126.

Quære, the materiality of a plea traversing the allegation of the acceptance of the assignment of mortgage, and the effect of that plea. *Ib.*

Declaration on a deed set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. Clause 20 provided that the plaintiff would accept during the first five months defendants' notes at three months in payment, defendants agreeing to place at the order of the plaintiff, till the notes were paid by them, defendants' bonds to the value of said notes, such bonds being estimated at 85 per cent. of their face value, and after the first five months defendants agreed to pay cash. Breach that defendants did not during the first five months "deliver to the plaintiff" their bonds to the value of the notes, &c:—Held, breach bad, for defendants' covenant was to place said bonds at the order of plaintiff, which was capable of a different meaning. *Shanly* v. *Midland Railway of Canada*, 33 U. C. R. 604.

The declaration stated an agreement to pay to three persons, and the agreement was to pay half to one and half to the two others:—Semble, no variance. *Bens* v. *Storer*, 12 U. C. R. 623.

The plaintiff declared in assumpsit on an agreement with defendant to make 100,000 bricks, and then averred that he had made 68,000 of them, and prepared in part 30,000 more, but that defendant would not allow him to complete them, but absolutely discharged, hindered and prevented him from doing so. Defendant pleaded, 1. that the plaintiff entered upon defendant's close to complete the work there, and that defendant prevented him, as he lawfully might, which was the same hindering and preventing; and, 2. that the plaintiff was making the said bricks upon defendant's close, and had made 68,000 of them in so bad and unskilful a manner that they were wholly useless, and was proceeding to make the rest in the same way, and that therefore defendant did then forbid and prevent him from making the residue:—Held, that both pleas were bad, because pleaded to the whole declaration and not answering the discharge, and that a replication of leave and license to the first plea was good. *Toleman* v. *Crew*, 2 U. C. R. 186.

V. Rescission and Cancellation.

Alteration of Contract.] — See *Mason* v. *Burrows*, 29 C. P. 138.

Building Contract—*Effect of Cancelling Signatures.*]—An injunction restraining a corporation from permitting certain buildings to be completed under a contract was dissolved, it appearing that the contract which had been entered into between the corporation and the contractor had been cancelled. On production of the contract in court, it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. *Edinburgh Life Assurance Co.* v. *Town of St. Catharines*, 10 Gr. 379.

Building Contract—*Penalty — Release by Parol.*]—Declaration, for work and materials in construction of a house for defendants. Plea, that by deed dated 31st July, 1871, plaintiff covenanted to finish the works before 31st October, 1871, under a forfeiture of $20 for every week the work was left unfinished after that day; that the plaintiff did not complete the works till 20 weeks after said date, and thereby $400 became due from plaintiff to defendants, which defendants are willing to set off. Replication, on equitable grounds, that after the breach in the plea alleged, the defendants for good and sufficient consideration by parol discharged the plaintiff from the performance of the covenant and damages for the breach thereof:—Held, good. *Simpson* v. *Kerr*, 33 U. C. R. 345.

Election to Rescind Where Other Party not Bound.]—The defendant alleged that the plaintiff agreed with defendant's wife, that defendant, with whom he had left some notes for collection, should keep the proceeds for himself and maintain the plaintiff free of charge for the remainder of his life. Quære, whether the plaintiff could rescind such agreement, and sue for the money collected, defendant not being bound. *Bush* v. *Abel*, 7 C. P. 499.

Employment for Term—*Employer Dismissing.*]—Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided; and in case of failure of the plaintiff to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines, or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final. To an action by the plaintiff for wrongful dismissal, defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified:—Held, that defendant was bound to establish the ground mentioned in his notice for terminating his agreement. *Griggs* v. *Billington*, 27 U. C. R. 520.

Indefinite Repudiation.]—Defendant agreed with his son that if he would remain and work with him, so as to assist in paying for a lot of land which he had purchased, he should be paid for his services by the property being divided with him. The son remained, worked upon the land for several years, and died. After his death, defendant stated that he "had a conversation in his family, and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons:"—Held, that neither this conversation, nor a subsequent offer on defendant's part to pay plaintiff, as administratrix of the son, $800 in satisfaction of the action, amounted to a repudiation or rescission of the only bargain between the father and son, which was to divide the land; and that, therefore, indebitatus assumpsit for the son's work and labour would not lie. *McClarty* v. *McClarty*, 19 C. P. 311.

Innocent Misrepresentation—*Common Error.*]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration, a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. *Cole* v. *Pope*, 29 S. C. R. 291.

Manufacture and Sale of Chattels.]—Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense with reference to it:—Held, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment. The court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed. *Ontario Lantern Company* v. *Hamilton Brass Manufacturing Company*, 27 A. R. 346.

Pleading.]—Quære, as to the sufficiency of a plea to a written contract, that before breach it was rescinded, and a new contract substituted, not alleging the rescission to have been in writing. Such a plea was allowed to be pleaded, but leave given to plaintiff to reply, take issue and demur; the demurrer, if any, to be first determined. *Wingate* v. *Enniskillen Oil Co.*, 10 L. J. 216.

Purchase of Business—*Default by Purchaser—Assets Acquired after Purchase.*]—In June, 1872, J. B. and W. B. purchased a flour business from R. B., but J. B. soon after refused to have anything to do with it, and the business was carried on in the name of R. B., but for the benefit of W. B., J. B. having refused to carry out the purchase. In June, 1873, W. B. also purchased from J. B. his share in an express business carried on by both of them. Subsequently, W. B. being desirous of carrying on both businesses in his

own name, an agreement was executed by R. B., J. B., and W. B., which recited that all the property, &c., book debts, notes, securities, and accounts of R. B. and J. B. were the property and effects of W. B., and held by him free from any interest of R. B., except the payment of any debts or liabilities which by reason of the manner of carrying on the business they or either of them might be made liable for, although in fact not liable. W. B. then agreed with R. B., that all moneys received or realized upon the said assets should be fully applied in payment of the liabilities as shewn in the ledgers and balance sheets of the said businesses, &c.; and that in the event of the foregoing clauses not being carried out R. B. should have full power to assume and collect all said assets, and pay off the liabilities herein assumed; and that W. B. would furnish R. B. with all the necessary books, documents, &c., relating to the accounts then remaining unpaid, and would furnish him with a list of the amounts received and paid, and relating thereto, at the end of each and every month, until all the liabilities were fully satisfied. Subsequently default was made in the payment of the liabilities mentioned in the agreement:—Held, that under the agreement R. B. was only entitled to the assets existing at the time of the execution of the agreement, and not to those subsequently acquired. *Kerr* v. *Bradford*, 26 C. P. 318.

Rescission.]—Form of decree where mortgage rescinded after money advanced. See *Superior Loan and Savings Co.* v. *Lucas*, 15 A. R. 748, reversing *S. C.*, 44 U. C. R. 106.

Sale of Goods—*Refusal to Accept—Subsequent Retention.*]—Defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered the oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented, and requested defendant to return the oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered:—Held, that the original contract had been rescinded, and that the plaintiff might sue upon a new contract arising out of the retention of the oil by defendant. *Thompson* v. *Smith*, 21 C. P. 1.

Sale of Goods — *Insolvency.*] — Sale of goods—Insolvency of parties—Right to rescind. See *Bingham* v. *Mulholland*, 25 C. P. 210.

Sale of Land — *Parol Rescission.*]—A agrees to pay B. for a lot of land upon receiving a deed. B. offers a deed, when A. declares his inability to pay, and proposes new terms, which are accepted:—Held, that B. was thereby relieved from the necessity of tendering a deed to entitle him to sue A. or rescind the contract; that B. was at liberty to rescind the contract, and might do so by parol; and that an agreement in writing, under the Statute of Frauds, might be waived, discharged, and determined by a subsequent verbal agreement. Quære, whether before or after the breach of the agreement. *Mulgrew* v. *Pringle*, Dra. 269.

Sale of Shares—*Conditions as to Retention in Office.*]—The plaintiff agreed to purchase from the defendant seventy-six shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the shares, which were transferred to him. At the defendant's request he then pledged these seventy-six shares, and, as the jury found, lent the defendant forty-four other shares of his own, to pledge to a bank, which discounted the note for the defendant. The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Company, should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Company, at a fixed salary. The defendant at the maturity of the note retired it, and took an assignment to himself of the 120 shares. The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the forty-four shares, on the ground that the purpose for which they had been pledged had been fulfilled: and for a return of the note, and to be relieved from the purchase of the seventy-six shares, on the ground that the condition of the purchase, (viz.: his being retained in office,) had not been fulfilled, but had been broken by the defendant's procuring his dismissal:—Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the seventy-six shares were to have been paid for, there could be no rescission of the whole contract; but that the plaintiff—the finding of the jury as to the forty-four shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the seventy-six shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action:—Held, also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office. *Brown* v. *Nelson*, 7 O. R. 90.

Sale of Timber—*Revocation of Extension of Time.*]—The owner of land by a memorandum in writing sold the timber thereon, and when the time verbally agreed upon for its removal was nearly expired, the vendor told his vendee that he might have another year within which to complete the cutting and removal of the timber:—Held, that the vendor was not at liberty afterwards to revoke such extension of time. *Lawrence* v. *Errington*, 21 Gr. 261.

Waterworks—*Notice.*]—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract:—Held, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it

would, under the circumstances, be inequitable to rescind the contract:—Held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Town of Richmond* v. *Lafontaine*, 30 S. C. R. 155.

VI. SUBSTITUTION AND ASSIGNMENT.

Assignment Without Leave — *Knowledge of Crown—Rescission—Quantum Meruit—Damages.*]—See *Regina* v. *Smith*, 10 S. C. R. 1.

Bond to Secure Rent — *Surrender of Lease.*]—Declaration on a bond to plaintiffs securing payment by L. of the rent of certain premises, and averring that rent was then in arrear. Plea, on equitable grounds, that L. had died, having by will appointed defendant and another his executors, who continued in possession of the premises as tenants to plaintiffs under the lease to L. until a certain day, when an agreement (not stated to have been in writing) was entered into between the widow of L., the defendant, and the other executor, as executors, and one S., with plaintiffs' consent, that S. should purchase the lease of the premises for the amount of the rent then agreed upon as in arrear, and that the widow and executors should surrender the lease and possession of the premises, and S. should become tenant to plaintiffs, and should have additional yard room, &c., and should in consideration thereof give his note payable to plaintiff B., for the said agreed sum, and defendant should for accommodation, and as surety for S., join him as maker of the note; that the tenancy and defendant's liability on the bond and in respect of the rent should cease, and plaintiffs should accept the note and surrender of the lease and possession in satisfaction and discharge of the rent then overdue, and of defendant's liability upon the bond and lease; that an indorsement was made under the hands and seals of the executors and widow upon the lease, at plaintiffs' request and accepted by them, surrendering to plaintiffs said lease and all the estate and interest of the testator at the time of his death in the premises, as also their own interest therein as his executors, and that the widow consented thereto, and also surrendered to plaintiffs; that the note for the rent was made by S. and defendant payable to plaintiff B., and delivered by S. to plaintiffs, and plaintiffs took possession of the premises, and accepted the surrender thereof in full satisfaction and discharge. Replication, on equitable grounds, setting up, by way of estoppel to the admissibility of the plea, that in an action in the county court upon said note against defendant and S., they had pleaded an entirely different agreement from that alleged in the above plea respecting said note, and that the consideration for the note had wholly failed; that the jury had found the issue joined thereon in their favour; and that defendant subsequently, upon motion for a new trial, made and filed an affidavit stating that neither defendant nor S. had ever received any benefit, &c., for said note, or in payment thereof, by reason of which said acts and statements plaintiffs had been prevented from recovering the amount of said note:—Held, on demurrer, plea good, both in substance and in form; in substance, as setting up an entirely new contract and part performance in substitution of the former contract; and in form, as shewing the plaintiffs to have been sufficiently identified with the whole transaction to be bound by it, as they had taken the benefit of it:—Held, also, replication bad. *Bradfield* v. *Hopkins*, 16 C. P. 298.

Building Contract — *Abandonment.*]—To an action for breach of contract between plaintiffs and defendant, that defendant would build plaintiffs' railway to be completed by a day named, defendant pleaded equitably that the plaintiffs, with consent of defendant, agreed with E. to finish said railway, and defendant, before breach, abandoned said contract, and E. entered upon and took possession of the works on said railway, and continued the same with plaintiffs' consent. Replication, that by the agreement in the last plea mentioned, the plaintiffs' rights against defendant were expressly reserved:—Held, on demurrer, replication good, but plea bad, as not shewing that the alleged substituted contract contained all the esentials requisite to make it a complete discharge and release of the original one. *Port Whitby and Port Perry R. W. Co.* v. *Dumble*, 32 U. C. R. 36.

See S. C., 22 C. P. 36, where the court of common pleas, in an action against the principal, took a different view as to the replication.

Building Contract—*Change in Plan.*]—To a declaration upon a sealed agreement to build a vessel for plaintiff, of a certain size and according to a certain model, by a certain day, &c., defendant pleaded, that he procured materials, and before breach of the agreement he was ordered by plaintiff to build a vessel of larger size; and that in pursuance of plaintiff's directions, and by his order and request, he did erect and build such larger vessel, and was consequently compelled to take a longer time, which is the breach complained of:—Held, no answer to the declaration. *Gaskin* v. *Counter*, 6 C. P. 99.

Building Contract—*Change in Plan.*]—Declaration on a contract by a testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished and not according to the specifications, &c. The 7th plea stated that after testator's contract and promise, it was agreed between him and plaintiff in his lifetime that he should not perform them, but that instead testator should deliver to plaintiff, who was to accept, a different boiler and engine, larger and more valuable, requiring a longer time for construction; and afterwards, before action, testator in his lifetime, and defendants as executors, did make and deliver to plaintiff, who accepted the same upon such terms, and paid the price thereof:—Held, bad. *Leonard* v. *Northey*, 22 C. P. 11.

Oral Alteration of Terms — *Quantum Meruit.*]—See *Barry* v. *Ross*, 19 S. C. R. 360.

Postponing Performance.]—While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it postponing the period for performance, and the original consideration will be regarded as imported into such new agreement, and will support it. *Hurlburt* v. *Thomas*, 3 U. C. R. 258; *O'Donnell* v. *Hugill*, 11 U. C. R. 441.

Previous Rights Reserved.]—G. and S., the managers of certain steamboats running in opposition, S. having only one boat, and G. two, referred to arbitration the terms on which the opposition should cease. The arbitrators awarded that each party should run one boat at different hours, and that S. should pay G. £150. Afterwards G. and some of the owners of the steamer for which S. was agent entered into an agreement respecting the two boats which the award allowed to run, which stated that the parties had agreed to settle the disputes between them as steamboat owners on the following terms, and then specified the hours and days on which the boats were to leave the different ports; but it was expressly declared that this agreement was without prejudice to any demand which G. might have upon S.:—Held, that G.'s right to the £150 awarded was not affected by such agreement. *Gildersleeve* v. *Stewart*, 2 P. R. 114.

Remuneration for Services—*Collateral Contract—Novation.*]—Where services have been performed by one person for the benefit and at the request of another, and have been charged to the latter, the fact that a third person has subsequently agreed to pay for such services, and has had judgment recovered against him therefor, by the person rendering them, will not prevent the latter recovering in an action against the person liable in the first instance, unless the subsequent agreement amounts to a novation. *Herod* v. *Ferguson*, 25 O. R. 565.

Sale of Goods—*Extending Time for Delivery.*]—Declaration, that defendant agreed to sell and deliver to plaintiff within one week certain wheat, and the plaintiff advanced $600 on account, yet defendant failed to deliver. Plea, that before breach it was agreed that the plaintiff should, and he did waive the delivery within one week, and extended the time for delivery:—Held, plea bad, for no subsequent delivery was alleged, nor that the extended time had not elapsed. *Molson* v. *Bradburn*, 25 U. C. R. 457.

Sale of Land—*Forfeiture—Extension.*]—An indorsement on a contract for the sale of land extending the time for payment, was:—Held, not to do away with the provision for forfeiture on default, but to incorporate the extended time in the agreement as if originally there. *Marcus* v. *Smith*, 17 C. P. 416.

Substitution of New Agreement.] — See *Penman Manufacturing Co.* v. *Broadhead*, 21 S. C. R. 713.

Supplying Milk to Factory.]—Assignment, but without warranty, of agreement made with certain farmers by which the latter agreed to give the milk of their cows to no other cheese factory than to that of N. D. —Right of action. See *Demers* v. *Duhaime*, 16 S. C. R. 396.

See COMPANY, V. 3—CROWN, III. 2—LUNATIC, II.—MASTER AND SERVANT, II.—MORTGAGE, II.—MUNICIPAL CORPORATIONS, IX., XVIII. — PARTNERSHIP, I. — PETITION OF RIGHT—PRINCIPAL AND AGENT, IV. 1, V. 1, X. 1—PRINCIPAL AND SURETY—SALE OF GOODS, II., III.—SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 7—SHIP, II. 8—SPECIFIC PERFORMANCE—STATUTES, X.—SUNDAY, I.—TIMBER AND TREES, I.

CONTRACTOR.

See MASTER AND SERVANT, V. 2.

CONTRIBUTION.

See BILLS OF EXCHANGE, II. — PRINCIPAL AND SURETY, VI. 1 (*a*)—SHIP, XIII.

CONTRIBUTORIES.

See COMPANY, X. 3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, III.—SHIP, V. 3 (d).

CONTROVERTED ELECTIONS.

See MUNICIPAL CORPORATIONS, XIX. 5—PARLIAMENT, I. 11.

CONVERSION.

Expropriation.]—P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which was refused. Subsequently on the application of the company and with the consent of P.'s solicitor, the county Judge made an order fixing the amount of security to be given for damages, and the price of the land, and giving the company possession upon their paying the amount of such security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff as executor or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof:—Held, that notice to treat having been given, and a claim made by the landowner, and refused by the company, and the money having been paid into court and possession taken by the company, these circumstances under the authority of Nash v. Worcester Improvement Commissioners, 1 Jur. N. S. 973, would entitle the landowner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded. *Hoskin* v. *Toronto General Trusts Co.*, 12 O. R. 480.

Infant's Estate.]—The principle of s. 56 of C. S. U. C. c. 12, relating to the conversion of infants' estates sold under that Act, is also

applicable to all cases where it is necessary for collateral purposes to effect the conversion of an infant's estate from realty into personalty; the rule of the court in all such cases being that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134.

Special Act.]—One of several heirs of an intestate being lunatic, an Act was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and it was held, that this share, for the purpose of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Gr. 254.

See TIMBER AND TREES, II. — TROVER AND DETINUE, II.

CONVICTION.

See CERTIORARI, II. 2—COSTS, IV.—CRIMINAL LAW — INTOXICATING LIQUORS — JUSTICE OF THE PEACE, II. 2, III. 2, 3— MEDICINE AND SURGERY, II.

COPYRIGHT.

Book—*Importation of Foreign Reprints*—*Assignment of Proprietorship.*]—Upon a motion for an interim injunction restraining the defendants from importing into Canada for sale, and from exposing and offering for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," in infringement of the plaintiffs' copyright in such book, it appeared that at the time of the author's death he was the owner of and entitled to the copyright in such book for the British dominions, including Canada, and that after his death such copyright and ownership had been assigned and transferred to the plaintiffs by those upon whom they devolved; that the defendants had imported copies of the book from the United States of America, and were offering them for sale in Canada:—Held, that s. 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict. c. 45, prohibiting the importation of foreign reprints by any person not being the proprietor of the copyright, or some person authorized by him, is now in force in Canada; and the plaintiffs were, therefore, entitled to prohibit the importation of foreign reprints into Canada. 2. But the plaintiffs had no right to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had not complied with s. 24 of 5 & 6 Vict. c. 45, by causing an entry of their proprietorship to be made in the book of registry of the Stationers Company, the word "proprietor" in s. 24 meaning the person who is the present owner of the work. Dictum of Cockburn, L.C.J., in Wood v. Boosey, L. R. 2 Q. B. 340, not followed. Weldon v. Dicks, 10 Ch. D. 247, and Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux, [1897] 2 Q. B. 1, followed. *Morang* v. *Publishers' Syndicate*, 32 O. R. 393.

Book — *Registration* — *Infringement* — *Particulars.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright:—Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right. Sweet v. Maughan, 11 Sim. 51, not followed. Mawman v. Tegg, 2 Russ. 385, 390, and Page v. Wisden, 20 L. T. N. S. 435, followed. *Liddell* v. *Copp-Clark Co.*, 19 P. R. 332.

Consent Judgment—*Damages*—*Costs.*]—Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—Held, that the plaintiffs were entitled to the costs of the action; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into court. *Anglo-Canadian Music Publishing Association* v. *Somerville*, 19 P. R. 113.

Circulars—*Forms.*]—The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright, if time, labour and experience have been devoted to its production. The plaintiff, the proprietor of a school for the cure of stammering, had obtained copyright for publications consisting of: (1) "Applicant's Blank," a series of questions to be answered by entrants to the school; (2) "Information for Stammerers," an advertisement circular; (3) "Entrance Memorandum," an agreement to be signed by entrants; and (4) "Entrance Agreement," similar to No. 3, but more formal:—Held, that the plaintiff had copyright in the publications, and was entitled to an injunction restraining infringement thereof. Griffin v. Kingston and Pembroke R. W. Co., 17 O. R. at p. 605, dissented from. *Church* v. *Linton*, 25 O. R. 131.

Depositing Copy in Parliamentary Library.]—Section 5 of C. S. C. c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for an infringement of it. *Griffin* v. *Kingston and Pembroke R. W. Co.*, 17 O. R. 609.

English Copyright—*Importation of Foreign Reprints.*]—Held, affirming 23 Gr. 590, that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vict. c. 45, to copyright it in Canada under the Copyright Act of 1875,

with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada. *Smiles* v. *Bedford*, 1 A. R. 436.

Infringement — *Biographical Sketches.*] The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted works therefor. In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence. *Garland* v. *Gemmill*, 14 S. C. R. 321.

License to Publish—*Acquiescence.*]—To create a perfect right under 38 Vict. c. 88 (D.), there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing, there may be such conduct on the part of the owner, in assenting to and encouraging the infringement complained of, as to disentitle him to relief in equity by way of injunction. *Allen* v. *Lyon*, 5 O. R. 615.

Notice on Title Page—*Anticipating Application.*]—G., the writer of a book, printed the book which he intended to copyright, with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete:—Held, that this did not invalidate the patent, and quære whether it was an infringement of s. 17 of the Copyright Act, 37 Vict. c. 88 (D.), so as to subject G. to any penalty. *Gemmill* v. *Garland*, 12 O. R. 139, 14 S. C. R. 321.

Notice on Title Page—*Error in Form.*] On the title page of the book as published the plaintiff caused these words to be printed: "Entered according to the Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture, at Ottawa:"—Held, that this was sufficient compliance with s. 9 of the Act, although the form of words used was not exactly the same as there prescribed, inasmuch as the words "of Canada," omitted after the word "Parliament," were immaterial. General remarks on forms prescribed in various cases by Acts of Parliament. *Garland* v. *Gemmill*, 14 S. C. R. 321.

Printing Canadian Copyright Work Abroad—*Publication in Canada.*]—Section 33 of the Copyright Act, R. S. C. c. 62, does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition who has the work printed abroad, and inserts notification of the existence of such copyright on copies published in Canada. *Lancefield* v. *Anglo-Canadian Music Publishing Association (Limited)*, 26 O. R. 457.

Priorities of British and Canadian Copyrights.]—There is a very clear distinction to be observed in the Copyright Act, R. S. C. c. 62, between works which are of prior British copyright, and those which are of prior Canadian copyright. If there is a prior British copyright, and thereafter Canadian copyright is obtained by the production of the work, then, by s. 6, that local copyright is subject to be invaded by the importation of lawful British reprints. But if the Canadian copyright is first on the part of the author or his assigns, then, under s. 4, the monopoly is secured from all outside importations. *Anglo-Canadian Music Publishers' Association (Limited)* v. *Suckling*, 17 O. R. 239.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright. *Ib.*

Proprietor in England — *Ignorance of Infringement—Evidence of Copyright.*]—The plaintiffs, a company incorporated in England for the purpose of securing Canadian copyright, and of acquiring the protection of the Canadian Copyright Act, 1875, moved to restrain the defendants from offering for sale in Canada a collection of songs imported from New York, which contained songs covered by the plaintiffs' Canadian copyright:—Held, that neither the facts that the domicile of the plaintiffs was in London, England, nor that the defendants were ignorant of the plaintiffs' right, were defences to the plaintiffs' action. The affidavit of the plaintiffs' manager, setting out their incorporation, and the acquisition of the copyright of the songs in question, which was in no way controverted, was held, for the purposes of the motion, sufficient evidence of copyright. The defendants were ordered to pay the costs of the action although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in court. *Anglo-Canadian Music Publishers' Association (Limited)* v. *Winnifrith Brothers*, 15 O. R. 164.

Proprietor in England — *Copyright Through Agent — Stereotyping.*]—A person resident in England who procures a book for valuable consideration, to be compiled for him, the compiler not reserving his rights, is the proprietor thereof, and entitled, either personally or through an agent in Canada, to copyright under the Copyright Act, R. S. C. c. 62. Printing and publishing the book from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation of the copies. American reprints of the plaintiff's copyright book added as an appendix to American reprints of the Bible imported into Canada, were held to be a violation of the plaintiff's rights. *Frowde* v. *Parrish*, 27 O. R. 526, 23 A. R. 728.

Railway Ticket.]—A railway ticket is not a subject of copyright under the Act. *Griffin* v. *Kingston and Pembroke R. W. Co.*, 17 O. R. 660.

Works of Fine Art—*Imperial Act.*]—The Imperial Act, 25 & 26 Vict. c. 68, an Act

for amending the law relating to Copyright in Works of Fine Art, does not extend to the colonies, and copyright thereby conferred is confined to the United Kingdom. *Graves* v. *Gorrie*, 32 O. R. 266.

CORONER.

Evidence — *County Attorney Advising as to Wording of Verdict.*]—At a coroner's inquest evidence is properly receivable under R. S. C. c. 174, s. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment the improper reception of evidence is no ground for a certiorari to bring up the coroner's inquisition. Regina v. Ingham, 5 B. & S. at p. 260, specially referred to. *Regina* v. *Sanderson*, 15 O. R. 106.

It is not improper for the county attorney acting for the prosecution to enter the jury-room, with the consent of the coroner, after the jury have reached a conclusion, where the object of the county attorney is to advise the jury as to the proper language to be employed in order to draw their verdict after it has been arrived at. *Ib.*

Evidence — *Admissibility at Trial.*] — A coroner's court is a criminal court, and the depositions of a witness before such court, who is subsequently charged with murder, cannot be received in evidence against him at the trial. *Regina* v. *Hendershott*, 26 O. R. 678.

Evidence—*Admissibility at Trial.*]—The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, and who is subsequently charged with an offence, are receivable in evidence against him at the trial. Regina v. Hendershott, 26 O. R. 678, overruled. *Regina* v. *Williams*, 28 O. R. 583.

Not followed in *Regina* v. *Hammond*, 29 O. R. 211.

Excluding Counsel from Inquest.]—A barrister cannot insist upon being present at a coroner's inquest, and upon examining and cross-examining the witnesses, &c., and can maintain no action against the coroner for excluding him from the room. Defendant in such an action having justified as coroner, it was held, on the authority of Garnett v. Ferrand, 6 B. & C. 611, that the plea was good, for, 1. The coroner was not liable to a civil action for anything done in his judicial capacity; and, 2. He was authorized in what he did. In a second count the plaintiff set out the facts, stating that as a barrister and attorney-at-law he had been employed by certain clients to attend on their behalf at an inquest held by the defendant as coroner on the body of one W., in the issue of which they were interested, and that the defendant unlawfully and maliciously, and without reasonable or probable cause, refused to allow him to act, and forcibly compelled him to desist:—Held, bad, for the same reasons that the plea was sustained. *Agnew* v. *Stewart*, 21 U. C. R. 396.

Fire Inquest — *Fees.*] — Under 20 Vict. c. 36, the coroner is made the judge of the necessity for investigating into the cause of a fire; and therefore, to an application for a mandamus to the treasurer to pay him his fees, it was held no answer to shew that in the opinion of the reeve and others the inquiry was not called for:—Held, also, that the want of funds in the treasurer's hands was no answer, the payment not having been refused on that ground. *In re Fergus and Cooley*, 18 U. C. R. 341.

Form of Inquisition.]—Held, that the inquisition set out in this case was bad, for the principal was not sufficiently charged either with manslaughter or murder; and it was uncertain which crime it was intended to charge the others as aiding in, although they were said to have been present at the "murder aforesaid." *Regina* v. *Breden*, 16 U. C. R. 487.

Form of Inquisition — *Concurrence of Jurors — Appending Names of Jurors.*] — A coroner's inquisition on the body of M. found that G. on, &c., at, &c., "did feloniously and maliciously kill and slay one M., against the peace of our Lady the Queen, her crown and dignity, in self-defence of him, the said G., without malice or intent to kill:"—Held, that it must be quashed, on the application of G., as not disclosing with certainty any criminal offence on his part. Semble, that it was also a fatal objection that twelve jurors did not concur in the finding. The Christian and surnames of all the jurors need not be appended to the inquisition where they are given in the body of it. *Regina* v. *Golding*, 39 U. C. R. 259.

Form of Inquisition—*Constable Acting as Juror—Juror Giving Evidence.*]—The caption to an inquisition finding the prisoners guilty of murder, stated that the inquest was held at H., &c., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Queen Victoria, and the inquisition to be "an inquisition indented, taken for our Sovereign Lady the Queen," &c., "in view of the body of an infant child of A. W. (one of the prisoners) then and there lying, and upon the oath of" (giving the names of the jurors) "good and lawful men of the county, and who being then and there duly sworn and charged to inquire for our said Lady the Queen, when where, how and by what means the said female child came to her death, do upon their oaths say," &c.:—Held, that the statement of the time of holding the inquest was sufficient; that it sufficiently appeared that the presentment was under oath; and that it need not be under seal; that there was a sufficient finding of the place where the alleged murder was committed; and of identification of the child murdered with that of the body of which the view was had. *Regina* v. *Winegarner*, 17 O. R. 208.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness; and Y., a juryman, was also sworn and gave evidence as a witness:—Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him from giving evidence; and so also Y. was not precluded. *Ib.*

Form of Warrant.]—A coroner's warrant to arrest J. C., reciting a coroner's inquisition, and stating the offence as follows: that J. C. "stands charged with having inflicted blows on the body of the said D. F.," and not shewing the place where the blows, if any, were inflicted, or the offence, if any, was committed, is bad. *In re Carmichael*, 10 L. J. 325.

Identifying Body.] — The inquisition was held to be defective in not identifying the body of the deceased as being the person with whose death the prisoner was charged; but the prisoner was recommitted, as the evidence shewed that a felony had been committed. *Regina* v. *Berry*, 9 P. R. 123.

Inquest on Sunday.]—A coroner's inquest held on Sunday is invalid. *In re Cooper*, 5 P. R. 256.

Insurance—*Certificate of Loss.*]—A coroner is a magistrate who may give a certificate of loss under an insurance policy. *Kerr* v. *British America Assurance Co.*, 32 U. C. R. 569.

Malicious Verdict — *Trespass.*]—Plaintiff sued defendant in trespass, stating that acting as coroner he assaulted the plaintiff &c. The second count stated that defendant was acting as coroner, &c., and that a jury being duly sworn he held an inquisition on the body of one N. F., then lying dead, setting forth the finding of the jury, which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff and through culpable negligence on his part in not having given sufficiently explicit directions, and charging that defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c. At the trial, on its being objected that defendant, as a coroner, was a Judge of a court of record, and that no action would lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted maliciously, and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and super visum corporis, or that he had issued his warrant on the finding of the jury. On this the plaintiff was nonsuited:—Held, that as defendant was acting judicially, trespass would not lie against him; and that though the nonsuit did not appear so erroneous as to warrant its being set aside, still, that if the plaintiff desired to present facts to the jury not suggested to them at the trial, he should be allowed to do so, on payment of costs. *Garner* v. *Coleman*, 19 C. P. 106.

Post-mortem Examination — *Damages.*]—The wife of the plaintiff having died suddenly, the defendants, three practising physicians and surgeons, acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making and made there, a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants. There was no consent in writing of the county crown attorney:—Held, that the coroner, having authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem. Held, also, that no rule of law forbade the making of the post-mortem before the impanelling of the jury; that was a matter of procedure in the discretion of the coroner. Held, also, that the meaning of s. 12 (2) of R. S. O. 1897 c. 97, was that the coroner should not, without the consent of the Crown attorney, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained. Semble, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, $600, was excessive. *Davidson* v. *Garrett*, 30 O. R. 653.

Poundage.]—A coroner is not entitled to poundage on an attachment against a sheriff. *In re Duggan*, 2 U. C. R. 118.

Rider to Verdict.]—At an inquest held upon the body of a boy who had committed suicide, the verdict, after finding the cause of death, stated that from evidence submitted the jury judged that the boy's master, a medical man, had not done justice to him according to his agreement made with the boy's father in Scotland, in regard to his clothing and the labour he had to perform:—Held, that the latter part of the verdict was relevant and within the province of the jury; and although the evidence seemed to preponderate the other way, the court could not on that account alter the finding. *In re Miller*, 15 U. C. R. 244.

Rider to Verdict — *Intituling Affidavits.*]—A coroner's jury found the cause of a death into which they were inquiring to have been disease, adding that it was accelerated by an over dose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F., as a cholera preventive; and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing. This inquisition having been brought up by certiorari, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indictable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference. Quære, whether the affidavits were properly intituled The Queen, plaintiff, v. Robert Farley, defendant. *Regina* v. *Farley*, 24 U. C. R. 384.

Summoning Jury.]—The coroner, under a special writ of venire, is not required to return a panel of thirty-six jurors, 36 Geo. III. c. 2, and the general jury law, being applicable only to the sheriff and not to the coroner. *Fraser* v. *Dickson*, 5 U. C. R. 231.

Summoning Jury.]—48 Geo. III. c. 13, s. 5, gives no authority to the coroner to summon a special jury. Where the sheriff is interested some indifferent person appointed by the court must strike the jury. *Clandinan* v. *Dickson*, 8 U. C. R. 281.

Territorial Jurisdiction.]—A coroner for the county of Carleton was held to have jurisdiction to hold an inquest in the city of

Ottawa, situate in that county. *Regina* v. *Berry*, 9 P. R. 123.

Witness Fees—*Medical Practitioner.*]—A medical witness attended during two inquests held on fifty-two persons, and occupying several days; no post mortem examinations were made:—Held, entitled, under 13 & 14 Vict. c. 56, only to 25s., for each day's attendance, (not for each body), together with his mileage in travelling. *In re Askin and Charteris*, 13 U. C. R. 498.

Witness Fees—*Post Mortem.*]—Where a coroner, under C. S. U. C. c. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a post mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by s. 9, a mandamus to the coroner, to make his order on the county treasurer for the fees of such witness, under s. 10, was refused:—Semble, that on an application for such mandamus, the county treasurer as well as the coroner must be called upon. *In re Harbottle and Wilson*, 30 U. C. R. 314.

See Gilchrist v. *Conger*, 11 U. C. R. 197; *Johnson* v. *Parke*, 12 C. P. 179.

See MALICIOUS PROCEDURE, II. 1 (a).

CORRUPT PRACTICES.

See MUNICIPAL CORPORATIONS, XIX. 6—PARLIAMENT, I. 3.

COSTS.

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1. *In General*, 1448.
2. *Appeal from Taxation*, 1452.
3. *Revision of Taxation*, 1455.

I. APPEALS AS TO COSTS.

By-law in Question in Action Repealed.]—After the rendering of the judgment by the court of Queen's bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the supreme court of Canada:—Held, that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Defendant Ordered to Pay all Costs.]—Where a defendant is ordered to pay all costs of the action, but no further relief is given by the judgment, an appeal from the judgment is not an appeal for costs within the meaning of s. 65 O. J. Act. A judgment ordering the defendant to pay the whole costs of the action cannot be supported unless the plaintiff is entitled to bring the action. Dick v. Yates, 18 Ch. D. 76, followed. *Fleming* v. *City of Toronto*, 20 O. R. 547, 19 A. R. 318.

Discretion.]—The court will not interfere with the discretion exercised as to costs, unless the Judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case. Young v. Thomas, [1892] 2 Ch. 134, followed. It is not intended by Rule 1170 (*a*) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from. *Campbell* v. *Wheler*, 17 P. R. 289.

Discretion of Court Appealed From.]—It is only when some fundamental principle of justice has been ignored or some other gross error appears that the supreme court will interfere with the discretion of provincial courts in awarding or withholding costs. *Smith* v. *Saint John City Railway Company, Consolidated Electric Company* v. *Atlantic Trust Company, Consolidated Electric Company* v. *Pratt*, 28 S. C. R. 603.

Erroneous Principle—*Misapprehension of Fact.*]—The rule as to an appeal on the question of costs appears to be this, that if, in making the order complained of, there has been any violation of principle, or the court has proceeded on a wrong general rule, or if the discretion of the court has been exercised upon any misapprehension of fact, a court of appeal will interfere, but not otherwise. *Wansley* v. *Smallwood*, 11 A. R. 439.

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

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

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

Receiver—*Ex Parte Order.*]—After judgment a receiver may be appointed ex parte in case of emergency or where there is danger apprehended in the disposal of property. Re Potts, [1893] 1 Q. B. at p. 662, and Minter v. Kent, &c., Land Society, 11 Times L. R. 197, referred to. And where ex parte orders were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—Held, that the disposition of the costs should not be reviewed on motion to continue the receiver. McLean v. Allen, 14 P. R. 84, distinguished. *Stark* v. *Ross*, 17 P. R. 237.

Submitting to Order.]—On an application by an insurance company to stay proceedings in an action on a policy, pending an arbitration as to the amount of loss under the statutory conditions, the court granted a stay on the company admitting its liability on the policy; and further ordered, but without defendants' consent, that either party might, after the award, apply to the court in respect of the costs of the arbitration. On a subsequent application an order was made by a Judge in chambers for defendants to pay a part of such costs:—Held, that the court had jurisdiction to deal with the costs; and moreover, that defendants having submitted to the order of the court, and taken the benefit of it, could not object to the order of the Judge made under it. *Hughes v. British America Insurance Co., Hughes* v. *London Assurance Co.*, 7 O. R. 465.

Successful Litigant in Effect Paying Costs.]—See *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Supreme Court—*Appeal Involving Costs Only.*]—In order to avoid expense the supreme court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it. *Schlomann* v. *Doucker*, 30 S. C. R. 323.

Wrong Principle.]—Where in an action in the county court costs upon the scale of the division court only are given an appeal will lie to a divisional court if the Judge of the court below has proceeded upon a wrong principle. Where an action is properly brought in the county court the plaintiffs should not be deprived of their costs of such action by reason of what they may have done pendente lite. *Grove* v. *Bender*, 20 C. L. T. Occ. N. 95.

II. Giving and Withholding Costs.

1. *In General.*

Accidental Omission to Award Costs.]—The trial Judge reserved judgment and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs:—Held, that the case came within Rule 338, and that the Judge had power even after an appeal to a divisional court, which left his judgment undisturbed, to make an order as to costs. Fritz v. Hobson, 14 Ch. D. 542, followed. *Hardy* v. *Pickard*, 12 P. R. 428.

See Re Great Western Advertising Co. v. *Rainer*, 9 P. R. 494.

Argument Conducted Unsatisfactorily.]—The court being dissatisfied with the mode in which the argument was conducted, and the brief of the pleadings had been prepared, though it allowed a demurrer to the bill, liquidated the costs at $10 only. *McFadyen* v. *Stewart*, 11 Gr. 272.

Costs not Asked in Rule.]—Costs not asked in rule, though they were at the bar:—

Held, no objection, as they are in the discretion of the court under the Judicature Act. *In re Peck and Town of Galt*, 46 U. C. R. 211.

Doubtful Point.]—The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *Re North York Election, Paterson* v. *Mulock*, 32 C. P. 458.

Equal Division of Judges.]—The two Judges who composed the divisional court at the hearing of this case disagreeing, a motion to set aside the judgment of the trial Judge in favour of the plaintiff was dismissed with costs. *Cousineau* v. *City of London Fire Ins. Co.*, 15 O. R. 329.

Illegible Affidavits.] — Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the court refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him. *Burnham* v. *Garvey*, 27 Gr. 80.

Indemnified Defendant.] — One defendant agreed to save another harmless as regards the costs of an action. In the written retainer of the latter to his solicitors it was provided that the costs should be charged to the former defendant. The plaintiffs having been ordered to pay the costs of the defendants:—Held, by the court below, 16 P. R. 346, a proper case to allow two sets of costs, and that no disability existed on the part of the indemnified defendant to tax and recover his costs against the plaintiffs. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333, distinguished:—Held, by the divisional court on appeal, that the indemnified defendant was not entitled to costs against the plaintiffs. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333, followed. *Meriden Britannia Company* v. *Braden*, 16 P. R. 346, 410. Affirmed in appeal, 17 P. R. 77.

Indulgence.] — On motion for leave to answer notwithstanding an order pro confesso, where the proposed answer was not properly sworn:—Held, that it could only be granted on the terms of paying the costs of the application and of the order pro confesso; but if the answer had been properly sworn, the application would have been allowed without costs. *Merrill* v. *Evans*, 1 Ch. Ch. 303.

Infringement of Copyright.]—The defendants were ordered to pay the costs of the action for infringement of a copyright although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in court. *Anglo-Canadian Music Publishers Ass'n. (Limited)* v. *Winnifrith Brothers*, 15 O. R. 164.

Inquiry Justifiable.]—Where the petitioner had carefully abstained from ascribing fraud or fraudulent conduct to the plaintiff, and the circumstances were such as to invite discussion, the court in dismissing the petition did so without costs. *Ricker* v. *Ricker*, 27 Gr. 576.

Irregularity.] — Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to shew that the notice was irregular. *Waller* v. *Claris*, 11 P. R. 130.

Liability to Solicitor—*Indemnity.*]—If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Meriden Britannia Co. v. Braden, 17 P. R. 77, followed. This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defeading solicitors continued to act upon the retainer of the guarantee company. *Walker* v. *Gurney-Tilden Co.*, 19 P. R. 12.

Municipal Arbitration.] — The power given by the Municipal Act, R. S. O. 1897 c. 223, s. 460, to arbitrators under that Act "to award the payment by any of the parties to the other of the costs of the arbitration, or of any portion thereof," should receive the same construction as Consolidated Rule 1130; the discretion given is a legal discretion, and subject to the rule that when the claimant has been guilty of no misconduct, omission or neglect such as to induce the court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation. *In re Pattullo and Town of Orangeville*, 31 O. R. 192.

New Grounds of Attack.]—The applicants for an order quashing a by-law before moving had appeared on a notice, given by them, to name an arbitrator before a Judge, who raised an objection to the by-law, whereupon the applicants gave notice of abandonment and moved to quash:—Held, that the applicants were not estopped, but that they should have no costs. *Re Davis and City of Toronto*, 21 O. R. 243.

New Grounds of Defence.]—Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the court of appeal. *McVicar* v. *McLaughlin*, 16 P. R. 450.

Novel Point.]—Demurrer overruled without costs, as it was the first occasion the point decided under it had arisen since the Judicature Act. *Rumohr* v. *Marx*, 29 Gr. 179.

Novel Point.]—In this case the action was dismissed without costs as the point decided was a new one, and the statute was not plainly expressed. *Wallace* v. *Lobo School Trustees*, 11 O. R. 648.

Point not Taken.]—In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs. *City of Montreal* v. *McGee*, 30 S. C. R. 582.

Point not Taken.]—Where the only defence set up failed, and the ground on which the court decided against the plaintiff was not taken, or even pointed to in any manner by the answer, the court, though it dismissed the bill, refused defendant his costs of the suit. *McAnnany* v. *Turnbull*, 10 Gr. 288.

Prohibition—*Forum Chosen in Deference to Judge's Views.*]—On a motion for a writ of prohibition to restrain an action in a division court:—Held, that as the learned Judge who tried the case did not allow county court costs in similar cases, and as the plaintiff was obliged to sue in the division court at the risk of prohibition, or in the county court and lose his costs, the defendant should get no costs of this motion, unless he should successfully resist the suit to be subsequently brought to recover the amount of the note. *Re Young* v. *Morden*, 10 P. R. 276.

Settlement—*Tender of Costs.*]—After issue joined, plaintiff and defendant settled the action on condition of defendant paying the costs incurred, which were stated at a certain sum by plaintiff's attorney, and defendant gave his note therefor payable before the assizes. On the first day of the assizes, defendant's agent tendered the amount, reserving to himself the right of taxation; and the plaintiff's attorney refused to receive it, except unconditionally. The agent afterwards tendered it unconditionally, but it was then refused, because additional costs had been incurred; and the plaintiff's attorney took a verdict for nominal damages. The court set the verdict aside on payment of the sum originally agreed upon, and made the plaintiff's attorney pay the costs of the application. *Ruttan* v. *Robertson*, 2 U. C. R. 37.

Slander—*Verdict for* $1.]—Where, in an action of slander, the jury returned a verdict for the plaintiff for $1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered. *Bell* v. *Wilson*, 19 P. R. 167.

Strict Rights.]—The defendants having paid into court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641, 22 A. R. 414.

Technical Objection.]—Appeal quashed with costs where, upon the merits, there appeared to be no reason to differ from the court below. *Teskey* v. *Neil*, 15 P. R. 244.

Tender.]—Discussion as to the effect of the defences of tender and payment into court upon the question of costs and otherwise. Rules 632-640 considered. *Davis* v. *National Assurance Co.*, 16 P. R. 116.

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

Towage—*Tender.*]—Where, in an action for towage services, the defendants paid into court an amount sufficient to liberally compensate the plaintiffs for the services rendered, they were given their proper costs against the plaintiffs. *Hine* v. *The "Thomas J. Scully,"* 6 Ex. C. R. 318.

Undefended Action.] — Where it was held that a legatee having signed a receipt, not being by law bound to execute a release, no costs were given against him in an action undefended to compel him to execute a release. See *Kaiser* v. *Boynton*, 7 O. R. 143.

Undertaking Before Action.]—Where an offer to do certain work, which would abate an injury to suppliant's property caused by a public work, was made in writing by the Crown and its receipt acknowledged by the suppliant before action brought, but such offer was not repeated in the statement of defence (although filed subsequently pursuant to leave given), the court, in decreeing the suppliant relief in terms of the undertaking, refused costs to either party. *Fairbanks* v. *The Queen*, 4 Ex. C. R. 130.

Venue—*Party not in Fault.*]—Costs were not given against the plaintiffs where they obtained a change of venue to expedite the trial because of the illness of a witness, they not being in fault. *Mercer Co.* v. *Massey-Harris Co.*, 16 P. R. 171.

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2. *Conduct of the Parties.*

Charges not Sustained.] — When the plaintiff made charges of improper conduct against the administratrix, which were not sustained in evidence, he was ordered to pay all costs other than of an ordinary administration suit. *Hodgins* v. *McNeil*, 9 Gr. 395.

Common Mistake.]—Held, that the costs in this case having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs. *Dalby* v. *Bell*, 29 Gr. 336.

Delay and Acquiescence.]—Where defendants set up a defence to a bill, which if tenable would have formed sufficient grounds for their having taken steps to set aside the transaction, which it was now sought to enforce, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the court, under the circumstances, ordered them to pay the costs of the suit. *Miller* v. *Ostrander*, 12 Gr. 349.

Delay—*Want of Candour.*]—In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which the verdict was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before. *Cushman* v. *Reid*, 20 C. P. 147.

Delay.]—Costs refused on ground of delay in proof of claim by dowress. *Hyde* v. *Barton*, 8 P. R. 205.

Delay in Taking Objection.]—An appeal was allowed without costs where an objection to jurisdiction was not taken in limine. *Jacobs* v. *Robinson*, 16 P. R. 1.

Delay in Making Objection to Title.]—Under the circumstances of this case, it was held that the vendee had not, by his conduct and delay, waived his right to object to the title, but as he had not raised the objection in the proper manner at the proper time, he was allowed no costs of his action. *Nason* v. *Armstrong*, 22 O. R. 542.

Demurrer Invited.] — A count having been drawn so as to invite a demurrer, the demurrer was overruled without costs. *Smith* v. *Lancaster Township*, 45 U. C. R. 86.

Discreditable Defence.] — On application for an injunction against a corporation, though refused, the corporation were not allowed their costs, as their conduct in the matter in question was highly discreditable. *Darby* v. *City of Toronto*, 17 O. R. 554.

Dismissal of Action for Penalties—*Defendant Guilty of Bribery.*]—An order was made dismissing an action for penalties under the Dominion Election Act, 37 Vict. c. 9, for wilful delay in prosecution, without costs, for the reason that a primâ facie case of bribery was established against the defendant, which he had not attempted to contradict. *Miles* v. *Roe*, 10 P. R. 218.

Dower—*No Demand.*]—Although in this case the plaintiff was entitled to judgment of seizin, yet as there was no demand made and the defendants were always ready and willing to assign the dower the plaintiff was not entitled to costs. *Malone* v. *Malone*, 17 O. R. 101.

Each Party at Fault.]—The plaintiff, by his bill, did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the court could not grant. The court on pronouncing a decree refused costs to either party. *Clemow* v. *Booth*, 27 Gr. 15.

Ex Parte Judgment.] — In this case judgment having been granted ex parte, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted. *Jackson* v. *Gardiner*, 19 P. R. 137.

Extravagant Claim.]—Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered. *McLeod* v. *The Queen*, 2 Ex. C. R. 106.

Failure to Make Proper Admissions.]—In an administration action commenced by writ the plaintiff was allowed upon taxation only such costs as would have been taxed had he begun his proceedings by a summary application under Rule 965. The defendant claimed to have taxed to him and set off his additional costs incurred by reason of the less expensive procedure not having been adopted. He had not in the action admitted the right of the plaintiff to an account, but had pleaded a release, and had not objected to the procedure adopted:—Held, that the defendant's additional costs had not been incurred by reason of the plaintiff's improper or unnecessary proceedings, but by his own conduct in not admitting the right to an account and in not objecting to the plaintiff's manner of proceeding at the earliest possible stage; and the case therefore did not come within Rule 1195. Semble, it would have been proper to raise the question at the hearing; but the taxing officer had jurisdiction under Rule 1195, without an order, to "look into" it. *Moon* v. *Caldwell*, 15 P. R. 159.

False Answers.]—The court, although unable upon the evidence to grant the relief asked, refused defendants their costs up to the original hearing, in consequence of the untruthfulness of their answers. *Finlayson* v. *Mullard*, 10 Gr. 130.

False Denial of Facts.]—When the defendant had by his answer denied the agreement to convey, which, however, was clearly established by his own evidence, he was refused his costs. *Ferguson* v. *Ferguson*, 28 Gr. 380.

False Statements in Answer.]—Costs refused where action dismissed but successful defendant in his answer swore to what was untrue, or to what he did not know to be true. *McKay* v. *Davidson*, 13 Gr. 498.

Fraud not Proved.] — Costs withheld from the defendant because he had misled the plaintiff as to his power to make an exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove. *Tenute* v. *Walsh*, 24 O. R. 309.

Impugning Motives.]—Where an answer improperly impugned the motives of the solicitor who filed the bill, the court, although it dismissed the bill with costs, directed the costs of the answer to be disallowed to the defendant. *McKenzie* v. *Yielding*, 11 Gr. 406.

Inequitable Defence.]—In a suit instituted to compel payment of the amount of a policy of insurance against fire the company raised the defence of ultra vires, which the court sustained and dismissed the bill, but refused the company their costs of suit, as in opposing the plaintiff's claim they were resisting upon inequitable grounds the payment of a just debt. *Lawson* v. *Canada Farmers' Ins. Co.*, 28 Gr. 525.

Inspector of Estate—*Breach of Duty.*]—Where the appellant was an inspector of an insolvent estate and participated in arrangements intended to secure a fraudulent preference to a particular creditor the appeal was allowed with costs but the action against him was dismissed without costs and an order made that no costs should be allowed in any of the courts below. *Brigham* v. *Banque Jacques-Cartier*, 30 S. C. R. 429.

Misleading Conduct.] — The beneficial owner of land omitted to have the paper title thereto in his own name, and thus enabled his son, who held such title, to mislead parties into accepting a mortgage thereon from the son. The court, though unable to refuse him relief, in a suit brought to set aside such mortgage, under the circumstances refused him his costs. *Gray* v. *Coucher*, 15 Gr. 419.

Misleading Conduct.]—In this case the motion to quash the by-law was refused, but without costs, as the applicant had been led

into his position by the indiscretion of certain members of the corporation. *In re Workman and Town of Lindsay*, 7 O. R. 425.

Misrepresentation Before Action.]—Costs were refused to successful claimants where there had been a misrepresentation innocently made by their agent, to whom they had not communicated facts within their knowledge. *Smith* v. *The Queen*, 2 Ex. C. R. 417.

Mortgage—*Tender.*]—Where the defendant, who had covenanted that only $664 was due on a mortgage held by a building society on property purchased by plaintiff in his answer admitted an error in the computation of the amount due to the society, and offered to pay the difference between the $664 and what he alleged was the cash value of the mortgage and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark* v. *Shepherd*, 29 Gr. 316.

Mortgage—*Undue Haste.*]—Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office and left word that he was ready to pay the money, the court refused the plaintiff his costs, and held that the bill was unnecessarily and improperly filed. *McLean* v. *Cross*, 3 Ch. Ch. 432.

Mortgage—*Unsuccessful Claim to Consolidate.*]—The defendants before action tendered, with the amount due on the first mortgage, an assignment thereof, which the plaintiffs, being mortgagees in possession, were not bound and declined to give, under R. S. O. 1887 c. 102, s. 2, and subsequently but without tender the defendant offered to take a reconveyance:—Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of their costs of the action. *Stark* v. *Reid*, 26 O. R. 257.

Negligence.] — Under a sequestration against the defendant, property on his land had been seized, to which a third party laid claim, and which the bailiff released to the claimant upon his own undertaking. Upon inquiry by the plaintiff into the circumstances, he released the property, but not until after notice given by the claimant of a motion in the nature of one for an examination pro interesse suo: — Held, that the claimant, by leaving his property in the custody of defendant, had brought the difficulty on himself, and was therefore not entitled to the costs of the application. *Harvey* v. *Taylor*, 1 Ch. Ch. 353.

Personal Charges.]—Remarks as to the unnecessary introduction of personal charges and assertions of motives in resisting an application for mandamus in this case and costs refused in dismissing it. *In re Stanton and Board of Audit of Elgin*, 3 O. R. 86.

Personal Misconduct by Members of Council.]—The wrong (if any) complained of, being a personal wrong on the part of the members of the council who voted for the resolution:—Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Marsh* v. *Huron College*, 27 Gr. 605.

Prohibition—*Unmeritorious Defence.*]—A summons for a writ of prohibition to a division court was made absolute without costs, there being no meritorious defence. *Kinsey* v. *Roche*, 8 P. R. 515.

Setting Up Untenable Defences.]—The appeal of one of the defendants, a bank, was allowed and the bill against them dismissed, but as they set up a claim in their original answer, which was urged on appeal and could not be maintained, they were held not entitled to their costs of defence or of the appeal. *Bailey* v. *Jellett*, 9 A. R. 187.

Solicitor Stating Impertinent Matter.]—The plaintiff's attorney having stated impertinent and irrelevant matter in his affidavit, was ordered to pay the costs of the application. *Anonymous*, 4 P. R. 242. See also *Corley* v. *Roblin*, 5 L. J. 225.

Suppression of the Facts.]—It is within the power of the court or a Judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shewn to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the Judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province." For the same reason the defendant was entitled to the costs of his application to be discharged from custody. *Scane* v. *Coffey*, 15 P. R. 112.

Tampering With Informant.]—A conviction was quashed, without costs, where it appeared that the defendant had attempted to tamper with the informant. *Regina* v. *Ryan*, 10 O. R. 254.

Undue Haste—*Charges not Sustained.*]—When a plaintiff, without proper inquiry into facts, and with undue haste, filed a bill in this court to enforce a judgment at law, in which he made charges of fraudulent practices against the defendant, the court, while granting him the relief to which he was strictly entitled, refused him his costs of the suit, and ordered him to pay the costs of the defendant. *Neale* v. *Winter*, 9 Gr. 261.

Unmeritorious Defence.]—In this case the defendant was refused his costs, as the ground on which he had succeeded did not go to the merits. *Regina* v. *Sparham*, 8 O. R. 570.

Unmeritorious Use of Name.] — No costs were given to defendant in an action to restrain him from using a certain designation of his college as he had sought by the use of the name to advantage himself in an unmeritorious way. *Robinson* v. *Bogle*, 18 O. R. 387.

Untrue Plea—*Statute 4 Anne c. 16.*]—See *McLeod* v. *Torrance*, 3 U. C. R. 174.

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3. *Divided Success.*

Demurrer Successful in Part.]—Held, that the demurrer being partially successful

and partially unsuccessful, neither party should get costs. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

Different Branches.]—Held, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the divisional court, she should get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of apportionment, no costs should be given or received. *Gough* v. *Bench*, 6 O. R. 639.

Failure in Main Object.]—The plaintiff having failed in that part of a suit which rendered a bill necessary, and as the other objects of the suit could have been attained by less expensive proceedings, and it being considered that in case the latter course had been adopted the costs to the insolvent estate would have been about equal to the costs incurred by it in defending the suit, no costs were given to either party. *Darling* v. *Wilson*, 16 Gr. 255.

Patent Action.]—In a suit seeking to restrain the use by defendant of an oven, which had been the subject of a patent in favour of the plaintiff, the plaintiff having succeeded as to part only of his claim, no costs were given to either party up to the hearing. A reference as to damages having been directed, subsequent costs were ordered to abide the result. *Hunter* v. *Carrick*, 28 Gr. 489.

Rectification of Mortgage.]—The court refused in this case to reform an instrument on parol evidence, although satisfied that the plaintiffs ought to have succeeded had the case been one depending on the weight due to such evidence, and had the bill only asked for that relief would have dismissed it with costs; but as the bill contained a prayer for foreclosure, that relief was afforded the plaintiffs, subject to the payment of such costs as the defendant, an assignee in insolvency, had incurred in resisting a rectification of the mortgage. *Dominion Loan & Savings Society* v. *Darling*, 27 Gr. 68.

Several Defences.] — Where defendants had set up several grounds of defence on which much evidence was gone into, and the court without going into these defences, dismissed the plaintiff's bill on a ground not argued, and which might have been taken by demurrer to the bill:—Held, that the defendants were notwithstanding, upon the authorities, entitled to the whole costs of their defence. *Simpson* v. *Grant*, 5 Gr. 267.

Several Grounds of Appeal.] — The plaintiff appealed from the report of the master, stating eleven objections thereto. On the argument he abandoned one, two were found in his favour, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the court, instead of giving one set of costs to the plaintiff and another to the defendants, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff. *Ferguson* v. *Frontenac*, 21 Gr. 188.

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4. *43 Elizabeth c. 6.*

See McGuire v. *Donaldson*, Tay. 247; *Cameron* v. *McLean*, Tay. 381; *Jeffrey* v. *Lawrence*, 5 O. S. 317; *Harper* v. *Ward*, M. T. 4 Vict.; *Goodall* v. *Glen*, 6 U. C. R. 14; *Jones* v. *Marshall*, 11 U. C. R. 204.

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5. *Good Cause.*

In an action for seduction it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get the costs, whereupon judgment was directed to be entered for him without costs:—Held, that good cause was shewn why costs should not be given to the defendant within Rule 428, which declares that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge or court shall otherwise order. *Walmsley* v. *Mitchell*, 5 O. R. 427.

Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages:—Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only. Wilson v. Roberts, 11 P. R. 412; Garnett v. Bradley, 3 App. Cas. 544, followed. *Wellbanks* v. *Conger*, (24), 12 P. R. 447.

The court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict, and therefore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shewn by the result of a trial of substantially the same issues before another forum, could not be regarded. *Ib.*

An action by the bailiff of one division court against the bailiff of another division court to recover the proceeds of goods seized and sold by the latter, such goods being at the time of such seizure and sale already under seizure by the plaintiff upon executions in his hands against the execution debtor, was tried before the Judge of a county court, without a jury, who held that the plaintiff was entitled to recover, but, under the circumstances, deprived the plaintiff of his costs, and ordered that the defendant's costs of the action, and the costs of the seizure and sale, should be deducted from the amount of the judgment. On appeal from such exercise of discretion, this court reversed the decision of the learned Judge, and ordered judgment to be entered for the plaintiff with costs. Hagarty, C. J. O., reserved his opinion as to the existence of any right in any Judge to make a defendant pay the costs of a plaintiff who has failed to establish a right to recover, or to make a plaintiff who substantially proved his right to recover, pay the costs of the defendant. Per Patterson, J.A.—Rule 428 gives full discretion over the apportionment of costs, and in proper cases to deprive the successful party of costs, but does not extend to make any party, whether plaintiff or defendant, who is wholly successful in his action or defence, pay his defeated opponent's costs. Per Osler, J.A.—The jurisdiction in question is one which existed in the old court of chancery, though the circumstances in which it was exercised, were of a very special and unusual character. *Mitchell* v. *Vandusen*, 14 A. R. 517.

In an action for libel, the jury found that the defendant was guilty of libelling, but that

the plaintiff had sustained no damage. The trial Judge dismissed the action, but ordered the defendant to pay the plaintiff's costs, and gave the latter judgment therefor. The defendant thereupon moved in the divisional court against the judgment for costs, which that court varied by ordering the action to be dismissed with costs, and the plaintiff having appealed to this court from the judgment at the trial, dismissing the action, as also from the judgment of the divisional court:—Held, that although Rule 428 gives to the Judge or court the power of depriving any of the parties to an action, plaintiff or defendant, of their costs; it does not confer the power of compelling a successful party to pay the costs of an unsuccessful party. Mitchell v. Vandusen, 14 A. R. 517, considered, approved and followed:—Held, also, allowing the appeal of the plaintiff from the judgment at the trial, that a venire de novo should be awarded. *Wills* v. *Carman*, 14 A. R. 656. See also *Bush* v. *McCormack*, 20 O. R. 497.

By R. S. O. 1887 c. 52, s. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs, unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case, reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a division court. *Re McLeod* v. *Emigh* (2), 12 P. R. 503.

The jury found a verdict for the plaintiff on his claim for $200, and for the defendants on their counterclaim for $100, and stated that they wished the plaintiff to have full costs and the defendants to have no costs, and the Judge gave effect to the expression of their wishes as to costs:—Held, that the recommendation of the jury did not constitute good cause for depriving the defendants of the costs of the counterclaim. *Weaver* v. *Sawyer*, 16 A. R. 422.

In an action tried by a jury, where the defendant recovers on a counterclaim, the costs should be on the scale of the court in which the action is brought by the plaintiff, unless the Judge for good cause makes a different order. The fact that the recovery is for a sum within the jurisdiction of an inferior court is not good cause for such an order. *Foster* v. *Vicgel*, 13 P. R. 133.

When the special jury before which an action of libel was tried returned to the court-room after considering their verdict, the foreman announced a verdict for the defendant. He then asked if the jury had anything to do with the question of costs. The trial Judge replied that he thought not, but if any recommendation was made it would be considered. The foreman then announced that in the opinion of the jury each party ought to pay his own costs. Upon a motion by the plaintiffs to the trial Judge for an order disposing of the costs in the way recommended by the jury:—Held, that the recommendation of the jury as to costs was not a part of their verdict, but if so it was an announcement of a result at which they had no right in law to arrive; the verdict was complete before anything was said as to costs. If the verdict for the defendant would not have been given except with the recommendation as to costs, that would be matter for consideration upon a motion for a new trial, and not upon the present motion. Upon the motion the plaintiffs filed affidavits of some of the jurors, stating that they would not have agreed in a verdict for the defendant if they had thought the result would be to throw upon the plaintiffs the whole costs of the action:—Held, that these affidavits were not receivable in evidence. Regina v. Fellowes, 19 U. C. R. 48, followed. Jamieson v. Harker, 18 U. C. R. 590, distinguished. It was also contended by the plaintiffs that the trial Judge should make an order depriving the successful defendant of costs, upon the recommendation of the jury and the facts appearing in evidence:—Held, that the question of costs was within the power of the trial Judge, and he could only interfere with the event for "good cause." (Con. Rule 1170). By acting on the recommendation of the jury he would, in effect, be abdicating his functions and allowing the jury to determine what was "good cause." "Good cause" means some misconduct leading to the litigation, or in the course of the litigation, which requires the court in justice to interfere, and there is a marked distinction between interfering with costs going to the plaintiff and costs going to the defendant; and upon the facts of this case there was no "good cause" for interfering. *Farquhar* v. *Robertson*, 13 P. R. 156.

The plaintiffs claimed more than $13,000 upon a special contract for iron sold to the defendants, and damages for refusal to accept a portion of the goods sold. The defendants denied their liability to pay for any part of the iron, setting up that it was not what they had contracted for, and counterclaiming for damages for breach of contract. The case was tried by a jury, who in answer to questions left to them found that the iron delivered was not up to contract, but that the defendants had accepted and used a portion of it; and judgment was entered for the plaintiffs by the trial Judge for over $5,000 for the portion of the iron used by the defendants, at the contract price, less fifteen per cent. for inferiority, as found by the jury. The trial Judge gave the plaintiffs the costs of the action and the defendants the costs of the counterclaim, and the divisional court (15 O. R. 516) affirmed the judgment and disposition of costs. The defendants appealed upon the question of costs only, contending that they had succeeded upon the issue as to the quality of the iron, and were entitled to the costs of that issue. The defendants had not asked at the trial to have judgment entered for them upon such issue, nor was it so entered:—Held, by the majority of the court, that there was, upon the evidence, "good cause" within the meaning of Con. Rule 1170 for depriving the defendants of the costs of the issue found by the jury in their favour, and the order of the trial Judge and the divisional court should not be interfered with. Per Hagarty, C.J.O.—If the trial Judge did not intend by his order to deprive the defendants of such costs, then the costs were properly left to follow the event, which was in favour of the plaintiffs to the extent of over $5,000. Per Burton, J.A.—The defendants, not having applied for judgment thereon, were not entitled to costs of the issue found by the jury in their favour. Per Osler, and Maclennan, JJ.A.—Although there was no formal order specifically depriving the

defendants of costs, the trial Judge and the court below intended to deprive them of costs for good cause. Huxley v. West London Extension R. W. Co., 14 App. Cas. 26, specially referred to. *Bertram & Co.* v. *Massey Manufacturing Co.*, 13 P. R. 184.

The court can interfere with the trial Judge's discretion in depriving a successful party of costs in an action tried by a jury, where he has given effect to considerations which do not constitute "good cause" within the meaning of Con. Rule 1170. *Fulton* v. *Tipond*, 13 P. R. 485.

The plaintiff's principal claim, upon which he succeeded, was for wood cut and removed by the defendant. The trial Judge ruled that the conduct of the plaintiff in refusing a remeasurement caused unnecessary litigation, and he deprived him of the costs of that claim. The plaintiff and defendant had each had a measurement made, and differed as to the result. The plaintiff refused to have a remeasurement and brought the action, the result of which shewed that his measurement was correct:—Held, that the plaintiff's refusal was not misconduct inducing the litigation, and there was no "good cause" for depriving him of costs. Huxley v. West London Extension R. W. Co., 14 App. Cas. at pp. 33-4, specially referred to. *Ib.*

Con. Rule 1170 provides that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the Judge before whom the action or issue is tried or the court otherwise orders:—Semble, that there must be substantially an application at the trial, and if the trial Judge, anticipating the application of counsel, makes the order in presence of opposing counsel, he makes it on application. *Ib.*

The words of Rule 1172 "the Judge or court makes no order respecting the costs" do not confer any wholly discretionary powers on the Judge, but must be read with Rule 1170, as referring to an order made "for good cause." And where, in an action in a county court for damages for bodily injuries sustained by the plaintiff through the alleged negligence of the defendant, the jury found for the plaintiff and assessed the damages at $30, and added that the defendant should pay "the court expenses," and the Judge made an order that the plaintiff should have full county court costs, and that the defendant should not have the set-off provided by Rule 1172, because, in his opinion, the injury done to the plaintiff was attended by circumstances of great aggravation, and the jury ought to have given larger damages:—Held, that these were not circumstances which constituted "good cause" within the meaning of Rule 1170; for the very matters relied upon by the Judge as "good cause" had been passed upon adversely by the jury; and therefore the costs should follow the event under Rule 1172. Beckett v. Stiles, 5 Times L. R. 88, followed. *McNair* v. *Boyd*, 14 P. R. 132.

In an action for damages for assault and negligence brought in the high court and tried by a jury, a verdict for $110 damages was rendered. The trial Judge directed judgment to be entered for that sum, with county court costs, and ordered that the defendant should have no right to the excess of his costs in the high court over county court costs, in the manner provided for by Rule 1172. The trial Judge's reasons for making the order preventing the set-off were: (1) because the defendant had induced the plaintiff to go with him to his own physician after the assault complained of, promising to pay the bill, and had afterwards refused to perform his promise; and (2) because the plaintiff might reasonably have expected the damages to have been allowed at more than $200, and so was entitled to bring his action in the high court:—Held, that neither of these reasons could be treated as "good cause" within the meaning of Rule 1170; and therefore the costs should follow the event under Rule 1172. McNair v. Boyd, 14 P. R. 132, followed. *Baskerville* v. *Vose*, 15 P. R. 122.

In an action for damages for malicious prosecution and arrest brought in the high court of justice and tried by a jury, the plaintiff recovered a verdict for $50. The trial Judge entered judgment for this sum with costs to the plaintiff on the scale of the county court, and ordered that the defendant should not be allowed to set off his extra costs occasioned by the action being brought in the high court. He was of opinion that the plaintiff had reasonable grounds for bringing the action in the high court; that the conduct of the defendant was wrong; and that the verdict might well have been larger:—Held, that there was no "good cause" under Rule 1170 for depriving the defendant of the set-off provided for by Rule 1172. McNair v. Boyd, 14 P. R. 132, followed. *Carton* v. *Bradburn*, 15 P. R. 147.

The rule of the supreme court of judicature for Ontario, passed on 4th November, 1893, amending rule 1170 by providing that where an action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, the trial judge, in his discretion, otherwise orders, does not apply to actions tried before it was passed. And where the jury in an action of tort, tried before the passing of the new rule, assessed the plaintiff's damages at $100, and the trial Judge did not give judgment till after the passing of the new rule, and then ordered that the plaintiff should have costs on the high court scale:—Held, that he had no power to so order, unless for "good cause shewn" within the meaning of rule 1170, as it stood at the date of the trial. The right to or to set-off costs is a substantial right, and not a mere matter of procedure. But, under rule 1170, the court has the power to make such order as to costs as may seem just, irrespective of good cause; and, as in this case, the awarding of so small a sum as $100, assuming the plaintiff's right to recover, was almost perverse, and the plaintiff had a right to expect an award well beyond the jurisdiction of the county court, the divisional court affirmed the trial Judge's disposition of the costs. Stratford v. Sherwood, 5 O. S. 169, at pp. 170, 171, followed. *Island* v. *Township of Amaranth*, 16 P. R. 3.

In an action of tort, tried before the passing of the rule of 4th November, 1893, amending rule 1170, the jury assessed the plaintiff's damages at $200, and judgment was given for the plaintiff for that amount, but the trial Judge did not give judgment upon the question of costs till after the passing of the new rule, and then ordered that the plaintiff should have costs on the high court scale. An appeal from this order was dis-

missed by a divisional court. Per Boyd, C.—The amendment of the rule was to be regarded by the trial Judge, while the application of the plaintiff for full costs was before him, and while the action was still pending. Changes in the law as to costs since the Judicature Act are matters of procedure, and, as such, act retrospectively or with reference to current and uncompleted proceedings. But even if rule 1170 in its unamended form applied, the divisional court had under it an alternative power over the costs, not limited by the condition as to good cause, and, as this was not a case in which the costs of the plaintiff should be diminished by taxation on a lower scale, or by the allowance of a set-off, the jurisdiction should be exercised in accordance with the view of the trial Judge. Meredith, J., dubitante, considered himself bound by Island v. Township of Amaranth, 16 P. R. 3, to arrive at the same conclusion. *McGillivray* v. *Town of Lindsay*, 16 P. R. 11.

Under rule 1170, as it stood before the amendment made by rule 1274, a divisional court had the power to make such order as to costs as might seem just, irrespective of "good cause." Meyers v. Defries, 4 Ex. D. 176; Marsden v. Lancashire, etc., R. W. Co., 7 Q. B. D. 641, followed. Island v. Township of Amaranth, 16 P. R. 3, approved. Where similar motions are made to the same court in two actions and the parties in the first agree that the decision in the second shall govern, there is nothing to preclude an appeal in the first action, even though there is no appeal in the second, unless it was agreed that the decision in the latter should be final. Per Maclennan, J.A.—Rule 1274 was inapplicable to this action, which was tried before it came into force. *Coutts* v. *Dodds*, 16 P. R. 273.

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6. *Unnecessary or Unduly Expensive Proceedings.*

Action to Enforce Award.]—It not appearing that there was any good reason for filing a bill instead of proceeding to enforce an award in the usual way, the court refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Moore* v. *Buckner*, 28 Gr. 606.

Administration.] — Where an executor obtained the usual order for the administration of his testator's estate, and, upon the hearing on further directions, no reason was shewn for invoking the aid of the court, and the guardian of the infants did not object in any way to the course taken by the executor, the court refused both parties their costs. *Springer* v. *Clarke*, 15 Gr. 664.

Administration.]—In the case of small estates, an administration suit can only be justified where every possible means of avoiding the suit has been exhausted before suit brought. *McAndrew* v. *LaFlamme*, 19 Gr. 193.

Where a next friend filed a bill for a minor, without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs. *Ib.*

Administration.] — Administration suit —Costs allowed out of estate—Employment of experts — Costs of journeys — Attendance before master—Service of warrants on creditors—Fees paid to counsel in United States—Comparing deeds of property, &c. See *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Administration.]—Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby much unnecessary costs and trouble, the court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch* v. *Parry*, 27 Gr. 193.

Administration.] — When it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation, for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the plaintiff was ordered to pay the costs of all parties. *Re Woodhall, Garbutt* v. *Hewson*, 2 O. R. 456.

Administration.]—The decision reported in 13 P. R. 403, upon appeal from taxation of costs between solicitor and client, disallowing to the solicitors the additional costs occasioned by their bringing on their client's behalf an action for administration, where a summary application would have sufficed, was affirmed by the court of appeal. In the administration action the additional costs incurred by the defendants in that action were allowed to them by way of set-off against the costs awarded to the plaintiff:—Held, that no relief could be obtained by the client, upon a proceeding for taxation of costs, in respect of the loss suffered by her in virtually paying these costs to the defendants. *Re Allenby and Weir*, 14 P. R. 227.

Affidavits.]—Costs for superfluous or irrelevant matter introduced into affidavits will not be allowed, and in extreme cases the Judge will disallow costs of the whole affidavit. *Corley* v. *Roblin*, 5 L. J. 225.

Affidavits.]—Where plaintiff filed many useless affidavits and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the master that they should not be allowed to the plaintiff on taxation, though he discharged defendant's summons with costs. *Hooper* v. *Burley*, 1 C. L. J. 273.

Affidavits.]—As the affidavits filed on shewing cause to a rule for a mandamus in this case were unnecessarily long, the corporation were only allowed half their costs. *In re School Trustees of South Fredericksburg and Corporation of South Fredericksburg*, 37 U. C. R. 534.

Court Instead of Chambers.]—Where a party moves in court for what should properly be moved for in chambers, the court will not allow him any costs of the application even if the motion be granted. *Murney* v. *Courtney*, 10 Gr. 52.

Court Instead of Chambers.]—Where a cause was set down to be heard on further directions, for the purpose of having remedied a defect in the master's report, the court, although it made the order asked, refused the plaintiffs costs other than those of a motion in chambers; the order being such as might have been obtained on motion there. *King* v. *Connor*, 10 Gr. 364.

Court Instead of Chambers.]—Where a motion to stay proceedings was made in court it was enlarged into chambers, and costs were ordered against the applicants. *Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288.

Counsel Fees.]—With respect to brief and counsel fees, it was held under the circumstances of this case that the master should allow no disbursement to counsel with briet, nor any charge with brief either not actually incurred or unnecessarily incurred. *Pegg* v. *Pegg*, 7 U. C. R. 220.

Cross-Action.] — Costs of cross-actions refused where such actions unnecessary. *Norrell* v. *Canada Southern R. W. Co.*, 9 A. R. 525.

Defence Instead of Demurrer.] — Where, instead of demurring to the bill, the defendant put in an answer, and went to an examination and hearing, the court, on dismissing the bill, gave the defendant costs only as upon demurrer. *Brouse* v. *Cram*, 14 Gr. 677.

Defence Instead of Demurrer.]—One principle upon which this court has steadily acted is, that where two courses of proceeding are open, one less expensive than the other, and a party can with equal advantage to himself adopt either, and he takes the more expensive one, he does so at the peril of costs. Where, therefore, a woman, after the death of her husband, was joined as a party defendant in a suit upon a mortgage created by her late husband, in which she had not joined, and instead of demurring put in an answer, the court at the hearing dismissed the bill as against her, without costs. Bush v. Trowbridge Waterworks Co., L. R. 10 Ch. 459, considered, distinguished, and not followed. Saunders v. Stull, 18 Gr. 590, approved of and followed. *Gildersleeve* v. *Cowan*, 25 Gr. 460.

Defence Instead of Demurrer.]—Where an objection might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off against the costs of a judgment on the pleadings for an admitted debt. *Wallis* v. *Skain*, 21 O. R. 532.

Expensive Procedure.]—In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs. *Vandewaters* v. *Horton*, 9 O. R. 548.

Injunction.]—The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the application for it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

Mortgage—*Claim for Possession.*]—The practice of bringing an action for an amount due on a mortgage within the proper competence of the division court in the high court, by making a claim for possession of the land, is one that must be carefully guarded; and except in cases clearly indicating the necessity for proceeding in the high court, no costs will be given to the plaintiff. In this case where the amount claimed under a mortgage was within the proper competence of the division court, but the suit was brought in the high court, and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandewaters* v. *Horton*, 9 O. R. 548.

Pleadings.]—The master disallowed a great portion of the pleadings, which he considered unnecessary, and the court discharged with costs a rule nisi to revise the taxation. *Malloch* v. *Grier*, 2 U. C. R. 113.

Pleadings.]—Unnecessarily lengthy pleadings ordered to be reduced by the master at the party's expense. *Canada Permanent Building and Savings Society* v. *Harris*, 16 C. P. 54.

Printing.]—The costs of printing unnecessary material disallowed. *Bryce* v. *Loutit*, 21 A. R. 100.

Several Motions Instead of One.]—Costs not allowed where several motions depended really upon the same considerations, and there should have been only one motion. See *Monteith* v. *Walsh*, 10 P. R. 162.

Trial at Place Distant from Residence of Witnesses.]—Where the parties to a cause had produced and examined their witnesses at Toronto, all of whom resided at a distance therefrom, and in close proximity to one of the circuit towns, the court, while awarding the general costs of the cause to defendant, refused him the costs of the attendance of his witnesses. *Ledyard* v. *McLean*, 10 Gr. 139.

Trial Instead of Demurrer.]—Where a question might have been raised by demurrer, without the expense of a trial, no other costs or greater were taxed to the defendants than would have been taxed to them had they simply demurred to the statement of claim, and the demurrer had been decided in their favour. *Hepburn* v. *Township of Orford*, 19 O. R. 585.

Two Suits for Same Object.]—Where there were two suits by a solicitor for the same object, the master refused in one of the two, without a special order, to tax as between party and party, more than part of the costs, and it appearing that, as between solicitor and client, no part of that bill could have been recovered, the court refused to interfere with the taxation. *Spence* v. *Clemow*, 15 Gr. 584.

Will—*Motion.*]—As there were no disputed facts and no questions that could not have been raised under Rule 938, costs only of a motion under that rule were allowed. *In re Brown, Brown* v. *Brown*, 32 O. R. 323.

III. Particular Classes of Costs.

1. *Abortive Proceedings.*

Judge Refusing to try Case.]—An order was made by the master in chambers changing the venue from the assizes at Simcoe, for which notice had been given, to the chancery sittings in London. The Judge presiding at those sittings having refused to take the case, as it belonged to a common law division:—Held, without determining whether the master's order was a proper one, that the plaintiff was justified in acting on it, and his costs occasioned by the abortive proceedings were allowed to him. *Schwob* v. *McGloughlin*, 9 P. R. 475.

Jury Disagreeing.]—The costs of a trial which was abortive because the jury disagreed, no order to the contrary having been made by the Judge at the trial, were held taxable against the defendants by the plaintiff who ultimately succeeded. *Copeland* v. *Township of Blenheim*, 11 P. R. 54.

Nonsuit by Judge ex Mero Motu.]—Upon the trial of a county court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit, and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the court of appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs:—Held, however, that nothing was shewn to induce the court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term. The mere fact that the Judge below has ex mero motu made an erroneous adjudication is not a ground for absolving the respondent from the costs of the appeal. *Mills* v. *Hamilton Street Railway Co.*, 17 P. R. 74.

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2. *Apportionment and Severance.*

Appeals Argued Together.]—When the actions were in the court of appeal an order was made by a Judge of that court that only one appeal book should be printed for the three cases, and the three cases were argued together, but the defence was different:—Held, that the taxing officer was right in allowing separate counsel fees in each case. *Petrie* v. *Guelph Lumber Co.*, *Stewart* v. *Guelph Lumber Co.*, *Inglis* v. *Guelph Lumber Co.*, 10 P. R. 600.

Chattel Mortgage — *Action to Set Aside*]—See *Martin* v. *Sampson*, 17 C. L. T. Occ. N. 87.

Common Defence by Several Defendants.]—An action by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants:—Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed. Re Colquhoun, 5 DeG. M. & G. 35, and Clark v. Virgo, 17 P. R. 260, followed. *Zavitz* v. *Dodge*, 17 P. R. 295.

Contractor and Sureties.]—In an action by a municipality against a contractor, one of his sureties, and the executors of a deceased surety, three separate defences were delivered by different solicitors. It did not appear that separate solicitors were employed for the mere purpose of increasing costs:—Held, that the defendants were not liable in any joint character, and were entitled to tax separate bills of costs. *Township of Logan* v. *Kirk*, 14 P. R. 130.

Costs Given Generally — *Trustee and Deceased Trustee.*]—The first part of General Order 315 applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them. *Reid* v. *Stephens*, 3 Ch. Ch. 372.

Former Partners.]—In an action against a municipal corporation for injury to a drain, the corporation caused the two contractors who had constructed the drain, and the assignee of one of them, to be made defendants. The two contractors were partners at the time of the construction of the drain, but had dissolved partnership before the action was begun. One partner appeared, and defended by one solicitor, and the other partner and his assignee by another solicitor. Judgment was given dismissing the claim of the corporation against the added defendants with costs, but they were not by the judgment limited to one set of costs:—Held, that there was no "law of the court" which, under the circumstances of this case, justified the taxing officer in refusing to allow more than one set of costs to the added defendants. Con. Rule 1202 considered. *Melbourne* v. *City of Toronto*, 13 P. R. 346.

Fraud Charged.]—The bill, which was filed against H., L., and T., alleged that a deed of the land in question from the plaintiff to H.'s father, though absolute in form, was only a mortgage. The father had died, having devised the land to H., and appointed L. and T. executors. The bill charged that the testator was overpaid by receipt of rents and profits in his life-time, and that since his death the defendants had received a large amount of rents, of which an account was sought. It also charged the above defendants and another defendant with fraud. On the hearing the suit was compromised, the plaintiff agreeing to pay the "costs of several defendants to their respective solicitors:"—

Held, that defendants were justified in severing their defence, and could tax separate bills. Held, also, that where one of several defendants is charged with fraud, the others are not obliged to connect their defence with his. *Conolly* v. *Hill*, 7 P. R. 441.

Fraud Charged.]—The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrong-doers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McL. defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McL., and that they believed it to be true, and believed that the statement made by them and McL., which was the foundation of the actions, was true:—Held, that the taxing officer was right in allowing two bills of costs, one to the defendant McL. and one to the other defendants. *Petrie* v. *Guelph Lumber Co., Stewart* v. *Guelph Lumber Co., Inglis* v. *Guelph Lumber Co.*, 10 P. R. 399.

Interpleader — *Success as to Some Goods.*]—Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized, amounting to one-sixth of total value, were not covered by the mortgage:—Semble, although the mortgagee was entitled to the general costs of the issue a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

Maker and Indorsers of Note.]—Where separate actions were brought against the maker and indorsers of a note, and upon a demurrer to the replication judgment was given for defendant, and the plaintiffs made one application to amend in three cases:—Held, that defendant was entitled only to the costs as for one case, in attending to oppose it. Held, also, that as to the ordinary fee disbursed to counsel to argue the demurrer in the three cases, and the ordinary taxable costs occasioned to defendant by the demurrer in each case, they might be allowed to defendant. *Bank of British North America* v. *Ainley*, 7 U. C. R. 521.

One Defendant Successful.]—One of several defendants who, in an action of tort, joins his co-defendants in plea of not guilty, upon which a verdict is rendered in his favour against plaintiff, though plaintiff recovers against his co-defendants, is entitled to a proportion of the taxed costs of defence. *Huntingdon* v. *Lutz*, 10 L. J. 46.

One Defendant Successful.]—Plaintiff sued C. and G., G. being a married woman, and obtained a verdict against both. In term both defendants obtained a rule to enter a nonsuit for them, or a verdict for G. The latter part of the rule was made absolute. The taxing officer disallowed the plaintiff any costs in term, because he had not given notice that he abandoned his verdict against G., and taxed to her one-half of the costs of the term motion, both defendants having appeared by the same attorney:—Held, on appeal, that a proper proportion of the costs in term should be allowed to the plaintiff, against defendant C., and the taxing officer was directed to inquire whether any binding contract of retainer had been entered into by G., and if not to allow her only disbursements. *Clark* v. *Creighton*, 9 P. R. 125.

One Defendant Successful.]—An action against two defendants, who defended by the same solicitor, was dismissed as against one with costs, and judgment was given for the plaintiff against the other with costs:—Held, that the successful defendant should on taxation be allowed the costs of services (if any) appertaining wholly to his own defence, and at most only a proportionate part of the costs of services appertaining to both defences, as in Heighington v. Grant, 1 Beav. 228. *Clark* v. *Virgo*, 17 P. R. 200.

Persons in Same Class.]—Where the several members of classes of persons interested in an estate severed in instructing counsel, the court, though it gave them costs out of the estate, directed the attention of the master to the subject of taxation. *Crawford* v. *Lundy*, 23 Gr. 244.

Purchaser against Vendor and Subsequent Purchaser.]—In a suit for specific performance by a vendee against his vendor and a person to whom he had sold after agreeing to sell to the plaintiff, the defendants may sever in their defence and employ separate solicitors, and each is entitled on dismissal of the bill with costs to tax a separate bill. *Barrett* v. *Campbell*, 7 P. R. 150.

Several Issues of Fact.]—See *Caniff* v. *Bogart*, 6 L. J. 59; *Mein* v. *Short*, 11 C. P. 430; *Holton* v. *McDonald*, 12 C. P. 246; *Evans* v. *Kingsmill*, 4 U. C. R. 132.

Several Issues of Law and Fact.]—See *Davis* v. *Davis*, 5 O. S. 453; *Richmond* v. *Campbell*, H. T. 2 Vict. R. & J. Dig. 813; *Sheldon* v. *Hamilton*, M. T. 3 Vict. R. & J. Dig. 813; *Clarke* v. *Durham*, T. T. 4 & 5 Vict.; *Taylor* v. *Carr*, 4 U. C. R. 149; *Bank of B. N. A.* v. *Ainley*, 7 U. C. R. 521; *S. C.*, 1 C. L. Ch. 187; *Fraser* v. *Hickman*, 12 C. P. 213; *Kinloch* v. *Hall*, 26 U. C. R. 134; *Townsend* v. *Sterling*, 4 P. R. 125.

Successful Defence upon one Ground —*Costs Relating to Other Grounds.*]—It was adjudged that the plaintiff should pay to the defendants so much of the costs of the action (upon a building contract), reference, and appeal, as were occasioned by reason of his claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect:—Held, that in taxing costs under this direction the officer was in error in disallowing to the defendants the costs of witnesses called to shew the value, &c., &c., of the extras that had been disallowed to them by the architect's certificate, which was attacked by the plaintiff. The defendants were not called upon to stand upon a single item of evidence, though in the end it might appear that the item would have been sufficient for their purposes. *Lockard* v. *Waugh*, 17 P. R. 269.

Tenants.]—Two actions were brought by the same plaintiffs against different defendants to recover rent for different parcels of land, in which the defences were not identical. A compromise was effected, and it was agreed between the parties "that judgment shall be

entered in each of the said actions for the amounts claimed therein by the plaintiffs," with costs of suit between solicitor and client; and judgments were entered accordingly:—Held, that the plaintiffs were entitled to tax a separate set of costs for each action. *Baldwin* v. *Quinn; Baldwin* v. *McGuire*, 16 P. R. 248.

Two Branches.]—Where an action was, roughly speaking, divisible into two parts, one claiming compensation for land, and the other seeking to restrain the defendants from proceeding to estimate it in an improper way, and the judgment gave the plaintiff the costs of the first branch and no costs of the second to either party:—Held, that the taxing officer had not erred in principle in allowing the plaintiff one-half of the general costs and also items which exclusively related to the first branch. *Vanzant* v. *Village of Markham*, 15 P. R. 412.

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3. *Costs in the Cause.*

Assignment of Bond before Action.]—The costs of an application under s. 82 of the Surrogate Court Act, C. S. U. C. c. 18, for an assignment of a probate bond, in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on default. *Closson* v. *Post*, 6 L. J. 141.

Change of Venue.]—The venue in an action to restrain the infringement of a patent was changed, without terms, to Brockville. As the defendant had been slow in applying, the costs of the application below and in appeal were made costs in the cause. *Aitcheson* v. *Mann*, 9 P. R. 253.

Commission to take Evidence.]—The costs of a commission to take evidence in a foreign country, form part of the costs of the cause. *Colborne* v. *Thomas*, 4 Gr. 169.

Demurrer Books.]—See *Elliott* v. *Northern Assurance Co.*, 6 P. R. 111.

Interlocutory Order — "*Costs in the Cause*" — *Discretion of Trial Judge.*]—Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts these costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under rule 1130 and s. 119 of the Judicature Act, R. S. O. 1897 c. 51. Koosen v. Rose, [1897] W. N. 25, 76 L. T. N. S. 145, 45 W. R. 337, 13 Times L. R. 257, distinguished. *Dickerson* v. *Radcliffe*, 10 P. R. 223.

Interlocutory Order — "*Costs in the Cause*"—*Discretion of Trial Judge.*]—The judgment of the trial Judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: "This court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs." Two interlocutory orders made the costs of applications "costs in the cause;" two made them "costs in the cause to the successful party;" one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein." It was conceded that the plaintiff was entitled to the costs made payable in any event:—Held, following Dickerson v. Radcliffe, 19 P. R. 223, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff. Held, also, that the words "costs in the cause to the successful party" did not mean more than costs in the cause; and, even if they did, the plaintiff was not a successful party. Brotherton v. Metropolitan District Railway Joint Committee, [1894] 1 Q. B. 666, followed. *Murr* v. *Squire*, 19 P. R. 237.

Motion Stayed.] — Where defendant serves a notice of motion, but before the return thereof the plaintiff takes out on praecipe and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs thereof, under the order to dismiss, as costs in the cause. *Purdy* v. *Ferris*, 1 Ch. Ch. 303.

Motion to Rescind.]—Costs of applying to rescind a Judge's order to allow county court costs, were held not to be costs in the cause. *Cameron* v. *Campbell*, 1 P. R. 170.

Motion to Stay Proceedings.]—Where after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid, the costs of the motion to stay proceedings will be made costs in the cause. *Little* v. *Hawkins*, 3 Ch. Ch. 78.

Opposing Rule to Set Aside Award.] — The costs of shewing cause against a rule for setting aside an award, are costs in the cause, and the successful party is entitled thereto, although no mention of them is made in the rule. *Corporation of Essex* v. *Parke*, 12 C. P. 159.

Postponing Trial.] — Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases, the costs will be disposed of according to circumstances and in the discretion of the Judge. *Pattison* v. *McNab*, 12 Gr. 483.

Postponing Trial.] — A motion was granted for postponing the hearing and examination of a cause, on the ground of the absence of a material witness after notice of hearing had been given, although the cause had been at issue for some months previous. The costs of such a motion are costs in the cause. *Graham* v. *Machell*, 2 Ch. Ch. 376.

Postponing Trial.]—It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, costs in the cause. *Rees* v. *Attorney-General*, 2 Ch. Ch. 386.

Postponing Trial.]—Costs of moving to postpone a trial on account of the absence of a material witness will be costs in the cause where the party moving has made diligent efforts, &c., to secure the attendance. *Brown* v. *Porter*, *Knox* v. *Porter*, 11 P. R. 250.

Rehearing.]—The decree in a cause gave the plaintiff the general costs thereof:—Held, that this did not carry the costs of rehearing an interlocutory order made refusing an injunction, which order was reversed on rehearing; the practice requiring that, where costs of rehearing are intended to be given they must be expressly mentioned in the decree or order giving the costs of the cause. *Mossop* v. *Mason*, 20 Gr. 406.

Special Jury.] — The costs of a special jury are costs in the cause, not costs of the day. *Whitehead* v. *Brown*, 2 O. S. 345.

Special Wording.]—The phrase "costs in the cause," generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award as follows: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201.50:"—Held, that the words "costs in the cause," meant the whole costs of the plaintiff and defendants. *Scott* v. *Grand Trunk R. W. Co.*, 3 P. R. 276.

Supplemental Order Varying Judgment.]—The plaintiff had obtained a decree with costs against defendant. Afterwards, by consent, a supplemental order varying the decree was made, which was silent as to costs:—Held, that the costs of such order and proceedings thereunder were not costs in the cause, and could not be taxed against the defendant. *Attorney-General* v. *Taylor*, 1 Ch. Ch. 362.

Taxing Officer's Discretion.] — The plaintiffs obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, but was not put in at the trial:—Held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs, on the ground that the evidence had not been used. *Dominion, &c., Co.* v. *Stinson*, 9 P. R. 177.

When Directed.]—In an appeal against an order refusing further security for costs, the appeal was dismissed, and the costs made costs in the cause to the plaintiff. *Bell* v. *Landon*, 9 P. R. 100.

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4. *Costs of the Day.*

The rule for costs of the day for not proceeding to trial, is absolute in the first instance. *Chisholm* v. *Simpson*, Dra. 2.

Held—1. Under s. 225, C. L. P. Act, C. S. U. C. c. 22, that the rule should be drawn up in the principal office at Toronto; 2. That deputy clerks of the Crown have no power, under the 120th rule of practice, to issue rules for costs of the day. *White* v. *Shire*, 7 L. J. 206.

Per McLean, C.J., and Wilson, J., under rule of court No. 120, such rule may issue in vacation, at any time after the assizes for which notice was given. Per Hagarty, J., semble, that the rule of court was not intended to allow such a rule to be obtained sooner than by the previous practice, but to give it either in the term following the assizes or in any subsequent vacation. *Adshead* v. *Upton*, 22 U. C. R. 429.

Costs allowed for not proceeding to assessment of damages pursuant to notice. *Cross* v. *Cronther*, Tay. 186; *King's College* v. *Maybee*, 2 U. C. R. 94.

The court refused to order a plaintiff to pay defendant's executors the costs of not going to trial pursuant to notice. *Morris* v. *Randall*, Tay. 299.

Costs were allowed to a defendant who had accepted short notice, and the plaintiff did not proceed to trial pursuant thereto. *Harris* v. *Hawkins*, 3 O. S. 142.

Where the plaintiff having given notice of trial, did not enter his record in time, but defendant, notwithstanding, agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial, he was refused the costs of the day. *Doe d. Crawford* v. *Coppledike*, 4 O. S. 6.

Where a cause was put to the foot of the docket with defendants' consent, and was not tried, costs of the day were refused. *Bank of Upper Canada* v. *Covert*, 4 O. S. 324.

Where the plaintiff's attorney sent notice of countermand to his agent in town, but too late for service, and the defendant's witnesses attended for the trial:—Held, that their expenses were rightly allowed in the costs of the day. *Spafford* v. *Buchanan*, 4 O. S. 325.

Defendant is entitled to costs where the plaintiff does not enter his cause on the commission day, although he offers to enter it subsequently, which the defendant refuses to allow. *O'Neil* v. *Barnhart*, 5 O. S. 453.

Costs were refused, where after notice of trial defendant pleaded de novo, and the plaintiff did not proceed to trial, the court considering a new notice necessary. *McMillan* v. *Ferguson*, M. T. 2 Vict.

Where no notice of trial had been given, but the cause was entered after the commission day by consent, and the plaintiff did not afterwards proceed to trial:—Held, that the defendant was entitled to costs of the day. *Tenbroeck* v. *Cole*, 1 U. C. R. 401.

In ejectment, where the jury having been sworn were discharged on defendant objecting that the jurata was defective, the defendant was not allowed costs of the day. *Doe d. Crooks* v. *Cummings*, 2 U. C. R. 380.

Where a cause in the absence of plaintiff's counsel was struck out, and afterwards on his application restored, and then leave obtained to add pleas, and the cause at the close of the assize was not tried, a rule by defendant for costs of the day was set aside. *Scott* v. *Crosthwaite*, 6 L. J. 159.

Where a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant states he is ready, and the cause is struck out of the docket, defendant is entitled to his costs of the day. *White* v. *Shire*, 7 L. J. 206.

After the jury had been sworn, it appeared that the notice to examine defendant had been served too late, and the plaintiff having no evidence, was unable to go on. The Judge dismissed the jury, telling the plaintiff's attorney that they might be called together when convenient, at any time during the assizes, and the case taken. The plaintiff was afterwards ready to go on, but defendant's attorney refused to allow the case to be taken out of its order, and it was not tried:—Held, that defendant could not move for judgment as in case of nonsuit; but as the plaintiff's laches had rendered it necessary to dismiss the jury, the rule was discharged without costs. *Taylor* v. *Smith* 2 P. R. 213.

A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed:—Held, overruling Wallace v. McKay, 1 Ch. Ch. 67, that the defendant was entitled to have the case struck out of the paper, with the costs of the day. *Cobourg and Peterborough R. W. Co.* v. *Covert*, 7 Gr. 411.

An application for costs of not proceeding to hearing according to notice will not be granted ex parte. The practice discussed. Armour v. Noble, 3 Ch. Ch. 90, considered. *Jardine* v. *Hope*, 3 Ch. Ch. 197.

As to when costs of the day will be granted. *Re McDonell*, 4 Ch. Ch. 60.

The costs of a special jury are costs in the cause, and not costs of the day. *Whitehead* v. *Brown*, 2 O. S. 245.

The plaintiff had a verdict on all the issues, subject to a demurrer; the demurrer was decided in favour of the defendant; the plaintiff had leave to amend on payment of costs:—Held, not entitled to the costs of the day at nisi prius, not having succeeded on any of the issues. *Bank of British North America* v. *Ainley*, 1 C. L. Ch. 187.

Held, that 29 & 30 Vict. c. 42, s. 1, does not refer to costs of the day in the same suit, and consequently proceedings cannot be stayed in a suit in which the costs of the day have not been paid. Held, nevertheless, that this can be done on the ground of abuse of the process of the court, where the proceedings are vexatious. *Nicholson* v. *Coulson*, 6 P. R. 65.

No costs of the day for not proceeding to trial pursuant to notice in an interpleader suit will be allowed until the termination of the proceedings. *Salter* v. *McLeod*, 10 L. J. 299.

In ejectment against U. and H., after notice of trial given a summons was obtained to allow U. to defend as landlord in lieu of H., and an order to that effect was made on the commission day of the assizes, 13th April. The plaintiff, in consequence, did not enter his record, and on the 27th, during the assizes, defendant's attorney (who had made no amendment as allowed by his order) took out a rule for costs of the day on the ordinary affidavit, that the plaintiff had not proceeded to trial pursuant to notice nor countermanded it:—Held, that such rule must be set aside with costs, for the plaintiff under the circumstances was not bound to go to trial in pursuance of his notice. Per McLean, C.J.—Such rule was irregular, for as the Judge at nisi prius might have allowed the record to be entered at any time during the assizes, there could be no default until they were over. *Adshead* v. *Upton*, 22 U. C. R. 429.

Where, upon a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant, though present in court, does not insist upon having the cause struck out or a nonsuit entered, in consequence whereof the cause is passed over, defendant is not entitled to costs of the day. *Vanluvan* v. *Tolan*, 8 L. J. 276.

Where defendants' counsel was ready at the assizes, and the plaintiff's counsel not being prepared, the cause was struck out:—Held, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but their proper course was to have insisted upon a nonsuit. *Crofts* v. *McMaster*, 3 P. R. 121.

Defendant obtained a Judge's order: "That the trial of this cause be put off to the next spring assizes for York, and that the record now entered for trial be withdrawn, and that said trial be so put off on payment of costs." The costs were taxed, but defendant refused to pay them. The record was not withdrawn:—Held, that as the record was not withdrawn, and was a remanet, the order should be treated as conditional, and that defendant could not be compelled to pay the costs; but a summons to rescind the order was made absolute. *Brega* v. *Hodgson*, 4 P. R. 47.

Held, that a "reasonable time" need not be given in which to pay the costs of the day, &c., after taxation, but that the order, &c., may be made a rule of court, &c., the day after taxation. *Smith* v. *Cronk*, 9 C. L. J. 237.

Where plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day: his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into evidence unless by leave of the court. *Wallace* v. *McKay*, 1 Ch. Ch. 67.

After the plaintiff had entered the record for trial, the defendant took out an order staying proceedings until security for costs were given, whereupon the record was withdrawn:—Held, that defendant was not entitled to costs of the day. *Fitzgerald* v. *Ludwig*, 7 P. R. 187.

Plaintiff being ready to proceed with the trial of his case at the assizes, defendant's counsel applied for a postponement, stating that defendant and his witnesses had not arrived, to which the plaintiff did not object, though anxious to have the case disposed of. On the following day, when the case was again called on, the plaintiff was not ready, owing to the absence of a witness, who had been there the day before, but the Judge insisted upon the cause proceeding, whereupon the plaintiff, in order to avoid a nonsuit, withdrew the record:—Held, that defendant was entitled to the costs of the day, and an order made by the clerk of the Crown and pleas, setting aside a sidebar rule therefor, was accordingly rescinded. *Parkinson* v. *Thompson*, 44 U. C. R. 29.

The practice of giving costs of the day is superseded by the O. J. Act. No officer of

the court has now power to issue a rule for such costs. Where the plaintiff fails to enter the cause, defendant should apply to a Judge under rule 264. The master in chambers has no jurisdiction to entertain an application for costs under that rule. *Hopkins* v. *Smith*, 9 P. R. 285.

See Hogg v. *Crabbe*, 12 P. R. 14.

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5. Counterclaim.

Building Contract—*Deduction for Unskilful Work.*]—To an action on a building contract, the defendant set up the defence that the work was incompletely and unskilfully done, and counterclaimed for damages by reason thereof. The master to whom the action was referred found that $177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the defendant had suffered damage to the extent of $177:—Held, that the questions raised by the defendant might have been raised in a similar action before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he had set up was properly a counterclaim. *Cutler* v. *Morse*, 12 P. R. 594.

The plaintiff claimed $1,205, the balance of the contract price for work done, and the defendant claimed that by reason of imperfect work the balance should be reduced by $900. The defendant was allowed $266.54 in respect of his claim for reduction, and the plaintiff, therefore, recovered $938.46:—Held, that what the defendant claimed was neither a set-off nor a counterclaim; and, as the plaintiff had substantially succeeded, he should get the general costs of the action and reference, less the costs incurred by the defendant in establishing the items of improper work on which he succeeded. Cutler v. Morse, 12 P. R. 594, followed. *Sanderson* v. *Ashfield*, 13 P. R. 230.

Claim and Counterclaim.]—An action on an unsettled account, to which there was a counterclaim, also on an unsettled account, was referred. The referee found that there was a sum of $148.81 due the plaintiff on his claim, and $164.50 due the defendant on his counterclaim, leaving a balance due defendant of $15.69, and he certified to entitle the defendant to full costs. The Statute of Limitations was pleaded respectively to the claim and counterclaim, and the items barred by the statute were in consequence disallowed; but apart from the statute the balance would have been in the plaintiff's favour:—Held, that the plaintiff and defendant were entitled to recover the costs of and relating to the claim and counterclaim, and proof thereof respectively, including the reference and subsequent proceedings; the defendant being also entitled to recover the sum of $15.69; the taxing officer to divide items in common; and judgment entered for the party in whose favour the balance should be found. *Coughlin* v. *Hollingsworth*, 5 O. R. 207.

Claim and Counterclaim.] — Although for some purposes a claim and counterclaim form but one action, yet the costs of the counterclaim are to be taxed separately from the costs of the action, a counterclaim being, for the purposes of taxation, to be treated as a cross-action. McGowan v. Middleton, 11 Q. B. D. 464, and Beddall v. Maitland, 17 Ch. D. 174, followed. *Emerson* v. *Gearin*, 12 P. R. 399.

Where the order of a divisional court varied the judgment at the trial by directing that the counterclaim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into court the amount of the costs of the action, but was silent as to the costs of the counterclaim:—Held, that the rights of the parties must be governed by this order, and not by anything that preceded it, and that under it the plaintiffs were not entitled to tax the costs of the counterclaim. *Ib.*

Claim and Counterclaim.] — Where judgment is given for the plaintiff upon his claim with costs, and for the defendant upon his counterclaim with costs, the amounts to be set off, the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit, and the defendant the costs of the counterclaim as though he had wholly succeeded in the suit. *Summerfeldt* v. *Johnston*, 17 P. R. 6.

Claim and Counterclaim.]—Where the plaintiff succeeds upon his claim, and the defendant upon his counterclaim, the former should receive the costs of the action, and the latter those of the counterclaim. *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.*, 17 P. R. 156.

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

Items Common to Defence and Counterclaim.]—A claim and counterclaim are to be treated as separate actions, and the costs are to be taxed in accordance with that principle; but items common to both defence and counterclaim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him. In re Brown, Ward v. Morse, 23 Ch. D. 377, followed. Griffiths v. Patterson, 22 L. R. Ir. 656, not followed. Summerfeldt v. Johnston, 17 P. R. 6, distinguished. *Haggert v. Town of Brampton*, 17 P. R. 477.

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6. Disclaimer.

Disclaimer without Previous Notice.]—A., an execution creditor of B., was made a defendant to a suit as claiming an interest in

certain chattels which the defendant claimed as prior mortgagee. A. filed an answer and disclaimer, but it appeared that his solicitor had given instructions to the sheriff to seize the interest of the debtor therein, if any:—Held, that before answering the bill he should have notified the plaintiff that he made no claim to the chattels, and that, not having done so, he was not entitled to the costs of the suit. *Lymburner* v. *Clarke*, 12 Gr. 30.

Formal Disclaimer not Filed.]—J., one of the defendants, had bid for and had become purchaser of a lot of land sold under the provisions of R. S. O. 1877 c. 216, by certain parties claiming to be the trustees of the Coloured Wesleyan Methodist Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer disclaimed all interest in the result of the suit, and alleged that no effort had been made by him to have the sale carried out, as he was aware that the same would have to be first confirmed by the members of the said church. At the trial judgment was pronounced setting aside the sale, and ordering the defendants generally to pay costs:—Held, that under the circumstances, a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, but the action in the court below was dismissed as against him, without costs. *Wansley* v. *Smallwood*, 11 A. R. 439.

IV. Particular Items, Matters and Persons.

Abstract of Title.]—Attendance to bespeak and for registrar's abstract of title, to prepare for litigation or prove title, is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Administration—*Taxed Costs in Lieu of Commission.*]—See *Wright* v. *Bell*, 15 C. L. T. Occ. N. 193.

Affidavits—*Irregular Filing.*]—The costs of affidavits for use on a motion in the weekly court filed with the clerk in chambers, instead of in the registrar's office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the court on the motion, and are recited in the order made thereon. *Sturgeon Falls Electric Light and Power Co.* v. *Town of Sturgeon Falls*, 19 P. R. 286.

Affidavit on Production.]—The plaintiffs made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavit:—Held, that they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits. *Baldwin* v. *Quinn*, *Baldwin* v. *McGuire*, 16 P. R. 248.

Affidavit on Production.]—Attendance to search affidavit on production is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Agency Letters.]—Necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county in which the solicitor resides, or in another county, or in Toronto. *Agnew* v. *Plunkett*, 9 P. R. 456.

Alimony—*Counsel Fee.*]—Rule 1144 does not warrant the making of an order for payment by defendant to plaintiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shewn that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor. *Gallagher* v. *Gallagher*, 17 P. R. 575.

Alimony — *Disbursements — Undertaking.*]—Notwithstanding the language of Rule 1144 — "only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed. *Stevenson* v. *Stevenson*, 19 P. R. 48.

Appeal.]—Allowance on ground not taken below. See *Page* v. *Austin*, 7 A. R. 1; *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464; *Garrett* v. *Roberts*, 10 A. R. 650; *Vancelsor* v. *Hughson*, 9 A. R. 390.

Appeal from Report — *Evidence.*] — Held, that the defendant was not entitled to tax as part of his costs of the plaintiff's appeal from the report the amount paid for a copy of the evidence taken before the referee, which was required by the defendant for his own appeal. *Denison* v. *Woods*, 18 P. R. 328.

Application to Stay Proceedings.]—Held, that the costs of a chamber application to stay proceedings until term in a superior court case tried at the county court under the Law Reform Act 1868, are taxable under a rule for a new trial upon payment of costs, the county court Judge having refused to stay the proceedings. *Merchants Bank* v. *Ross*, 6 P. R. 214.

Arbitration.]—In taxing the costs of an arbitration upon the county court scale, no larger fee for attendance of counsel before the arbitrators than $25 can be allowed, even though the attendance is for several days. *Re Montague and Township of Aldborough*, 12 P. R. 141.

Arbitration — *Increased Fees.*] — Item 153 of Tariff A, Con. Rules, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. 1887 c. 53, s. 24. *Re McKeen and Township of South Gower*, 12 P. R. 553.

Arbitration—*Second Counsel Fee.*]—In taxing the costs of an arbitration, a taxing officer has jurisdiction, in his discretion, to allow a second counsel fee. The provision of R. S. O. 1887 c. 53, s. 25, that not more than one counsel fee shall be taxed, is inconsistent with item 164 of the tariff of costs appended to the Consolidated Rules, 1888, and, by virtue of 51 Vict. c. 2, s. 4, must be taken to be repealed. Re McKeen and Township of South Gower, 12 P. R. 553, followed. Howard v. Herrington, 20 A. R. 175, and Arscott v. Lilley, 14 A. R. 283, distinguished. *Re Pollock and City of Toronto*, 15 P. R. 355.

Assignee.]—The assignee for the benefit of creditors, may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be. *Macdonald* v. *Balfour*, 20 A. R. 404.

Assignee — *Costs of Litigation in respect to Disputed Claim.*] — An assignee for the benefit of creditors, on instructions of the inspectors, contested the plaintiff's claim, who then brought an action, which was dismissed with costs, but, on appeal to the divisional court, this decision was reversed, with costs to be paid by the defendant, the assignee. The creditors, after taking counsel's opinion, resolved to appeal to the court of appeal, but the appeal to that court was dismissed with costs. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings:—Held, that he was entitled to do so. *Smith* v. *Beal*, 25 O. R. 368.

Assignee—*Removal of.*]—Where a Judge of a county court, acting under R. S. O. 1887 c. 124, s. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as persona designata, and has no power to order payment of costs. The proceedings in such a case are not in any court; and Rule 1170 (a) does not apply to them. Re Pacquette, 11 P. R. 463, followed. History and construction of Rule 1170 (a). *Re Young*, 14 P. R. 303.

Attending for Depositions.]—Attendances to bespeak copies of depositions of parties, on their examination for discovery in the action, should be taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Attending on Notice without Payment.]—Plaintiff having attended under defendants' notice, without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs. *Ham* v. *Lasher*, 24 U. C. R. 357.

Attending to Hear Judgment.]—Attendance to hear judgment should only be taxed once, that is, attendance when judgment is delivered. *Ham* v. *Lasher*, 24 U. C. R. 357.

Defendants could not tax the costs of enlarging plaintiffs' rule for their own convenience. *Ib.*

Attending to Hear Judgment.]—A fee for attending to hear judgment on a day fixed, when the Judge deferred it till a subsequent day at Toronto, should have been taxed. A fee for attending to hear judgment at Toronto should have been taxed, although a fee on a previous attendance, when judgment was deferred, had been allowed, and a charge for sending a telegram advising defendants of result of judgment, by direction of Judge, should have been allowed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Attorney Paid by Salary.]—Right to recover costs from opposite party where attorney is paid by a fixed salary. See *Stevenson* v. *City of Kingston*, 31 C. P. 333.

Barrister Conducting his own Case.]—A solicitor, who is also a barrister, cannot tax a counsel fee to himself when he sues in person and conducts his own case. *Smith* v. *Graham*, 2 U. C. R. 268.

But the rule does not extend to partners. *Henderson* v. *Comer*, 3 L. J. 29.

Barrister Conducting his own Case.]—A counsel conducting his own case in court cannot tax a counsel fee against the opposite party. Smith v. Graham, 2 U. C. R. 268, followed. *Clarke* v. *Creighton*, 15 P. R. 105.

Barrister and Solicitor Acting for Himself and Co-Trustees.]—One of several trustees who is a barrister and solicitor, and acts for himself and his co-trustees as solicitor and counsel in an action, may tax against the opposite party his full costs, including instructions and counsel fees. Cradock v. Piper, 1 Macn. & G. 664, followed. Smith v. Graham, 2 U. C. R. 268, distinguished. *Strachan* v. *Ruttan*, 15 P. R. 109.

Bonus By-law—*Scrutiny*]—Under s. 372 of the Municipal Act, R. S. O. 1897 c. 223, a county court Judge, on a scrutiny of the ballot papers cast on the voting for a bonus by-law, cannot award costs against the corporation if it be successful in upholding the by-law. *Township of Aldborough* v. *Schmeltz*, 32 O. R. 64.

Brief.]—Where fees paid to witnesses are disallowed, the portions of counsel's brief containing their evidence should also be disallowed. *Carlisle* v. *Roblin*, 16 P. R. 328.

Brief.]—See *Re Robinson*, 16 P. R. 423.

Building Societies—*Petition.*] — A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. 1887 c. 169. An administrator appointed by a court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of s. 47 of R. S. O. 1887 c. 169, "share, bond, debenture, or obligation" applied to a savings bank account, petitioned the court under s. 49:—Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them:—Held, also, that the doubts of the petitioners were reasonable and they were entitled to costs. *Re Ging*, 20 O. R. 1.

Company — *Liquidator.*] — An order was made by a county court, under R. S. O. 1887 c. 183, for the winding-up of the companies, and a liquidator was appointed, who brought in a list of contributories. The contributories shewed cause to their names being settled upon the list, and the court made an order in the case of each of them, reciting that it appeared there was no jurisdiction to make the winding-up order and that all proceedings were irregular or null, and ordering that each contributory should have his costs of shewing cause, to be paid by the companies and the liquidator:—Held, that if there was jurisdiction to make the winding-up order, the contributories could not defend themselves by shewing that it was irregular or erroneous; and if there was no jurisdiction, all the proceedings were coram non judice, and there was no jurisdiction, the court being an inferior one, to order the liquidator or the companies to pay the costs. And even if there was jurisdiction, in the circumstances of this case it should not have been exercised against the liquidator. Rule 1256 does not apply to

proceedings under the Winding-up Act, either by virtue of s. 34 of the Act or otherwise. Remarks as to multiplicity of orders taken out in the matters. *Re Cosmopolitan Life Association, Re Cosmopolitan Casualty Association*, 15 P. R. 185.

Company — *Liquidator*] — Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it. *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.*, 17 P. R. 156.

Company—*Liquidator Intervening — Personal Order for Costs.*]—After the action was at issue, an order was made by a Quebec court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that court to proceed with this action. Afterwards the liquidator obtained an order from that court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally. This court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the court in the Province of Quebec having control of the assets. *Boyd* v. *Dominion Cold Storage Co.*, 17 P. R. 468.

Convictions.]—Remarks on the question of costs in quashing convictions. *Regina* v. *Westlake*, 21 O. R. 619.

The court in considering the question of costs suggested that in future with the notice of motion for a certiorari, a notice might also be served stating that unless the prosecution was then abandoned, and further proceedings rendered unnecessary, costs would be asked for, when a strong case would be made for granting the defendant costs in cases in which it would be unjust and unfair to put defendant to such costs. *Regina* v. *Westgate*, 21 O. R. 621.

Convictions quashed with costs to be paid by the prosecutor. *Regina* v. *Hazen*, 23 O. R. 387.

The practice is not to give costs on quashing a conviction. Regina v. Johnston, 38 U. C. R. 546, followed. *Regina* v. *Somers*, 24 O. R. 244.

Costs against the informant refused. Regina v. Somers, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina* v. *Steele*, 26 O. R. 540.

Co-owners of Ship.]—In actions of account between co-owners the rule as to the incidence of costs followed by the courts of law in partnership actions, may be adopted in a court of admiralty.——In an action of account where there is a deficiency of assets the court may order the costs of the proceedings to be borne equally by the co-owners. *Sidley* v. *The Ship "Dominion," Sidley* v. *The Ship "Arctic,"* 5 Ex. C. R. 190.

Copies.]—A writ of summons is a "pleading or other document" within the meaning of Rule 395, and more than four copies cannot be taxed. The provision of Rule 395 as to four copies covers all copies required during litigation, and extends to the copy of pleadings in the brief. *Sparks* v. *Purdy*, 15 P. R. 1.

Copies—*Depositions.*]—See *Re Robinson*, 16 P. R. 423.

Copies—*Depositions.*]—In taxing the costs of a motion in chambers, no allowance can be made for copies of depositions taken for use upon the motion. *Rennie* v. *Block*, 17 P. R. 317.

Copies—*Judgments.*]—Charges for procuring copies of opinions of Judges in another action, for the instruction of counsel, should not be taxed as between party and party. *Platt* v. *Grand Trunk R. W. Co.*, 12 P. R. 273.

Costs Out of Estate—*Successful Litigant in Effect Paying Costs.*]—The supreme court of New Brunswick, while deciding against the next of kin on his claim as against the husband to the residue of the estate of a feme covert, directed that his costs should be paid out of the estate. The next of kin's appeal to the supreme court of Canada was dismissed with costs, and the direction as to costs of the court below was struck out of the decree, as that direction had the effect of making the successful party pay the costs. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Counsel Fees—*Advising on Evidence—Reference—Brief—Copies of Depositions.*]—Upon appeal from the taxation between solicitor and client of a bill of costs for the defence of an action of redemption in which, before the beginning of the sittings at which the action was entered for trial, an arrangement had been made between the parties that all the matters in question should be referred to a master, and accordingly no witnesses were subpœnaed, and a reference was directed at the sittings:—Held, that the taxing officer had no discretion to allow an increased counsel fee with brief at the trial, as the action could not be said to be of a special and important character, nor to allow a fee for advising on evidence. The reference lasted for 137 hours, 18 of which were occupied in argument. Nearly the whole of the time was devoted to the main matter in contest, viz., whether the defendant should be charged with an occupation rent, and if so at what amount. The master found that they were chargeable with a rent of $312.50. The taxing officer allowed the solicitor $302 for the time occupied in taking the evidence and $47 for the argument: — Held, that the allowance of counsel fees upon a reference, under clause 107 of the tariff, should be exceptional and made only when matters of special importance or difficulty are involved at some particular sitting; and also that the taxing officer should have taken into consider-

ation the unreasonable time occupied over so small a matter, and have exercised his discretion by confining the solicitor to the minimum allowance of $1 an hour, under clause 104 of the tariff, for the argument as well as for the taking of the evidence. The taxing officer allowed the solicitor $77.50 for brief upon appeal from the master's report; this amount included $67.80 paid to the master for copies of the depositions:—Held, that the solicitor had no primâ facie right to order and charge for these copies, and, in the absence of any authority from his clients, should not be allowed for them upon taxation. The taxing officer allowed the solicitor $35 counsel fee upon the appeal, $12 for travelling expenses, and $10 counsel fee upon the plaintiff's motion for judgment, which came before the court with the appeal:—Held, that these allowances, though liberal, were not so clearly wrong as to justify the court in interfering. *Re Robinson*, 16 P. R. 423. An appeal to the court of appeal was dismissed, the members of the court being divided in opinion as to the regularity of the taxation.

——— *Alimony — Consent Judgment.*]—The parties to an alimony suit consented to a decree, whereby defendant was ordered forthwith to "pay the plaintiff the sum of $75, and all disbursements in the suit as between solicitor and client, including sheriff's fees on executions; such disbursements to be taxed and allowed by the master of this court":—Held, that in proceeding under this decree the master had properly allowed to the plaintiff a sum of $50 paid by the plaintiff to her solicitors, they being also counsel, for counsel fees on the examination and hearing of the cause. *Bucke* v. *Bucke*, 21 Gr. 77.

——— *Appeal from Taxation.*]—No counsel fee was allowed upon an appeal from pending taxation of costs to the master under Con. Rule 854. *Re Nelson*, 13 P. R. 30.

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

——— *Commission to Examine Witnesses Abroad.*]—Upon the settlement of an action it was arranged that the defendants should pay the plaintiff's costs less counsel fees:—Held, that a per diem charge of $20 for attendance in a foreign country on a commission issued by defendants, was to be regarded as a solicitor's attendance and not as that of a counsel. *Greey* v. *Smith*, 7 C. L. T. Occ. N. 168.

——— *Counsel not Attending.*]—A counsel fee will be taxed between party and party, even though the counsel did not attend the trial. *Henderson* v. *Comer*, 3 L. J. 29.

——— *Discretion of Local Officer—Increased Counsel Fees.*]—See *Re Macaulay*, 18 P. R. 184.

——— *Entry for Trial.*]—A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given. *Dewar* v. *Orr*, 3 Ch. Ch. 141.

——— *Hearing Before Master.*]—Where evidence taken before the master, sitting for a Judge, was entered in the decree as having been taken in court, the same fees were taxed to counsel before the master as before a Judge. *Rae* v. *Trim*, 8 P. R. 405.

——— *Increased Fee.*]—An application for an increased counsel fee must be to the Judge who tried the case. *Ratrick* v. *Monarch Ins. Co.*, 3 L. J. 30.

——— *Increased Fee—Accidental Absence of Counsel.*]—On motion by plaintiffs to revise taxation:—Held, that under rule of court of H. T. 22 Vict. (18 U. C. R. 58), no single Judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the master allow more as between party and party. If brief for second counsel was actually prepared, his accidental absence at the trial should make no difference. *Ham* v. *Lasher*, 24 U. C. R. 357.

———*Liability of Client.*]—An attorney is entitled to recover against his client fees paid to counsel conducting the case at the trial. *Brock* v. *Bond*, 3 U. C. R. 349.

——— *Motion.*]—On an application for further security for costs, a counsel fee of $10 was allowed. *Bell* v. *Landon*, 9 P. R. 100.

———*Partner of Litigant.*]—The rule that a person cannot tax a counsel fee in his own case does not extend to his partner. *Henderson* v. *Comer*, 3 L. J. 29.

———*Postponement of Trial.*]—Where, before the commission day, an order had been obtained to postpone the trial on payment of costs, and the plaintiff afterwards, on taxation of costs, claimed a counsel fee as paid to the partner of plaintiff's attorney, without shewing when or how paid; and it appeared that the record had not been entered for trial, the master refused to tax the counsel fee; and a summons for a revision of his taxation was discharged. *Manary* v. *Bash*, 9 L. J. 327.

———*Reference — Advising on Evidence.*]—An action by an architect to recover $600 for professional services was by consent referred for trial to an official referee, who reported that the plaintiff was entitled to recover $397. The defendant had before action tendered $325, and had paid that amount into court with his defence. The defendant appealed from the report, and the plaintiff also appealed, after the defendant's appeal had been set down. Both appeals were dismissed with costs. A further appeal by the defendant to the court of appeal was also dismissed:—Held, upon appeal from taxation of costs, that the plaintiff was entitled to tax a counsel fee upon the trial before the referee, the amount of which would not be reviewed, and also a fee for counsel advising on evidence. Re Robinson, 16 P. R. 423, distinguished. *Denison* v. *Woods*, 18 P. R. 328.

——— *Reference at Trial.*]—Held, that a counsel fee may be taxed for the trial, although the case was referred to arbitration without being entered upon. *Wood* v. *Foster*, 6 P. R. 175.

———*Settlement Before Trial.*]—Where in a country cause the record was entered and afterwards settled before the commission day, the master, upon consulting the chief justice of the common pleas, refused to allow the costs of entering the record or counsel fee. *Hingston* v. *Whelan*, 8 L. J. 72.

———*Taxing Officer's Powers.*]—The Administration of Justice Act, 1885, has not conferred upon local registrars of the high court the power of taxing counsel fees of any greater amount than is allowed by the tariff of costs in force. *Bank of British North America* v. *Western Assurance Co.*, 11 P. R. 30.

———*Taxing Officer's Discretion.*] — The discretion of the taxing officer as to counsel fee at the trial should not be interfered with. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

——— *Taxing Officer's Discretion.*]—Held, that the amount to be allowed per diem to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with. *Re Hillyard and Royal Insurance Co.*, 12 P. R. 285.

——— *Taxing Officer's Discretion.*]—The master, in a case occupying three days, allowed $75 to the senior counsel and $30 to the junior, and declined to tax a counsel fee for consultation between counsel previous to trial. The Judge refused to interfere. *Fox* v. *Toronto and Nipissing R. W. Co.*, 7 P. R. 157.

——— *Taxing Officer's Discretion.*]—The discretion of a taxing officer as to the amount of counsel fees will not be interfered with upon appeal. *Talbot* v. *Poole*, 15 P. R. 274.

——— *Taxing Officer's Discretion.*] — The practice is not to interfere upon appeal with the discretion of a taxing officer as to the quantum of a counsel fee. *Rondot* v. *Monetary Times Printing Co.*, 18 P. R. 141.

———*Trial Alone to be Considered.*]—The counsel's fee should be exclusively as for fee with brief at the trial. *Doe d. Boulton* v. *Switzer*, 1 C. L. Ch. 83.

——— *Two Fees.*]—The question of the allowance of counsel fees is one for the discretion of the taxing officer; and where the action is strenuously contested on both sides, it is proper to allow fees to both senior and junior counsel. *Carlisle* v. *Roblin*, 16 P. R. 328.

Crown.]—In an action in the nature of an information filed by the attorney-general, costs will not be allowed to the defendant against the Crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

Crown.] — The attorney-general is never made to pay costs, even upon interlocutory proceedings. *Gibson* v. *Clench*, 1 Ch. Ch. 69.

Crown.]—The rule that the Crown neither claims nor pays costs is favoured by the court as most consistent with the dignity of the Crown and the practice of the court; and where the Crown is made a party in consequence of the discharge of an international duty, and out of courtesy or for form's sake, having no substantial interest in the question at issue, and no interests have suffered, and no loss accrued by the Crown disclaiming or not appearing, the court will certainly not order costs to be paid to the attorney-general. *United States* v. *Denison*, 2 Ch. Ch. 263.

Depositions not Used at Trial.]—In an action for libel the defendants, in support of their defence of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken thereunder for use at the trial. The evidence, however, was not used, owing to the plaintiff being called as a witness by the defendants and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—Held, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against the plaintiff the costs of executing the commission, the taking of the evidence having been, under the circumstances, not unreasonable, and the fact that it was not used not being sufficient to deprive the defendants of the costs of it. *Rondot* v. *Monetary Times Printing Co.*, 18 P. R. 141.

Demurrer.]—Where a demurrer has been left to be disposed of by the trial Judge, and has not been so disposed of by him when giving judgment in the action, nor by a divisional court on appeal, he has still power to dispose of the costs of it, and any application for that purpose should be made to him; but if to another Judge, it must be to a Judge in court. The master in chambers, having no jurisdiction to decide a demurrer, has none to determine the costs of it. *Jones* v. *Miller*, 16 P. R. 92.

Director—*Solicitor.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company:—Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in court conducted by him as solicitor for the company, but not in respect of business done out of court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder. Cradock v. Piper, 1 Macn. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O. R. 289.

Discontinuance.] — Where the plaintiff serves a notice of discontinuance under Rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs which may exceed the defendant's general costs. Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's costs and pay them to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

Discretion.]—By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the

ground that he was really the person who hired them. There was no subsequent pleading:—Held, that the reply was a direct violation of Rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs. No opinion expressed as to whether a divisional court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

Drainage Actions.]—Where actions begun in the high court were referred at the trial to the drainage referee, and upon appeal from his report an order was made by an appellate court for taxation and payment of costs of the actions:—Held, that they were not costs coming within the provisions of s. 24, s.-s. 4, of the Drainage Trials Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal. *Crooks* v. *Township of Ellice*, *Hiles* v. *Township of Ellice*, 16 P. R. 553.

Election—*Dismissal of Petition—Sheriff's Costs of Publication.*]—Where an election petition is dismissed at the trial without costs the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and although the sum deposited as security is not a security for such expenditure, payment out of court will only be ordered on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff. *East Middlesex (Provincial)*, 2 E. C. 150.

Enlargement of Motion.]—A counsel fee of $5 for each necessary and proper enlargement of a court motion should be taxed. *McCallum* v. *McCallum*, 11 P. R. 179.

Estate—*Persons not Trustees.*]—The costs payable out of an estate to persons not trustees thereof, were directed to be taxed between party and party only. *Gray* v. *Hatch*, 18 Gr. 72.

Evidence—*Advising on.*]—See *Re Robinson*, 16 P. R. 423.

Examination de Bene Esse.]—An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination de bene esse before the trial. The order provided that after the conclusion of the plaintiff's examination, he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff; and that the examination might be given in evidence at the trial, "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined, and partly cross-examined, under this order, and was examined by the medical men, but his cross-examination, owing to his ill-health, was never completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action:—Held, under the circumstances of the case, that the examination of the plaintiff de bene esse was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action. Beaufort v. Ashburnham, 13 C. B. N. S. 598; 32 L. J. N. S. C. P. 97; 7 L. T. N. S. 710; 11 W. R. 267; 9 Jur. 822, followed. *Carty* v. *City of London*, 13 P. R. 285.

Examination for Discovery.]—An objection that a person examined by the defendants for discovery was not an officer or representative of the plaintiffs should have been taken at the outset and was not open on taxation. *Township of Logan* v. *Kirk*, 14 P. R. 130.

By Rule 1384, Rule 1177 was rescinded and a new Rule substituted, providing that the costs of every interlocutory examination should be borne by the examining party, unless otherwise ordered. Where an action was begun and the defendants examined for discovery before the Rule was passed, but was tried and judgment given after it was passed, but before it came into force:—Held, that the new Rule applied, and the taxing officer had no power to tax to the successful plaintiff the costs of the examination without an order therefor. Application for such order should be made to the trial Judge at the trial or immediately after judgment. *McClary* v. *Plunkett*, 16 P. R. 310.

Executors and Administrators—*Just Allowances — Unsuccessful Litigation.*]—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate and being unsuccessful were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts. Where it is plain that a dispute can be settled only by litigation it is not necessary for a trustee to ask the advice of the court before defending. *In re Williams*, 22 A. R. 196.

Executors—*Mortgage Action.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

Executors—*Unsuccessful Action to Establish Will.*]—Where the person named as an executor in a written instrument failed, in the final result of this action, to establish it as the last will of the testator, and the court of last resort refused to order that his costs incurred therein should be paid out of the estate:—Held, that the court of first instance could not make an order for payment, out of moneys paid into that court by the administrators pendente lite, of these costs as costs of the litigation, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because

he never was an executor. *Purcell* v. *Bergin*, 16 P. R. 301.

Exemplification of Judgment.]—Before a party can tax the costs of obtaining an exemplification of judgment, he must serve the other side with notice to admit, under rule 28 E. T. 1842; but the master may allow the costs of procuring a copy of the roll. *Conger* v. *McKechnie*, 1 C. L. Ch. 220.

Ex parte Motion.]—Costs should not be awarded against another person upon an ex parte motion. *McLean* v. *Allen*, 14 P. R. 84.

Ex parte Order.]—Counsel fee on attendance to obtain ex parte order is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Ex parte Order.]—Where ex parte orders for the appointment of a receiver were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—Held, that the disposition of the costs should not be reviewed on motion to continue the receiver. McLean v. Allen, 14 P. R. 84, distinguished. *Stark* v. *Ross*, 17 P. R. 237.

Expropriation.]—In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended. *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.

Where a railway company in expropriating land under the Dominion Railway Act agreed to pay to the land-owners "all costs incidental to the arbitration" had to fix the compensation to be paid:—Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration. *Ib.*

Fee Revising Reply.]—Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, a counsel fee for settling plaintiff's reply to the defendant's counterclaim should have been taxed in addition to fee allowed on settling statement of claim. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Foreign Commission.]—Upon taxation a fee was properly allowed for counsel in British Columbia attending upon examination of witnesses there. *Township of Logan* v. *Kirk*, 14 P. R. 130.

Increasing Fees.]—The discretion of a Judge to order an increase of fees, payable to solicitor or counsel, has been taken away by the general orders 511 and 608. *Re Curry*, 24 Gr. 528.

Indictment for Nuisance.]—Upon an application for a rule to tax the costs of proceedings on an indictment for nuisance under 5 & 6 Will. & Mary, c. 33, and that they should be allowed to a particular person, the court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina* v. *Gordon*, *Regina* v. *Robson*, 8 C. P. 58.

Infant.]—An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose. Hartshorn v. Early, 19 C. P. 139, and Slator v. Brady, 14 Ir. C. L. R. 61, 342, followed. The discretion given by Con. Rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs. *Lipsett* v. *Perdue*, 18 O. R. 575.

Infant—*Next Friend*—*Costs out of Estate or Share.*]—The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by acts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the high court, but was dismissed on appeal to the court of appeal:—Held, that the costs should not be made payable out of the testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession. In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants. *Smith* v. *Mason*, 17 P. R. 444.

Infringement of Copyright.]—Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—Held, that the plaintiffs were entitled to the costs of the action; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into court. *Anglo-Canadian Music Publishing Association* v. *Somerville*, 19 P. R. 113.

Injunction.]—Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of the defendant, against whom an injunction had been ordered, the court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing. *Fire Extinguisher Co.* v. *North Western (Babcock) Fire Extinguisher Co.*, 20 Gr. 625.

Injunction.]—The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the

application for it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

Instructions for Affidavit of Disbursements.] — Instructions for common affidavit of disbursements were properly disallowed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Instructions for Brief.] — Instructions for brief should be allowed where the brief itself is allowed. *McCallum* v. *McCallum*, 11 P. R. 179.

Instructions for Examination.] — Instructions for the examination of the plaintiff, and of the defendants, each $2, should have been taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Instructions for Reply—*Proceedings to Save Expense.*] — On a taxation between party and party, instructions for reply will not be allowed, as well as instructions for statement of claim. But expenses incurred in procuring a deed, and certain other documents, which caused a saving of expense, were allowed. *Torrance* v. *Torrance*, 9 P. R. 271.

Instructions to Defend.]—A bill had been filed but not served, and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend, some two months before the dismissal of the bill:—Held, that defendant was entitled to tax instructions, and the costs of the taxation. *Bissett* v. *Strachan*, 8 P. R. 211.

Interlocutory Costs.]—Where under the judgment in an action the costs thereof are to be taxed to one party, and under interlocutory orders certain costs are payable to the opposite party in any event on the final taxation the taxing officer should not close the taxation of the costs of the action and certify the result until the interlocutory costs are taxed, unless there is unreasonable delay in bringing in a bill of the latter costs. *Cousineau* v. *Park*, 15 P. R. 37.

Interpleader—*Sheriff's Fees and Costs—Divided Success.*]—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it:—Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, &c.; and that the execution creditors should have an order over against the claimant for one-half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

Interpleader — *Reservation.*]—The costs of an interpleader issue should not be reserved by the interpleader order to be disposed of in chambers, but should be left to be dealt with by the trial Judge. *Grothe* v. *Pearce*, 15 P. R. 432.

Judgment Debtor.]—Under Rule 1180, the costs of proceedings to examine a judgment debtor may be allowed, in the discretion of the court or a Judge, where the examination has not actually taken place. And where the judgment debtor attended upon an appointment for his examination, procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt, he was ordered to pay the costs of the proceedings. *Popham* v. *Flynn*, 15 P. R. 286.

Justice of the Peace.]—Where a plaintiff in an action against a magistrate for acting maliciously and without reasonable and probable cause, being guilty of the offence of which he was convicted, was, under the operation of C. S. U. C. c. 126, s. 17, restricted to the recovery of only three cents damages, he was held not to be entitled to any costs whatever. *Haacke* v. *Adamson*, 10 L. J. 270.

Held, that ss. 18 and 19 of C. S. U. C. c. 126, taken together must be limited "to any such action" not provided for in s. 17 of the same Act. *Ib.*

Held, that no one can have costs taxed to him who did not incur costs. *Ib.*

Land Titles Act—*Costs as between Solicitor and Client—Costs as of a Court Motion.*]—A local master of titles has power by virtue of ss. 137 and 74 of the Land Titles Act, R. S. O. 1887 c. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by rule 16 (2) of the rules in the schedule to the Act has power to give a special direction that costs as of a court motion may be taxed. And where a master in his discretion so ordered, a Judge in chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence. *Re Ross and Stobie*, 14 P. R. 241.

Liability to Solicitor—*Taxation against Opposite Party.*]—Where, by the terms of an express contract, a party is not to be liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333, approved. *Meriden Britannia Co.* v. *Braden*, 16 P. R. 410; 17 P. R. 77.

Litigant in Person.] — The judgment debtor appeared in person and argued his own case on appeal:—Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument. *Millar* v. *Macdonald*, 14 P. R. 499.

Local Master.] — Held, that the local masters, who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under chancery tariff of 23rd March, 1875, when taxing costs. *McGannon* v. *Clarke*, 9 P. R. 555.

Maritime Law—*Action in rem—Benefit to Claimants Generally.*]—Where a party in an action in rem has incurred costs which have benefited not only himself but parties in other actions against the res, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in court before any other payment is made thereout. *The Queen* v. *The City of Windsor, Symes* v. *The City of Windsor*, 5 Ex. C. R. 223

Maritime Law—*Towage.*]—In an ordinary contract of towage the vessel in tow has control over the tug, and if the pilot of the tow negligently allows the tug to steer a dangerous course whereby the tow is injured the tug is not responsible in damages therefor. (2.) Where a very great part of the blame is to be attributed to the tug the costs of the latter in defending the action may not be allowed. *The "Prince Arthur"* v. *Jewell* (*The "Florence,"*) 5 Ex. C. R. 151.

Married Woman.] — Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill and interest:—Held, that the judgment was irregular and might have been set aside with costs if the defendant had applied promptly; and, under the circumstances, the judgment was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer. *Cameron* v. *Heighs*, 14 P. R. 56.

Married Woman — *Set-off.*]—Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs. An application to vary the order made upon the appeal by directing that the costs thereof should be set off pro tanto against the amount of the judgment was refused; but the court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off pro tanto against the costs awarded by the judgment to be levied out of the defendant's separate property. Pelton v. Harrison (No. 2), [1892] 1 Q. B. 118, followed. *Hammond* v. *Keachie*, 17 P. R. 565.

Married Woman.]—Inquiry directed as to retainer, with direction that only disbursements be taxed if formal retainer not proved. See *Clark* v. *Creighton*, 9 P. R. 125.

Mechanics' Lien—*Costs of Owner—Costs of Lien-holders—Scale of Costs.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the master's office. The amount due from the owner to the contractor should be paid into court by the former, less his costs, which should be taxed as to a stake-holder watching the case. The costs of lien-holders establishing their liens should be paid as a first charge on the fund. The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Mechanics' Lien—*Payment into Court.*]—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lien-holders. Payment of the former sum into court was ordered and made, the amount, however, being insufficient to pay the claims of lien-holders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into court:—Held, that by the payment into court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, 26 O. R. 189.

Mechanics' Lien—*Appeal.*]—Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action. Semble, that the costs of such an appeal are within the scope of s. 45. *Gearing* v. *Robinson*, 19 P. R. 192.

Mortgage—*Infants.*]—In a mortgage action, where possession is claimed, the writ of summons if served on the official guardian need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession, and the costs of such service will be disallowed. Rules 258 and 259 considered. *Sparks* v. *Purdy*, 15 P. R. 1.

Mortgage — *Appearance.*]—Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in Rule 718 enters an appearance in which he disputes the amount, judgment cannot be entered on præcipe; a motion to the court becomes necessary, and the defendant so appearing must pay the additional costs of it:—Semble, in such a case, that where there are several defendants, there should be only one judgment against all. *Rice* v. *Kinghorn*, 17 P. R. 1.

Motion — *Preliminary Objection—Affidavits.*]—Where an interlocutory motion was dismissed upon preliminary objections:—Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it. *Whitewood* v. *Whitewood*, 19 P. R. 183.

Motion Abandoned.]—Where a motion stands over, and afterwards the party moving gives notice of abandoning the application, the costs which are given against him are not those of an abandoned motion, but of a motion refused. *Dennison* v. *Devlin*, 11 Gr. 84.

Motion for Judgment.] — Held, that upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under Rule 739, which was useless and not according to the practice, and was refused because the indorsement on the writ of summons claimed "interest on arrears of rent," and was, therefore, not a good special indorsement. *Baldwin* v. *Quinn; Baldwin* v. *McGuire*, 16 P. R. 248.

Negligence of Solicitor.] — The court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor, of proceedings which had been set aside in the action as irregular, and as to which the judgment creditor alleged negligence and want of skill. *Gall* v. *Collins*, 12 P. R. 413.

Notice of Trial.]—Where one of several defendants gives notice of trial, and afterwards, becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party. *Strachan* v. *Rutton*, 15 P. R. 109.

One of Firm not a Solicitor.]—The defendant in this action was represented by a firm purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him:—Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if proof had been given. Reeder v. Bloom, 3 Bing. 9, —— v. Sexton, 1 Dowl. 180, followed. *Scott* v. *Daly*, 12 P. R. 610.
See Kempt v. *Macauley*, 9 P. R. 582.

Partnership.]—In partnership actions, in the absence of special circumstances such as misconduct or negligence, the assets will be applied, first, in payment of creditors, next, in payment of the sum found due to the successful party, and lastly, in payment of the costs of all parties. Hamer v. Giles, 11 Ch. D. 942, followed. The fact of a balance being found due by one partner to the other is no reason for departing from the ordinary rule as to costs. *Chapman* v. *Newell*, 14 P. R. 208.

Partnership.]—The fact that in an action to take the accounts of a partnership, one partner has succeeded in his contention as to such accounts as against the contention of his co-partner, is not sufficient to entitle him to the costs of the action against the latter. Chapman v. Newell, 14 P. R. 208, followed. *Mitchell* v. *Lister*, 21 O. R. 318.

Postponing Trial.] — Under an order made at the assizes postponing the trial upon payment of "the costs of the day," only one counsel fee of $10 is taxable. *Hogg* v. *Crabbe*, 12 P. R. 14

Postponing Trial.]—An action came on for trial, and a postponement was applied for by the defendant, and was ordered upon payment of the costs of the day: — Held, that counsel fees were chargeable and taxable according to the discretion of the taxing officer, and not according to an arbitrary limit. Hogg v. Crabbe, 12 P. R. 14, dissented from. *Outwater v. Mullett*, 13 P. R. 509.

Praecipe Order.]—Held, that only one attendance should be allowed on obtaining a praecipe order. *Latour* v. *Smith*, 13 P. R. 214.

Railway Arbitration — *Witnesses.*]—Costs of witnesses who have appeared before arbitrators to give evidence as to the value of land taken by a railway. See *Re McRae and Ontario and Quebec R. W. Co.*, 12 P. R. 282.

Redemption — *Defences not Proved.*]—In answer to a bill for the redemption of a mortgage alleging usury in the original transaction, the mortgagee set up several defences which were decided against him. The court, in decreeing redemption, ordered the plaintiff to pay the costs as of a common redemption suit, and defendant the costs of the issues found against him. *Isherwood* v. *Dixon*, 5

Reference.]—See *Re Robinson*, 16 P. R. 423.

Retaining Fee.] — Where the defendant was ordered to pay the plaintiffs' costs of a former action, as between solicitor and client, an unpaid retaining fee which the plaintiffs had agreed in writing to pay to their solicitors, over and above the costs of the action, was held not to be taxable. Re Geddes and Wilson, 2 Ch. Ch. 447, and Ford v. Mason, 16 P. R. 25, approved and followed. Re Fraser, 13 P. R. 407, distinguished. *McKee* v. *Hamlin; Hamlin* v. *Connelly*, 16 P. R. 207.

Revivor.]—See *Girardot* v. *Welton*, 19 P. R. 162, 201.

Salvage Action.]—See *The Gleniffer*, 3 Ex. C. R. 57.

Second Application.]—Where an application has been refused with costs, and a motion is made for leave to make a new application of the same nature, on further evidence, the new evidence must be produced, and the costs of the previous application paid. *Anon.*, 1 Ch. Ch. 196.

Services not Covered by the Tariff.]—The tariff of costs now in force does not pretend to exhaust all possible items of services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the court. It is therefore for the taxing officer to determine, according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction. Rules 154 and 168 of T. T., 1856, are still in force as to matters not embraced in the tariff of 1881. *Ball* v. *Crompton Corset Co.*, 11 P. R. 256.

Service on Infant.]—The costs of serving an infant personally who is out of the jurisdiction will not be allowed. *Rew* v. *Anthony*, 9 P. R. 545.

Service out of the Jurisdiction.]—Held, that where the plaintiff, before serving the writ of summons on defendants out of the jurisdiction, obtains an order shortening the time for appearance, he should include in it an order allowing the issue of the writ for service out of the jurisdiction, and should not have taxed to him the costs of a subsequent order allowing the service. Rule 274 and form 121 considered. *Sparks* v. *Purdy*, 15 P. R. 1.

Sessions — *Appeal to Sessions* — *Witness Fees.*]—Where an appeal to the sessions is dismissed without being heard and determined on the merits there is no power to impose costs. Re Madden, 31 U. C. R. 333, followed. Section 58 of R. S. C. c. 178 authorizes justice of the peace to allow witness fees. *Regina* v. *Becker*, 20 O. R. 676.

Sessions — *Order to Sheriff to Abate Nuisance—Costs.*]—The defendant was convicted at the general sessions on an indictment for a nuisance in obstructing the highway by

the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the sessions made an order directing the sheriff to abate the same at defendant's costs and charges, and to pay the county crown attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order:—Held, that the sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ de nocumento amovendo; that the order being a judicial act was properly removed by certiorari, and must be quashed, but without costs. Remarks as to the jurisdiction of the sessions as to the costs. *Regina* v. *Grover*, 23 O. R. 92.

Sessions—*Appeal.*]—On an appeal to a county court Judge from a summary conviction under the Act to provide against frauds in the supplying of milk to cheese, butter, and condensed milk factories (52 Vict. c. 43, s. 9), the Judge has the same power to award costs as the sessions of the peace under ss. 879-889 of the Criminal Code, 1892. Under the Criminal Code, s. 880, the court may, on appeal, award such costs, including solicitor's fee, as it may deem proper, and there is no power in the high court to review such discretion. *Regina* v. *McIntosh*, 28 O. R. 603.

Sessions.]—Where the chairman of the general sessions of the peace made a minute of dismissal of an appeal from the conviction of a police magistrate, with costs to be taxed by the clerk of the peace, but no formal order was drawn up in pursuance of such minute:—Held, that a certificate of the clerk as to the amount of such costs and a subsequent order of the court of general sessions directing a distress warrant to issue in respect of the same were irregular and must be quashed. If such formal order had issued the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay them. Freeman v. Read, 9 C. B. N. S. 301, specially referred to:—Held, also, that in view of s. 880 (*e*) (*f*) of the Criminal Code the formal order might have been drawn up at any future sittings of the court of general sessions and the costs included therein nunc pro tunc if necessary, the power to determine the amount of such costs not being, as it is in England confined to the justices at the same general sessions at which the appeal is heard. *Re Bothwell and Burnside*, 31 O. R. 695.

Settling Bond.]—A disbursement charged in a bill of costs of $1 paid in stamps to an officer of the court upon settling a bond was disallowed upon appeal from taxation. Such a fee is not authorized by tariff B. annexed to the Consolidated Rules under the item "Every reference, inquiry, examination, or other special matter." *Casey* v. *Morden*, 16 P. R. 127.

Similiter.] — Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, the costs of a similiter, with jury notice, were properly disallowed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Solicitor — *Action without Authority.*]—An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received. On a motion made therefor by the plaintiff the judgment and all subsequent proceedings were set aside, and the solicitors ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party. *Scribner* v. *Parcells*, 20 O. R. 554.

Solicitor — *Action without Authority.*]—Upon application to the court therefor the next friend of an infant plaintiff may be allowed to withdraw, upon such terms as the circumstances of the case and the welfare of the infant may require. Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitor revoking the authority to use her name, to which they replied that the proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors:—Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the court as to liability for costs theretofore incurred. As to costs:—Held, that the court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff as client has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter:—Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 449.

Solicitor — *Action without Authority.*]—By a resolution of the council of a municipal corporation the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the

defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out. Semble, that the corporation should have been parties to the motion:—Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrong-doing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

Solicitor—*Action without Authority.*] — On the application of the defendants the name of one plaintiff was struck out on the ground that the solicitors had not been properly authorized to sue, but the solicitors having acted in good faith no costs were awarded. *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33.

Solicitor—*Profit Costs—Counsel Fees.*]—Solicitors suing in person are entitled to fees for the same services as are allowed in like cases in England, but a solicitor, who is also a barrister, cannot tax a counsel fee to himself when he sues in person, and conducts his own case. *Smith* v. *Graham*, 2 U. C. R. 268.

But the rule does not extend to partners. *Henderson* v. *Comer*, 3 L. J. 29.

Solicitor—*Barrister Conducting his Own Case.*]—A counsel conducting his own case in court cannot tax a counsel fee against the opposite party. Smith v. Graham, 2 U. C. R. 268, followed. *Clarke* v. *Creighton*, 15 P. R. 105.

Solicitor — *Trustee—Instructions—Counsel Fees.*]—One of several trustees who is a barrister and solicitor, and acts for himself and his co-trustees as solicitor and counsel in an action, may tax against the opposite party his full costs, including instructions and counsel fees. Craddock v. Piper, 1 Macn. & G. 664, followed. Smith v. Graham, 2 U. C. R. 268, distinguished. *Strachen* v. *Ruttan*, 15 P. R. 109.

Solicitor—*Striking Name of Solicitor off Roll.*]—Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be made to a Judge in court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and in default that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into court for the purpose of having the name struck off, and this should be on notice to the solicitor. Ruling of a taxing officer that costs of the first application should be taxed as of a chambers motion only, reversed on appeal. *Re Bridgman*, 16 P. R. 232.

Solicitor—*Trustee—Proceedings in Surrogate Court.*]—A solicitor trustee acting on behalf of himself and his co-trustee is entitled to profit costs for preparing the accounts of the trustees and attending the audit thereof before the surrogate Judge. *In re McNab*, 19 C. L. T. Occ. N. 74.

Special Disposition of Costs.] — See *McCullough* v. *Clemow*, 26 O. R. 467; *Dolen* v. *Metropolitan Life Ins. Co.*, 26 O. R. 67.

Special Jury.] — An application for a Judge's certificate, that a cause is a proper cause for a special jury, must be made immediately after the trial on the same day the cause is tried. *Binkley* v. *Desjardine*, Tay. 177.

Specific Performance.] — In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the master's office. Games v. Bonnor, 33 W. R. 64, followed. Brady v. Walls, 17 Gr. 699, and Re Boustead and Warwick, 12 O. R. 488, specially referred to. *Dame* v. *Slater*, 21 O. R. 375.

Staying Proceedings.]—The costs of a chamber application to stay proceedings until term, in a superior court case tried at the county court under the Law Reform Act, 1868, are taxable under a rule for a new trial upon payment of costs, the county court Judge having refused to stay proceedings. *Merchants Bank* v. *Ross*, 6 P. R. 215.

Striking out Cause.]—If a cause irregularly set down for hearing by the plaintiff is struck out upon defendant's motion in chambers with costs, this entitles the defendant to tax costs of the application only, and not the costs of preparing for hearing. *Frietsch* v. *Winkler*, 3 Ch. Ch. 141.

Subpœna—*Fee On.*] — Fee on subpœna by direction of the court to be allowed on taxations under the tariff of costs where the amount itself is properly taxable. *Stephen* v. *Simpson*, 3 C. L. J. 102.

Subpœna—*Service.*]—Held, that service of subpœnas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion. *Ham* v. *Lasher*, 24 U. C. R. 357.

Semble, that subpœnas being mesne process, under s. 277 of C. L. P. Act, no fees can be allowed for mileage or service, if not made by the sheriff. *McLean* v. *Evans*, 3 P. R. 154.

Held, having regard to Con. Rules 254, 1212, 1217, and items 16 and 17 of tariff A., that the plaintiff was not entitled to tax anything for costs of service by his solicitor of writs of subpœna. *Carty* v. *City of London*, 13 P. R. 285.

Subpœna.] — Engrossment of order for subpœna and attendance to file the order are not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Supreme Court—*Motion to Quash Appeal.*]—On motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, shewing that the amount in controversy was

sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. *Irrechel* v. *Auer Incandescent Light Mfg. Co.*, 28 S. C. R. 268.

Surveys—*Maps—Taxing Officer's Discretion.*] — Expense incurred for surveys and other special work of that nature, made in order to qualify witnesses (surveyors) to give evidence, are not taxable between party and party, the English chancery order 120 (1845) not being in force here. *McGannon* v. *Clarke*, 9 P. R. 555.

The taxing officer refused to allow charges for maps prepared to identify the details of the line mentioned in the judgment as that which the Judge considered the true line, and also for a certificate of the state of the cause, for a letter advising of judgment, and for instructions on motion for judgment:—Held, that there being no error in principle, but only an exercise of discretion by the taxing officer, the court would not interfere with his ruling. *Ib.*

Transfer of Right Pendente Lite—*Stay of Proceedings.*]—It may, in rare cases, such as Chambers v. Kitchen, 16 P. R. 219, be necessary and desirable under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs. Under the circumstances of this case, the fact that F. had become pendente lite the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action. But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs. *Murray* v. *Wurtele*, 19 P. R. 288.

Term Fee.]—No term fee is allowed after judgment. *Wilt* v. *Lai*, 1 C. L. Ch. 216.

Nor unless there has been some proceeding during the term. *Ham* v. *Lasher*, 24 U. C. R. 357.

Test Case.]—Costs of both parties of an appeal to the judicial committee were directed to be paid by the successful appellant, special leave having been given to him under special circumstances notwithstanding the small amount at stake. *Forget* v. *Ostigny*, [1895] A. C. 318.

Third Party.] — Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard* v. *Credit Valley R. W. Co.*, 9 O. R. 616.

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial:—Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs. *Tomlinson* v. *Northern R. W. Co.*, 11 P. R. 419.

Held, that the order of the court below, 11 P. R. 419, refusing the third parties their costs, was made in the exercise of a discretion which, by s. 52 O. J. Act, was not subject to review without leave, and as no such leave had been given, an appeal from the order was dismissed, with costs. The court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be allowed by the taxing officer. *S. C., ib.* 526.

In an action for rent or royalties upon iron received by the defendants, they served a notice upon a third party claiming contribution from him. The third party appeared; and an order was made that he should be at liberty to defend the action as regarded the questions between the plaintiff and the defendants only, and to appear at the trial, call witnesses, cross-examine the witnesses called by the plaintiff and defendants, and be bound by the findings. The third party delivered a statement of defence, which was directly against the plaintiff's statement of claim, except a portion thereof which stated that he was not a proper party, and that no right of contribution existed against him, but this portion was struck out at the trial upon his own application. The plaintiff was successful in the action:—Held, that the third party had adopted the position of one who was called upon by his own interest to defend the action, and that he should not recover from the defendants who brought him in his costs of so defending it. *Wallbridge* v. *Gaujot*, 13 P. R. 463.

Where a third party has been brought into an action by the defendant, and an order obtained by the latter directing that the question of indemnity as between the third party and himself be tried after the trial of the action, and that the third party be at liberty to appear at the trial of the action, and oppose the plaintiff's claim, so far as the third party is affected thereby, and at the trial the action is dismissed:—Semble, that the third party is entitled against the defendant to costs up to and inclusive of the trial. Held, however, that the disposition of such costs is in the discretion of the trial Judge, whose order, by R. S. O. 1897 c. 51, s. 72, is not subject to

appeal without leave. Held, also, that the third party cannot be heard in a divisional court upon an appeal by the plaintiff from the judgment at the trial, and is entitled to no costs of such appeal. *Ewing* v. *City of Toronto*, 18 P. R. 137.

Where in an action for negligence the defendants served a third party, under Rule 329, with notice of a claim for indemnity, but he did not appear thereto, and no order was made or applied for under Rule 332:—Held, that he was under no obligation to take any proceeding, and was not bound by the result of the action; and his subsequently appearing at the trial and asking to be made a defendant was gratuitous, and he was not entitled to costs against the defendants. *Gibb* v. *Township of Camden*, 16 P. R. 316.

The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs:—Held, that the defendants were entitled to be paid by the third parties, their costs of defence to be taxed between solicitor and client, and their costs of the claim over against the third parties to be taxed between party and party. Hartas v. Scarborough, 33 Sol. J. 661, followed. *King* v. *Federal Life Assurance Company*, 17 P. R. 65.

Trusts and Trustees.]—Upon a petition by a surviving trustee under a will to be discharged from the trusteeship, it appeared that a trust fund created by the will had become impaired, and a reference was directed to take an account of the dealings of the trustees with the fund. The master reported that a portion of the fund had been lost in the hands of the petitioner's deceased co-trustee, and that the estate of the latter was liable therefor. Upon appeal the report was sent back to be amended by charging the petitioner with the portion of the fund so lost by his co-trustee:—Held, that the inquiry as to the petitioner's liability having resulted unfavourably to him, he must bear the costs of it; but was entitled to receive out of the fund his costs of the petition and of bringing in his accounts; and, upon payment of the amount found due by him, and of the costs awarded to be paid by him, to his discharge. *Re Hawkins*, 16 P. R. 136.

Unauthorized Proceedings — *Payment under Invalid Execution.*] — A person who finds himself a party plaintiff to proceedings which he has never authorized is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not; and the fact that an order dismissing the action has been issued before the applicant becomes aware that his name has been used makes no difference in the rule. Nurse v. Durnford, 13 Ch. D. 764, followed: Delay in moving to set aside the proceedings from the 1st August to the 25th September:—Held, not a bar to relief, where no detriment had resulted to the defendants thereby. The sheriff having seized the plaintiff's goods under execution upon an order dismissing the action with costs, the plaintiff paid the costs to the sheriff, who undertook to hold the amount for ten days "to be returned if writ set aside, and if not within that time, to be applied in payment of execution." After the lapse of more than ten days, during which the plaintiff took no step, the sheriff paid over the money to the defendants. The plaintiff having afterwards established his right to be relieved from liability:—Held, that he was entitled to be repaid by the defendants. *Morris* v. *Confederation Life Association*, 17 P. R. 24.

Unsuccessful Application to Take an Affidavit off the Files—*Criminal Code.*]—The costs referred to in ss. 897 and 898 of the Criminal Code are those dealt with by the general sessions of the peace, when a conviction or order is affirmed or quashed on appeal to it; but the above sections are not applicable to the costs of an unsuccessful application to a Judge of the high court to take an affidavit off the files, after a conviction has been moved by certiorari into that court. *Regina* v. *Graham*, 29 O. R. 193.

Will.] — The rule is, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party, to question either the execution of a will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party." This rule was acted upon, and the plaintiff relieved from costs in a case where the plaintiff had seen the deceased the day after the will was executed, and found him very low and unable to speak intelligibly, and where the testator had to several persons spoken approvingly of the conduct of the plaintiff, a son of a deceased brother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, in which his name was not mentioned, and which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof. *Macaulay* v. *Kemp*, 27 Gr. 442.

Where a plaintiff claiming under a will, insisted on a construction which was decided against her, whereby her claim was considerably reduced, she was, nevertheless, under the circumstances of the case:—Held, entitled to the costs of the suit. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

M. H. proved a will as executrix; afterwards a subsequent will was found dated about a time when the testator was in a weak state of health, both physical and mental. A suit was brought by S. H., the executor in the latter will, against M. H. to set aside the first and establish the second will, which was successful, and in which M. H. was ordered to pay the costs:—Held, that M. H., in an action for an account of her dealings with the estate, having a fair question for litigation in endeavouring to uphold the first will, was entitled to the costs thereof out of the estate. *Hill* v. *Hill*, 6 O. R. 244.

Where a testator provided that the executrix was to have the sole management during her life, and the executors were to manage afterwards; and the latter filed a bill against the executrix without sufficient cause, they were not allowed their costs; but the matter having been brought to the notice of the court

a decree for an account was made as respected the executrix. *Hellem* v. *Severs*, 24 Gr. 329.

In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious. The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim:—Held, that these defendants were in a position similar to that of "interveners" under the English procedure, and were not entitled to costs out of the estate. Held, also, that they were not entitled to costs against the plaintiffs. Semble, that they would be entitled to compensation in the administration of the estate. *Logan* v. *Herring*, 19 P. R. 168.

Costs ordered to be paid out of the real estate, as the litigation had related to it. *McMylor* v. *Lynch*, 24 O. R. 632.

The costs of opposing an unsuccessful appeal to the court of appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief. *Re Cassie, Toronto General Trusts Co.* v. *Allen*, 17 P. R. 402.

Held, that although testamentary expenses, which include the costs of a suit for construction and administration, are usually payable out of the general personal estate, yet here the provision that the testamentary expenses were to be paid out of the first money which should come into his executors' hands, shewed the testator contemplated the payment of such expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate; and there being nothing else in the will to affect or alter this, the costs of this action must be borne ratably by the pure and impure personalty, and the proceeds of land directed to be sold. *Ball* v. *Rector and Churchwardens of Church of the Ascension*, 5 O. R. 386.

The court ordered that the costs in this case should be paid by the respondents (executors and trustees of the will) out of the general residue of the estate of the deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should have received portions of the said residue ratably according to the amounts of the respective sums received by them. *Fisher* v. *Anderson*, 4 S. C. R. 406, 429.

Winding-up — *Creditors' Solicitors.*] — Upon a reference for the winding-up of a company, the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets:—Held, that this class of order and liability was not favoured by the courts, and should be invoked and attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services. *Re Drury Nickel Co.*, 16 P. R. 525.

Witnesses—*Admissions—Time of Attendance.*]—The plaintiff, not being bound to rely on the admissions of the defendants on their examination for discovery, the costs of procuring the attendance of a witness to prove what was then admitted should have been taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Where there is no daily peremptory list of cases at the assizes, and it is necessary to keep the witnesses in attendance from the first day, the fees for such attendance should be taxed. *Ib.*

——— *Discretion as to Number—Witness not Called—Election Act.*]—In trials under the Controverted Elections Act of 1871, the costs and witness fees, and the materiality of evidence, are in the discretion of the master, subject to the court, as in other trials. *Re Prescott Election*, 32 U. C. R. 303.

The master will generally be sole judge as to how many witnesses shall be allowed for as to one issue. *Ib.*

Where the master allowed fees to seventy witnesses subpœnaed, but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses:—Held, that the master exercised a proper discretion, even though respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove; the facts that each witness was subpœnaed to prove appearing on the petitioner's brief put in before the master, and it appearing also by affidavit that the witnesses were subpœnaed bonâ fide, and were material. *Ib.*

There is no presumption in a trial under the Controverted Elections Act of 1871 arising from the number of witnesses subpœnaed that they are unnecessarily called. The presumption is to the contrary. *Ib.*

——— *Disproving Defence.*]—Costs of evidence to disprove the merits of the defence set up must not be incurred without consideration, and will not be allowed as of course. *Redford* v. *Todd*, 6 P. R. 154.

——— *False Affidavit of Increase.*]—Witness fees which had not been paid at the time the affidavit of disbursements was made, were disallowed by the master, whose ruling was sustained by a divisional court. *Hornick* v. *Township of Romney*, 11 C. L. T. Occ. N. 329. *See Harding* v. *Knust*, 15 P. R. 80.

——— *Medical Witness.*]—The plaintiff's own physician attended on him during an examination de bene esse, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff would amount to:—Held, that there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the

action. *Carty* v. *City of London*, 13 P. R. 285.

——— *Public Officer.*]—A public officer in charge of documents for which he is responsible, and attending as a witness in his public capacity and in relation to matters connected with his office, will be allowed professional witness fees of $4 a day. *In re Nelson*, 2 Ch. Ch. 252.

See Beadman v. *Ewen*, 27 U. C. R. 176.

——— *Travelling Expenses.*] — A plaintiff who is entitled only to division court costs of an action can tax as part of such costs his travelling expenses from abroad to attend the trial, if he is a necessary and material witness. *Talbot* v. *Poole*, 15 P. R. 274.

——— *Trial Postponed.*]—A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpœnaed to attend a trial at Hamilton, which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce. The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement. The seventeen witnesses were subpœnaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the court:—Held, that in refusing the plaintiffs the costs of subpœnaing these seventeen witnesses, the taxing officer did not erroneously exercise the discretion given him by Rule 442 O. J. Act. *Christopher* v. *Noxon*, 10 P. R. 149.

——— *Trial Postponed.*] — Where costs were awarded to the plaintiffs upon a postponement of the trial, and the case was not tried till after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxation was reopened upon payment of costs, and the taxing officer was directed to reconsider the allowance of witness fees. *Conmee* v. *North American Railway Contracting Co.*, 13 P. R. 433.

———*Unsuccessful Issues.*]—By the judgment on further directions the plaintiffs were awarded the costs of the action and reference. Upon appeal from the taxation of such costs the defendant contended that the plaintiffs should not be allowed the costs of attendances and witnesses in the master's office relating to items in the account in question as to which the plaintiffs failed:—Held, that the plaintiffs were entitled to all the costs properly, fairly, and reasonably incurred upon the reference, but not to costs of unnecessary proceedings or witnesses, and costs of witnesses called to establish something on which the party calling them failed were in the discretion of the taxing officer. Con. Rules 1195 and 1215 considered. *Latour* v. *Smith*, 13 P. R. 214.

——— *Witness not Called.*]—Where witnesses are subpœnaed but not called, the master should decide whether they were necessary or not, and allow or refuse their expenses accordingly. *McLean* v. *Evans*, 3 P. R. 154.

———*Witness not Called.*]—Where witnesses in attendance at the trial are not called, the onus is on the party subpœnaing them to shew their relevancy. *Carlisle* v. *Roblin*, 16 P. R. 328.

——— *Witness Paid by Both Parties.*]—Where witnesses are subpœnaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other. *McLean* v. *Evans*, 3 P. R. 154.

Written Argument.]—Where the Judge directed reasons for judgment in plaintiff's favour to be put in, the plaintiff's charges for drawing, settling, engrossing, &c., such reasons should have been taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157.

Wrong Person Served as Defendant.]—A person of the same name as the defendant served by mistake with the writ in the action, was held entitled to his costs of opposing a motion for judgment under Rule 324, O. J. Act. *Lucas* v. *Fraser*, 9 P. R. 319.

See APPEAL, IX. 1.

V. RECOVERY OF COSTS.

1. *In General.*

Bail-bond—*Staying Proceedings.*]—Sureties sued on a bail-bond, obtained an order to stay proceedings on the render of their principal, "upon payment of costs:"—Held, that the words "upon payment of costs" are words of agreement, not mere words of condition, and that execution for the costs was properly issued under the order. *Stuart* v. *Branton*, 9 P. R. 566.

Contribution—*Petition to Open Judgment.*]—In an action by creditors to set aside a conveyance of land as fraudulent, a consent judgment was pronounced, which was so framed as to exclude creditors other than the plaintiffs from sharing in the proceeds of the property. Upon the petition of a creditor this judgment was opened up, the conveyance was declared fraudulent and void against all creditors, and a reference was directed to a master to sell the lands and distribute the proceeds of sale among the creditors and incumbrancers. It was also ordered that the petitioner's costs should be paid by the plaintiffs and the two defendants. The master made a special finding in his report that the whole of the petitioner's costs had been paid by one of the defendants. The latter appealed from the report on the ground that the plaintiffs should have been found liable to contribution in respect of these costs, and also moved substantively for an order for payment of one-third thereof by the plaintiffs:—Held, that the master was right under the terms of the reference not to deal with the question of contribution; but that the appellant was entitled to a substantive order against the plaintiffs for payment of one-third of the costs, because the plaintiffs were jointly liable with him and the other defendant therefor. *Fouchier* v. *St. Louis*, 13 P. R. 318.

Demand.]—A party who has to pay debt and costs on a final judgment on verdict, nonsuit, demurrer, or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "rea-

sonable time" for payment. *Coolidge* v. *Bank of Montreal*, 6 P. R. 73.

Demand.]—The plaintiff taxed costs on an order on 10th May. These costs were revised in Toronto on 22nd May, and on the same afternoon were demanded of defendant's attorney in Toronto, the defendant himself living in Belleville. On 23rd May, the order for costs was made a rule of court:—Held, that the rule was regular. *Smith* v. *Cronk*, 6 P. R. 80.

Execution—*Reasonable Time.*]—It is irregular to take out a fi. fa. the instant costs have been taxed without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Ch. Ch. 94.

Execution — *Reasonable Time.*] — Held, that a "reasonable time" need not be given in which to pay the costs of the day, &c., after taxation, but that the order, &c., may be made a rule of court, &c., the day after taxation. *Smith* v. *Cronk*, 9 C. L. J. 237.

Execution.] — The word "immediately" in Rule 863 means "instanter;" and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation. *Clarke* v. *Creighton*, 14 P. R. 34.

Interest.]—Costs of all parties to an action for the construction of a will were ordered to be paid out of the estate of the testator, and were taxed in 1883, but there were no funds available for their payment until 1888:—Held, that interest upon these costs could not be allowed out of the estate. *Archer* v. *Severn*, 12 P. R. 648.

Service of Notice of Motion.]—Where an order for payment of costs is sought which may, under C. S. U. C. c. 24, s. 19, be followed by execution, as in this instance, for payment of costs of a prosecution for libel under C. S. U. C. c. 103, the service of the summons must in general be personal. The court may, under special circumstances, dispense with personal service. Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that defendant is keeping out of the way to evade service; and even in this case, it is by no means clear that personal service will be dispensed with. Service on the attorney, on the record, and on the wife of the defendant, it not being shewn that he was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada, and gone to reside in the United States. *Regina* v. *Simpson*, 10 L. J. 220.

Subpoena for Costs.] — See *Saul* v. *Cooper*, 4 Gr. 61.

Tender of Costs.]—On the 1st March, an order was made setting aside a judgment on payment of costs within a week. On the 8th March, the costs were tendered, and through error refused. On the same day the defendant, treating the judgment as set aside, filed and served his pleas, together with a demand of replication. Plaintiffs afterwards demanded the costs, and on non-payment issued execution:—Held, 1. That the tender of costs was in sufficient time; 2. that the tender was a compliance with the order setting aside the judgment on terms; 3. that where the conduct of the defendant's attorney was vexatious, this was a ground for refusing costs of the application. Plaintiffs afterwards, to avoid judgment of non pros. took issue on the pleas, and then executed a power of attorney, authorizing a party to demand payment of costs, payment of which was refused on the ground that the power of attorney was not countersigned by the president of the company:—Held, 1. That the duty to pay costs continued, notwithstanding the refusal to receive them when tendered; 2. that the filing of the replication was not, under the circumstances, a waiver of the plaintiffs' right to costs; 3. that the plaintiffs were entitled to a substantive order directing the payment of the costs, and the costs of the application. Quære, as to plaintiffs' right, under the circumstances, to costs, between attorney and client, to be paid by the attorney for the defendant, as a punishment for his vexatious conduct. *Gore District Mutual Fire Insurance Co.* v. *Webster*, 10 L. J. 190.

Undertaking of Solicitors.] — Semble, that payment out of the moneys in court to the defendant of his costs of the high court and court of appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. Kelly v. Imperial Loan Co., 10 P. R. 499, commented on. *Agricultural Insurance Co.* v. *Sargent*, 16 P. R. 397.

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2. *Set off.*

Agreement to Set off.] — A plaintiff having taken out a rule for the payment of costs, &c., erroneously entitled, gave defendant's attorney notice of a waiver of the rule and proceedings under this rule were stayed by a Judge's order until the fourth day of next term. The plaintiff after that day issued the rule properly entitled, and having obtained an order for an attachment, arranged with defendant's attorney to allow certain costs to be set off against the costs for non-payment of which the attachment was ordered, and that the attachment should only be proceeded with for the balance. The defendant on the 21st November, obtained a rule to set aside the rule or the attachment thereon issued, on the ground that the plaintiff's attorney had issued the rule properly entitled without authority, and during the time the proceedings were stayed by the Judge's order. Against this rule it was shewn that on the 18th November the plaintiff's attorney served a notice on defendant's attorney, abandoning the second rule and the attachment issued thereon:—Held, that the Judge's order only stayed proceedings upon the rule erroneously entitled, not in the cause; and that the arrangement made by defendant's attorney with plaintiff's attorney as to setting off costs after the attachment had been ordered, precluded defendant from going back to object to proceedings antecedent to the granting of the attachment; and as, in addition to this, notice of abandonment of the attachment had been served before defendant's attorney took out this rule, that such rule should be discharged with costs. *Doe Murphy* v. *McGuire*, 1 P. R. 33.

Alimony.] — Order for interim alimony payable by defendant—Set-off of costs against allowance. See *Maxwell* v. *Maxwell*, 7 P. R. 63.

Claim and Counterclaim.] — Where judgments were recovered in the same action, by the plaintiff on his claim with general costs of action, and the defendant on his counterclaim with costs thereof, such claim and counterclaim arising out of the same subject matter, the judgment for counterclaim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counterclaim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff. *Brown* v. *Nelson*, 11 P. R. 121.

Quære, when a judgment, as in this case, has been framed without directing a set-off, whether a Judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Ib.*

Claim and Counterclaim.]—The plaintiff recovered judgment against the defendant, with costs, upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord, himself became the purchaser; and the defendant recovered judgment against the plaintiff, with costs, upon a counterclaim for rent and damages to the demised premises. The judgment did not direct any set-off, and the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs, awarded to plaintiff and defendant respectively:—Held, that the claim and counterclaim were separate and distinct, and the judgments must be treated as judgments in separate actions; and Con. Rule 1204 did not apply to enable the taxing officer to deduct or set off costs. Under the circumstances of this case, the court deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals. *Link* v. *Bush*, 13 P. R. 425.

Claim and Counterclaim — *Relief Obtainable without Cross-action—Set-off.*]—The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one. The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered:—Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off pro tanto against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character. Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such:—Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of action. Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs, should be taxed to him and added to his other costs and set off against the defendant's costs. *Girardot* v. *Welton*, 19 P. R. 162, 201.

Compelling Entry of Judgment.]—If the plaintiff refuse to enter his judgment in a case where defendant is entitled to set off his costs against plaintiff's verdict and costs, a Judge in chambers will limit a time within which plaintiff must enter his judgment, and in default, allow defendant to enter it for him. *Sinclair* v. *Barrow*, 3 L. J. 49.

Held, that a defendant who conceives he has a right to costs against a plaintiff, in consequence of plaintiff having recovered in a superior court an amount within the jurisdiction of an inferior court, is entitled to call upon plaintiff, either himself to proceed to the entry of judgment, or to bring in the record, in order that judgment may be entered by defendant. *Cross* v. *Waterhouse*, 3 P. R. 287.

Held, also, that a Judge in chambers has power to entertain the application and make the order. *Ib.*

Cross-actions at Law and in Equity.] —A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff successfully defended before any injunction could be obtained; he proceeded no further with his suit in equity, and the bill was dismissed with costs. It was claimed that the costs at law should be set off as against these costs, but the referee considered that costs at law could not be set off against costs in equity, that being the rule in England. The Judge in chambers affirmed the order of the referee as to the first point, and without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, affirmed the order of the referee in this point also, on the ground that the lien of the attorney attached, and was paramount to any right to set-off. *Webb* v. *McArthur*, 4 Ch. Ch. 63.

Cross-actions at Law and in Equity.] —A defendant in an ejectment suit entitled to relief in equity on the ground of mistake, defended the action, in which he was unsuccessful, instead of coming at once to this court for relief. Subsequently he filed a bill and obtained a decree with costs, but the plaintiff at law was held entitled to set off against such costs his costs of the ejectment subsequent to the writ. *Haynes* v. *Gillen*, 21 Gr. 15.

Different Causes of Action.]—Where there is a different cause of action in different courts between the same parties, the costs will not be ordered to be set off. *Cuthbert* v. *Commercial Travellers Association*, 7 P. R. 255.

Different Rights.]—On the dismissal of a bill, costs were taxed to the defendants, and

execution issued against the plaintiff, which was returned nulla bona. Two of the defendants, as administrators, held moneys part of which would, on distribution, belong to the plaintiff, and which they now applied for leave to set off against the taxed costs. Under the circumstances the motion was refused. *Black* v. *Black*, 11 Gr. 270.

Divided Success.]—Where the plaintiff's bill sought to enforce two judgments, one of which the court held him not entitled to enforce, no costs were given to either party up to the hearing. The rule seems to be, that where the costs are to be set off against other costs, the court will not give costs to either party. *Cameron* v. *Bradbury*, 9 Gr. 67.

Equitable Considerations.] — Under Rule 436, a discretion is allowed as to whether or not there shall be a set-off of costs in the same action, where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter. *McCarthy* v. *Cooper*, 12 P. R. 125.

A direction to set off costs was properly refused under the following circumstances:—The plaintiff succeeded at the trial of an action for specific performance of a contract for the sale of land, and was given costs up to the trial; on reference to a master he failed to shew title, and was ordered to pay defendant his costs subsequent to the trial, and to repay $500 of the purchase money which had been paid by the defendant; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by him as security for costs, whereas the $500 could not be recovered against the plaintiff, who was worthless. *Ib.*

Failure to Claim Set-off.]—If plaintiffs on a verdict are allowed only district court costs, and defendant neglect to take out a rule to be present at the taxation, the court will not direct a revision that defendant's costs may be deducted. *McCall* v. *Cameron*, 1 U. C. R. 414.

Insolvent Debtor.] — In a partnership suit, the partnership was found indebted to the defendant; and, on the other hand, the defendant was liable for certain costs. The defendant having become insolvent, it was held that the plaintiff was entitled, notwithstanding the insolvency, to set off the costs against the debt. *Brigham* v. *Smith*, 17 Gr. 512.

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

Interlocutory Costs.]—Proceedings may be considered "interlocutory" within the meaning of Rule 1205, till satisfaction is obtained in respect of the moneys, costs, or subject matter in controversy; and where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and defendant's solicitors were by an order declared to have a lien upon such judgment, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the solicitor's lien was declared, a set-off was allowed. *Clarke* v. *Creighton*, 14 P. R. 34. See the next case.

Where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order of court declared to have a lien upon such judgment, and to have the sole right to control the judgment and execution to the extent of their costs between solicitor and client, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the lien was declared:—Held, reversing 14 P. R. 34, that Rule 1205 did not apply to enable a set-off of the costs to be made. *Clarke* v. *Creighton*, 14 P. R. 100.

Where, under the judgment in an action, the costs thereof are to be taxed to one party, and under interlocutory orders certain costs are payable in any event to the final taxation, the taxing officer should not close the taxation of the costs of the action and certify the result until the interlocutory costs are taxed, unless there is unreasonable delay in bringing in a bill of the latter costs. *Cousineau* v. *Park*, 15 P. R. 37.

In the course of a proceeding for the taxation, at the instance of the client, of the solicitors' bill of costs, there were several interlocutory applications and appeals by the solicitors, which were dismissed with costs to be paid by the solicitors forthwith:—Held, that the solicitors were not entitled to have these costs set off against the amount of costs alleged to be due to them upon the bills then being taxed. *Re Clarke and Holmes*, 15 P. R. 269. See the next case.

Decision below, 15 P. R. 269, refusing to order a set-off of certain interlocutory costs against the amount alleged to be due to the solicitors upon bills in course of taxation, affirmed on appeal:—Held, that, as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to the set-off. If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation, would not have prevented their being ordered to be set off; but it raised an inference that it was not intended that they should be set off. Whether the costs in question should be set off or not, was in the master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the court, it could not be said that an improper discretion had been exercised. *Re Clarke and Holmes*, 16 P. R. 94.

Interlocutory Costs — Rules 1164, 1165 —*Discretion of Taxing Officer — Appeal.*]— See *Wright* v. *Calvert*, 18 C. L. T. Occ. N. 218.

Joint and Individual Liability.]—To entitle a party to set off one debt against another, it must be shewn that the debts are due from and to the same parties respectively. Where, therefore, a debt was due from A. to B., and an amount of costs was due from B. and his solicitor to A., the court refused an application made by B. and his solicitor to set off the one amount against the other, although the effect of such a set-off would have been that B. would have paid a debt for which he was only jointly liable with another. *Wilson* v. *Switzer*, 1 Ch. Ch. 160.

Judgment in another Action.]—Held, that a judgment purchased by defendant from a third party cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien. *Bennett* v. *Tregent*, 6 P. R. 171.

Motion after Judgment.]—Held, that the costs of a motion made after judgment might be treated as interlocutory, for the purposes of a set-off under Reg. Gen. 52. *Young* v. *Hobson*, 8 P. R. 253.

Motion to Postpone.]—Where a defendant put off a trial on payment of costs, and never having paid them afterwards, obtained a verdict:—Held, that those costs could not be set off against defendant's general costs, there being no affidavit of his insolvency. *Potts* v. *Doyle*, 5 O. S. 97.

Plea Confessed.] — Defendant pleaded several pleas on which issue was joined, and afterwards pleaded a defence arising since suit commenced, to which the plaintiff replied, confessing its truth, and praying judgment for costs. It was ordered that all the pleas and issues thereon, except the plea confessed, should be struck out, the costs of such pleas to be set off against plaintiff's general costs of the cause. *Gordon* v. *Robinson*, 1 C. L. J. 326.

Solicitor's Lien—*Different Actions.*]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien: that is the effect of Rule 1205. The lien is simply a right to the equitable interference of the court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs. *Turner* v. *Drew*, 17 P. R. 475.

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

Successful Plaintiff Appealing in Part.]—A decree had been made in a cause giving the plaintiffs relief, and ordering defendants to pay the costs, which however, were not paid. The plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal was dismissed with costs, to be paid to one of the respondents; thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly. *Bank of Upper Canada* v. *Thomas*, 10 Gr. 356.

Successful and Unsuccessful Defendants.] — The practice at common law with respect to the set-off of one defendant's costs against those of another, for the benefit of the plaintiff, does not prevail here. Nor can a plaintiff set off costs payable by one defendant against that defendant's share of the joint costs of defence in the same suit, all defendants being represented by the same solicitor. *Commercial Bank* v. *Elwood*, 1 Ch. Ch. 219.

Successful and Unsuccessful Defendants.]—By the judgment in the action costs were awarded to the plaintiff against the chief defendant, and to the other defendants against the plaintiff, without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor: —Held, that, under Rule 1204, the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set off the costs ordered to be paid to the plaintiff by the chief defendant against the costs ordered to be paid by the plaintiff to the other defendants. Construction of Rules 1204 and 1205. The older decisions as to set-off are not applicable since Rule 3. *Flett* v. *Way*, 14 P. R. 312.

Term Motion.]—The costs of a motion in term are interlocutory costs, and the party to whom they are awarded is entitled to have them set off against the judgment of the opposite party obtained in the same cause. *Young* v. *Hobson*, 8 P. R. 253.

Two Actions.]—Two actions commenced in December were tried in May: the plaintiff had a verdict in one and defendant in the other. In March the plaintiff assigned all his effects to his attorney for the benefit of creditors:—Held, that notwithstanding the assignment defendant was entitled to set off his costs against the plaintiff's verdict and costs, saving the attorney's lien for his costs, if it could be shewn that the property assigned to him was insufficient to pay them. *Tippett* v. *Haacke*, 1 P. R. 365.

3. *Settlement of Action or Attainment of Object.*

Collusion—*Costs of Solicitor.*]—See *Bellamy* v. *Connolly*, 15 P. R. 87; and *Sanridge* v. *Ireland*, 14 P. R. 29.

Defendant Insisting on Trial.]—The rule of this court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where under such circumstances the referee refused an application by plaintiff for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. *McLean* v. *Cross*, 3 Ch. Ch. 432.

Defendant Refusing to Consent to Summary Disposition.]—Where the object of a suit has been attained, the proper course is for the plaintiff, if he seeks costs, to apply to the defendant to have the question of costs disposed of on a motion; unless he does so, he will not be given the extra costs occasioned by going on to a hearing. *Webb* v. *McArthur*, 3 Ch. Ch. 364.

Quære, will such a motion be entertained at all, except by consent. *Ib.*

Semble, if the defendant refuse consent to the costs being disposed of on motion, the plaintiff will get his extra costs of going to hearing. *Ib.*

See Gore District Mutual Fire Insurance Co. v. *Webster*, 10 L. J. 190.

Forum for Disposal of Costs.]—Where a suit becomes unnecessary by reason of matters subsequent to its institution, the question of costs cannot be disposed of in chambers, except by consent. *Merchants' Bank* v. *Musgrove*, 7 P. R. 59.

Libel—*Apology.*]—After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—Held, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs. Knickerbocker Co. v. Ratz, 16 P. R. 191, followed. *Eastwood* v. *Henderson*, 17 P. R. 578.

Motion in Chambers.]—The claim for which a suit had been brought having been compromised, the question by whom the costs of the suit should be borne, was determined by the referee in chambers, on a summary application by consent of the parties. Upon appeal, the court refused to interfere with the discretion exercised by the referee as to costs. *Garforth* v. *Cairns*, 9 C. L. J. 212.

Motion for Costs—*Power of Master or Judge in Chambers to Dispose of Costs.*]—Action by plaintiffs against defendants for infringement of a patent of the plaintiffs. The defendants were, before action, notified of the infringement of a patent, but denied it. In the action, the defendants, besides denying the allegations in the statement of claim, set up that they had not used the machine alleged to be an infringement for two years, and did not intend to use it again, and offered to give a covenant against further use, and paid $10 into Court as damages. This the plaintiffs accepted, and moved in chambers for the costs of the action, which the master gave them; but the court, upon appeal, ordered that the parties should pay their own costs up to the time of the motion (which the defendants had offered before the motion), and that the plaintiffs should pay the costs of the motion and appeal. Upon further appeal to a divisional court, there was a division of opinion, and the appeal was dismissed without costs. *Knickerbocker Co.* v. *Ratz*, 16 P. R. 30.

An appeal to the court of appeal by the plaintiffs from the above order, was allowed and the master's order restored:—Held, that he had a jurisdiction to make the order which did not necessarily depend upon consent of the parties to go before him. North v. Great Northern R. W. Co., 2 Giff. 64, and Thompson v. Knights, 7 Jur. N. S. 704, followed. 2. That the Judge in chambers had exercised his discretion and reversed the master's order upon a wrong principle, and his decision was appealable. Wansley v. Smallwood, 11 A. R. 439, and Crowther v. Elgood, 34 Ch. D. 691, followed. 3. That when the action was begun the circumstances justified it, and there was nothing to take the case out of the ordinary rule that the person in the wrong shall answer in costs. Proctor v. Bayley, 42 Ch. D. 390, distinguished. *Knickerbocker Co.* v. *Ratz*, 16 P. R. 191.

Proceeding to Trial.]—Where the object for which a bill was filed has been obtained during the progress of the cause, it should not be brought to a hearing on the mere question of costs without an offer to settle that question otherwise. *O'Sullivan* v. *Claxton*, 26 Gr. 612.

Summary Disposal in Chambers—*Object of Action not Attained.*]—The plaintiff claimed in this action damages for injury to his person and property by the alleged negligence of the defendants in having a foul drain in front of his property, and an injunction. The defendants denied the plaintiff's allegations, and alleged that if the plaintiff had suffered any injury it was by his own negligence. Before trial of the action, the defendants opened and inspected the drain and did some work upon it. The plaintiff, professing to regard this as a compliance with his demand, asked the defendants to consent to the costs being disposed of by order in chambers, to which the defendants answered that the work was being done in the ordinary course of municipal work, without the intention of admitting any liability, and refused to consent. The plaintiff moved in chambers, without consent and against the objection of the defendants, and obtained an order for payment by the defendants of the costs of the action:—Held, that, under the circumstances, there was no jurisdiction to summarily dispose of the costs in chambers, the object of the action not having been substantially attained. Knickerbocker Co. v. Ratz, 16 P. R. 191, distinguished. *Hunter* v. *Town of Strathroy*, 18 P. R. 127.

Validating Act.]—Held, that the plaintiffs were entitled to the costs of the action down to the time of the passing of an Act validating the by-law complained of, and in addition to the costs of a motion in chambers

for the disposal of the action, and that the defendants were entitled to the subsequent costs and to the costs of the appeal. Observations on the course taken by the legislature in passing Acts to validate proceedings which are under attack in a pending action, leaving the costs of the action to be disposed of by the court as if the Act had not passed. *Dwyer* v. *Town of Port Arthur*, 19 A. R. 555. Reversed by the supreme court on the merits, 22 S. C. R. 241.

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4. *Staying Proceedings for Non-payment of Costs.*

The court refused to stay proceedings until payment of costs in two other suits pending for the same cause. *Richmond* v. *Campbell*, E. T. 2 Vict.

When the second action appears to be vexatious, the court will stay the proceedings till the costs of the first action be paid. *Bays* v. *Kuttan*, 1 C. L. Ch. 20.

Non-payment of costs of the day is not a sufficient ground for staying proceedings until such costs are paid, except perhaps in an extreme case. *Becket* v. *Durand*, 6 L. J. 15.

In an action of trespass de bonis, in the county court, the Judge stayed proceedings, on it appearing that defendants had been sued for the same causes in the county court of another county, in which action the proceedings against them were held to be coram non judice, and whereof the costs, though taxed, had not been paid. A mandamus to compel the Judge to proceed to try this case, was refused on the ground that the defendants being primarily interested, had a right to be before the court and heard:—Semble, that the proceedings should not have been stayed. *In re Dollery* v. *Whaley*, 12 C. P. 552.

The plaintiff, having sued in the county court, proved a claim beyond the jurisdiction, whereupon the jury was discharged. He then brought his action in this court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the county court action and pay the costs of it. The order was rescinded, for, 1. the county court having no jurisdiction, the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2. this suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed. *Hodgson* v. *Graham*, 26 U. C. R. 127.

An action was prosecuted to trial in the name of a plaintiff who was dead before the commencement of the suit, but of this the attorney was ignorant. The death of plaintiff being shewn at trial, the record was struck out by the Judge. An action was subsequently brought for the same cause by the parties properly entitled to sue:—Held, that this action was not vexatiously brought, so as to entitle defendant to stay proceedings in it until the costs of the first were paid. *Davis* v. *Weller*, 5 P. R. 150.

Held, that 29 & 30 Vict. c. 42, s. 1, does not refer to costs of the day in same suit, and consequently proceedings cannot be stayed in a suit in which costs of the day have not been paid. Held, nevertheless, that this can be done on the ground of abuse of the process of the court, where the proceedings are vexatious. *Nicholson* v. *Coulson*, 6 P. R. 65.

Where a plaintiff files a bill for relief, and both parties dying after answer, a new bill setting forth substantially the same facts is filed by the plaintiff's heir against defendant's heir, praying no relief but a discovery, and to perpetuate the testimony of witnesses, proceedings in the second suit will not be stayed till the costs of the first are paid. Semble, that if both suits were instituted by the same individual, and if he were liable to pay the costs of the first, he would not be prevented from prosecuting the second until he had paid those costs. *Street* v. *Ryckman*, 1 Gr. 215.

In prosecuting a claim to land before the referee of titles, a contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant. *Shepherd* v. *Hayball*, 13 Gr. 681.

Non-payment of the untaxed costs of an unsuccessful application in a former suit is no bar to a motion for a like purpose in another suit between the same parties. *Erie and Niagara R. W. Co.* v. *Galt*, 15 Gr. 567.

A plaintiff suing in formâ pauperis is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in this court, touching the same subject matter, unless it can be shewn that the proceedings are vexatious. *Casey* v. *McColl*, 3 Ch. Ch. 24.

Where therefore a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited, and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue in formâ pauperis, the two orders for giving security were set aside. *Ib.*

Where costs are given to a plaintiff suing in formâ pauperis, they are in general, and unless otherwise ordered, dives costs. *Ib.*

See Stewart v. *Sullivan*, 11 P. R. 529. See also Security for Costs, *post* VII.

VI. Scale of Costs.

1. *In General.*

Accounts.]—This action was tried without a jury, and the plaintiff recovered judgment for $120.75, "together with the costs of action, to be taxed according to the proper scale applicable:"—Held, that a county court has jurisdiction to entertain and investigate accounts and claims of suitors however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; and in this case a county court would have had jurisdiction. *Bennett* v. *White*, 13 P. R. 149.

The case, not having been tried by a jury, did not fall under Con. Rule 1172; and the determination of the scale of costs was a matter in the discretion of the court. In the exercise of such discretion the principles of Con. Rule 1172 were applied to the case, and the plaintiff was allowed costs on the county court scale, and the defendant the excess of his costs incurred in the high court, as between solicitor and client, over the amount which he would

have incarrred in the county court, to be set off. *Ib.*

Arbitration.]—Where upon an arbitration under s. 385 et seq. of the Municipal Act, 1892, the arbitrators made their award and directed that the costs should be paid by the land-owners, but did not fix the amount nor direct on what scale they should be taxed, as required by s. 389:—Held, that there was no authority for their taxation either upon the high court or the county court scale. But semble, that upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs. *Re Village of Preston and Aloiz*, 16 P. R. 318.

Ascertained Amount — *Fulfilment of Condition.*]—Claim for $475, ascertained by agreement between the parties, reduced by payment to an amount within county court jurisdiction. The plaintiff, however, before he could recover was obliged to give evidence of the fulfilment of a condition:—Held, that the plaintiff was entitled to a certificate for full costs. *Swartwout* v. *Skead*, 11 C. L. J. 329.

Ascertained Amount — *County Courts Act.*]—The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of stock at a named price, the plaintiffs undertaking that in event of loss the defendant's liability should not exceed $200. In an action upon this contract the plaintiffs recovered $200 and interest:—Held, that the amount of $200 recovered was ascertained by the act of the parties within the meaning of s. 23 (2) of the County Courts Act, R. S. O. 1897 c. 55, and therefore recoverable in a county court. Decision below, 18 P. R. 308, reversed. *Thompson* v. *Pearson*, 18 P. R. 429.

Ascertained Amount.]—The increased jurisdiction of the county court applies only in the comparatively plain and simple cases where by the act of the parties or the signature of the defendant the amount is liquidated or ascertained as being due from one party to the other on account of some debt, covenant, or contract between them; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them. *Robb* v. *Murray*, 16 A. R. 503.

Assessment of Damages—*Order Giving Costs.*]—An order in chambers referred an action in the high court of justice to a master to assess the damages, and directed that the costs should be taxed to whichever party was successful in a certain appeal. There was no trial, and no judgment was entered. The master assessed the damages at $60, and the taxing officer taxed to the plaintiff, who succeeded in the appeal, his costs upon the high court scale:—Held, that the officer had no power under the order to determine the scale of costs, and he was therefore right in taxing upon the scale of the court in which the action was brought. *McGarvey* v. *Town of Strathroy*, 11 P. R. 57.

Balance on Taking Accounts.]—The decree on further directions gave the plaintiff costs to be taxed by the master, who was "to determine the scale under which the same are to be taxed." The original report found $37 due the plaintiff, viz., $22.50 in respect of work done, and $18 for damages, less $3.50 allowed defendants for damages;—the defendants by their answer having admitted and offered to pay $22.23 in respect of the work. The taxing officer allowed costs upon the higher scale. On rehearing, which by agreement was also treated as an appeal from the master, the court allowed an objection to the taxation, and directed costs to be taxed on the lower scale only, without costs to either part of the rehearing. *Smith* v. *McDonald*, 25 Gr. 600.

Bond — *Damages.*] — The defendant, for valuable consideration, executed a bond in favour of the plaintiff, conditioned for the payment of the principal and interest secured by a mortgage executed by the plaintiff. The defendant having made default in payment of the interest for four years, the plaintiff was compelled to pay the arrears, amounting in all, together with the interest on the amount unpaid, to $163, for the recovery of which he sued the defendants in the county court, when judgment was given for that sum, together with division court costs, against which the amount of the defendant's county court costs was ordered to be set off:—Held, (1) that the debt or money demand arose from payment of the money by the plaintiff, and the amount of it was not ascertained by the signing of the bond. (2) That under the circumstances the Judge had no discretion to refuse the plaintiff, who had been successful in the litigation, his full county court costs. Mitchell v. Vandusen, 14 A. R. 517, considered and followed. Kinsey v. Roche, 8 P. R. 515; Wiltsie v. Ward, 8 A. R. 549; Forfar v. Climie, 10 P. R. 90, approved. Graham v. Tomlinson, 12 P. R. 367, referred to. *McDermid* v. *McDermid*, 15 A. R. 287.

Bond—*Penalty.*]—In an action on a bond for $500 given to secure payment of costs in the supreme court of Canada in a prior action, judgment was given for the plaintiff for $318.55, the amount at which such costs were taxed and certified in the supreme court:—Held, that the amount recovered was not ascertained by the act of the parties or by the signature of the defendants, within R. S. O. 1887 c. 47, s. 19, and the plaintiff was entitled to costs of the action on the scale of the high court. *Hager* v. *Jackson*, 16 P. R. 485.

Certificate as to Lower Scale.]—The 554th general order as to the filing a certificate of the applicability of the lower scale tariff is directory, and the omission of it does not entitle a defendant in case of the dismissal of the bill to the higher scale costs, except for fees of court actually paid. *Ferguson* v. *Rutledge*, 18 Gr. 511.

Consent Verdict.]—Where an action was brought on an open account, and a verdict entered by consent for the amount claimed, which was within the county court jurisdiction:—Held (dissenting from Bonter v. Pretty, 9 C. P. 273,) that it was a case in which, under rule of court No. 155, a Judge in chambers could make an order for full costs. *Cumberland* v. *Ridout*, 3 P. R. 14.

Consent Verdict — *Costs to Abide the Event.*]—The parties, by consent, allowed a verdict for the plaintiff for $1 to be taken before the Judge at the assizes, to be altered according to the result of a reference agreed upon, and also agreed that the costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for $85. A question having arisen as to the scale of costs:—Held, follow-

ing Watson v. Garrett, 3 P. R. 74, and Hyde v. Beardsley, 18 Q. B. D. 244, that "costs to abide the event" does not mean that the plaintiff, if successful, shall necessarily have full costs, but that he shall have such costs as, under the statutes and rules of court, a plaintiff recovering the amount that he recovers by the event is entitled to. *Andrews* v. *City of London*, 12 P. R. 44.

Held, also, following Cumberland v. Ridout, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended upon Rule 511, under which the taxing officer was directed to proceed. *Ib.*

Contract — *Extrinsic Evidence.*]—In an action in the county court for $37.50, balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for an open account for $27.35, against which the defendant was allowed $25 for defective work and material:—Held, that the division court had no jurisdiction, and that the plaintiff was entitled to his costs on the county court scale. Kinsey v. Roche, 8 P. R. 515, approved of. McDermid v. McDermid, 15 A. R. 287, followed. Re Graham v. Tomlinson, 12 P. R. 367, not followed. *Kreutziger* v. *Brox*, 32 O. R. 418.

Court of Appeal.]—Where the plaintiff recovered judgment in the high court for a sum within the jurisdiction of the county court, and was allowed costs on the county court scale only, with the usual set-off to the defendant, and the defendant's appeal from the judgment to the court of appeal was dismissed with costs:—Held, that the court of appeal having ordered the defendant to pay the costs of the appeal generally, without any limitation as to scale or amount, and there being only one tariff of fees payable upon appeals from the high court, that tariff must govern the allowance of costs under the judgment of the court of appeal. *Holmes* v. *Bready*, 18 P. R. 79.

Costs of Unsuccessful Application—*Costs Paid to Opposite Party—Counsel Fees.*]—By the judgment in an action it was ordered that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of certain litigation, as between solicitor and client, and certain bills were referred for taxation between solicitor and client. Upon appeal from the taxation:—Held, that it was to be treated as if it had been directed on an application, under s. 32 of the Solicitors' Act, R. S. O. 1887 c. 147, by the defendant as the person chargeable, and was a taxation between the solicitors and their clients, the plaintiffs. 2. That the decision of the taxing officer allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, should not be interfered with. 3. That the payment by the solicitors to the opposite party in the litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of the costs of the action, was a proper payment on behalf of the clients, to which payments credited on the reference might have been applied, and should be treated as so applied. 4. That, notwithstanding the provisions of the tariff, the taxing officer was justified in taxing larger counsel fees upon this taxation than had already been allowed between solicitor and client for the same services, and that his discretion as to the amount thereof should not be interfered with. Re Geddes and Wilson, 2 Ch. C. 447, followed. *Smith* v. *Harwood*, 17 P. R. 36.

County Court—*No Order as to Costs.*]—In an action in a county court, tried by a Judge without a jury, judgment was given for $36, no order being made as to costs:—Held, that no costs could be awarded, and a mandamus was granted to the county court clerk to enter up judgment for the plaintiff with costs, and without allowing defendant to set off against the judgment the difference between county and division court costs. *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494.

County Court Action—*Motion to Change Venue.*]—The costs of an application to the master in chambers, under Rule 1219, to change the place of trial in a county court action, should be taxed on the county court scale, but the costs of an appeal in the same matter from the master's order to a Judge in chambers and of a further appeal to a divisional court should be taxed on the high court scale. *Re Hicks* v. *Mills*, 18 P. R. 123.

County Court Action Transferred to High Court.]—The provisions of Rule 1219 are applicable to an action transferred from a county court to the high court by virtue of 54 Vict. c. 14 (O.); and the costs of the proceedings after the transfer should be taxed upon the lower scale where the case falls within s.-s. 4 of the Rule, by reason of the plaintiff seeking equitable relief and the subject matter involved not exceeding $200. *Struthers* v. *Green*, 14 P. R. 486.

County Court Tariff.] — The tariff of costs under the C. L. P. Act, 1876, did not apply to county courts. *Chard* v. *Lount*, 2 L. J. 227.

Damages Claimed Beyond Jurisdiction.]—The mere fact that the damages have been laid at a sum beyond the jurisdiction of the county court, does not entitle the plaintiff without a certificate, to superior court costs. In the absence of this certificate the master on taxation must be governed by the verdict recovered. *Miller* v. *Beaver Mutual Fire Insurance Co.*, 15 C. P. 75.

Damages for Non-return of Promissory Note.]—The plaintiff held defendant's note for $300, and gave it back to the defendant to hold until the latter should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for breach of his contract to return the note. The action was referred to a referee who found the plaintiff entitled to $314 damages, being the amount of the note and interest:—Held, that so soon as the facts relating to the note had been arrived at, the quantum of damages was a fixed amount ascertained by calculating the amount of the defendant's liability upon the note; and therefore the claim was within the jurisdiction of the county court under R. S. O. 1887 c. 47, s. 19 s.-s. 2; and the plaintiff was entitled to costs upon the county court scale only. The defendant was entitled to set off the difference between county court and

high court costs of the defence. *Johnson* v. *Kenyon*, 13 P. R. 24.

Before a motion for costs was made, the defendant offered to pay the plaintiff's costs upon the county court scale:—Held, that this was not an offer which the plaintiff was bound to accept, and the plaintiff was entitled to the costs of the motion on the county court scale. *Ib.*

Defence Arising after Action — *Discharge of Part of Claim.*]—On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a division court claiming $64 from the plaintiff and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a county court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the division court. On the 6th September judgment was given in the division court for the primary creditor against the primary debtor (the plaintiff in this action) for $64 and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40:—Held, that the service of the summons was no bar to this action; and the defence that the defendant was discharged as to $57.50 by his payment into the division court was a defence which did not arise until the payment was made and judgment given in the division court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of the service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the $57.50, the action was properly brought in a county court, and the plaintiff was entitled to costs on the scale of that court. *Pickard* v. *Tims*, 19 P. R. 109.

Delivery Up of Promissory Note.]—In an action brought in the high court to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, it was determined that the note was wrongfully held by the defendants, who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment:—Held, that the action sounded in tort and not in contract, and could not have been brought in a county court; and the successful plaintiff was therefore entitled to tax his costs on the high court scale. Johnson v. Kenyon, 13 P. R. 24, distinguished. Robb v. Murray, 16 A. R. 502, followed. *Plummer* v. *Coldwell*, 15 P. R. 144.

Drainage.]—Section 113 of the Drainage Act, R. S. O. 1897 c. 226, providing that the tariff of the county court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the referee under s. 94 only because the court thinks they may be more conveniently disposed of by him. *McCulloch* v. *Township of Caledonia*, 19 P. R. 115.

Drainage.]—Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of s. 93 of the Drainage Act, R. S. O. 1897 c. 226, under which proceedings before the drainage referee may be taken without bringing an action, and an order is made referring the action to the referee for trial, the costs should be taxed according to the tariff of the county court, under s. 113. *Moke* v. *Township of Osnabruck*, 19 P. R. 117.

Drainage.]—Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R. S. O. 1897 c. 226, and no tariff of fees having been framed thereunder, the tariff of the county court applies, not only to proceedings before the drainage referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the court of appeal from the decision of the referee should be the county court tariff. *Re Township of Metcalfe and Townships of Adelaide and Warwick, Re Township of Colchester North and Township of Gosfield North*, 19 P. R. 188.

Foreign Judgment.]—The plaintiff sued the defendant on a foreign judgment for $240, and specially indorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. 1877 c. 50, s. 153, and that the plaintiff was entitled to superior court costs. *Davidson* v. *Cameron*, 8 P. R. 61.

Fraudulent Conveyance.]—The costs of a suit by a judgment creditor, to whom less than $200 is due, to obtain payment of his own debt alone out of property alleged to have been conveyed away to defeat the plaintiff's claim, are taxable according to the lower scale, no matter what the value of the property may be. *Forrest* v. *Laycock*, 18 Gr. 611.

Fraudulent Conveyance.]—The plaintiffs had judgment and execution against one of the defendants for less than $200, and sought in this action, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other, as fraudulent. At the trial this action was dismissed. At the time it was brought the sheriff had other executions in his hands against the same defendant, amounting to more than $200:—Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded $200, and the costs were taxable on the high court scale. *Dominion Bank* v. *Heffernan*, 11 P. R. 504.

It is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed. *Ib.*

Fraudulent Conveyance — *Settlement.*]—In an action by a judgment creditor, seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plaintiff, the proceedings were not alleged to be taken on behalf of other creditors, and the plaintiff's judgment was less than $200. It appeared that there were three other claims, amounting in all to $36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for $75 and costs, and upon the taxa-

tion of these costs a question arose as to the scale:—Held, that the case was taken out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the claims of other creditors need not be considered; and the plaintiff's claim being less than $200, the costs should be on the lower scale. Forrest v. Laycock, 18 Gr. at p. 622, followed. Dominion Bank v. Heffernan, 11 P. R. 504, distinguished. *McKay* v. *Magee*, 13 P. R. 106, 146.

Fraudulent Conveyance — *Amount of Subject-matter.*]—An action by simple contract creditors, the amount of whose claim was less than $200, suing on behalf of themselves and all other creditors, to obtain judgment and equitable execution against the lands of the debtor conveyed to a third person in alleged fraud of creditors. It appeared that the land was worth more than $200, and that the claims of execution creditors exceeded $600 in the aggregate:—Held, that the amount of the subject-matter involved exceeded $200, and the costs should be taxed on the higher scale. Hall v. Pilz, 11 P. R. 449; Dominion Bank v. Heffernan, ib. 504; and Forrest v. Laycock, 18 Gr. 611, followed. *Morphy* v. *Fawkes*, 18 P. R 24.

Goods Sold — *Partial Success — Taxing Officer's Duty.*]—An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for $103.80, and the other for $106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs, the master made an order, under Rule 322 O. J. Act, for final judgment against the defendants for the first parcel of goods sold and delivered, that is, for $103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the court." Under this order the taxing officer allowed the plaintiffs county court costs on that part of their claim upon which they obtained the order for judgment, and he allowed to the defendants the full costs of the high court of justice on that part of the plaintiffs' claim upon which the defendants succeeded, that is the claim for $106.40, the price of the second parcel of goods. Upon an application by the defendants to revise the taxation:—Held, that it was the duty of the taxing officer to look at the pleadings, and if necessary receive affidavits so as to ascertain the facts of the case; that division court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the division court; that the defendants should have superior court costs down to and including the statement of defence, which would not have been required but for the plaintiffs claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set-off pro tanto against the plaintiffs' judgment and costs. *White Sewing Machine Co.* v. *Belfry*, 10 P. R. 64.

Goods Sold.]—In an action for the price of goods sold and delivered, in which the plaintiff recovered $200, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the county court, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation:—Held, not so. Thompson v. Pearson, 18 P. R. 429, distinguished. *Evans* v. *Chandler*, 19 P. R. 160.

Goods Sold.]—Action in the common pleas division for $228.20 the balance of a claim of $1,828.20, for 8,310 lbs. of butter at 22c. per lb. $1,600 had been paid on account of the claim. The plaintiff obtained a verdict for $228.20. No certificate for costs was asked for at the trial:—Held, on a motion to a Judge for an order directing the defendant to pay to the plaintiff full costs, without deduction or set-off, that the amount was liquidated by the act of the parties, within the meaning of R. S. O. 1877 c. 43, s. 19, s.-s. 2, and the plaintiff, without a Judge's certificate, was entitled to county court costs only. *Durnin* v. *McLean*, 10 P. R. 295.

Goods Sold.]—Where in an action in the high court an order was made by a local Judge upon consent, allowing the plaintiffs to sign judgment for $233, with costs of suit to be taxed:—Held, that full costs were not implied unless it was a case for suing in the high court; and the jurisdiction of the taxing officer to decide as to the scale of costs was not ousted. History of Rule 1174. The claim was $233, the price of furniture sold by the plaintiffs to the defendant, according to prices indorsed on the writ, and duly delivered. By his statement of defence the defendant admitted $160.50, which he paid into court. As to the balance he pleaded that it was not payable, because the goods ordered in respect thereof were not supplied or delivered, and that there was no agreement therefor within the Statute of Frauds:—Held, that the pleadings only must be looked at to ascertain what was in dispute; that the cause of action was one and indivisible; and that the whole cause of action was not for an ascertained amount within the county court competence. Vogt v. Boyle, 9 P. R. 249, distinguished. *Brown* v. *Hosc*, 14 P. R. 3.

Illegal Distress.]—The defendants under a mortgage for $2,300, made by plaintiff's father, and containing a distress clause, distrained the plaintiff's goods for interest amounting to $112.55. The plaintiff claimed that the distress was illegal and should be set aside, that the defendants should be enjoined from selling the goods distrained, and that the plaintiff should be paid $200 damages, or if the distress should be held legal, that the plaintiff should be subrogated to the right of the defendants under their mortgage, as against the mortgagor. The Judge at the trial found in favour of the plaintiff, assessing the damages at $25, and granting the injunction prayed for; but this judgment was reversed by the divisional court and judgment for defendants was ordered to be entered, with costs:—Held, that the action was not one that could properly have been brought under the equity jurisdiction of the county court before the passing of the O. J. Act and Law Reform Act, 1868, though the arrears of interest and the damages found by the learned Judge were less than $200; and therefore the case did not come under Rule 515 O. J. Act, and the costs should be taxed on the scale of the high court. *McDonell* v. *Building and Loan Association*, 11 P. R. 413.

Interest upon Verdict.]—The interest which a verdict or judgment bears by virtue of R. S. O. 1887 c. 44, s. 88, is no part of the claim; and the question as to the scale upon which costs are to be taxed is to be determined by the amount of the verdict or judgment irrespective of such interest. Malcolm v. Leys, 15 P. R. 75, distinguished. *Sproule* v. *Wilson*, 15 P. R. 349.

Interference with Lateral Support.]—The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged. The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land:—Held, that the plaintiff was entitled to full costs. *Snarr* v. *Granite Curling and Skating Co.*, 1 O. R. 102.

Interlocutory Motion—"*In any Event.*"]—In an action in the high court where the plaintiff was given the costs of certain interlocutory motions "in any event of the action" and was afterwards awarded costs on the county court scale he was held entitled to the interlocutory costs on that scale only. *Blake* v. *Toronto Brewing and Malting Co.*, 8 C. L. T. Occ. N. 123.

Interpleader.]—In interpleader issues. See *Masuret* v. *Lansdell*, 8 P. R. 57; *Phipps* v. *Beamer*, 8 P. R. 181; *Beaty* v. *Bryce*, 9 P. R. 320; *Arkell* v. *Geiger*, 9 P. R. 523; *Christie* v. *Conway*, 9 P. R. 529.

Judgment for Amount within Inferior Jurisdiction.]—It is not a fair construction to incorporate with Rule 511 the provisions of R. S. O. 1877 c. 50, s. 346, that section being restricted to a case where there is a trial. White v. Belfry, 10 P. R. 64, commented upon. *Andrews* v. *City of London*, 12 P. R. 44.

Justices of the Peace.]—In an action against justices of the peace for false imprisonment, &c., the divisional court (10 O. R. 631) ordered judgment to be entered for the plaintiff for $25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation:—Held, that the action being within the proper competence of the division court (unless the defendant objected thereto), the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off:—Held, also, that the effect of R. S. O. 1877 c. 73, s. 19, read in connection with s. 12 of that Act and with R. S. O. 1877 c. 43, s. 18, s.-s. 5, R. S. O. 1877 c. 47, s. 53, s.-s. 7, and with R. S. O. 1877 c. 50, s. 347, is not to provide that the plaintiff should have costs on the superior court scale when his recovery is within the jurisdiction of an inferior court. Per Cameron, C. J.—The case came under s. 18 rather than s. 19 of R. S. O. 1877 c. 73. *Ireland* v. *Pitcher*, 11 P. R. 403.

Libel.]—Where in an action of libel a verdict for $1 damages was found, and the Judge at the trial gave no certificate for costs:—Held, that the plaintiff was entitled to tax full costs. Garnett v. Bradley, 3 App. Cas. 944, considered and followed. *Wilson* v. *Roberts*, 11 P. R. 412.

Mechanic's Lien.]—Where the plaintiff's claim in an action to enforce a mechanic's lien was only $142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over $200:—Held, that the action was properly brought in the high court of justice, and the costs should be on the scale of that court, and it made no difference that the other lien holder failed to substantiate his claim. *Hall* v. *Pilz*, 11 P. R. 449.

Mechanic's Lien.]—The plaintiffs, subcontractors, in an action brought in the High Court to enforce a mechanic's lien, claimed against the contractor $245.29, and recovered $284.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of $1,700 between the contractor and the landowner, it was found that the latter owed only $63.79, and the plaintiffs' lien was limited to this amount:—Held, upon an appeal from taxation of costs, that the contractor could not have sued the landowner in the division court to recover the balance of $63.79, but must have proceeded in the county court, and the plaintiffs, suing upon the same claim, were therefore entitled to county court costs; and as the plaintiffs' claim was beyond the jurisdiction of the division court, upon any construction of the meaning of s. 28 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, the plaintiffs could not have brought their action in the division court, and were therefore entitled to tax their costs upon the county court scale. *Truax* v. *Dixon*, 13 P. R. 279.

Held, that, as the plaintiffs could not have hoped to establish a case which would have entitled them to high court costs, the defendant landowner should be allowed a set-off of the excess of his costs incurred in the high court over what he would have incurred in the county court; but as the action was tried without a jury, and Con. Rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the court; and the judgment of the court was amended so as to meet the case. *Ib.*

Mechanic's Lien.]—The costs of lienholders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Mortgage — *Account.*]—Mortgagees, after the exercise of the power of sale in their mortgage, claimed that $182.61 was still due to them, but on an account being taken, $20.07 was found due to the mortgagor:—Held, that laying aside the question of the whole amount of the mortgage money ($6,705), the amount involved was $202.68, and therefore the case was not within Rule 515 O. J. Act (C. S. U. C. c. 15, s. 34, s.-s. 8) and the costs were properly taxed on the higher scale. *Morton* v. *Hamilton Provident and Loan Society*, 10 P. R. 636. Affirmed, 11 P. R. 82.

Mortgage—*Foreclosure.*]—When a plaintiff files a bill in the court of chancery to foreclose a mortgage for a sum within the jurisdiction of the county court no costs will be allowed him. The fact that defendant is resident in a county other than where the land is situate will not vary this rule. *Connell* v. *Curran*, 1 Ch. Ch. 11.

See Hyman v. *Roots*, 11 Gr. 202.

Mortgage—*Surplus after Sale.*]—Prima facie the sum realized on a sale under a power contained in a mortgage is the subject matter of the suit. A mortgagee exercised the power of sale contained in his security, and realized $350. On a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $130. The plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350. *McGillicuddy* v. *Griffin*, 20 Gr. 81.

Mortgage — *Surplus after Sale — Claimants in Different Counties.*]—After a mortgage sale, the first mortgagee paid the surplus proceeds of sale ($162) into court. The third mortgagee petitioned for payment out to him of the $162, alleging that the second mortgage was void for want of consideration, &c. A reference was directed, and the master found that the second mortgage was valid, and that a much larger amount than $162 was due upon it. The claimants of the fund lived in three different counties. An order made upon further directions gave the second mortgagee the costs of the petition and reference: —Held, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the county court, and therefore, and also because the different respondents resided in different counties, and the money in question was in court in a third county, the taxing officer was right in taxing costs upon the higher scale. *Re Lyons*, 10 P. R. 150.

Partnership Accounts.] — The plaintiff and defendant entered into partnership to furnish G. & W. with certain staves, for the price of $2,000. The contract was not fulfilled, and the plaintiff subsequently brought an action, and obtained a reference to take an account of the partnership dealings. The report found that the plaintiff had contributed to the partnership capital $87.39, and the defendant $233.89, and that there was due from the defendant to the plaintiff $43.74. The taxing officer taxed the plaintiff's costs under the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, s.-s. 1. On appeal, this ruling was reversed. *Blancy* v. *McGrath*, 9 P. R. 417.

Payment into Court.]—The plaintiff in an action in the high court of justice claimed $296.14, the balance of an account of $896 for rent and goods sold and delivered. The defendants in their statement of defence admitted a liability of $170.30, but claimed a credit of $81.14, leaving a balance of $89.16, which they brought into court with their defence. The plaintiff served notice under Rule 218 O. J. Act, 1881, accepting the amount paid in full of the claim, and proceeded to tax his costs. Upon taxation a question arose as to the scale of costs:—Held, that the provision in Rule 218, that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of court; the costs should therefore, be on the county court scale, as the whole amount of the account was over $800, and the amount admitted by the defendant was $170.30. *Chick* v. *Toronto Electric Light Co.*, 12 P. R. 58; *Tobin* v. *McGillis*, *ib.* 60 *n.*

Payment into Court — *Sum within Competence of Division Court.*]—The plaintiff in an action in a county court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the county court thereupon made a summary order allowing the defendant to set off his costs incurred in the county court in excess of such costs as he would have incurred in a division court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff:—Held, that the plaintiff was entitled to tax his costs of the action according to the county court scale, irrespective of the amount paid into court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge. Held, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R. S. O. 1897 c. 55. *Babcock* v. *Standish*, 19 P. R. 195.

Reduction by Payments.]—Where a note originally beyond the jurisdiction had been reduced within it by payments after action, the plaintiff was allowed full costs. *Kilborn* v. *Wallace*, 3 O. S. 17.

Where, after action in the superior court, defendant paid $152 in full of the suit, which the plaintiff accepted, less costs, to be paid when taxed or agreed on, it was held that the plaintiff was entitled to full costs, as if the money had been paid into court. *Leslie* v. *Forsyth*, 1 C. L. J. 188.

Where a note was reduced by payments before action, full costs were refused. *Donnelly* v. *Gibson*, 5 O. S. 704.

Where an account originally beyond the jurisdiction of the district court, was reduced within the jurisdiction of the court of requests by payments before action, a suggestion to deprive the plaintiff of full costs under the Court of Requests Act, was refused. *Scott* v. *Ferguson*, *Scott* v. *Rooke*, M. T. 3 Vict.

The plaintiff is entitled to full costs, when he sues for the balance of an account originally beyond the jurisdiction of the district court, but reduced by payments never specially applied to any items in the account. *Mearns* v. *Gilbertson*, 6 O. S. 573.

In an action for goods sold and delivered, the plaintiff claimed $453.50, but the verdict decided that his proper claim was at first only $324.77: of this $155 was paid before action, leaving $169.77, of which defendant paid into court $119.77, and the verdict was $58. A certificate for full costs was refused. *Brown* v. *McAdam*, 4 P. R. 54.

Except in very special cases certificates will be refused when the claim is reduced by payment within the jurisdiction of an inferior court. *Ib.*

Replevin.]—A certificate is necessary to obtain full costs in replevin as in other ac-

tions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts. *Ashton* v. *McMillan*, 3 P. R. 10.

At the trial in replevin in the county court a verdict was entered for defendant, with leave reserved to move to enter it for the plaintiff, and no certificate was applied for. On appeal a verdict was directed for the plaintiff for 15s., and the clerk of the county court taxed only division court costs. The Judge refused a revision, and this court would not interfere. *In re Coleman* v. *Kerr*, 28 U. C. R. 297.

The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not shew that the action could not have been brought in the District Court. The plaintiff, to entitle him to Queen's bench costs, must prove at the trial that the goods are really of greater value. *Wheeler* v. *Sime*, 3 U. C. R. 265.

Residence of the Parties.]—Where an action was brought upon a promissory note, the consideration for which had arisen in the district of A., and the plaintiff brought his action and recovered a verdict under £15, in the district of B., the court refused to set aside a certificate for costs, under the District Court Act. *Secord* v. *Hornor*, Tay. 215.

Where plaintiff and defendant and the plaintiff's witnesses resided in different districts, full costs were allowed on a cause of action within the jurisdiction of the district courts. *Hugill* v. *Driscoll*, Dra. 234.

Full costs were refused on a note under £40 where the plaintiff resided in the United States. *Sawyer* v. *McDonell*, T. T. 7 Will. IV.

Full costs will not be allowed on a cause of action within the jurisdiction of the district court, unless the cause of action arose in the district in which the plaintiff resides, or defendant removed from the district in which the action accrued before action brought. *Ketchum* v. *Crysler*, H. T. 7 Will. IV.

Full costs allowed on a note for £10, defendant having left the district in which it was made, and residing in another. *Perrin* v. *Carson*, T. T. 2 & 3 Vict.

Full costs allowed in a cause within the jurisdiction of the district court where there were several defendants residing in different districts. *Jones* v. *O'Sullivan*, H. T. 3 Vict.

So in a joint action against maker and indorser of a note, for less than £40. *Bank of British North America* v. *Dennison*, 1 U. C. R. 414.

Action against maker and indorser of a note for £25, made and indorsed at Perth, in the Bathurst district, but discounted at Brockville, in the Johnstown district, by the agent of the plaintiffs, the indorsees, laying the venue in the Johnstown district. Judgment by default, and an order to compute was obtained:—Held, plaintiffs entitled to Queen's bench costs. *Commercial Bank* v. *Kerr*, 5 U. C. R. 320.

Where the amount in dispute is under $200 but the defendant is out of the jurisdiction, the plaintiff is entitled to costs on the higher scale. *Skelly* v. *Skelly*, 18 Gr. 495.

Where a cause was properly within the equity jurisdiction of a county court, but the defendants resided in a different county from that in which the land in question was situated, the costs were ordered to be taxed on the higher scale. *Doubledee* v. *Credit Valley R. W. Co.*, 8 P. R. 416.

Surrogate Court—*Order of Transfer.*]—An order transferring a cause or proceeding from a surrogate court into the high court contained a clause providing that in the event of the defendant, the applicant for the order, failing to establish his defence, his costs, if any were allowed him, should be on the surrogate court scale. By a consent judgment, which recited the pleadings and proceedings, and adjudged that the will which was disputed by the defendant was the last will of the testatrix, and should be admitted to probate, it was also adjudged that the costs of all parties should be paid out of the estate. Held, upon appeal from taxation, that the defendant was bound by the order of transfer, and his costs should be taxed on the scale of the surrogate court. *Re Forster, Battisby* v. *Witherspoon*, 18 P. R. 65.

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

Taxing Officer's Powers.]—Semble, that since as well as before the Law Reform Act (1868), which transferred to the court of chancery the jurisdiction theretofore exercised by the county courts, it is competent to the master, upon a direction to tax costs generally, to tax upon the higher or lower scale, according to whether or not the subject matter of the suit was or is within the county court jurisdiction. *Brough* v. *Brantford, Norfolk and Port Burwell R. W. Co.*, 25 Gr. 43.

Taxing Officer's Powers.]—Where there has been a trial of an action, and the plaintiff has thereat been awarded costs, Rule 1174 gives no jurisdiction to the taxing officer to deal with the scale of costs. Brown v. Hose, 14 P. R. 3, distinguished. Andrews v. City of London, 12 P. R. 44, applied and followed. *Dale* v. *Weston Lodge*, 17 P. R. 513.

Timber.]—The plaintiff sued for damages sustained by the defendant cutting timber on his own land, after having sold such timber standing to the plaintiff's assignor. It was determined by the court that the timber sold was an interest in land:—Held, that the title

to land was brought in question in the action, and therefore, although the plaintiff recovered only $155, a county court would have no jurisdiction, and the costs should be on the scale of the high court. *McNeill* v. *Haines*, 13 P. R. 115.

See, also, *Danaher* v. *Little*, 13 P. R. 361.

Title to Land in Question.]—Trespass q. c. f. Plea, "that the close was not the close of the plaintiff." Verdict for 1s. damages:—Held, that the plaintiff, under 22 Car. I. c. 9, without a certificate that the title came in question, was entitled to full costs. *Lake* v. *Briley*, 5 U. C. R. 307.

Trespass q. c. f. with a count for taking goods: Plea, not guilty by statute. Verdict for £1 and no certificate:—Held, plaintiff not entitled to full costs. *Hawkes* v. *Richardson*, 9 U. C. R. 229.

Trespass q. c. f. Plea, general issue only. Verdict for 20s. A certificate under 22 & 23 Car. II. was refused at the trial:—Held, approving Hawkes v. Richardson, 9 U. C. R. 229, that the plaintiff was entitled at least to county court costs. *Davis* v. *Barnet*, 10 U. C. R. 501.

In trespass, defendant pleaded not possessed, which was held bad on demurrer, and plaintiff obtained a verdict with 1s. damages. A certificate under 43 Eliz. was obtained by defendant after judgment entered and costs taxed, that damages were under 40s. On motion for revision of taxation:—Held, that the plaintiff was entitled to costs, because the Judge could have had no opportunity of certifying that the title was in question under the plea, after its being held bad on demurrer; and that the certificate under 43 Eliz. was too late. *Kain* v. *McGill*, 2 C. P. 151.

In an action against a road company for obstructing a flow of water from plaintiff's lands, the plea of not guilty by statute, was held not to bring the title to the land in question, so as to entitle the plaintiff to full costs without a certificate. *Overholt* v. *Paris and Dundas Road Co.*, 7 C. P. 293.

Where in trespass the title to land was not in question upon the pleadings, and the plaintiff obtained only £5 damages, and no certificate:—Held, that he was entitled only to division court costs. *Hamilton* v. *Clarke*, 2 P. R. 180.

Under 16 Vict. c. 177, s. 1, it is for the plaintiff claiming full costs to shew that the title did really and bonâ fide come in question, not merely that by the pleadings it might have been put in issue. *Ib.*

Plaintiff sued for trespass to land, and obtained a verdict for 1s., the pleas being not guilty, not possessed, and liberum tenementum; and the Judge certified that the action was really brought to try a right, besides the right to recover damages for the trespass complained of:—Held, that this certificate alone, taken with the pleadings, was equivalent to an assertion by the Judge that the title to the land was in question and entitled the plaintiff to full costs. *Spiers* v. *Carrique*, 23 U. C. R. 585.

In trespass q. c. f. defendant pleaded that the land was not the plaintiff's, and the plaintiff obtained a verdict for £10:—Semble, that he would have been entitled to full costs without a certificate, though title were not brought in question at the trial (as in this case it was held to be). *Humberstone* v. *Henderson*, 3 P. R. 40.

In trespass q. c. f. and for taking goods, defendant pleaded not guilty; that the goods were not the plaintiff's; and justification under a fi. fa. Title to land was not brought in question:—Held, that the plaintiff on a verdict for $175 was clearly not entitled to full costs without a certificate. *Stewart* v. *Jarvis*, 27 U. C. R. 467.

The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own. At the hearing the court retained the bill with liberty to the plaintiff to bring an action. The plaintiff brought the action and recovered a verdict of $20. It appearing that the question in issue was the plaintiff's title to the land, he was held entitled to a decree with costs, notwithstanding the small amount of damage which had been actually done by the defendant. *McAlpine* v. *Eckfrid*, 16 Gr. 595.

To an action for negligently setting out fire, which spread to the plaintiff's land and damaged his woods, the defendant, amongst other pleas, pleaded that the land and property were not the plaintiff's. There was a verdict for the plaintiff with $50 damages, but no certificate for costs:—Held, following Humberstone v. Henderson, 3 P. R. 40, that the plea raised the question of title to land, and that the plaintiff was therefore entitled to full costs without a certificate. *Coulson* v. *O'Connell*, 29 C. P. 341.

Held, that on a plea of non demisit to a count in covenant, a question of title arises, which entitles the plaintiff to superior court costs, although no certificate be granted. *Purser* v. *Bradburne*, 7 P. R. 18.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the defendant was the tenant of the plaintiff:—Held, that the title was put in issue by such denial, and as a county court would therefore have had no jurisdiction, the costs should be on the scale of the high court, although the plaintiff recovered only $75:—Held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference. *Worman* v. *Brady*, 12 P. R. 618.

Where in an action by a monthly tenant against his landlord and other persons for wrongful entry upon the demised premises, the landlord denied the plaintiff's tenancy:—Held, that the title to land was brought in question, and the costs of the plaintiff were properly taxed on the high court scale, although the damages recovered were only $104. Worman v. Brady, 12 P. R. 613, and Danaher v. Little, 13 P. R. 361, followed. Tomkins v. Jones, 22 Q. B. D. 599, specially referred to. *Flett* v. *Way*, 14 P. R. 312.

In an action brought in the high court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land

described for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husband-like, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same were situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings:—Held, not so; for the defendant was, on the face of the record, estopped from pleading non demisit, and his denial could only be read as a traverse of the actual execution of the lease. Purser v. Bradburne, 7 P. R. 18, commented on:—Held, also, that the "custom" pleaded was not the "custom" meant by s. 69, s.-s. 4, of the Division Courts Act, R. S. O. 1887 c. 51, which refers to some legal custom by which the right or title to property is acquired, or on which it depends. Legh v. Hewitt, 4 East 154, followed:—Held, therefore, that the action was within the competence of the division court, and that the costs should follow the event in accordance with Rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

Trespass.]—In an action in the common pleas division, for trespass to lands and removal of fixtures, the plaintiff recovered a verdict for $50. The taxing officer taxed division court costs to the plaintiff, and full costs to the defendant. The pleadings admitted an entry under an agreement as to placing fixtures, and their removal and appropriation, but put in issue their wrongful removal:—Held, that the taxing officer was right, the title to corporeal hereditaments not being in question:—Held, also, that though the defendant had failed to prove his defence, he was entitled to set off his costs. *Richardson* v. *Jenkin*, 10 P. R. 292.

Trespass to Land—*Injunction—Counterclaim—Declaratory Judgment.*]—Under s. 23, s.-s. 8, of R. S. O. 1897 c. 55, a county court can give a judgment for nominal damages and grant an injunction in an action for trespass to land, where the value of the land does not exceed $200. A counterclaim upon which no relief is given can make no difference as to the jurisdiction of a court; and semble, also, that a judgment declaring a right can be given in a county court by virtue of s.-s. 13 of s. 23, R. S. O. 1897 s. 55. Where an action of the proper competence of a county court was brought in the high court, the successful plaintiff was allowed costs on the county court scale, with a set-off to the defendants of the excess of their costs over county court costs. *Fitchett* v. *Mellow*, 18 P. R. 161.

Varying Order.]—At the trial the learned Judge allowed only county court costs. On shewing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed; but the court, in the absence of a substantive motion therefor, refused to interfere. *Dyment* v. *Northern and North-Western R. W. Co.*, 11 O. R. 343.

Verdict.]—The amount of the verdict primâ facie settles the jurisdiction, and if under any circumstances the inferior court could have tried the action for that amount, a certificate is necessary. *Bonter* v. *Pretty*, 9 C. P. 273.

Verdict.]—The verdict of the jury must determine for all purposes of costs the amount of the plaintiff's claim. *Brown* v. *McAdam*, 4 P. R. 54.

Water Privilege—*Appeal from Order of County Court Judge.*]—The disposition of the costs of an appeal is not a part of the practice and proceedings upon the appeal. Upon an appeal from an order of a county court Judge, under R. S. O. 1887 c. 119, with respect to a water privilege, the court of appeal has power, under s. 18, to direct that the costs shall be taxed on the scale applicable to high court, county court, or division court appeals; and the Judge to whom application for leave to appeal is made under s. 16 has no power to control the discretion of the court in this respect. *Re Burnham*, 16 P. R. 390.

Work and Labour.]—Where the plaintiffs in an action in the high court of justice to recover a sum for work and labour and materials, the amount not being liquidated or ascertained, recovered $190.01 for debt, and $14.54 for interest from the issue of the writ of summons:—Held, that the amount recovered was not within the jurisdiction of a county court, and the plaintiffs were entitled to costs on the scale of the high court. *Malcolm* v. *Leys*, 15 P. R. 75.

Work and Labour — *Goods Sold.*]—Whenever a sum up to $400 is agreed on by the parties as the remuneration for a service to be performed, or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the county court, denial of the contract and price not availing to oust the jurisdiction. Robb v. Murray, 16 A. R. 503, considered. *Ostrom* v. *Benjamin* (2), 21 A. R. 467.

See COUNTY COURT — DIVISION COURT — PROHIBITION.

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2. *Certificate for Costs.*

(a) For County Court Costs.

Under 13 & 14 Vict. c. 53, s. 78, in a case brought in this court, and a verdict rendered within the division court jurisdiction, the Judge had no power to order county court costs. *Cameron* v. *Campbell*, 11 U. C. R. 159.

Where plaintiff in good faith sues in a county court, and had reasonable grounds for supposing that he would recover more than he could recover in the division court, the Judge may properly certify for county court costs. *Donnelly* v. *Fletcher*, 8 L. J. 109.

If one of the Judges of the superior courts would grant a certiorari by reason of difficult questions of law, to remove the cause if commenced in a division court, it is proper for the Judge of the county court to certify for county court costs. *Patterson* v. *Snook*, 8 L. J. 109.

Where the verdict exceeds $60, and a certificate for full costs is refused, the master has still power to inquire whether a division court had jurisdiction, and to tax county court costs. In this case the action was for use and occupation, the plaintiff recovered $100, and the master taxed county court costs. The learned Judge who tried the case would have certified for such costs if he had had authority to do so, and he therefore refused to interfere. *Harold* v. *Stewart*, 2 C. L. J. 245.

The proceedings here with regard to writs of error to county courts, must be governed by the old practice in England. The plaintiff, in the county court, recovered $5 on a declaration containing counts on the warranty of a horse for deceit, and the common counts. No certificate was granted, and judgment was entered for defendant for his costs of defence as between attorney and client, less the $5 damages. The plaintiff removed the judgment by writ of error, contending that under the statute of Ontario, 31 Vict. c. 24, s. 2, s.-s. 4, he was entitled to division court costs. The defendant obtained a rule calling upon the plaintiff to assign errors:—Held, not his proper course: but that he should have sued out a scire facias quare executionem non. Held, also, that this writ could not be said to have been sued out merely for delay, in which case the court will not stay execution, for there was fair ground for contending that the plaintiff was entitled to division court costs, and that the defendant should have deducted his own costs in such court from his own county court costs. *Pope* v. *Reilly*, 29 U. C. R. 478.

A certificate under 31 Vict. c. 24, ss. 1, 2, was granted after a verdict for $118, "to entitle the plaintiff to county court costs:"—Held, that there could not be a set-off of costs on such certificate. *Moore* v. *Price*, 5 P. R. 9.

13 & 14 Vict. c. 53, s. 78, enacts, that in any suit which might have been brought in a division court, unless the Judge shall certify as therein mentioned, so much of defendant's costs as shall exceed the costs which would have been incurred by him in the division court shall be set off by the master in entering judgment against the plaintiff's costs, and defendant shall be entitled to execution against the plaintiff when the costs so set off shall exceed the plaintiff's verdict and division court costs:—Held, that under this the defendant might set off the excess of his costs of defence above his own and the plaintiff's verdict. *Cameron* v. *Campbell*, 12 U. C. R. 159; *S. C.*, 1 P. R. 170.

Held, also, that the plaintiff's attorney, having advanced to the plaintiff the amount of the verdict, could have no lien so as to deprive the defendant of the benefit of the statute. *Ib.*

(b) *For Full Costs.*

The plaintiff recovered a verdict within the jurisdiction of the district court, and as soon as the verdict was recorded, the court adjourned. A motion for a certificate, made at the opening of the court on the following morning:—Held, too late. *Falls* v. *Lewis*, Dra. 500.

A certificate under 58 Geo. III. c. 4, if not moved for after other causes have been tried, though upon the same day, will not be granted. *McKee* v. *Irwine*, 1 U. C. R. 160.

When ordered at the trial but not completed from inadvertence it may be completed afterwards at any time. *Linfoot* v. *O'Neill*, 5 O. S. 343.

Where there are issues in law and in fact, and a venire to try the issues and assess the damages, a certificate must be applied for at the trial, and an order cannot be made by a Judge as in cases of assessment, after judgment by default. *Mahoney* v. *Zwick*, 4 O. S. 99.

Where a verdict was found for the plaintiff in a defended cause, and the Judge at nisi prius did not certify, but the plaintiff afterwards obtained an order for costs in chambers from another Judge, as if the damages had been assessed after judgment by default—the court set the order aside. *McNab* v. *Reeves*, H. T. 6 Vict.

After the jury had rendered their verdict, but before any other business, the Judge examined a witness to prove only that the cause was commenced before the late District Court Act, and therefore proper to be tried in the Queen's Bench, and thereupon granted a certificate:—Held, properly granted. *Handcock* v. *Bethune*, 2 U. C. R. 386.

A certificate either under the Division Court or District Court Act, must be moved for immediately after the verdict is rendered, and no discretion remains with the court or with the Judge who tried the cause to grant it afterwards. *Malloch* v. *Johnston*, 4 U. C. R. 352.

Semble, that where in a personal action the sum recovered is within the division court jurisdiction, a certificate must be moved for at the trial, or costs cannot afterwards be given. *Hamilton* v. *Clarke*, 2 P. R. 189.

In trespass, the verdict was for 45s., and a certificate was applied for at the trial. The Judge took time to consider, and before judgment entered, but after the first four days of next term, certified that the trespass was wilful and malicious, and that it was a proper case to be tried in the superior court:—Held, that the delay was no objection. *Wise* v. *Hewson*, 1 P. R. 232.

A certificate having been granted, on application first made three months after verdict, and costs taxed thereon, the order was rescinded and costs revised: the defendant was at the same time allowed to set off the excess of his costs of defence between attorney and client over county court costs against the plaintiff's costs of the cause. *Bonter* v. *Pretty*, 9 C. P. 273.

Where a verdict for substantial damages is subsequently reduced by the court to a nominal sum, the court has power, under ss. 345-8 of R. S. O. 1877 c. 30, to grant a certificate for costs; but the motion must be made when the judgment reducing the verdict is delivered, or before the rule absolute is issued, unless the matter is postponed to a future day. In this case the judgment reducing a verdict for $1,000 to nominal damages, was delivered on the judgment day after Easter term, but no certificate was then moved, and the rule

absolute issued without one. The court, notwithstanding the delay, as the practice was new, granted the certificate on a motion made in the following term, and directed the rule absolute to be re-issued with a certificate embodied therein. *Driffill* v. *McFall*, 42 U. C. R. 597.

In an action for damages for breach of contract, the jury awarded the plaintiff $68.50, and the trial Judge entered judgment for that amount, and certified to entitle the plaintiff to costs on the division court scale, and to prevent the defendant from setting off high court costs. On appeal, a divisional court varied the order as to costs so as to give the plaintiff such costs only as he would have recovered under R. S. O. 1877 c. 50, s. 347, s.-s. 3, where the Judge at the trial did not certify. *Livernois* v. *Bailey*, 12 P. R. 535.

An appeal to the court of appeal was dismissed without costs, the Judges being divided in opinion. *S. C.*, 13 P. R. 62.

The master is not to refuse to tax Queen's bench costs, merely because the verdict is within the district court jurisdiction, although the Judge has not certified. *Murray* v. *Orr*, Dra. 3.

Full costs not allowed where in covenant only £2 was recovered, and the Judge did not certify. *Gardner* v. *Stoddard*, Dra. 94.

Effect of the word "withdrawn" in a certificate. *Ib.*

One of the plaintiffs being Judge of the district court in which the defendant resided, full costs were allowed, although the cause of action was within the district court jurisdiction. *Jones* v. *Wing*, 3 O. S. 36.

An action of seduction may, under some circumstances, be brought "to try a right," or the grievance complained of may be "wilful and malicious;" and therefore, on a verdict under 88, without a certificate, the plaintiff was held not entitled under C. L. P. Act, s. 324, to any costs whatever, but, as the statute is confined to a verdict or assessment, he was entitled to full costs of demurrer. *Townsend* v. *Sterling*, 4 P. R. 125.

The fact that a plaintiff prays an injunction is not sufficient to entitle him to full costs without a certificate. The action itself and the equitable relief sought must be such as to justify the Judge in certifying it to be a proper action to be tried in the superior court. There is nothing in the Patent Act, C. S. C. c. 34, to justify the Judge in refusing to certify for costs, merely because defendant might have defeated the plaintiff entirely by proper pleading, but had not done so. Under the peculiar circumstances of these cases:—Held, that the first was a case proper for a certificate, but the second case not so. *Emery* v. *Iredale*, *Emery* v. *Hodge*, 7 L. J. 181.

In an action on a lease alleged to contain a covenant sued on, where it was a difficult question of law to determine whether or not the lease contained such a covenant, although the jury found $140 damages only, the Judge certified that the cause was a fit one to be tried in the court of common pleas. *Thompson* v. *Crawford*, 9 L. J. 262.

Where in an investigation of a charge under the Petty Trespass Act, 4 Will. IV. c. 4, before magistrates, the plaintiff was guilty of a contempt, for which the magistrates convicted him, but without warrant, and plaintiff brought an action for false imprisonment against them and recovered:—Held, that the action did not arise in consequence of anything done by the magistrates under the Petty Trespass Act, and that therefore it was not necessary for the Judge under the 21st section of that Act, to certify his approval of the verdict to entitle the plaintiff to his costs. *Armour* v. *Boswell*, 6 O. S. 450.

Full costs were allowed in a bailable action, there being no Judge in the district where the cause of action arose when the action was brought. *Jennings* v. *Dingman*, T. T. 4 & 5 Vict.

So, also under similar circumstances in a non-bailable action. *Willis* v. *Merriton*, T. T. 4 & 5 Vict.

The plaintiff sued in the Queen's bench, and applied for Queen's bench costs, on the ground that on the day he commenced his suit, no Judge of the county court had been appointed by the government to fill up the vacancy that had occurred: but, held that under the circumstances Queen's bench costs could not be allowed. *Sutherland* v. *Tisdale*, 1 C. L. Ch. 213.

The plaintiffs having recovered only £5 against a corporation, were allowed Queen's bench costs, as the right to sue a corporation in a district court was doubtful. *Fisher* v. *City of Kingston*, 4 U. C. R. 213.

The court ordered full costs on an assessment of damages upon a cause of action exceeding £30, but under £40, it being a case in which the court would have granted a certificate if there had been a trial. In another case, it was refused. *Ferrie* v. *Young*, *McGill* v. *Stull*, 3 O. S. 140.

It is no ground for a certificate that defendant's set-off could not be tried in the district court. *Gooderham* v. *Chilver*, 5 O. S. 496.

Plaintiff, residing in the London district, sold goods to defendant residing in the Western district, who gave his note for the amount:—Held, that on the mere surmise that the consideration of the note might be disputed, the plaintiff was not justified in suing in the Queen's bench, and could not therefore get full costs. *Cronyn* v. *Probat*, 6 O. S. 192.

Declaration on a special count and common counts—General verdict for a sum within the district court jurisdiction and no certificate:—Held, plaintiff entitled only to district court costs. *Washburn* v. *Longley*, 6 O. S. 217.

Declaration in covenant, assigning two breaches, one for liquidated, and the other for unliquidated demands. Verdict under £40:—Held, plaintiff not entitled to Queen's bench costs without a certificate. *Beattie* v. *Cook*, 6 O. S. 217.

Where plaintiff, an attorney, brought assumpsit and recovered 3s., the court held him entitled to full costs, as he proved a cause of

action to the amount of £20 and upwards, although the jury decided against him on those items of his claim on hearing the whole evidence. *King* v. *Such*, 5 O. S. 81.

Attorneys, suing for costs by an attorney, and not by attachment of privilege, were refused full costs. *Strachan* v. *Bullock*, 2 U. C. R. 382.

Trespass for assault and battery. Defendant pleaded that the plaintiff was wrongfully in defendant's close, and molliter manus imposuit to turn him out, and the plaintiff replied excess, and obtained a verdict for 1s.:—Held, that he was entitled to full costs. *Caniff* v. *Corwin*, T. T. 5 & 6 Vict.

In an action for assault and battery, where a battery has been proved, the Judge nevertheless has a discretion to withhold a certificate for full costs under 22 & 23 Car. II. c. 9. *Carr* v. *Trotter*, 8 U. C. R. 324.

An action for assault and battery was brought before 16 Vict. c. 175, s. 26, and damages were afterwards assessed at 1s. After the passing of the C. L. P. Act, s. 312, the plaintiff applied for an order to tax full costs:—Held, that 16 Vict. c. 175, being in force till the C. L. P. Act came into operation, the plaintiff might have moved under it; and the application was refused. *Savage* v. *Robertson*, 2 P. R. 307.

Held, that a party who gave instructions for an action, without specifying the court, (the attorney not stating that he would expect him to pay the difference should the verdict be within the county court jurisdiction, and commencing the action in the superior court), was only liable for county court costs between attorney and client, the sum recovered being within the jurisdiction of the county court, and no higher costs being taxable between party and party. *Scanlon* v. *McDonough*, 10 C. P. 104.

An action in which it would be necessary to issue a commission for the examination of witnesses may be brought in one of the superior courts, although the amount sued for may be within the jurisdiction of an inferior court. *Comstock* v. *Leaney*, 3 L. J. 13.

An order for a certiorari to bring up a case into a superior court entitles the defendant to the full costs of that court if he succeed, without any certificate. *Corley* v. *Roblin*, 5 L. J. 225.

Trover for a deed. Verdict for £24 16s. A new trial was ordered unless plaintiff would accept nominal damages, to which he consented. The court refused to compel plaintiff to enter judgment and tax his costs, or allow defendant to do so for him, in order to set off the costs of defence, and recover the excess over the plaintiff's verdict and taxable costs—first, because it is not clear that an action of this nature is within the jurisdiction of the division court; and secondly, because the verdict was not reduced until after the trial, and the plaintiff therefore had no opportunity to apply for a certificate, which perhaps he might otherwise have obtained. *Ginn* v. *Scott*, 11 U. C. R. 542.

Where in an action for false imprisonment the plaintiff obtained a verdict for 1s., and no certificate:—Held, that as he was entitled to no costs, defendant could not, under s. 328 of the C. L. P. Act, set off or recover his costs, against him. *Cross* v. *Waterhouse*, 23 U. C. R. 590.

Held, that where plaintiff, without a trial, recovers in a superior court an amount within the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—s. 328 of C. L. P. Act not being applicable. *Johnson* v. *Morley*, 3 P. R. 217.

Under 31 Vict. c. 24, s. 1, a Judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act. *Orok* v. *Garvin*, 5 P. R. 169.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff with 1s. damages:—Held, that (there being important rights at stake, and it being such a case as would properly be removable from an inferior court by certiorari), the plaintiff was entitled to a certificate for full costs. *Ib.*

In an action for breach of promise of marriage, a certificate for full costs under 31 Vict. c. 24, s. 1, was moved for at the trial, and refused; but some seven weeks afterwards the plaintiff applied for and obtained a certificate under the same section, to prevent the defendant from setting off costs. The certificate was set aside, for, 1. Section 1, which only authorizes such a certificate in actions of trespass or trespass on the case, does not extend to actions of contract, like the present; and, 2. As the certificate granted was not applied for at the trial, nor the consideration thereof postponed, it was granted too late. *Major* v. *McKenzie*, 23 C. P. 261.

Held, that the Act 31 Vict. c. 24, s. 1 (O.), deprives a plaintiff of costs in all cases of trespass or trespass on the case, no matter what defence may be pleaded, where the verdict is under $8, and there is no certificate of costs from the presiding Judge. *Davis* v. *Vandecar*, 28 C. P. 185.

In trespass quare clausum fregit, where the pleas were, not guilty, that the land was not the plaintiff's, and a right of way, there was a verdict for one shilling damages only, and no certificate. The master having refused to tax the plaintiff any costs, the plaintiff obtained a Judge's order directing the taxation of full costs:—Held, that the order must be rescinded. *Ib.*

The plaintiff, in an action for trespass to land, in which the pleas were only not guilty and leave and license, recovered damages, and the Judge refused to certify for costs. The plaintiff then applied for leave to enter a suggestion on the record that the trespasses were committed after notice, and for an order, on such entry, that the master should tax full costs:— Held, that s. 325 of the C. L. P. Act not being repealed by 31 Vict. c. 24 (O.), the plaintiff was entitled under it to enter the suggestion; but the proviso to that section—not to be found in the corresponding Imperial enactment, 3 & 4 Vict. c. 24, s. 3—would prevent him from recovering more than division court costs, without a certificate. *Howden* v. *Donnelly*, 40 U. C. R. 119.

In an action for slander the plaintiff is entitled under a certificate for full costs pursuant to 31 Vict. c. 24 (O.), to tax full costs of suit; but he is not so entitled without a certificate, upon the ground that some of the words mentioned in the declaration are not actionable without special damage laid. *Stewart* v. *Moffatt*, 20 C. P. 89.

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3. Solicitor and Client Costs.

Payable by Opposite Party.]—Where costs have to be paid by the opposite party and not by the client, there is no difference between "costs as between solicitor and client," and costs between solicitor and client;" both mean costs between party and party, to be taxed as between solicitor and client; and held, that the plaintiff was entitled to tax against the defendant, under the words of the judgment, only such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action; but that the taxation should be as liberal as possible, under the practice, in favour of the plaintiff. Cousineau v. City of London Fire Ins. Co., 12 P. R. 512, followed. *Heaslip* v. *Heaslip*, 14 P. R. 21. See the next case.

The decision in 14 P. R. 21, as to the taxation of costs under a judgment for payment by the defendant to the plaintiff of costs "between solicitor and client," and as to the procedure where there has been an appeal to a master under Rule 854, affirmed. Per Boyd, C.—The real distinction in taxations "between" and "as between" solicitor and client turns upon the source of payment, and where the payment is by the opposite party, the taxation is on a less liberal scale than where the client himself pays. Per Meredith, J.—The words "between solicitor and client" are not technically appropriate or applicable to a case where the costs of the action are to be paid by one party to another; and these words cannot have any greater effect or more extended meaning than the appropriate words "as between solicitor and client." *Heaslip* v. *Heaslip*, 14 P. R. 165.

Taxable Costs.]—The words "taxable costs of defence," used in Rule 1172, do not mean costs as between solicitor and client. *Talbot* v. *Poole*, 15 P. R. 274.

VII. Security for Costs.

1. When Ordered.

(a) In General.

Alimony Action.]—An order for security for costs will not be made in an alimony suit. *Bennett* v. *Bennett*, 7 P. R. 54.

Appeal.]—Rule 826 is applicable to an appeal under s. 39 (2) of the Mechanics' Lien Act, R. S. O. 1897 c. 153, by the respondent in the court below from the order of a divisional court reversing the judgment upon the trial of a mechanic's lien action, where the amount in question is more than $100, and not more than $200; and therefore security for the costs of such an appeal must be given unless otherwise ordered. *Sherlock* v. *Powell*, 18 P. R. 312.

Appeal—*Proverty of Appellants*.]—Upon an appeal by the defendants to the court of appeal from an order of a divisional court reversing the judgment at the trial and ordering judgment to be entered for the plaintiffs for possession of land with costs:—Held, that the fact that the appellants had no means or money or resources other than the land in question, and were unable to procure sureties, was not a ground for dispensing with security for costs of the appeal. Until it is reversed, there is a presumption in favour of the correctness of every judgment of a court of competent jurisdiction. If the defendants had a lien on the land for a sum exceeding $400 for improvements made by them in the belief that the land was their own, security might be dispensed with or the lien charged by way of security. But in this case the plaintiffs would be entitled to mesne profits as against the improvements, and the defendants had mortgaged the land for the money laid out, and the lien, if any, was the mortgagee's. *Thuresson* v. *Thuresson*, 18 P. R. 414.

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

Attachment.]—The judgment creditor obtained an attaching order, which was set aside by the local Judge who granted it; the judgment creditor then appealed to a Judge in chambers unsuccessfully, and had given notice of a further appeal to a divisional court, when his proceedings were stayed by an order of the master in chambers requiring him to give security for costs, on the ground that he was insolvent and was proceeding for the benefit of another:—Held, that the order for security could not be sustained: the judgment creditor was not proceeding either by action or petition; and there was no authority for ordering security. Re Rees, 10 P. R. 425, overruled. *Palmer* v. *Lovett*, 14 P. R. 415.

Claimants in Master's Office.]—Parties residing out of the jurisdiction who come into the master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees, Urquhart* v. *Toronto Trusts Co.*, 10 P. R. 425.

Defendant Claiming Relief.]—A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction:—Semble, such relief should not be asked by way of counterclaim. *Walmsley* v. *Griffith*, 11 P. R. 139.

See Molsons Bank v. *Sawyer*, 19 P. R. 316.

Divisional Court.]—Rule 825, providing that no security for costs shall be required on a motion or appeal to a divisional court, does not preclude a defendant from obtaining

an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a divisional court is pending. Arnold v. Van Tuyl, 30 O. R. 663, distinguished. *Tanner* v. *Weiland*, 19 P. R. 149.

Division Courts Act.]—The real plaintiff need not shew upon the trial that security for costs has been given, as required by the Division Courts Act, C. S. U. C. c. 19, s. 154. If not given, defendant may move to stay proceedings, or perhaps may plead it in bar of the action. Quære, as to the meaning of that clause in the statute. *McDonald* v. *McDonald*, 21 U. C. R. 52.

Dower.]—Security for costs may be obtained in an action for dower. *Nolan* v. *Reid*, 1 P. R. 264.

Elections—*Cross-Petition.*]—Under s. 13 of the Controverted Elections Act, R. S. O. 1887 c. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross-petition. *Kingston (Provincial)*, 2 E. C. 10.

Executors and Administrators.]—An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right. And an executrix resident abroad, applying for payment out of court of moneys to the credit of her testator, was ordered to give security for the costs of an alleged assignee of the fund, who opposed the application. The rule as to security applies to a motion as well as to a petition. *Re Parker, Parker* v. *Parker*, 16 P. R. 392.

Foreign Commission.]—An order for a foreign commission being discretionary, there is power to impose proper terms in making it. And the plaintiff was required to give security for the costs of a commission to examine a witness abroad, where the information as to his exact locality was slender and it seemed doubtful whether he would attend to be examined. Langen v. Tate, 24 Ch. D. 522, followed. *Coleman* v. *Bank of Montreal*, 16 P. R. 159.

Foreign Corporation — *Assets in Ontario.*]—The plaintiffs, a foreign corporation, having acquired the patent right to manufacture and sell a certain incandescent light in the Dominion of Canada, entered into an agreement with another company by which the latter were to act as the agents of the plaintiffs in Ontario, and to manufacture and sell the lights at a fixed price or lease them, and the plaintiffs were to receive the net profits, guaranteeing the other company against loss. The other company carried on the business and leased the lights in their own name. A large number of these lights were in existence in Ontario, under lease to different persons:—Held, that as the lights could not be made available in execution without a taking of accounts between the two companies, they were not assets of the plaintiffs in Ontario sufficient to answer a motion for security for costs. Nor could the plaintiffs be regarded as resident in Ontario by reason of their doing business through the medium of the other company. *Welsbach Incandescent Gaslight Co.* v. *St. Leger*, 16 P. R. 382.

Infant.]—An infant out of the jurisdiction petitioning for relief will be required to give security for costs. *Stinson* v. *Martin*, 2 Ch. Ch. 86.

Infant.]—Infants having bonâ fide cause of action are privileged suitors; and the same rule as to security for costs should not be applied as in the case of adults. If the next friend of the infant plaintiffs, being the natural guardian, is within the jurisdiction when the action is begun, and so continues pendente lite, the court will not too anxiously scrutinize the tenure of his residence. And where the infant plaintiffs and their natural guardian and next friend were foreigners, and came within the jurisdiction merely for the purpose of bringing the actions, but continued therein up to the time of an application for security for costs, and it appeared that they had a bonâ fide cause of action, an order staying proceedings until a new next friend within the jurisdiction should be found, was reversed. *Scott* v. *Niagara Navigation Co.*, 15 P. R. 409, 455.

Infant — *Guardian* — *Next Friend.*]—An infant cannot be required to give security for costs nor can his guardian or next friend. Re McConnell, 3 Ch. Ch. 423, approved and followed. *Moran* v. *Kellogg*, 10 C. L. T. Occ. N. 184.

Infant—*Next Friend.*]—An infant, residing out of the jurisdiction, brought an action for administration, by her mother, who resided in the jurisdiction, but was without substance, as next friend:—Held, that the plaintiff could not be required to furnish security for costs. *Roberts* v. *Coughlin*, 18 P. R. 94.

Interpleader.] — An execution creditor made defendant in an interpleader issue, may be ordered to give security. *Lovell* v. *Wardroper*, 4 P. R. 265.

Interpleader.]—The claimant under an interpleader issue, if out of the jurisdiction, is bound to give security. *Walker* v. *Niles*, 3 Ch. Ch. 108.

Interpleader.] — Security for costs may be ordered in interpleader proceedings. Swain v. Stoddard, 12 P. R. 590, approved and followed. Belmonte v. Aynard, 4 C. P. D. 221, 352, distinguished. The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party. *Re Ancient Order of Foresters and Castner*, 14 P. R. 47.

Interpleader.]—In a sheriff's interpleader the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue. *Knickerbocker Trust Company of New York* v. *Webster*, 17 P. R. 189.

Justice of the Peace—*Character of Property of Plaintiff.*]—Upon applications under 53 Vict. c. 23 (O.), for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country. Section 2 of the Act provides that it is to be shewn that the plaintiff is not possessed of property sufficient to answer the costs of the action:—Held, that the court should be less exacting as to the character of the property where the person is a bonâ fide resident than in the ordinary case of a

stranger who seeks to justify upon property within the jurisdiction; the test is: is it such property as would be forthcoming and available in execution? And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered. *Brady* v. *Robertson*, 14 P. R. 7.

Justice of the Peace—*Merits.*]—In an action against a justice of the peace for false arrest and imprisonment, it appeared that there was a valid warrant of commitment against the plaintiff in the county of O., which was, in the absence of the police magistrate, indorsed by the defendant for execution in the city of T., and under which the plaintiff was there arrested. The plaintiff alleged that the arrest was illegal because the defendant's mandate was not actually indorsed upon the warrant, and because the defendant's authority was not shewn on the face of his mandate. It appeared, however, that the defendant's mandate was pasted or annexed to the warrant, and that the defendant in fact had authority, though it was not set out. It was admitted that the plaintiff was not possessed of property sufficient to answer costs:—Held, that the defendant was entitled to security for costs under 53 Vict. c. 23 (O.). Per Robertson, and Meredith, JJ. It was not intended by the statute that the merits of the action should be determined upon an application for security for costs. *Southwick* v. *Hare*, 15 P. R. 222.

Libel—*Newspaper — Frivolous Action.*]—Where an action of libel was brought by one Græme complaining of statements published in a newspaper imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper, after the commencement of the action, it was stated that the person referred to in the former article was not the plaintiff, and there were other facts shewing that the plaintiff was not the person referred to:—Held, that the action was frivolous, and the defendants were entitled to security for costs under R. S. O. 1887 c. 57, s. 9. *Græme* v. *Globe Printing Co.*, 14 P. R. 72.

Libel—*Newspaper — Criminal Charge.*]—The legislation in R. S. O. 1887 c. 57, s. 9, as to security for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public. In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel," and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her:—Held, that this did not involve a criminal charge within the meaning of s. 9 (*a*). The defendants did not contend that the grounds of action were trivial or frivolous; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action. The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith and without malice or ill-will towards the plaintiff:—Held, that, under these circumstances, an appeal from the discretion of a Judge in chambers in reversing a referee's decision and ordering security for costs, should not prevail. *Bennett* v. *Empire Printing and Publishing Co.*, 16 P. R. 63.

Libel—*Newspaper—Good Faith.*]—On an application under R. S. O. 1887 c. 57, s. 9, for security for costs in an action of libel, the Judge is not to try the merits of the action; if it appears on the affidavits filed by the defendant that there is a primâ facie case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied and security should be ordered; it is not for the Judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application. *Swain* v. *Mail Printing Co.*, 16 P. R. 132.

Libel—*Candidate for Public Office.*]—The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election:—Held, that the plaintiff was not a candidate for a public office in this Province within the meaning of R. S. O. 1887 c. 57, s. 5, s.-s. (2) (*a*), before the date of the writ for the election; and that as to the libels alleged to have been published before that date, a notice before action under the statute was necessary; but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under Rule 387, nor the action as to them summarily dismissed; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of s. 5, s.-s. (2) (*a*), and the statute did not apply, there having been no retraction. *Conmee* v. *Weidman*, 16 P. R. 239.

Libel—*Newspaper — Criminal Charge.*]—The words "involves a criminal charge" in R. S. O. 1887 c. 57, s. 9, s.-s. (1) (*a*), mean "involves a charge that the plaintiff has been guilty of a criminal offence." And where the words published by the defendants in their newspaper of which the plaintiffs, an incorporated company, complained in an action of libel, alleged that the plaintiffs had tried to bribe aldermen by issuing to them paid-up stock in the company:—Held, upon an application for security for costs under the above section, that the words did not involve a criminal charge, for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender. Mayor, &c., of Manchester v. Williams, [1891] 1 Q. B. 94, followed. Journal Printing Co. v. MacLean, 25 O. R. 509, distinguished. And where the defendants by affidavit shewed publication in good faith and other circumstances sufficient under the above section to entitle them to security for costs, and the case made was not displaced by the cross-examination of the deponent on his affidavit, an order was made for such security. *Georgian Bay Ship Canal Co. v. World Newspaper Co.*, 16 P. R. 320.

Libel — *Newspaper — Criminal Charge — "Blackmail."*]—Upon an application under R. S. O. 1887 c. 57, s. 9, for security for costs in an action for libel, in which the words com-

plained of, published in the defendants' newspaper, accused the plaintiff of attempted "blackmail": — Held, that the words might bear such a meaning as to charge the indictable offence defined by s. 406 of the Criminal Code, and the question whether they did so, when read with the context, was for the jury, and one which should not be determined upon this application; and the master in chambers having held that they "involved a criminal charge," his decision should not be interfered with. An action cannot be considered "trivial or frivolous" within the meaning of s. 9 merely because the existence of a good defence on the merits is shewn by the defendant's affidavit, and not contravened by an affidavit of the plaintiff. The latter may properly consider that upon an application for security for costs a denial on oath of the truth of the charges against him is unnecessary. *Macdonald* v. *World Newspaper Co.*, 16 P. R. 324.

Libel—*Newspaper—Good Faith.*] — In an action of libel against the publishers and editor of a newspaper, the defence suggested by affidavits filed upon an application under R. S. O. 1887 c. 57, s. 9, for security for costs, was that the statements complained of as defamatory did not refer to the plaintiff. The Judge who heard an appeal from an order made by a master for security being of opinion that, upon the fair reading of the statements complained of, they did refer to the plaintiff: — Held, that it did not appear that the defendants had a good defence on the merits, and that the statements complained of were published in good faith, and therefore the order should be set aside. Swain v. Mail Printing Co., 16 P. R. 132, distinguished. *Lennox* v. *Star Printing and Publishing Co.*, 16 P. R. 488.

Libel — *Newspaper — Criminal Charge—Pleading—Innuendo.*]—Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (*a*) of s. 9 (1) of the Act respecting Actions of Libel and Slander, R. S. O. 1887 c. 57, and the defendant is not entitled to security for costs. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge. *Smyth* v. *Stephenson*, 17 P. R. 374.

Libel — *Newspaper—Contentious Affidavit in Answer.*]—Upon an application for security for costs made under R. S. O. 1887 c. 57, s. 9 by the defendant in an action for an alleged libel contained in a public newspaper, the plaintiff desired to read and have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendants on which the motion was based, and contended that the object was not to try the facts on affidavits, but to shew that the agent had not knowledge of the facts, that many statements made by him were not true, and therefore that his affidavit was not such as required by s. 9:—Held, that the plaintiff's affidavit could not be read or used upon the application. *Bartram* v. *London Free Press Printing Co.*, 18 P. R. 11.

Libel—*Newspaper — Mercantile Agency.*] A printed paper issued daily by the conductors of a mercantile agency, to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "newspaper," and "printed for sale," within the meaning of s. 1 of R. S. O. 1897 c. 68; and the publishers are, therefore, in an action for libel brought against them, entitled to the benefit of the provisions as to security for costs contained in s. 10. *Slattery* v. *R. G. Dun & Co.*, 18 P. R. 168.

Married Woman.]—Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, that though suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. This case did not come within the class of cases where a nominal insolvent plaintiff is put forward, while the substantial litigant keeps in the background in order to avoid liability for costs. *McKay* v. *Baker*, 12 P. R. 341.

Misleading Description.] — The court will order a plaintiff to give security for costs if he misdescribe himself in his bill through an improper motive, or with the intention of misleading the defendant, even though on the application for security the plaintiff should furnish his true address. *Waldron* v. *McWalter*, 6 P. R. 145.

Mortgage Action.]—The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that anything was due, and the master being directed to inquire "what, if anything, was due." *Thompson* v. *Allagan*, 3 Ch. Ch. 15.

Motion to Quash By-law — *Recognizance.*]—On a motion to quash a municipal by-law a recognizance is necessary; a bond cannot be substituted. *Re Burton and Village of Arthur*, 16 P. R. 160.

Motion to Set Aside Consent.]—On a motion by plaintiff to set aside a consent to the dismissal of a bill, it appeared that the plaintiff resided out of the jurisdiction. The judges' secretary ordered that security to $100 should be given before the plaintiff could proceed with his motion. *Bolster* v. *Cochrane*, 4 C. L. J. 45.

Plaintiff in Gaol.]—Where the defendant applied for security and one of the plaintiffs deposed in an affidavit that he was resident at Kingston, where in fact he was in gaol, the court ordered security. *Bastable* v. *Mowatt*, Tay. 492.

Public Officer—*Pleading — Affidavits.*]—Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is

sued in his capacity of a public officer, and so entitled to security for costs under s. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shews by affidavits that his sole connection with the matters alleged against him was in his public capacity. *Parkes* v. *Baker*, 17 P. R. 345.

Sheriff.]—A sheriff executing a writ of fi. fa. is not an officer or person fulfilling a public duty within the meaning of R. S. O. 1897 c. 89, s. 1, and is not, therefore, entitled to security for costs of an action brought against him for negligence in not making a seizure under the writ. McWhirter v. Corbett, 4 C. P. 203, followed. *Creighton* v. *Sweetland*, 18 P. R. 180.

Slander.] — In an action for slander brought under 52 Vict. c. 14 (O.), the defamatory words complained of imputing want of chastity to the plaintiff, an unmarried female, and also for an assault, the defendant moved under s.-s. 3 of s. 1 of the Act, for security for costs, upon an affidavit which stated, among other things, that the defendant had a good defence on the merits, but did not disclose such defence:—Held, that the affidavit was not sufficient, for a primâ facie defence must be shewn; but the cross-examination of the defendant upon her affidavit might be read in aid of the affidavit itself; and counter affidavits could not be received:—Held, also, that the stay of proceedings in the order made for security for costs should not apply to the count for assault. *Lancaster* v. *Ryckman*, 15 P. R. 199.

Slander — *Burden of Proof.*] — Upon an application under 52 Vict. c. 14, s. 1, s.-s. 3 (O.), for security for costs of an action for slander imputing unchastity to a female, the onus is on the defendant to shew that the plaintiff has not sufficient property to answer the costs of the action; and to defeat such an application it is not necessary that the plaintiff should have property to the amount of $800 over and above debts, incumbrances, and exemptions. And where it was shewn that the plaintiff had property of the value of $500 at least, and it was not shewn that she had not property of much greater value, the application was refused. Bready v. Robertson, 14 P. R. 7, considered. *Feaster* v. *Cooney*, 15 P. R. 290.

Slander—*Meaning of Words Used—Good Defence.*]—In an action for slander brought by a married woman the words alleged to have been spoken were, "you are a blackguard; you are a bad woman;" and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant under 52 Vict. c. 14, s. 1, s.-s. 3 (O.), for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believed he had not used, the word "blackguard," and he denied that he used the words with the meaning attributed to them by the plaintiff:—Held, that the defendant had not shewn a good defence to the action on the merits, and his application was properly refused. Per Boyd, C., and Ferguson, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity. Per Meredith, J., that as it was shewn by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shewn a good defence upon the merits. *Paladino* v. *Gustin*, 17 P. R. 553.

Winding-up Act — *Intervening Shareholder out of the Jurisdiction.*] — An order was made by the court delegating the powers exercisable by the court for the purpose of winding up a company, to a referee, pursuant to R. S. C. c. 129, s. 77, as amended by 52 Vict. c. 32, s. 20 (D.):—Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened:—Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original applications of the shareholder had been dismissed, and appeals taken; but that the security should be limited to the costs of the appeals. *Re Sarnia Oil Co.*, 14 P. R. 335.

(b) *Costs of Former Action Unpaid.*

Actions at Law and in Equity.]—The plaintiff (the vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a fi. fa. goods to recover the costs, which was returned nulla bona. Afterwards the vendor filed his bill in equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given. *Follis* v. *Todd*, 1 Ch. Ch. 288.

Costs not Payable Personally.]—Certain proceedings in the Surrogate Court by the present plaintiff were determined in favour of the defendant, and judgment was given for him, with costs to be paid out of the estate. The plaintiff then filed her bill raising substantially the same questions as those tried in the surrogate court:—Held, that the plaintiff could not be ordered to give security for the costs of the present suit, under 29 & 30 Vict. c. 42, s. 1, for the costs of the former proceedings were not payable by her, but out of the estate. *Curtis* v. *McNabb*, 7 P. R. 246.

Ejectment.]—The mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security, if the costs of the first action have been paid, and the second action brought in good faith. *Armstrong* v. *Montgomery*, 5 P. R. 461.

Former Costs Paid.]—On an application for security for costs under C. S. U. C. c. 27, s. 76, the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order. *Chambers* v. *Unger*, 6 P. R. 101.

Identity of Actions Necessary.] — To bring a case within 29 & 30 Vict. c. 42, requiring security for costs to be given where another action for the same cause is pending,

it must be clearly shewn that the causes of action are identically the same, and not merely growing out of the same transaction. *Dean v. Lamprey*, 2 Ch. Ch. 202.

Quære, does the Act apply at all to this court, or to a case where one action is at law and the other in this court. *Ib.*

Lessor and Lessee of Goods.]—The plaintiff sued as lessee from her brother of certain goods, for damages for illegal distress. An action had been previously brought by her brother in respect of the same distress against the same defendant, and had been dismissed. Semble, that under these circumstances security for costs might be ordered. *Denham* v. *Gooch*, 13 P. R. 344.

Married Woman — *Next Friend.*]—A former suit, brought by a married woman in her own name for redemption of lands in which she claimed an estate for life, under a lease made in 1866, in which the bill had been dismissed with costs, to be paid by the next friend of the plaintiff, was considered substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of the second suit. A stay of proceedings until the costs of the former suit were paid, was refused, there being a distinction in this respect between suits by married women and suits by persons sui juris. *Redman* v. *Brownscombe*, 9 C. L. J. 192.

New Plaintiff — *Nominal and Insolvent Plaintiff.*]—Security for costs may be ordered where the costs of a former action for the same cause are unpaid, even although the actions are not between precisely the same parties, if the plaintiffs are suing substantially by virtue of the same alleged title. McCabe v. Bank of Ireland, 14 App. Cas. 413, followed. And where the title to property, the subject of the present and a former action of ejectment, was shifted into the hands of the present plaintiff to evade, if possible, the effect of an order requiring the plaintiff in the former action to give security for costs—the former action having been dismissed for default of such security—and it appeared that the present plaintiff knew the history of the prior litigation, an order for security for costs was affirmed. The order was also maintainable upon the ground that the plaintiff was a person of no substance, and the action brought mainly, if not entirely, for the benefit of some unknown and unnamed person, not a party to the record. *May* v. *Werden*, *May* v. *Bedingfield*, 17 P. R. 530.

Personal Action and Action as Administrator.]—The plaintiff, as administrator of his late wife, brought this action under R. S. O. 1887 c. 135, to recover compensation for her death, alleged to have been caused by reason of the negligence of the defendants. Previous to his obtaining letters of administration to his wife's estate he had brought an action in his own name against the same defendants for the same purpose, but discontinued it. The costs of the first action being unpaid, the defendants applied for security for costs under Con. Rule 1243:—Held, that the cause of action in the two cases was not the same, and an order staying proceedings till the plaintiff should give security for costs was set aside. *Lucas* v. *Cruickshank*, 13 P. R. 31.

Principal and Sureties.]—The plaintiff was nonsuited in an action against the sureties of A. Whilst this suit was pending the same plaintiff sued A., who then asked for security for costs under 29 & 30 Vict. c. 42, s. 1:—Held, that he was entitled to security. *Elliott* v. *Pinkerton*, 4 P. R. 86.

Prior Action without Authority.]—Upon an application by the defendant under Rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority:—Held, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, he not having taken the proper steps to get rid of these costs prior to the launching of the second action. *Lea* v. *Lang*, 17 P. R. 203.

"Proceeding for the Same Cause" — *Award.*]—The word "proceeding" in Rule 1243 means a proceeding in court. An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered. *Caughell* v. *Brower*, 17 P. R. 438.

Staying Proceedings.]—The practice by which, when the defendant's costs of a former action for the same or substantially the same cause were unpaid, the defendant was entitled to have the latter action stayed until they should be paid, is now superseded by the effect of Rule 3, the defendant's only remedy being to apply under Rule 1243 for security for costs in the second action. *Campbell* v. *Elgie*, 16 P. R. 440.

Substantial Identity Necessary.]—The plaintiff filed a bill against B. and his daughter, alleging that he had been induced by the false representations of defendants to marry the daughter, upon the supposition that her husband was dead, whereas he was alive; that the plaintiff was induced by B. to expend money on property which B. was to convey to the plaintiff, and his supposed wife, who afterwards left the plaintiff; and the plaintiff claimed a lien upon and sale of the property to repay his said expenditure thereon. This bill having been dismissed for want of prosecution, the plaintiff sued the executor of B., who had died, setting out his expenditure under the false representations, and alleging that after his supposed wife had left him B. agreed that upon receiving three years' rent of the property which was under lease, he would convey it to the plaintiff, and praying for specific performance:—Held, that the second suit was not for substantially the same cause as the first, and that defendant therein was not entitled to security for costs. *Caswell* v. *Murray*, 9 P. R. 192.

(c) *Nominal or Insolvent Plaintiff.*

Assignment — *Beneficial Interest.*] — Where an assignment had been made by the

plaintiff of his interest in a suit to secure a claim, such claim not equalling what the plaintiff claimed in his suit, the surplus to go to the plaintiff after the claim was paid, it was held that the plaintiff had such a beneficial interest in the suit as that no order for security could be made. *Carroll* v. *Eccles*, 2 Ch. Ch. 493.

Assignment Pendente Lite.] — Where the plaintiff, having filed a bill for an injunction to abate a nuisance, had parted with his interest in the land in question, proceedings were stayed until security for costs should be given, or the defective state of the record cured. *Swan* v. *Adams*, 7 P. R. 147.

Beneficial Interest.]—The plaintiff will be ordered to give security where it is shewn that he is insolvent, and is carrying on the suit for the benefit of another party, who seeks to escape the risk of costs. *Mason* v. *Jeffrey*, 2 Ch. Ch. 15.

Beneficial Interest.]—Where an insolvent plaintiff in an action is not an actor therein, but is a mere passive instrument in the hands of the real plaintiff, by whom the action is brought, security for costs will be ordered; but where the plaintiff, financially worthless, unable to pay costs, although he partly bring the action for the benefit of another, is also himself largely interested in the result, he has to be considered as the real acting plaintiff, and cannot be compelled to give security for costs. Delaney v. MacLellan, 13 P. R. 63, distinguished. *Wallbridge* v. *Trust and Loan Co.*, 13 P. R. 67.

Beneficial Interest.]—To entitle a defendant to security for costs, it is not sufficient to shew that the plaintiff is a man of no means and has no beneficial interest in the subject-matter of the action; it must be shewn that it is really the action of some other person. Gordon v. Armstrong, 16 P. R. 432, explained. *Major* v. *Mackenzie*, 17 P. R. 18.

Class Action — *Insolvent Plaintiff.*] — Where it appeared that a large number of persons had an interest in the settlement of the question involved in the suit, and they put forward as plaintiff in the suit one of their number, who was shewn to have been insolvent some years before the commencement of the suit, and did not appear to have accumulated any property since his insolvency, security for costs was ordered. *Hathway* v. *Doig*, 9 P. R. 91.

Class Action—*Ratepayer.*]—Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor. *Clark* v. *St. Catharines*, 10 P. R. 205.

Class Action—*Test Case.*]—Where several parties suffer damage from the acts of the defendant, and they agree among themselves to share the costs of a test action by one of them to establish his rights, security for costs will not be ordered even though such a plaintiff is insolvent. Clark v. St. Catharines, 10 P. R. 205, distinguished. *Clarke* v. *Rama Timber Transport Co.*, 10 P. R. 384.

Class Action.]—Security for costs was refused in an action brought by four ratepayers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve for an account of moneys received by the latter from the former, in spite of the financial incompetence of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, where the action was virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there was no contention that the action was frivolous. Clark v. St. Catharines, 10 P. R. 205, distinguished. *McAllister* v. *O'Meara*, 17 P. R. 167.

Company.]—An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent:—Held, upon the evidence, that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs. *Port Rowan and Lake Shore R. W. Co.* v. *South Norfolk R. W. Co.*, 13 P. R. 527.

Held, that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs. *Ib.*

Contributory.]—One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to the costs. *Re Rainy Lake Lumber Co.*, 11 P. R. 314.

Ejectment.]—The defendants in an action of ejectment, in which the plaintiff claimed title as owner subject to a mortgage to a bank, moved for security for costs on the grounds that the plaintiff was not able to pay costs and that the action was not really brought by him, but by the bank. It was shewn that the plaintiff was financially worthless; that his interest in the land was so doubtful that he did not feel sufficient interest in the question to litigate it. That the bank instructed their own solicitor to look into the title, took the advice of counsel, and were advised to have an action brought in the name of the mortgagor, who was then for the first time consulted about bringing the action; that the ordinary solicitor of the bank was retained to bring the action; and that he admitted he knew the plaintiff was insolvent. It was fairly deducible from the evidence that the bank had really in fact retained the solicitor, and that the solicitor would look to the bank for his costs:—Held, that under these circumstances the action must be regarded as

that of the bank, and not of the plaintiff, who was therefore required to give security for costs. Parker v. Great Western R. W. Co., 9 C. B. 766, and Andrews v. Marris, 7 Dowl. P. C. 712, followed. *Delaney* v. *MacLellan*, 13 P. R. 63.

Insolvency — *Affidavit — Notice of Motion.*]—Held, that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff. Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co., 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff. Held, also, that a finding that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application. Leave was given to the defendant to proceed in proper form with his application for security. *Pritchard* v. *Pattison*, 19 P. R. 180, 277.

Insolvent—*Action to Set Aside Attachment.*]—In a suit by an insolvent to set aside an attachment as fraudulently issued, the assignee in insolvency of the plaintiff having been made a defendant (although not a party to the alleged fraud), an order was granted under s. 39 of the Insolvent Act of 1875, requiring the plaintiff to give security for the costs of the defendant, the assignee. *Lee* v. *Moffatt*, 6 P. R. 284.

Insolvent — *Action for Personal Wrong.*]—Held, that under s. 39, Insolvent Act of 1875, an insolvent is bound to give security for costs in an action for a personal wrong. *Humphries* v. *Ramsay*, 13 C. L. J. 299.

Insolvent.]—Held, that under s. 39 of the Insolvent Act of 1875, an insolvent must give security for costs in every action he brings, and it was ordered in an action by him for malicious prosecution. *Humphries* v. *Ramsay*, 7 P. R. 188.

Insolvent Suing for Creditors.] — When the plaintiff has assigned all his property for the benefit of his creditors, and sues on their account, defendant may demand security. *Reid* v. *Cleal*, 1 C. L. Ch. 128.

Mortgagor—*Action to Establish Right of Way.*]—Where an action is brought to establish a right of way over lands adjoining those of which the plaintiff is the owner subject to a mortgage, and, having regard to the value of the property, the amount of the mortgage, and other circumstances, the lands may be said to be really the mortgagee's and the action substantially his, the defendant is entitled to security for costs, if the plaintiff be without substance: — Held, that the mortgagee was not a necessary party to the action. But, semble, that he was a proper party and should have been added. *Gordon* v. *Armstrong*, 16 P. R. 432.

Official Assignee.]—An official assignee in insolvency cannot be compelled to give security. *Monck* v. *Northwood*, 2 C. L. J. 268.

Official Assignee — *Personal Benefit*]—Where a bill was filed by an assignee in insolvency against B. for the indemnification of the estate in respect of a claim by C., which it was alleged B. should pay, and it appeared that the plaintiff was himself an insolvent; that there were no assets whatever of the estate he represented; and that the suit was brought at his instigation, risk, and expense, and for his benefit:—Held, that the plaintiff must give security for costs. *Mason* v. *Jeffrey*, 1 Ch. Ch. 379.

Official Assignee.]—Where the assignee of one of the plaintiffs, who had obtained his discharge in insolvency, brought an action in the name of the plaintiffs on an old judgment which had been assigned to the insolvent by the other plaintiffs, and to the benefit of which the assignee was entitled, he was ordered to give security for costs. *Boice* v. *O'Loane*, 7 P. R. 359.

Official Assignee.]—An assignee in insolvency bonâ fide suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is without means, and not beneficially interested in the suit. *Vars* v. *Gould*, 8 P. R. 31.

One of Several Plaintiffs.]—The rule that security for costs should not be ordered where it could be only against one of several plaintiffs does not now universally govern, since the law as to joinder of plaintiffs has been changed by Rule 89, O. J. Act, 1881. Quære, whether the rule was ever applicable to the ordering of security for costs against an insolvent plaintiff suing for the benefit of another person. *Irving* v. *Clark*, 12 P. R. 29.

Where one plaintiff was suing to enforce a mechanic's lien against certain land, and the other, an insolvent, suing on another's behalf to set aside a sale of the same land, security for costs was ordered against the latter plaintiff alone. *Ib.*

Partial Interest.] — On an application for security for costs, it appeared that the plaintiff, though a resident of Canada, was in such circumstances as not to be good for the costs of the suit, should it go against him; that other persons were greatly interested in the subject matter thereof; that the plaintiff's success would materially benefit them; and that the defendant had already succeeded in an ejectment suit at law in respect of the same right on one of the grounds relied on by the bill; but there being no evidence that the plaintiff was actually put forward by the other persons interested to try the right, or that the suit was not brought entirely at his own instance, security for costs was refused. *Little* v. *Wright*, 16 Gr. 576.

Receiver of Insolvent Company.] — The plaintiffs, an incorporated company, became insolvent pending an action at law for calls, and the court of chancery appointed a receiver to wind up their affairs, and authorized him to continue the action. An application was made to a Judge in chambers to compel the plaintiffs or the receiver to give security for costs:—Held, that the application should have been made to the court of chancery; but that in any event neither the

plaintiffs nor the receiver could be ordered to give security. *Provincial Ins. Co.* v. *Goodeham*, 7 P. R. 283.

Shareholder.]—An action was begun by D. as plaintiff, suing on behalf of himself and all other shareholders in the defendant company, to set aside a judgment obtained by the defendant C. against the company. D., who lived out of the jurisdiction, amended the writ of summons, before serving it, by adding A., another shareholder, as a plaintiff. Upon a motion by C. for security for costs, A. was examined, and it appeared from his examination that he had never intended bringing any action himself; that he did not know the nature or the position of the action; and that he did not know D. He had, however, written a formal letter authorizing D.'s solicitors to have him added as a plaintiff. It also appeared that A. had no property except some household furniture of trifling value:—Held, that A. was merely a nominal plaintiff, and that C. was entitled to an order for security for costs. There being reason to suppose that the action would be an expensive one, the plaintiffs were ordered to give security in the sum of $1,000. *Delap* v. *Charlebois*, 15 P. R. 45.

(d) *Next Friend.*

Idiots.] — The next friend of an idiot stands in the same position as the next friend of an infant, and is not required to establish his solvency or give security. Where, however, in the bill, the description and residence of the next friend were not given, the secretary ordered an amendment to be made within a week giving the residence and description, or the defendant to be entitled to security. *Sharp* v. *Sharp*, 2 Ch. Ch. 244.

Infants.]—When the court has appointed the natural guardian of an infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the court in making such appointment, such next friend will not be removed nor will he be ordered to give security, although in destitute circumstances. *Morris* v. *Leslie*, 5 P. R. 141.

In the case of an infant plaintiff, the court will not require security for costs, or remove a next friend because he is not a person of substance. *Re McConnell*, 3 Ch. Ch. 423.

Married Woman.] — Where a plaintiff sues with her brother-in-law, with whom she lives, as next friend, he will not be ordered to give security, even though there is a doubt as to his solvency. *Gardiner* v. *Graham*, 5 P. R. 463.

When one of several co-plaintiffs is a married woman, she must sue by next friend, who must be a solvent person capable of answering costs. *Rann* v. *Lawless*, 1 Ch. Ch. 393.

Where, upon a bill filed by a married woman by her next friend, it appears that after due inquiries the next friend is not known in the locality of which he is described to be a resident, and not in possession of any property there, an order will be made for security. *VanWinkle* v. *Chaplin*, 3 C. L. J. 44.

The next friend of a married woman who is co-plaintiff with her husband, will be required to give security if it appear that he is a person of no known means, and his residence not known—though it appear that the husband has a substantial interest and is not a mere formal party to the suit. *VanWinkle* v. *Chaplin*, 2 Ch. Ch. 98.

A feme covert plaintiff has a right to change her next friend without notice to the former next friend, and without giving him security for the costs already incurred. But notice to the opposite party is necessary, because the order for security is only given on condition of the antecedent costs of the opposite party being secured, if such a condition is desired by him. *Harvey* v. *Boomer*, 3 Ch. Ch. 11.

Held, qualifying McBean v. Lilley, 2 Ch. Ch. 247, as the decision in that case is stated in the head note; that the affidavit of a next friend, that he is worth $400 over and above all his debts, is only prima facie proof of his sufficiency as a next friend, and that evidence as to his circumstances may be given. *Walker* v. *Walker*, 3 Ch. Ch. 273.

Where evidence contradictory to the affidavit was adduced, which in the opinion of the court outweighed this statement, security or a new next friend was ordered. *Ib.*

The test of the solvency of a next friend is, whether he is worth £100 over and above what will pay his just debts. If the allegation to such effect is uncontradicted, or the fact established by evidence, it is sufficient. *Stovel* v. *Coles*, 3 Ch. Ch. 421.

When on a motion to change a next friend on the ground of insolvency, the next friend's own cross-examination shewed him worth the necessary amount, and no evidence to the contrary was adduced, the motion was refused with costs. *Ib.*

Other Cases.]—Where the next friend of a plaintiff has become insolvent and left the jurisdiction, the proper order to be made is, that proceedings be stayed until a solvent next friend be appointed, or until security be given. *McGoay* v. *Maladay*, 2 Ch. Ch. 437.

A next friend is liable for costs incurred while acting as such next friend, and not for other or past costs. *Poole* v. *Poole*, 2 Ch. Ch. 459.

Where a next friend had been appointed who proved to be an infant, and a new next friend was consequently appointed, an application to make the new next friend liable for the costs incurred before his appointment was refused. *Ib.*

When a bill is filed by a next friend, if he be not a person of substance, the plaintiff will be required to give security. *Leishman* v. *Eastwood*, 2 Ch. Ch. 88.

(e) *Residence Out of the Jurisdiction.*

Action to Restrain Proceedings at Law.]—Where a suit is brought in this court to restrain proceedings at law, the plaintiff will not be ordered to give security, though resident out of the jurisdiction; and that,

too, notwithstanding the bill may ask for relief other than the injunction. *Manly* v. *Williams*, 1 Ch. Ch. 48.

Admission of Claim.]—The right to security for costs under Rule 431, O. J. Act, is absolute, where the plaintiff resides out of Ontario, and it is immaterial that the defendant has no defence upon the merits. Quære, as to the proper time for making application for such security. *Bank of Nova Scotia* v. *La Roche*, 9 P. R. 503.

A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction. *Doer* v. *Rand*, 10 P. R. 165.

If it be made apparent by evidence, which the court should look at, that the defendant has no defence, security will not be ordered. *Ib.*

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of his action:—Held, that under these circumstances, the defendant was not entitled to security for costs, and a præcipe order for security was set aside with costs. *Ib.*

Security for costs will not be ordered when the defendant has admitted the cause of action; and it is not essential that the admission should be in the action, on the pleadings, or in any technical form. *Anglo-American Casings Co.* v. *Rowlin*, 10 P. R. 391.

The plaintiff swore that there was no defence on the merits, and produced a letter received from the defendant before action, promising to pay the claim sued on:—Held, that this, uncontradicted and unexplained, warranted the conclusion that there was no defence. Bank of Nova Scotia v. La Roche, 9 P. R. 503, not followed. *Ib.*

Since the passing of Con. Rule 1251, the practice sanctioned by Doer v. Rand, 10 P. R. 165, and Anglo-American Casings Co. v. Rowlin, ib. 391, is no longer applicable, and where a plaintiff, against whom a præcipe order for security for costs had been obtained, moved to set it aside and for judgment under Con. Rule 739 without paying $50 into court, under Con. Rule 1251, his motion was dismissed. *Payne* v. *Newberry*, 13 P. R. 354.

In cases where the defendants are possessed of funds belonging to the plaintiff, the discretion of the court will be exercised against hampering the plaintiff by ordering security for costs. The plaintiff, who lived out of the jurisdiction and had lately attained his majority, sued the defendants for an account and payment of funds which he alleged they held as joint trustees for him, he having had no account. The receipt of trust funds by both defendants was proved, but one defendant put the blame of their not being forthcoming on the other, and swore that he had a good defence to the action, though he did not disclose it. The other defendant did not defend:—Held, not a case in which the plaintiff should be required to give security for costs. *Duffy* v. *Donovan*, 14 P. R. 159.

Where there was an admission by the defendant of the debt sued for, sworn to and not contradicted, and the writ of summons was specially indorsed so as to enable the plaintiffs to move for judgment under Rule 739, an order for security for costs obtained by the defendant on præcipe, after appearance, the plaintiffs being out of the jurisdiction, was set aside, notwithstanding that the plaintiffs might have paid $50 into court under Rule 1251 and proceeded to move for judgment. Doer v. Rand, 10 P. R. 165, followed. Payne v. Newberry, 13 P. R. 354, not followed. *Thibaudeau* v. *Herbert*, 16 P. R. 420.

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

Application against Solicitor.] — Where, on petition against a solicitor for an account, it was alleged, and not denied, that he had large sums of the client's money in his hands, the petitioner, though resident in a foreign country, was relieved from giving security. *Re Carroll*, 2 Ch. Ch. 305.

The rule requiring security will be relaxed by the court in their discretion, when the circumstances require. *Ib.*

Application against Solicitor.] — Held, that the mere fact that a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for an order for security, but upon special circumstances being shewn it may be. *In re A. B.*, 6 P. R. 210.

Application against Solicitor.] — When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction. Re Percy and Kelly Nickel Co., 2 Ch. D. 531, followed. Where a charge of improper conduct is made against a solicitor, who is an officer of the court, by a person out of the jurisdiction, the court ought not to order security for costs, and thus prevent such a charge being investigated. *Sample* v. *McLaughlin*, 17 P. R. 490.

Attachment of Debts.]—In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor:—Held, that there was power to order security for costs. *Edwards* v. *Edwards*, 12 P. R. 583.

Claim by Defendant against Co-defendant.] — Where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendants, he is a "plaintiff" within the meaning of Rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs. Walmsley v. Griffith, 11 P. R. 139, considered. *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

Compliance with Order—*One Plaintiff within the Jurisdiction—Order against One of Several Plaintiffs.*]—The writ of summons was indorsed with a statement that the plaintiffs resided at the township of Brant, in the county of Bruce, and in the state of Wisconsin, in the United States of America. Upon this an order was issued upon præcipe under Con. Rule 1242 by an officer of the court requiring one of the plaintiffs to give security for costs and staying proceedings until security should be given. The plaintiffs, desiring to arrest the defendant, were refused an order because of the stay of proceedings, and then applied for and obtained an order allowing them to deposit $400 with an officer of the court, instead of giving a bond for security for costs, and also declaring it to be without prejudice to the right of the plaintiffs to set aside the order staying proceedings, and they paid the $400 to the officer accordingly:—Held, that it appeared from the indorsement on the writ that the plaintiffs resided out of Ontario, and that the issue of an order for security under Con. Rule 1242 was thereby warranted; but that the order issued, being against one plaintiff only, was irregular and might have been set aside; it was not void, however, and was good until set aside; and having been complied with, as it was by the deposit of the money with the officer, the compliance made it good, and it could not afterwards be set aside, notwithstanding the reservation in the order:—Semble, that if it had appeared by the indorsement, as it afterwards did by affidavit, that one of the plaintiffs in fact resided in Ontario, the order for security would have been void, and would have been set aside notwithstanding the compliance with it. *McConnell* v. *Wakeford*, 13 P. R. 455.

Contempt—*Leaving Jurisdiction to Avoid Arrest.*]—Where the plaintiff after the commencement of the action left the Province to escape arrest under orders of committal for contempt of court in other actions, he was ordered to give security for costs. *Codd* v. *Delap*, 15 P. R. 374.

Co-plaintiff Within the Province.]—Held, following Rann v. Lawless, 1 Ch. Ch. 333, that the fact of a co-plaintiff, resident within the jurisdiction, being on the record would not prevent an order for security for costs being granted. *Van Winkle* v. *Chaplin*, 3 C. L. J. 44.

Exchequer Court—*Action to Expunge a Trade-mark.*] — On an application by the plaintiffs to expunge defendants' trade-mark from the register, the defendants, resident out of the jurisdiction, applied for and obtained an order for security for costs against the plaintiffs, also resident out of the jurisdiction; plaintiffs thereupon applied for a similar order upon the ground that the matter was within the discretion of the court:—Held, that security should not be ordered against the defendants. *Wright, Crossley & Co.* v. *Royal Baking Powder Co.*, 6 Ex. C. R. 143.

False Address — *Temporary Residence within Jurisdiction — Incarceration under Criminal Sentence.*]—Where the plaintiff, who for two years previous to the commencement of the action had been a resident of the Province of Quebec, indorsed a false address, within Ontario, upon the writ of summons, for the purpose of misleading, and escaping giving security for costs, and was, at the time an application was made therefor, a prisoner in Ontario under a criminal sentence, he was ordered to give security for costs. Swanzy v. Swanzy, 4 K. & J. 237, followed. Redondo v. Chaytor, 4 Q. B. D. 453, commented on. *Fournier* v. *Hogarth*, 15 P. R. 72.

False Address — *Mistake—Residence out of the Jurisdiction — Temporary Return.*]—The plaintiff, who was a sailor on the lakes, at the time of the issue of the writ of summons was residing out of Ontario. The writ was, by a mistake of the plaintiff's solicitor, indorsed with a statement that the plaintiff resided in Windsor, Ontario; and upon the defendants moving for security for costs on the ground that the plaintiff had given a false address, the plaintiff declared that naming Windsor was a mistake, and that the true place of residence was Collingwood, Ontario. Collingwood was not then his actual place of residence. Pending the motion, however, he returned to Ontario, and went to reside temporarily at Sarnia:—Held, that the plaintiff by giving a false address entitled the defendants to move for security for costs, and it lay on the plaintiff to shew that his misstatement was not made malâ fide. That being shewn, the plaintiff would be driven to amend, or the defendants would be entitled to the order. But the plaintiff could not amend by substituting Collingwood, for he did not reside there at the date of the writ; and the defendants would have been entitled to the order but for the plaintiff's subsequent return to the jurisdiction. And:—Held, following Redondo v. Chaytor, 4 Q. B. D. 453, and Ebrard v. Gassier, 28 Ch. D. 232, that where a foreigner comes within the jurisdiction, pending a motion for security for costs and before judgment, although for the temporary purpose of enforcing his claim by action, he cannot be called upon to give security. The motion for security was refused, without costs to either party, and leave was reserved to the defendants to apply again if the plaintiff should go to reside out of the jurisdiction before the termination of the action. *Anderson* v. *Quebec Fire Ins. Co.*, 15 P. R. 132.

Military Officer.]—A military officer on duty out of Canada and suing as plaintiff, must give security. *Tripp* v. *Frazer*, 1 U. C. R. 253.

Misstating Address — *Temporary Residence within the Jurisdiction.*] — Where a plaintiff resident without the jurisdiction wilfully stated in his bill that he resided within it, security for costs was ordered. *Sutherland* v. *McDonald*, 9 P. R. 178.

A subsequent application to rescind the order on the ground that the plaintiff had returned within the jurisdiction and intended to remain there at the time of the former application, but had not then shewn the facts fully, was granted, but on appeal this order was reversed, and the order for security directed to stand. *Ib.*

Semble, that security will not be ordered, even where the plaintiff is a foreigner who has come within the jurisdiction temporarily, and only for the purpose of maintaining the suit. *Ib.*

"Ordinarily Resident"—*Discretion of Judge.*]—It is not a ground for refusing to order a plaintiff resident out of the jurisdiction to give security for the defendant's costs,

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

"Ordinarily Resident."]—Rule 1198 provides that security for costs may be ordered, among other cases, in the following: "(a) Where the plaintiff resides out of Ontario; (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario." The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction; and also that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction; and at the conclusion of the pending suit intended to reside out of the jurisdiction. The plaintiff's affidavit stated that he had not for the past year nor had he now any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick:—Held, that the actual residence abroad was still what primâ facie entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all. Denier v. Marks, 18 P. R. 465, overruled. *Allcroft* v. *Morrison*, 19 P. R. 59.

Property within Jurisdiction — *Consent to Charge Share with Costs.*]—A plaintiff residing out of the jurisdiction, but owning a substantial amount of property within it, should not be ordered to give security for costs. And where a plaintiff was applying summarily for an administration order, and it appeared that he had an interest worth $273 in the estate in respect of which he applied, he was absolved from giving security for costs, although his residence was out of the jurisdiction,, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs which he might be lawfully ordered to pay in the course of the administration proceedings. *Re Armstrong*, *Armstrong* v. *Armstrong*, 18 P. R. 55.

Property within the Jurisdiction.]—The recent Act, 22 Vict. c. 33, has effected a material change in the practice of this court as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the Province will not be sufficient to warrant an order for that purpose where it is shewn that he has property within the jurisdiction. *White* v. *White*, 1 Ch. Ch. 48.

Property within the Jurisdiction.]—A plaintiff who is resident out of the jurisdiction will not be ordered to give security for costs, if he is possessed of unincumbered real estate of sufficient value situate within the jurisdiction. *Gault* v. *Spencer*, 2 Ch. Ch. 92; 3 C. L. J. 70.

Refusal of Solicitor to Tell Residence.]—Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode was not sufficient evidence of his living out of the jurisdiction to support an order for security for costs. *Edwards* v. *Edwards*, 12 P. R. 583.

Removal Pendente Lite.]—When during the progress of a suit it occurs that all parties reside out of the jurisdiction, there may be an application for security for costs. *Parks* v. *Brown*, 4 L. J. 232.

Removal Pendente Lite.] — Where a plaintiff leaves the jurisdiction permanently while his action is pending, he will be ordered to give security for costs past as well as future. *Hately* v. *Merchants Despatch Transportation Co.*, 10 P. R. 253.

Removal Pendente Lite.]—The plaintiffs having recovered judgment in the action, the defendant appealed to the court of appeal, and then moved to compel the plaintiffs to give security for costs, on the ground that they resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in this Province, and withdrawn their assets therefrom. The motion was refused. *Exchange Bank* v. *Barnes*, 11 P. R. 11.

Residence at Time of Application.]—Held, that if the plaintiff be actually a resident of the Province at the time of the application, and intend so to remain until trial or judgment in the cause, security for costs ought not to be ordered. *Hawkins* v. *Paterson*, 3 P. R. 253.

Semble, if a resident in the Province were to declare his intention of leaving for abroad at once, and had sold off his property, and made other preparations for his immediate departure, with the intention of residing abroad, that upon these facts being shewn the party might be called upon to give security, according to the general practice. *Ib.*

Residence at Time of Application.]—The plaintiff, a British subject, having resided in the United States for several years, but never taken any oath of naturalization, or exercised the rights of citizenship, returned to this Province, and some months afterwards filed a bill in this court. A motion for security for costs was refused, although several persons swore that his intention was to leave immediately on the decision of the case, which the plaintiff denied. *O'Grady* v. *Munro*, 7 Gr. 106.

Residence at Time of Application the Test.]—A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time application is made the plaintiff is actually out of the jurisdiction. *Robertson* v. *Cowan*, 10 P. R. 568.

Residence not Mentioned in Writ.]—Where a plaintiff who resided out of the jurisdiction did not indorse his place of residence on the writ, the costs of an application for security were made costs to the defendant in the cause. *McCready* v. *Hennessy*, 9 P. R. 489.

Residence Unknown.] — Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security will be ordered, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and it is not shewn positively where he is resident. *Somerville* v. *Kerr*, 2 Ch. Ch. 168.

Service of the Crown.]—The mere fact of a plaintiff being in the service of the Crown and absent from the jurisdiction, is not sufficient to exempt him from giving security; it must be shewn that he is absent from his domicile in the service of the Crown. *Dickenson* v. *Duffill*, 1 Ch. Ch. 108.

Several Plaintiffs—*Only One in Jurisdiction—Joint Action.*]—Action by the widow, as dowress, and the children, as heirs-at-law, of a deceased person, to recover possession of land alleged to be the property of the deceased: —Held, that the action was a joint one, and although the plaintiffs other than the widow resided out of the jurisdiction, they could not be ordered to give security for costs. D'Hormusgee v. Grey, 10 Q. B. D. 13, followed. *Smith* v. *Silverthorne*, 15 P. R. 197.

Temporary Absence.]—A plaintiff out of the jurisdiction, with no certain place of abode, and having no property in this Province, though stating on affidavit that she was only temporarily absent, and intended to return, was ordered to give security for costs, there being no circumstances from which the court could reasonably infer that the intention to return would certainly be carried out. *Grant* v. *Winchester*, 6 P. R. 44.

Temporary Absence.]—Where a bill described the plaintiff as "of the city of Toronto," but afterwards contained the following statement, "by the advice of a physician the plaintiff has sought change of air, and is now temporarily resident at Rochester;"—Held, that it must be concluded that the residence was only temporary, and no order for security should be granted. *Wilson* v. *Wilson*, 6 P. R. 152.

Temporary Stay in Province.] — So in the case of a plaintiff from England, coming here merely to attend to the suit, and intending to return when it is over. *Gill* v. *Hodgson*, 1 P. R. 381.

Temporary Stay in Province.]—Semble, that security will not be ordered when the plaintiff intends to reside here during the suit. *Wilder* v. *Hopkins*, 4 P. R. 350.

Where a plaintiff came here shortly before commencing an action, but shewed an intention of residing here permanently, security was refused. *Ib.*

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2. *Practice and Procedure.*

(a) *Affidavits on Application.*

Where the plaintiff has left the Province, the affidavit should state that he has become a stationary resident abroad. *Micklejohn* v. *Holmes*, Tay. 39.

The affidavit must state with certainty that the plaintiff is not resident within the jurisdiction. *Redden* v. *McNab*, 4 O. S. 136.

Semble, that on the authority of Dowling v. Harman, 6 M. & W. 131, an affidavit that deponent is informed and believes that plaintiff resides abroad, is sufficient. *Morgan* v. *Hellems*, 1 P. R. 363.

But held not, on the authority of Joynes v. Collinson, 2 D. & L. 449. *Noad* v. *Provincial Insurance Co.*, 2 P. R. 381.

On making this application it must be shewn at what stage the proceedings are. *Torrance* v. *Gross*, 2 P. R. 55. But see *Mancilly* v. *Hays*, 1 C. L. Ch. 222.

The state of the cause should be shewn on affidavit; but, to supply a defect in this respect, a Judge may in his discretion look at the records of the court. *Hall* v. *Brigham*, 5 P. R. 464.

An order for security can only be obtained on præcipe when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. *Wilson* v. *Wilson*, 10 C. L. J. 173.

Where a bill described the plaintiff as of the city of Toronto, but stated that by the advice of a physician he had sought change of air, and was then temporarily resident at Rochester, it was held that an order for security could not properly be granted on præcipe. *Ib.*

A certificate of the state of the cause is only necessary where the application for security is made before answer filed. *Grant* v. *Winchester*, 6 P. R. 44.

In an application for security for costs on the ground that the plaintiff had generally lived abroad, the affidavits should state positively the absence from this country and residence abroad. *Smith* v. *Crooks*, 4 L. J. 67.

An order for security for costs will not be granted after the cause has been entered for trial, unless a clear and positive case be shewn. *Smith* v. *Crooks*, 4 L. J. 67.

An order for security for costs cannot be obtained under s. 71 of the Common Law Procedure Act, R. S .O. 1877 c. 50, upon an affidavit made by defendant's attorney. That section requires the affidavit to be made by the defendant personally. An application made upon the affidavit of the solicitor of defendants, a corporation, was therefore refused. *Martin qui tam* v. *Consolidated Bank*, 45 U. C. R. 163.

An affidavit filed by the defendant set out that "the said plaintiff has been for some time past, and is now, residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this court, having taken up his residence in New York, one of the United States of America:" — Semble, that a statement of the plaintiff's residence out of the jurisdiction, on information and belief is not sufficient:—Held, that the foreign residence of the plaintiff was here positively sworn to, and the affidavit was sufficient in substance for the court to act upon it in ordering security for costs. *Hollingsworth* v. *Hollingsworth*, 10 P. R. 58.

(b) *Bond and Sureties.*

Attorney.]—Where a plaintiff is required to give security for costs, the court will not allow his attorney (or partner, or both) in the cause to give the security. *Myers* v. *Hutchinson*, 4 L. J. 138, 2 P. R. 380.

Attorney.]—Held, that a practising attorney may be a surety in an election petition. *Re Hamilton*, 10 C. L. J. 170.

Attorney or Solicitor.]—It is irregular for a solicitor to become security for his client. *Beckitt* v. *Wragg*, 1 Ch. Ch. 5.

Form of Bond.]—A bond for security for costs must be made to the registrar. *Munro* v. *McLeod*, 7 P. R. 53.

One Surety—*Affidavits of Execution and Justification.*]—It is no objection to the bond that there is no affidavit of execution annexed. *Donnelly* v. *Jones*, 4 Ch. Ch. 48.

Neither is an affidavit of justification necessary until the solvency of the surety is questioned. *Ib.*

In the case of bonds for carrying a case to the court of appeal, an affidavit of justification is necessary under the order of court of error and appeal, No. 8. *Ib.*

A bond for security for costs need not be by two sureties unless the defendant, before the bond is prepared, gives notice that he requires two. *Ib.*

One Surety — *Approval of Bond—Form of Condition.*]—Held, that it is for the plaintiff's convenience to submit the name of the proposed surety to the opposite party before filing the bond, as he may risk the surety not being successfully objected to by the defendant, and it is not necessary that the surety should be first approved by defendant's solicitor or the registrar, nor is a plaintiff bound to give more than one surety unless he alone is insufficient. *Beaton* v. *Boomer*, 1 C. L. J. 108.

Held, also, that the bond should contain the condition to the effect that upon the surety (and not the plaintiff) paying the costs, the obligation should be void. *Ib.*

One Surety.]—It is not essential that a bond for security for costs should be by more than one obligor, if otherwise sufficient. *Fletcher* v. *Noble*, 9 P. R. 534.

Parties to Bond—*Condition of Bond.*]—Where, upon an application by one of several defendants, an order is made for security for costs, it may properly provide that the security is to answer the costs of all the defendants. Construction of Rules 1245 and 1247. Execution by the plaintiffs of a bond for security for costs may be dispensed with in a proper case. *Delap* v. *Charlebois*, 15 P. R. 325.

Surety Holding under Unregistered Conveyance.] — Where, on a motion in chambers to disallow a bond given on an appeal, it appeared from the examination of one of the bondsmen that he had lands of sufficient value, but that the conveyances to him were unregistered, it was directed that the conveyances should be registered. *Adamson* v. *Adamson*, 9 P. R. 96.

See COURT OF APPEAL, II. 1.

(c) *Cancellation of Bond and Payment Out of Court.*

Cancellation of Bond.]—Where a plaintiff, being out of the jurisdiction, has given security for the defendant's costs of the action, and has succeeded in the court of first instance and in the court of appeal, he is entitled, notwithstanding that the defendant is appealing to the supreme court of Canada, to have his security delivered out to him. Hamill v. Lilley, 3 Times L. R. 546, 56 L. T. N. S. 620, followed. *Marsh* v. *Webb*, 15 P. R. 64.

A judgment by the court of appeal, in favour of a defendant appellant, puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the supreme court of Canada. *Burgess* v. *Conway*, 11 P. R. 514.

Notice should be given to the opposite party of a motion to take the appeal bond off the files. *Ib.*

The plaintiff, who lived out of the jurisdiction, obtained a judgment at the trial, which was affirmed by the divisional court, except as to one defendant against whom the action was dismissed, without costs:—Held (reversing 11 P. R. 9), pending an appeal to the court of appeal by the other defendants, that the plaintiff was not entitled to have delivered out to him for cancellation a bond for security for costs of the action after judgment in his favour by the Queen's bench division before the time for appealing to this court had actually elapsed, and while an appeal was actually pending. *Hately* v. *Merchants' Despatch Co.*, 12 A. R. 640.

A defendant is not entitled to have delivered out to him for suit a bond for security for his costs of the action filed by the plaintiff, after judgment in the defendant's favour with costs in the high court, while an appeal by the plaintiff to the court of appeal is pending, notwithstanding that there is no stay of execution for the costs awarded to the defendant. Hately v. Merchants' Despatch Co., 12 A. R. 640, applied and followed. *Coffey* v. *Scane*, 16 P. R. 307.

Payment Out.] — When plaintiffs, who were residents out of the jurisdiction, had paid a certain sum into court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated. *Luther* v. *Ward*, 2 Ch. Ch. 175.

Where money has been paid into court for a specific purpose, and that purpose has been answered in favour of the party paying it in, it will be paid out to that party. *McLaren* v. *Caldwell*, 9 P. R. 118.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants' possession. The defendants appealed to the court of appeal. Plaintiffs applied for payment out of $300 paid in by them as security for costs on commencing the action:—Held, that as the plaintiffs were shewn to have goods in the country, and in the defendants' possession, the $300 should be paid out. But for this the plaintiffs would not have been entitled to the money, the appeal being a step in the original cause, not a new action. *Napier* v. *Hughes*, 9 P. R. 164.

Money paid into court in lieu of giving the usual bond for security for costs will not be paid out to the party paying it in, in whose

favour a decree has been made, pending an appeal to the court of appeal. *National Ins. Co.* v. *Egleson*, 9 P. R. 202.

Supreme Court Appeal.]—The defendants being entitled by the judgment of the court of appeal to the costs of the action, obtained out of court for suit the bond given by the plaintiff for security for such costs. Before action on the bond, and pending an appeal by the plaintiff from the judgment of the court of appeal to the supreme court of Canada, one of the sureties on the bond obtained leave and paid into court to the credit of this action $400, the amount due on the bond, to abide further order. Upon the application of the defendants the Judge in chambers directed $200 of the $400 to be paid out to their solicitors, upon the solicitors undertaking to refund the amount if the supreme court should vary the disposition of costs made by the court of appeal. *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499.

Supreme Court Appeal.]—Semble, that payment to the defendant out of the moneys in court of his costs in the high court and court of appeal upon the undertaking of his solicitors to repay in the event of an appeal to the supreme court succeeding, should not be ordered. *Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397.

Supreme Court Appeal.]—The plaintiffs recovered judgment in the high court against the defendants for damages and costs. The defendants appealed to the court of appeal, paying $200 into court as security to the plaintiffs for the costs of such appeal, which was dismissed with costs. The defendants launched a further appeal to the supreme court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security:—Held, that proceedings to enforce the plaintiffs' judgment in the high court were not stayed, either by force of s. 48 or otherwise. But the court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the court of appeal being stayed pending the appeal to the supreme court, which might determine that the plaintiffs were not entitled to the costs of the court of appeal; and the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in court pending the appeal. *Rombough* v. *Balch*, 19 P. R. 123.

(d) *Discharging Order.*

Property Held in Trust.]—A suit was brought to recover possession of certain lands, of which the plaintiffs claimed to be trustees, and to restrain the defendant, an overholding tenant, from committing waste. An order for security for costs had been obtained against the plaintiffs, by reason of their being out of the jurisdiction. The plaintiffs applied to discharge the order on the ground that they had property within the jurisdiction, and the property relied on was the property in question in this suit:—Held, that the plaintiffs not being entitled in their own right to the property, it did not constitute sufficient security for costs. *McKenzie* v. *Sinton*, 6 P. R. 282.

Property Within the Jurisdiction.]—The fact that defendant's solicitor knew that the plaintiffs had lands in the Province when he took out the order for security, was held a good ground of objection to the order. *Gleason* v. *Finch*, 3 Ch. Ch. 296.

An objection that the copy of the order served was not indorsed with the name and place of business of the solicitor serving it was overruled, it not being shewn to have been the first proceeding taken by him. *Ib.*

On the plaintiff shewing he had lands in the Province worth $4,000, an order for security obtained on præcipe was set aside, and the order being also irregular in form, it was set aside with costs. *Ib.*

A plaintiff resident abroad will not be released from giving security for costs, unless he shew that he has property to the value of $400 within the jurisdiction of the court and available in execution. Leasehold property may be sufficient. *Higgins* v. *Manning*, 6 P. R. 147.

The plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth $2,666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. The lease was for twenty-one years, and gave the defendants an option to purchase; under its terms no rent or taxes were to be paid until the title had been quieted under the Act for Quieting Titles, or a certificate was refused; in the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending. The plaintiff's interest in this property was held insufficient to entitle him to the discharge of an order for security. *Ib.*

Nature of the property within the jurisdiction necessary to discharge an order considered. *Wilson* v. *Wilson*, 6 P. R. 152.

Where the plaintiff lived out of the jurisdiction, but had real property in the jurisdiction, incumbered, but of the value of $510 over and above all incumbrances and all debts that it was shewn or suggested that he owed, a præcipe order for security for costs was set aside. *Belair* v. *Buchanan*, 17 P. R. 413, 476.

Return to Jurisdiction.]—Where after an order made for security, plaintiff came within the jurisdiction, made affidavit "that he is now residing in Toronto; that when he left Canada he intended to return, his absence from Canada being merely temporary; and that he now intends to remain in Toronto until after judgment has been obtained in this suit by or against him;" and undertook not to leave the jurisdiction without leave of the court or a Judge, or of defendant, until a reasonable time after defendant might properly enter judgment against him, an order was made discharging the order for security for costs. *Watson* v. *Yorston*, 1 C. L. J. 97.

Quære, as to relief in such a case if security for costs were actually given, and not merely an order staying proceedings till security given. *Ib.*

Where a plaintiff, who, when bill filed, was out of the jurisdiction, and had been ordered to give security, afterwards returned, but it appeared that he had no business and no intention of entering into any, no fixed place of abode, no house and no family or ties to bind him to the Province; and the court was of

opinion that the return of the plaintiff was merely to get rid of the order for security, the court declined to rescind it. *Marsh* v. *Beard*, 1 Ch. Ch. 389.

Where a plaintiff, who had been ordered to give security, returns within the jurisdiction to reside permanently, the order will be discharged. *Harvey* v. *Smith*, 1 Ch. Ch. 392.

A plaintiff who had been for several years and was at the time of the filing of the bill, resident in the United States, described herself in her bill as of the township of Bertie, in the Province of Ontario. Under these circumstances the court refused to discharge an order for security, although the plaintiff had returned to the jurisdiction and stated that it was her intention to reside there for the rest of her life. *Waldron* v. *McWalter*, 6 P. R. 145.

Security for Costs of Motion.] — A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in Rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 739. Thibeaudeau v. Herbert, 16 P. R. 420, distinguished. *Walters* v. *Duggan*, 17 P. R. 359.

Subsequent Acquisition of Property.] —The subsequent acquisition of property is no ground for rescinding an order for security. *Reaume* v. *Leavitt*, *Reaume* v. *Trowbridge*, 6 P. R. 70.

Terms—*Form of Order.*] — An appeal by the plaintiff from an order requiring him to give security for costs upon the ground that the costs of a former action, brought by plaintiff against defendant for the same cause, were unpaid, was dismissed by a Judge in chambers, and a further appeal by a divisional court, which held, 17 P. R. 203, that the plaintiff could not answer the application for security by shewing that the former action was brought without his authority. The costs of the appeals were made payable to the defendant in any event. The plaintiff, upon application in the former action, then had the judgment for costs against him therein set aside, upon the ground that the action was brought without his authority; and afterwards applied to set aside the order for security for costs:—Held, that the master in chambers, in setting aside the order for security for costs, had discretion to impose terms, and the terms imposed, viz., payment by the plaintiff of the costs of obtaining the order for security, of the appeals therefrom, and of the application itself, were competent and proper. As to the form of the order, a dismissal of the action, in the event of security not being given within a limited time, was authorized by Con. Rules (1888) 1243 and 1246. *Lea* v. *Lang*, 18 P. R. 1.

(e) *Dismissing Action.*

When security is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be granted ex parte on a certificate that no bond for security has been filed. *McCarrol* v. *McCarrol*, 2 Ch. Ch. 380.

The fact that the plaintiff has lodged an appeal against an order for security for costs is "sufficient cause," within the meaning of Rule 1246, to exempt him from having his action dismissed for failure to comply with the order, pending the appeal. And if a motion to dismiss is made, the better practice is to enlarge it before the appellate tribunal, to be dealt with after the main question has been determined. *Bennett* v. *Empire Printing and Publishing Co.*, 15 P. R. 430.

Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive. Carter v. Stubbs, 7 Q. B. D. 116, followed. Rule 1251 does not give a plaintiff any further time for or relieve him from the obligation of putting in his security for costs; it only enables him to remove the stay effected by the order, for the sole purpose of making a motion for judgment under Rule 739; and if he does not succeed in that motion, he must obey the order by putting in the full security. But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under Rule 739 and appealed to a Judge in Chambers, and afterwards to a divisional court from the order made upon such motion, without taking the objection that the action was at an end:—Held, that he had waived the objection; and a bond filed after the time limited was allowed. *Hollender* v. *Ffoulkes*, 16 P. R. 225. Upon appeal to the divisional court the decision was varied by extending, pursuant to Rule 485, the time for giving security. *Hollender* v. *Ffoulkes*, 16 P. R. 315.

On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks and in default that the action should be dismissed with costs, unless the court or judge on special application for that purpose should otherwise order. Within the four weeks the plaintiff obtained a summons, with a stay of proceedings, for "further time to perfect security for costs," and on the 10th December, 1885, an order was made extending the time till the 23rd December, 1885, but not providing that the dismissal of the action should be the result of non-compliance with its terms. Security was not furnished within the time so extended, and it was contended that after that the action was dead, and there was no jurisdiction to make an order in it:—Held, that the action never became dismissed under either of these orders, and that a motion to dismiss was regular and necessary. Whistler v. Hancock, 3 Q. B. D. 83, King v. Davenport, 4 Q. B. D. 402, distinguished. *Bank of Minnesota* v. *Page*, 14 A. R. 347.

Justice of the Peace—*Time.*]—An order under 53 Vict. c. 23 for security for costs in an action against a justice of the peace should not limit a time within which security is to be given nor provide for dismissal of the action in default; the order should be simply "that the plaintiff do give security for the costs of the defendant to be incurred in the action." *Thompson* v. *Williamson*, 16 P. R. 368.

An order under Rule 1244 for security for costs in an action for a penalty may properly

contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms. Thompson v. Williamson, 16 P. R. 368, distinguished. The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff:—Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff. *Ashcroft* v. *Tyson*, 17 P. R. 42.

See Lea v. *Lang*, 18 P. R. 1.

(f) *Time for Applying.*

Security granted, in an action proceeded with by the plaintiff's attorney, in the name of the plaintiff, for costs, before issue joined, and delay accounted for. *O'Bierne* v. *Gowin*, 1 C. L. Ch. 16.

Security refused where defendant had pleaded, and applied after notice of trial, without accounting for his delay. *McDade d. O'Connors* v. *Dafoe*, 1 C. L. Ch. 18.

The defendant may, under certain circumstances, demand security, with a stay of proceedings, even after plea. Generally, he must apply as soon as he reasonably can after knowledge of the fact of the plaintiff's residence abroad. *Wood* v. *Bellisle*, 1 C. L. Ch. 130.

An application made on the 23rd January, after issue joined, and on an affidavit sworn on the 4th, was refused. *Morgan* v. *Hellems*, 1 P. R. 363.

In ejectment, security for costs cannot be obtained before appearance, as in other actions; and the appearance does not put the cause at issue, so as to prevent the application. *Crowe* v. *McGuire*, 3 L. J. 205.

Held, that the defendant in ejectment not having appeared could not move for security. *O'Reilly* v. *VanEvery*, 2 P. R. 184.

In ejectment, commenced 26th February, 1861, appearance entered 18th March following, defendant, on 19th of same month, demanded security for costs, because plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when the plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial:—Held, that an application by defendant for security after service of the notice of trial was too late. *Fogo* v. *Pypher*, 3 P. R. 309.

An appearance was entered on 13th September, 1862, declaration filed on 29th, order for security for costs obtained on 7th October, 1862, on the ground that plaintiff had left Canada, and order rescinded on 11th March, 1863, on the ground of his return. Plaintiff again left Canada in October, 1863. An application was again made in March, 1864, for security:—Held, not too late: there being nothing to shew when defendant first had notice of plaintiff leaving in October, 1863, or that defendant had taken any steps in the cause, between that date and his application. *Somers* v. *Carter*, 3 P. R. 328.

A delay in applying for security from the 2nd July, when the interpleader issue was delivered, until the 11th August, was held fatal. *Lovell* v. *Wardroper*, 4 P. R. 265.

An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security given, must be made promptly after declaration served, according to the rule in ordinary cases. *Morris* v. *Leslie*, 5 P. R. 141.

Security must be applied for before the time for answering has expired. *Smith* v. *Day*, 2 Ch. Ch. 456.

The filing of an answer is a waiver of any claim for security. *Ib.*

The application may be made after the expiry of the time for answering. *Ganson* v. *Finch*, 3 Ch. Ch. 296.

Application for security for costs in this court must be made within the time allowed for filing statement in defence, except under special circumstances. *Wood* v. *The Queen*, 13 C. L. J. 16.

A defendant does not waive his right to security for costs by filing his answer, when the grounds entitling him to such an order are unknown to him at the time. *Pendry* v. *O'Neil*, 7 P. R. 52.

After an order for security for costs had been made, the cause came on to be heard, and was postponed on terms which were arranged at the time. Subsequently an application for further security was made:—Held, that such an order could not be made at this stage, as the application should have been made at the hearing. *Simon* v. *Banque Nationale*, 7 P. R. 422.

A motion for security for costs may be made at any time before issue is joined. *Caswell* v. *Murray*, 9 P. R. 192.

In a penal action brought by a common informer, an order for security for costs, under s. 71 of the C. L. P. Act, was held to have been properly made after the statement of defence had been delivered, and after the parties had been examined, as authorized by Rule 429, O. J. Act, but, held, that the order should direct that security should be given "for the costs to be incurred in such suit or action," following the words of s. 71. *Budworth* v. *Bell*, 10 P. R. 544.

(g) *Waiver of Right.*

Delay With Knowledge.]—The defendant was aware of the insolvency of the plaintiff before the action was commenced, but did not apply for security for costs until after issue was joined, alleging that he was not before aware that the plaintiff had not obtained his discharge.—Held, that the defendant had waived his right to security. *Robertson* v. *McMaster*, 8 P. R. 14.

New Plaintiff.]—Where a defendant had by answering waived his right to security, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction, it was held

that the defendant was entitled to security against the new plaintiff. *Thompson* v. *Callagan*, 3 Ch. Ch. 15.

Pleading in Abatement.]—A defendant, having applied for security for costs, does not waive his application by pleading in abatement before the rule is returnable. *Hastings* v. *Champion*, 6 O. S. 29.

Taking Steps in Action.]—A defendant, after plea, obtained an order to stay proceedings until security for costs was given to him, and the plaintiff delivered him a bond for such security, and at the same time gave notice of trial, and defendant signed an agreement to admit documents at the trial, but afterwards returned the bond, and gave notice that he would move to set aside plaintiff's proceedings if he went to trial. The plaintiff, however, tried his cause:—Held, that defendant had waived any irregularity or insufficiency in the bond. *Doe d. Leonard* v. *Myers*, 2 U. C. R. 382.

Taking Steps in Action.]—A petition by the defendant to reduce the amount of alimony allowed in the suit, came on to be heard on the 5th of October, when counsel for the plaintiff appeared and procured an enlargement for two weeks to answer the defendant's affidavits, and on the same day demanded and received copies of them. On the 19th October, counsel appeared and obtained a further enlargement for two weeks, but before the time expired applied for an order for security for costs, on the grounds stated in the report:—Held, without expressing an opinion on the merits, that the plaintiff had waived her right, if any, to such security. *Knowlton* v. *Knowlton*, 8 P. R. 400.

Taking Steps in Action.]—The defendant demanded copies of affidavits to be used on an injunction motion, and subsequently obtained an enlargement of the motion:—Held, not a waiver of his right to security for costs, because the facts on which to base such motion for security were unknown to him at the time of the demand and enlargement. *Hathway* v. *Doig*, 9 P. R. 91.

Time to Answer.]—Security will not be ordered to be given where a defendant has obtained further time to answer. *Arthur* v. *Brown*, 3 Ch. Ch. 396.

(h) *Miscellaneous Cases.*

Action on Bond.]—On an application for liberty to sue upon the bond given to secure the costs of an appeal against a decree of this court:—Held, that the party moving must shew a demand from, and refusal of the costs by, the sureties named in the bond. *Stokes* v. *Crysler*, 1 Ch. Ch. 14.

Action on Bond.]—On an application by defendant for leave to sue on the bond given in this case for security for costs, the plaintiff being resident out of the jurisdiction:—Held, that the decree must be produced, to shew that the defendants were ordered to receive their costs. *Roaf* v. *Topping*, 1 Ch. Ch. 14.

Admissions of Surety in Other Proceedings—*Refiling Bond.*]—A bond was filed by the defendant for the purposes of an appeal to the court of appeal. Leave to appeal was, however, necessary, and had not been obtained before filing the bond which was, therefore, on the 4th April, 1891, disallowed. Leave to appeal was afterwards obtained, and the same bond was, on the 18th September, 1891, refiled without the consent of the sureties, and was again disallowed:—Held, rightly so; for the sureties might object that the bond had been improperly used by the defendant; and the respondent was entitled to a security free from any objections of that nature. The plaintiff objected to the bond on the ground of the insufficiency of one of the sureties, and in support of that objection read the sworn statements of such surety in another action:—Held, that such statements were admissible against the defendant, who was putting forward the surety as a person of substance. *Jones* v. *Macdonald*, 14 P. R. 535.

Affidavits in Opposition.]—A party opposing the allowance of a surety's bond for security for the costs of an appeal, may read affidavits in opposition to the surety's affidavit of justification. *Campbell* v. *Royal Canadian Bank*, 9 C. L. J. 160.

Appearance.]—Defendant's attorney entering common bail, is a good appearance to sustain a motion for security. *Grace* v. *Meighan*, Dra. 187.

Effect of Order.]—The order for security for costs under Rule 431, O. J. Act, is a stay of proceedings, and a Judge has no power to set it aside when once properly issued and sign final judgment under Rule 80, O. J. Act. *Bank of Nova Scotia* v. *LaRoche*, 9 P. R. 503.

Held, that a præcipe order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the præcipe order for security for costs was refused. *Doer* v. *Rand*, 10 P. R. 162.

Since the passing of Con. Rule 1251, the practice sanctioned by Doer v. Rand, 10 P. R. 165, and Anglo-American Casings Co. v. Rowlin, ib. 391, is no longer applicable, and where a plaintiff, against whom a præcipe order for security for costs had been obtained, moved to set it aside and for judgment under Con. Rule 739 without paying $50 into court, under Con. Rule 1251 his motion was dismissed. *Payne* v. *Newberry*, 13 P. R. 354.

Where there was an admission by the defendant of the debt sued for, sworn to and not contradicted, and the writ of summons was specially indorsed so as to enable the plaintiffs to move for judgment under Rule 739, an order for security for costs obtained by the defendant on præcipe, after appearance, the plaintiffs being out of the jurisdiction, was set aside, notwithstanding that the plaintiffs might have paid $50 into court under Rule 1251 and proceeded to move for judgment. Doer v. Rand, 10 P. R. 165, followed. Payne v. Newberry, 13 P. R. 354, not followed. *Thibaudeau* v. *Herbert*, 16 P. R. 420.

An order for security for costs made pursuant to Rule 1199, and issued according to Form 95, has the effect of staying all further proceedings until security is given; and while such order stands, it is not competent for the plaintiff to proceed with a pending motion for

an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected. *Weekes v. Underfeed Stoker Co. of America*, 19 P. R. 299.

Examination of Surety — *Affidavit of Justification—Partnership.*]—A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas* v. *Blackey*, 14 P. R. 504.

Form of Order.]—The order for security should name the sum for which the bond for security is to be given. *Ganson* v. *Finch*, 5 Ch. Ch. 296.

Increasing Security.]—The usual præcipe order for security for costs had been taken out by the defendant and duly complied with by the plaintiff. Subsequently the cause was partially heard, but was adjourned for three months owing to the Judge being required to open another sittings of the court. The defendant thereupon, seeing that the costs far exceeded the security given, applied for an order for further security. It was not shewn that the defendants could not have foreseen that the $400 would not cover the costs, and the application was refused. *Bell* v. *Landon*, 9 P. R. 100. See *S. C.*, pp. 161, 162.

Judicial Notice of Territorial Divisions.]—Held, that by the Provincial statute, 16 Vict. c. 152, the whole Province having been set off into territorial divisions, the court is bound to take notice of such subdivisions of the country as that Act makes, and that therefore security for costs should be given, where the plaintiff is stated in the bill to be resident in Rigaud, county of Vaudreuil. *McDonald* v. *Dicaire*, 1 Ch. Ch. 34.

Limiting Time.] — On an application to limit the time for putting in security for costs, a plaintiff was allowed the same length of time as she would have had for answering the bill, if she had been a defendant, such time to date from the application to limit the time. *Grant* v. *Winchester*, 6 P. R. 56; *S. C.*, 9 C. L. J. 193.

Money Paid in With Defence.]—The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into court $150, and said that the same was sufficient, &c.:—Held, that the money paid into court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers* v. *Loos*, 11 P. R. 118.

See Bell v. *Fraser*, 12 A. R. 1; *Walmsley* v. *Griffith*, 11 P. R. 139.

Noting Bill After Security.]—Where a defendant obtains an order for security it is not necessary to file affidavits shewing that the order has been complied with before the bill is noted pro confesso. *Bolster* v. *Cochrane*, 2 Ch. Ch. 327.

Payment into Court.]—The defendant having obtained on præcipe an order for security for costs, a local Judge allowed the plaintiff to pay $200 into court in lieu of giving a bond for $400, and afterwards ordered a further payment of $50, but refused to increase the latter sum. An appeal from the order of the local Judge was dismissed, as $250 appeared to be sufficient: — Quære, whether there is any power to fix the amount at less than $400, where a præcipe order under Rule 431, O. J. Act, has been taken out. *North* v. *Fisher*, 10 P. R. 582.

An order amending a præcipe order for security for costs, issued under Rule 431, O. J. Act, by reducing the security to $200, cash paid into court, was reversed, where no reason was shewn for making the reduction:—Held, that Rule 429, O. J. Act, does not authorize the reduction of the sum named in Rule 431, O. J. Act. *Riddell* v. *McKay*, 11 P. R. 459.

Præcipe Order.]—An order for security for costs can only be obtained upon præcipe when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. *Wilson* v. *Wilson*, 6 P. R. 152.

Præcipe Order — *Increased Security — Election — Delay.*] — Increased security for costs refused where defendant had taken out the ordinary præcipe order, and could have foreseen the necessity of a commission to England, that being the ground of the application. *Trevelyan* v. *Meyers*, 15 C. L. T. Occ. N. 135.

See, also, *D'Ivry* v. *World Newspaper Co.*, 17 C. L. T. Occ. N. 82.

Several Defendants.] — Where defendants took separate orders for security, and the plaintiff obtained an ex parte order giving him liberty to pay $400 into court, instead of filing security by bond, the money so paid in was held to be security for all defendants, though the order recited one only of the orders for security. *Bolster* v. *Cochrane*, 2 Ch. Ch. 327.

Time to Plead.]—Held, that where a summons for security for costs, with a stay of proceedings, was obtained, followed by an order, also containing a stay of proceedings, the defendant has the same number of days after security given in which to plead that he had at the time the proceedings were stayed by the summons. *Ryley* v. *Parmenter*, 2 C. L. J. 268.

See COURT OF APPEAL, II. 1.

VIII. TAXATION OF COSTS.

1. *In General.*

Arbitrator's Fees.] — Arbitrator's fees may be referred to the master for taxation. *Scott* v. *Grand Trunk R. W. Co.*, 10 L. J. 72.

Award Giving Costs.]—Where the arbitrators having authority so to do awarded costs, and their award had not been moved against, it was the duty of the taxing officer to tax costs. *Re Smith and City of Toronto*, 13 P. R. 479.

Certificate—*Filing.*] — Upon the issuing of a certificate of taxation a taxing officer is functus officio, and it is only when the court

requires information that he should further certify. *Langtry* v. *Dumoulin*, 10 P. R. 444.

An appeal from a certificate of taxation will not lie until the certificate has been filed. *Ib.*

Under Rules 437 and 448, O. J. Act, a taxing officer may issue a certificate of his ruling on any points in dispute pending the taxation, and upon it an appeal may be had, but his right to issue such certificate ceases when he has issued his final certificate. *Ib.*

Costs of Taxation.]—Semble, that if defendant does not rule the plaintiff, or attend taxation, he will only be allowed a revision on payment of costs of it and of revision. *Halfpenny* v. *Kelly*, 1 C. L. Ch. 174.

Costs of Taxation.]—Where defendant asks the plaintiff for the amount of costs in order to settle, and the plaintiff merely gives the amount, and refuses a bill in detail, defendant will not be allowed the costs of an application for taxation:—Semble, it might be otherwise if the defendant paid the amount of costs into court. But the plaintiff may be compelled to refer his bill for taxation, and will not be allowed costs for obtaining such order. *Sutherland* v. *Rutheste*, 1 C. L. Ch. 178.

Costs of Taxation.] — The defendant paid the plaintiffs the amount of their claim and costs, as between party and party, the day before commission day. He afterwards taxed the costs, when more than one-sixth was struck off:—Held, that he was not entitled to the costs of taxation under C. S. U. C. c. 35, s. 31. *Bank of Montreal* v. *Hillard*, 7 P. R. 17.

Delivery of Bill.]—The defendant is not entitled to the delivery of any bill he is not entitled to have taxed; and where a bill has been taxed it will not again be referred, even with other or subsequent costs, except on proof of special circumstances. *Bell* v. *Wright*, 2 Ch. Ch. 96.

An application to tax costs should be on petition and not by motion. *Ib.*

Discontinuance.] — Where the plaintiff serves a notice of discontinuance under Rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs which may exceed the defendant's general costs. Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's costs and pay them to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

Evidence on Taxation.] — The taxing officers have the power to call for evidence on taxations pending before them. *Williamson* v. *Town of Aylmer*, 12 P. R. 129.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendant until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer, should report to a Judge in chambers. *Ib.*

False Affidavit of Increase.] — Upon the taxation of the plaintiff's costs of the action, he made the usual affidavit of increase, and was thereupon allowed for disbursements of sums of money as witness and counsel fees. The taxation was closed, and the certificate issued without objection. The defendant afterwards discovered that the fees had not been paid as stated in the affidavit, and made a motion to set aside the certificate and have the items in question disallowed:—Held, that neither the master in chambers nor a Judge in chambers had jurisdiction to entertain the motion. Upon a motion to a Judge in court:—Held, that the items should be disallowed. Hornick v. Romney, 11 C. L. T. Occ. N. 329, followed. *Harding* v. *Knust*, 15 P. R. 89.

Fixing Costs—*Bill.*]—When the registrar is directed to fix the amount of interlocutory costs and to aid him in doing so a bill of costs is prepared and taxed, the bill of costs should be filed. *Saunders* v. *Furnivall*, 2 Ch. Ch. 55.

Half-hour's Grace.] — One half-hour's grace is always allowed for both parties to appear under an appointment to tax. *Landon* v. *Stubbs*, 3 L. J. 70.

Misnomer of Witness—*Payment before Taxation.*]—A misnomer of a witness, David instead of Daniel, would be immaterial. *Ham* v. *Lasher*, 24 U. C. R. 357.

As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vict., and the master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries. *Ib.*

All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay. *Ib.*

Notice of Taxation.] — The judgment having been entered without notice of taxation, the court set it aside as irregular, in order to give defendant the advantage of a certificate under 43 Eliz. c. 6, which had been obtained after judgment, and therefore too late. *Davis* v. *Barnet*, 10 U. C. R. 501.

Want of notice of taxation is not in all cases a sufficient reason for setting aside judgment. *Riach* v. *Hall*, *Patterson* v. *Hall*, 11 U. C. R. 356.

Semble, that it is no ground. *Felton* v. *Conley* 1 P. R. 319.

Notice of Taxation—*Lapse of Appointment—Vacation.*]—The plaintiff's costs were being taxed by one of the taxing officers at Toronto, when he applied to stop the taxation in order that he might have the order for taxation varied. The taxation was stopped, the officer gave up to the plaintiff the bill of costs which he had brought in for taxation, and nothing further was done:—Held, that the effect of this was that the appointment to tax and the taxation lapsed, and no further proceedings could have been had without a fresh appointment; and, therefore, the taxing officer was not thereafter seized of the taxation, and the local registrar in whose office the action had been begun and was pending could properly issue his appointment, and tax the plaintiff's costs. *Cousineau* v. *City of London Fire Ins. Co.*, 13 P. R. 36.

Held, that the taxation was properly had during the long vacation. *Ib.*

The defendants objected that they had not a reasonable notice of the taxation by the local registrar, but did not ask for an enlargement of it, relying instead on objections they took to its proceeding at all, and the taxation proceeded in their absence:—Held, that having taken the risk they must also take the result. *Ib.*

Notice of Taxation—*Retaxation.*]—The defendant obtained an order dismissing the action with costs for non-prosecution, upon notice to the plaintiff, who did not appear upon the motion. The defendant did not serve the plaintiff with a copy of the order, and went on and taxed his costs, without notice to the plaintiff, and issued execution for the amount taxed:—Held, no ground for setting aside the execution that the order had not been served before the taxation. Hopton v. Robertson, 23 Q. B. D. 126*n*, distinguished. Held, also, that the absence of a notice of taxation was not an irregularity entitling the plaintiff to set aside the execution, but only to a retaxation of the costs. Lloyd v. Kent, 5 Dowl. 125, followed. *Cranston* v. *Blair*, 15 P. R. 167.

Order Giving Costs.]—Evidence cannot be received by a taxing officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction. *Keam* v. *Yeagley*, 6 P. R. 60.

Order Giving Costs.]—The defendant brought into court, with his defence, a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial finding that it was sufficient, directed judgment to be entered for the defendant, with costs:—Held, that the Judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into court. *Small* v. *Lyon*, 10 P. R. 223.

Overcharge of Fees.]—A Judge in chambers may make an order on a deputy clerk of the Crown to refund costs improperly received. *McIntosh* v. *Pollock*, 2 C. L. Ch. 209.

Party not Appearing.]—Where a party does not appear on notice of taxation, he cannot, perhaps, object to the amount of items taxable in the discretion of the master, but he is not precluded as to items in toto, upon the allowance of which the master has no discretion. *Conger* v. *McKechnie*, 1 C. L. Ch. 209.

Persons Entitled to Attend.] — The taxing officer has a discretion as to the attendance of parties claiming a right to attend on taxation, and his discretion will not be lightly interfered with. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Persons Entitled to Attend.]—G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue:—Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other as against G. if he succeeded in the issue. *Gall* v. *Collins*, 12 P. R. 413.

Questioning Affidavit of Disbursements.]—The master may examine into the truth of an affidavit of disbursements for witnesses' expenses, &c., or counsel's receipt for fees. *Doe d. Boulton* v. *Switzer*, 1 C. L. Ch. 83.

Taxation to Complete Judgment.]—There is no need for local officers, when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they as local officers may also do), to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation, and the full discharge of their functions as taxing officers, when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole with their signature, which is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then functi officiis. *Cuerrier* v. *White*, 12 P. R. 571.

Any objection to the taxation must be carried in in writing, before the signature of the officer is affixed. *Ib.*

Remarks upon the former practice at law and equity as to allocaturs and certificates of taxation. *Ib.*

Taxing Officer's Powers.]—Where the master is directed by a decree to tax the costs of the suit, he has no jurisdiction to decline taxing them, even if he find that the amount due does not exceed $200, and that the suit might have been brought in the county court. *McLeod* v. *Millar*, 12 Gr. 194.

Vouchers.]—Taxing officers should not allow any items for which there are not proper vouchers, and these vouchers, (except briefs, &c.), should be filed. *Wilson* v. *Moulds*, 4 P. R. 101.

On revision of a taxation by deputy clerks of the Crown, the master is not to allow any items which are not verified by vouchers which have been filed on the original taxation. *Ib.*

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2. *Appeal from Taxation.*

Appeal Pending Taxation.]—The practice upon appeals from pending taxations of costs to the master in chambers, or the master in ordinary, under Con. Rule 854, should be simple and inexpensive; there is no necessity for a formal order, or a counsel fee, upon such an appeal. *Re Nelson*, 13 P. R. 30.

It is not desirable that any taxation should come more than once by way of appeal before a Judge; and where there was an appeal pending the taxation to the master in ordinary, and an appeal from his order to a Judge in chambers, the latter was ordered to stand over till after the close of the taxation. *Ib.*

Appeal Pending Taxation.]—An appeal by the defendant in an action for alimony from the certificate of a taxing officer, upon taxation of the plaintiff's costs of the action and reference between solicitor and client, as directed by the judgment. Pending the taxation there was an appeal by the plaintiff to the master in chambers under Rule 854, upon which the master made an order allowing the appeal. The taxing officer in his certificate simply followed the order of the master, and the present appeal was in respect only of the items in question before the master. The order of the master was not appealed from, and the time for appealing from it had elapsed:—Held, that the appeal under Rule 854 should be looked upon as an intermediate thing and directory in character, and that the defendant was not precluded from appealing from the certificate of the taxing officer because he did not appeal from the order of the master. Re Nelson, 13 P. R. 30, followed. Re Monteith, 11 P. R. 361, distinguished. *Heaslip* v. *Heaslip*, 14 P. R. 21, 105.

Appeal to Divisional Court.]—An appeal lies to a divisional court from an order of a Judge in chambers upon appeal from a certificate of taxation of costs. The discretion of a taxing officer as to the amount of counsel fees will not be interfered with upon appeal. *Talbot* v. *Poole*, 15 P. R. 274.

Costs of Appeal—*Objections.*]—Upon an appeal to a Judge in chambers from the taxation of costs by a local taxing officer, where the bill was referred to one of the taxing officers at Toronto as upon a revision:—Held, that there should be no costs of the appeal and revision, unless substantially entire success was with one party or the other. *Platt* v. *Grand Trunk R. W. Co.*, 12 P. R. 273.

An appeal should not be allowed as to any item not included in the objections put in to the taxation. *Ib.*

Court of Appeal Costs.]—Quære, as to whether an appeal from taxation of the costs of an action in the court of appeal should not have been to a Judge of the court of appeal, instead of to one of the chancery division. *Petrie* v. *Guelph Lumber Co.*, 10 P. R. 600.

Divisional Court Jurisdiction.] — An appeal from the taxation of costs where the amount in question is less than $40, should not be brought before a divisional court. *Re McRae and Ontario and Quebec R. W. Co.*, 12 P. R. 327.

Extending Time — *Objections.*] — Time for appealing from taxation extended, as a matter of discretion, where, by the mistake of the solicitor, the appeal was at first brought on in due time in the wrong forum, and after that, but too late, in the proper forum. Where the principle on which the taxing officer acts is objected to, that is to say, his mode or method of proceeding in taxing the bill, it is not necessary for the party proposing to appeal to carry in written objections before the officer, as provided for by Rule 1230, to enable him to review his taxation, under Rule 1231. *Clark* v. *Virgo*, 17 P. R. 260.

Forum—*Court of Appeal—Costs.*] — The appeal from the taxing officer's taxation of costs in the court of appeal is to a Judge of the high court, not of the court of appeal. Petrie v. Guelph Lumber Co., 10 P. R. 600, applied and followed. *Holmes* v. *Bready*, 18 P. R. 79.

Forum.]—An appeal from a master's certificate of costs should be to the court, not to a Judge in chambers. *Grahame* v. *Anderson*, 2 Ch. Ch. 303.

Informal Certificate—*Notice.*]—Where no formal certificate of the result of a taxation by a local registrar of the party and party costs was filed, but the bill itself, with a memorandum at the end signed by the registrar shewing the result, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and it was admitted that execution had issued upon such memorandum:—Held, that the appeal should not be barred because no more formal certificate was filed. Two clear days' notice of such an appeal is sufficient. Exchange Bank v. Newell, 19 C. L. J. 253, distinguished. *McCallum* v. *McCallum*, 11 P. R. 179.

Informal Certificate.] — An informal certificate of taxation was written at the end of a bill of costs, shewing that it was taxed at so much, initialled by the taxing officer, and "filed" in his office: — Held, that this was not a sufficient filing of a certificate of taxation for the purposes of appeal, to satisfy the rule laid down in Langtry v. Dumoulin, 10 P. R. 444. McCallum v. McCallum, 11 P. R. 179, distinguished. *Gall* v. *Collins*, 12 P. R. 413.

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

Objections.]—Rule 447 applies to a taxation of costs conducted by a local taxing officer under the powers given him by 48 Vict. c. 13, s. 22 (O.), and an appeal from such taxation does not lie unless objections are carried in before the officer, as required by that rule. Quay v. Quay, 11 P. R. 258, followed. *Snowden* v. *Huntington*, 12 P. R. 248.

Objections.]—A party should not be deprived of his appeal from the taxation by reason of the officer having issued his certificate before the party has carried in his objections, as required by Rule 1230, where he has not delayed, and has acted in good faith, relying on the officer not issuing his certificate until after the taxation of interlocutory costs. Cuerrier v. White, 12 P. R. 571, distinguished. *Cousineau* v. *Park*, 15 P. R. 37.

Quantum and Quoties.]—Upon appeals from taxation of costs the court will not interfere with the discretion of the taxing officer as to the quantum or quoties of fees; and this rule covers any question of distribution or allotment of charges among different cases or branches of a case. *Conmee* v. *North American Railway Contracting Co.*, 13 P. R. 433.

Question of Principle.] — An appeal from taxation of costs was entertained in chambers where the amount involved was only $5.32, for the reason that a question of principle was involved. *Monk* v. *Benjamin*, 13 P. R. 256.

Referring Bill to Toronto Officer.]—It is a convenient practice, when any case is made on appeal from taxation as to several items, or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto, as upon a revision. *Quay* v. *Quay*, 11 P. R. 258.

Time for Appeal.] — Where costs have been taxed and the amount entered in an order, an appeal from the taxation must be disposed of before the issue of the order, otherwise it is too late. *St. Michael's College* v. *Merrick*, 15 C. L. J. 111.

Time for Appeal.]—Appeals from taxation by local officers must be brought on within eight days from the date of the taxing officer's certificate. *Stark* v. *Fisher*, 11 P. R. 235.

Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of masters and local judges, as was held in Stark v. Fisher, 11 P. R. 235, but the time for appealing may be enlarged by the master in chambers or a Judge. *Quay* v. *Quay*, 11 P. R. 258.

Appeals from taxation should be brought on within a reasonable time, and within eight days, the time limited for appeals under Rule 427, O. J. Act, is a reasonable time. Stark v. Fisher, 11 P. R. 235, and Quay v. Quay, 11 P. R. 258, approved. *Ireland* v. *Pitcher*, 11 P. R. 403.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation. *Re O'Donohoe*, 12 P. R. 612.

Unnecessary Appeal.] — As there was no need to appeal in this case, and the application might have been made in chambers, no costs of it were given. *Fouchier* v. *St. Louis*, 13 P. R. 318.

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3. *Revision of Taxation.*

If plaintiffs on verdict are allowed only district court costs, and defendant neglect to take out a rule to be present at the taxation, the court will not direct a revision that defendant's costs may be deducted. *McCall* v. *Cameron*, 1 U. C. R. 414.

A Judge in chambers can order a revision of taxation. *Doe d. Boulton* v. *Switzer*, 1 C. L. Ch. 83.

A revision was granted, as defendant's attorney was not present at the taxation, and some of the items were questionable. *Halfpenny* v. *Kelly*, 1 C. L. Ch. 174.

Defendant's costs not having been taxed with sufficient liberality, as between attorney and client, a revision was ordered on that ground. *Cameron* v. *Campbell*, 1 P. R. 170.

A revision of taxation was ordered on contradictory affidavits as to the payments sworn to in the affidavit of disbursements. *Smith* v. *McKay*, 1 P. R. 178.

Where, on the 27th June, the master, to whom certain bills had been referred, certified that there was £30 10s. due by the attorneys to their clients, which sum the clients on 7th July received from the attorneys under and pursuant to the allocatur, a summons obtained on 26th August for a revision, upon the ground that certain retainers had been improperly allowed, was discharged. *In re Smith & Henderson*, 9 L. J. 265.

Quære, whether under C. L. P. Act, 1856, s. 12, a Judge's order is not necessary to have taxation revised by the principal clerk. *Cochrane* v. *Scott*, *Cochrane* v. *Ross*, 3 P. R. 32.

Judgment was entered in an outer county, and full costs taxed. On the 26th July, 1860, the taxation was revised in Toronto, under C. L. P. Act, s. 331, and £2 15s. 7d. struck off. On the 2nd August the Judge who tried the cause gave a certificate or memorandum, stating, among other things, that he declined to certify that it was a proper case to be withdrawn from the inferior court, and on this the taxing officer, without any notice to or consent of the plaintiff, on the 3rd August, 1860, reduced the costs to division court costs and gave a certificate that he had done so, which was served on the plaintiff's attorney. In October, 1862, defendant sued the plaintiff for enforcing the execution for too much, which was the first notice plaintiff had of the reduction, and some time after that the master made an entry on the roll of this last revision, and the reduction thereby of the costs to £11 3s. 9d., adding "therefore let the said plaintiff have execution therefor," &c.:—Held, that the proceeding on the 3rd August, which was not shewn to have been a continuation or adjournment of the revision of the 26th July, and the subsequent entry on the roll was wholly unauthorized, and must be set aside. *Spiers* v. *Carrique*, 23 U. C. R. 585.

Where the taxation is not objected to before the master, the court is slow to interfere, but —Held, that the circumstances shewn in this case sufficiently explained the omission. *Stewart* v. *Jarvis*, 27 U. C. R. 467; 2 C. L. J. 330.

The bill of costs in this cause having been taxed by the local master, the plaintiff paid the amount taxed without protest:—Held, that he still was entitled to a revision before the master at Toronto. *Kormann* v. *Tookey*, 6 P. R. 112; *Elliott* v. *Northern Assurance Co.*, 10 C. L. J. 16.

An order to retax a bill of costs, on the ground that, through inadvertence, no person attended on behalf of the plaintiff, was refused, no improper items being pointed out in the bill as taxed. *Eastman* v. *Eastman*, 4 C. L. J. 322.

The taxing officer on revision of bills of costs taxed by a local master, has power under general orders 311 and 312, not only to strike out items improperly allowed, but also to restore items improperly struck out, and generally to review the taxation. *Keam* v. *Yeagley*, 6 P. R. 60.

A prohibition was granted restraining a Judge of the division court from proceeding upon an order for revision of costs, the application for such order not having been made within fourteen days from the judgment, and such order being in this case equivalent to a reversal of the judgment on the question of costs. *Bell* v. *Lamont*, 7 P. R. 307.

Held, that an application to a Judge in chambers to review a taxation of a sheriff's bill of costs taxed under R. S. O. 1877 c. 68, s. 48, was properly made under R. S. O. 1877 c. 68, s. 52, as Rule 477, applied only to the Toronto taxing officers appointed under Rule 438. *Grant* v. *Grant*, 10 P. R. 40.

A certain sum of money had been paid into court as security for the defendants' appeal to the court of appeal, which was afterwards abandoned; and by an order made on the consent of both parties it was provided that the plaintiff's costs should be paid out of this money after taxation:—Held, that this money was a fund in court within the meaning of Con. Rule 1207, and there should be a revision by one of the taxing officers at Toronto of the taxation of costs by the local registrar. *Cousineau* v. *City of London Fire Ins. Co.*, 13 P. R. 36.

See APPEAL, IX. 1 — ARBITRATION AND AWARD, IV.—ARREST, II. 2 (d)—COMPANY, X. 6 (c)—COURT OF APPEAL, II. 1, 3—CRIMINAL LAW, VIII. 3—DAMAGES, XV.—DEFAMATION, IV.—DISTRESS, III. 3 (a) — DIVISION COURT, VI. XIV. (b) — DOWER, I. 1, 2 — EJECTMENT, VI. 4 — EXECUTORS AND ADMINISTRATORS, III — FRAUD AND MISREPRESENTATION, III. 3 (c) — HUSBAND AND WIFE, I. 2 — INTERPLEADER, II. 3—LACHES, II.—LIEN, V. 3—MALICIOUS PROCEDURE, I. 3 — MANDAMUS, I. 3—MORTGAGE, IV. 3, VIII. 2, X. 4, XIII. 2, XIV. 1—MUNICIPAL CORPORATIONS, IV. 2, XIX. 5 (b) — PARLIAMENT, I. 11 (b) — PARTITION, IV. — PATENT FOR INVENTION, IV. 1—PAYMENT, I. 2 — PLEADING — PLEADING AT LAW BEFORE THE JUDICATURE ACT, III. V. 3 — PLEADING IN EQUITY BEFORE THE JUDICATURE ACT, III. 1 (d), IV. 1—PLEADING SINCE THE JUDICATURE ACT, IV.—PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XIII. 2 — PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, V. XIV. 1 (a), 3 (b), XV. 2 (a)—PRACTICE SINCE THE JUDICATURE ACT, V. 2 (b)—QUIETING TITLES ACT, IV.—RAILWAY, XV. 5 (b)—RECEIVER, IV. 1—REPLEVIN, II. 1—SEDUCTION, I. 1—SESSIONS, II. 4—SHIP, V. 1 — SOLICITOR, VI. — SPECIFIC PERFORMANCE, V. 15 (a)—SUPREME COURT OF CANADA, IV. 2—SURROGATE COURTS, II.—TRUSTS AND TRUSTEES, V. 3, VII. 3.

COSTS IN THE CAUSE.

See COSTS, III. 3.

COSTS OF THE DAY.

See COSTS, III. 4.

CO-SURETY.

See PRINCIPAL AND SURETY, VI. 1.

COUNSEL FEES.

See COSTS, III. 5.

COUNTERCLAIM.

See COSTS, III. 5—DISTRESS, III. 8—EJECTMENT, VI. 2 (d)—PLEADING—PLEADING SINCE THE JUDICATURE ACT, V.—SET-OFF, VII. 3.

COUNTERMAND.

See TRIAL, VII. 2.

COUNTY COURTS.

I. CLERK, 1458.

II. JUDGE, 1458.

III. JURISDICTION,

1. *In General*, 1460.
2. *Equitable Jurisdiction*, 1466.
3. *Liquidated or Ascertained Amount*, 1468.
4. *Replevin*, 1471.
5. *Title to Land*, 1472.

IV. PRACTICE AND PROCEDURE,

1. *In General*, 1475.
2. *Appeal from County Court*,
   (a) *When it Lies*, 1482.
   (b) *Procedure on Appeal*, 1489.

V. TRANSFER TO HIGH COURT, 1496.

I. CLERK.

Privilege from Arrest.]—A clerk of the county court, being also ex officio deputy clerk of the Crown and clerk of assize, is privileged from arrest only while engaged in his official duties, or while going to and returning from his office, and this court therefore discharged a rule to prohibit the county court Judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodson*, 27 U. C. R. 263.

II. JUDGE.

Appointment — *Deputy Judge.*]—Held, that the commission in this case appointing a deputy Judge during pleasure and the absence of the county Judge, was validly issued under R. S. O. 1877 c. 42, and that it was not essential to enable the deputy Judge to act that the county Judge should be absent from the county. *Regina* v. *Fee*, 3 O. R. 107.

Arrest.]—A Judge of a county court cannot be arrested upon mesne or final process. *Adams* v. *Ackland*, 7 U. C. R. 211.

Assignments Act—*Powers of Judge.*]—See *Re Parquette*, 11 P. R. 463; *Re Young*, 14 P. R. 303; *In re Rochon*, 31 O. R. 122; *Re Simpson and Clafferty*, 18 P. R. 402.

Attachment for Disobedience to Certiorari.]—The court will not order an attachment against a Judge of a district court for not obeying a certiorari, unless it be shewn clearly that he acted contumaciously.

In re Judge of District Court of Niagara, 3 O. S. 437.

Attachment for Disobedience to Subpoena.] — A county Judge being served with a subpoena duces tecum to produce a deed did not attend; and, on motion for an attachment, excused his absence on the ground of important private business, urging also that he obtained the deed and became possessed of his information as an attorney, that he had a lien on the deed, and that he was entitled to witness fees as an attorney:—Held, that he was not so entitled, and should have attended, and the rule was made absolute. *Deadman* v. *Ewen*, 27 U. C. R. 176.

Commission of Inquiry — *Tenure of Office.*] — Certain charges having been preferred against a county court Judge, a commission was issued under the great seal of Canada, reciting the facts and the provisions of 22 Geo. III. c. 75 (Imp.), and directing the commissioners to examine into the charges, and for that purpose to summon witnesses and require them to give evidence on oath and produce papers; and to report thereupon. The inquiry proceeded, and a motion was made for a prohibition:—Held, that inquiries under the Imperial Act should be made before the governor-general in council, and the authority could not be delegated, nor inquiry upon oath authorized by commission: — Held, also, that the commission could not be supported at common law, for it created a court for hearing and inquiring into offences without determining. *Re Squier*, 46 U. C. R. 474.

C. S. C. c. 13, and 31 Vict. c. 38 (D.), give power to issue commissions for inquiring into the administration of justice when the inquiry is not regulated by any special law, and an inquiry into the conduct of any one connected with the administration of justice is within the meaning thereof. But held, that this inquiry into the conduct of a county court Judge falls within the exception in the Act, being regulated by C. S. U. C. c. 14, ss. 1 and 4, which are a special law for such cases. *Ib.*

32 Vict. c. 22, s. 2 (O), 32 Vict. c. 26 (O.); 33 Vict. c. 12, s. 1 (O.); and R. S. O. 1877 c. 42, s. 2, assuming to repeal C. S. U. C. c. 14, and C. S. U. C. c. 15, s. 3, and to abolish the court of impeachment for the trial of county court Judges, and regulate their tenure of office, are ultra vires of the Provincial Legislature. *Ib.*

The tenure of office of the county court Judges is still regulated by C. S. U. C. c. 15, s. 3. *Ib.*

The different modes of proceeding against county court Judges for misconduct, pointed out. *Ib.*

Deputy Judge — *Partner of Applicant's Attorney.*]—A deputy Judge of the county court declined, on the ground that he was the partner of the plaintiff's attorney, to entertain an application by the defendant for a supersedeas because he had not been charged in execution within the term next after judgment:—Held, that the defendant was entitled to be discharged from custody under a writ of habeas corpus. *Reid* v. *Drake*, 4 P. R. 141.

Ejectment Against Judge—*Venue.*]—Held, that the fact of a defendant being a county Judge, where the plaintiff might otherwise have proceeded under the Overholding Tenants Act of 1868, and thereby have obtained a more summary remedy, is a sufficient reason to change the place of trial in an action of ejectment. *Anonymous*, 4 P. R. 310.

Quære, whether the circumstance of defendant being a county court Judge is not itself sufficient to give plaintiff the right to have the place of trial changed on grounds of public policy. *Ib.*

Extradition—*Powers of County Judge.*] —See CRIMINAL LAW.

Impeachment.]—See *In re Hughes*, 8 L. J. 203.

Practising Profession—*Gratuitous Services.*]—C. S. U. C. c. 15, s. 5, as amended by 29 Vict. c. 30, enacts, that no county court Judge shall directly or indirectly practise in the profession of the law as counsel, attorney, solicitor, or notary public, or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any court of this Province under the penalty of forfeiture of office and $400. The declaration alleged that defendant, being such Judge, did in certain proceedings in the surrogate court prepare certain papers and documents to be used in said court, to wit, the petition of one G., &c. (describing the papers). Defendant pleaded that he did not practise in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said surrogate court. The evidence shewed that defendant prepared gratuitously for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband:—Held, that the plea was proved, and a verdict was therefore entered for defendant on the leave reserved. Held, also, that the evidence did not bring defendant within the spirit of the Act, or the mischief against which it was directed which was the doing the acts prohibited for profit. *Allen* q. t. v. *Jarvis*, 32 U. C. R. 56.

Reference—*Fees.* —The fees on a reference to a county Judge from the superior court, such as an examination of a judgment debtor, must be paid in the proper stamps, and not in cash. *James* v. *Jones*, 4 P. R. 194.

Reference to "Judge."] — Held, that where a reference is directed to "the Judge" of a certain county, the senior Judge is the person referred to. *Elora Agricultural Co.* v. *Potter*, 7 P. R. 12.

Reference to Judge by Name.]—*Fees.*] When a reference is made from Nisi Prius to a Judge of a county court by name, adding his description, Judge of a county court, and not to him as Judge of the county court, he is entitled to his fees as such arbitrator. *Wood* v. *Foster*, 6 P. R. 175.

See Smith v. Rooney, 12 U. C. R. 661; *Leslie* v. *Emmons*, 25 U. C. R. 243.

III. JURISDICTION.

1. *In General.*

Accounts.] — Held, that a county court has jurisdiction to entertain and investigate accounts and claims of suitors however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act. *Bennett* v. *White*, 13 P. R. 149.

Action Beyond Jurisdiction — *Second Action in Superior Court.*] — The plaintiff,

having sued in the county court, proved a claim beyond the jurisdiction, whereupon the jury was discharged. He then brought his action in this court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the county court action and pay the costs of it. The order was rescinded, for 1, the county court having no jurisdiction the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2, this suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed. *Hodgson* v. *Graham*, 26 U. C. R. 127.

Amendment of Plan.]—Held, reversing 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined, for the county Judge to determine upon C's application to him, under R. S. O. 1877 c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition. *In re Chisholm and Town of Oakville*, 12 A. R. 225.

Balance.]—The inferior courts can entertain a suit for the balance remaining due upon a written undertaking to pay a larger sum. *Longworth* v. *McKay*, 6 O. S. 149.

Balance of Disputed Accounts.]—Where in an action in the county court, judgment is given for a sum in itself within the jurisdiction of the court, but which is the balance of a sum beyond the jurisdiction, and which was arrived at not by any settlement or statement of account between the parties, but as the ascertainment of a disputed account:—Held, this was the allowance of a claim beyond the jurisdiction of the court, and a writ of prohibition was granted. *Sherwood* v. *Cline*, 17 O. R. 30.

Capias in High Court.]—The Judge of a county court has no power, either as such Judge or as local Judge of the high court, to order the issue of a ca. sa. in an action in the high court. Cochrane Manufacturing Co. v. Lamon, 11 P. R. 351, followed. A Judge of the high court, sitting in "single court," has power to set aside such an order. *Waterhouse* v. *McVeigh*, 12 P. R. 676.

Covenant.] — Under 8 Vict. c. 13, s. 5, the district courts have jurisdiction in actions on covenant to pay a sum certain to £50. *Billings* v. *Nicolls*, 5 U. C. R. 622.

Damages for Loss of Cattle.]—The declaration stated that the plaintiff had delivered certain cattle to defendant to be pastured, &c., and to be re-delivered on request—with a breach, that through the negligence, &c., of the defendant, the cattle were lost. The plaintiff had a verdict for £9, and no certificate:—Held, that the action might have been brought in the county court. *Hinds* v. *Denison*, 1 C. L. Ch. 194.

Declaration of Right — *Assignments Act.*]—An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the county court. *Whidden* v. *Jackson*, 18 A. R. 439.

Distraining Beasts of the Plough.]—An action on the case, founded on the statute of Merton for distraining beasts of the plough, may be maintained in the county court. *McGregor* v. *Batson*, 2 C. L. Ch. 206.

Division Court Judgment.]—Held, following McPherson v. Forrester, 11 U. C. R. 362, that an action would not lie in a county court upon a division court judgment. *Donnelly* v. *Stewart*, 25 U. C. R. 398.

Imprisonment.] — A county Judge has power to imprison in the county Judge's criminal court. *Regina* v. *St. Denis*, 8 P. R. 16.

Inquiring into Facts.]—The Judge of a county court has the right at the trial of a case, where the jurisdiction of the court is denied, to inquire into the facts, so as to ascertain whether or not there be jurisdiction: e. g. to inquire whether there has been a settlement of accounts between the parties. Until such inquiry has been made, prohibition cannot be granted. *In re Dixon* v. *Snarr*, 6 P. R. 336.

See Swartwout v. *Skead*, 11 C. L. J. 329.

Investigation Under Municipal Act.]—Held, reversing 16 O. R. 275, where the county court Judge is making an investigation pursuant to the resolution of a council under R. S. O. 1887 c. 184, s. 477, he is acting as persona designata, and not in a judicial capacity, and is not subject to control by a writ of prohibition. That writ is not to be applied to any proceedings of any person or body of persons, whether they may be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual. Re Squier, 46 U. C. R. 474, considered. *In re Godson and City of Toronto*, 16 A. R. 452.

Liquidated and Unliquidated Claims.]—A county court has jurisdiction to try a claim up to $400 which is made up of an unliquidated amount of less than $200, and the balance of a liquidated amount. *Vogt* v. *Boyle*, 8 P. R. 249.

Mechanics' Liens.]—Held, that notwithstanding the apparently unlimited provisions of s. 1 of 53 Vict. c. 37 (O.), intituled an "Act to Simplify the Procedure for Enforcing Mechanics' Liens," the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in county courts and division courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Mechanics' Liens—*Mortgagee—Account.*]—Section 23 of R. S. O. 1887 c. 126, which allows proceedings to recover the amount of a mechanics' lien to be taken under certain circumstances in the county court and division court, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those courts cannot entertain an action in the nature of an action of account by a lien holder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

Objection to Jurisdiction.]—An objection to the jurisdiction exercised under R. S. O. 1877 c. 42, ss. 16, 22, was not entertained, because there was nothing upon the proceedings to shew that the case was not tried before the proper Judge. *McKenzie* v. *Dancey*, 12 A. R. 317.

Overholding Tenant.]—In ejectment in the county court, under 23 Vict. c. 43, it appeared that the defendant held the land under a verbal lease for a year, from 7th June, from one B., with the arrangement that if B. sold defendant would give up possession at the end of the year. B., in January, sold to the plaintiff, of which defendant had notice, and promised to give up possession, and the plaintiff gave defendant a notice to quit on the 8th June, his term having expired. At the trial the deed from B. to the plaintiff and the notice to quit were proved:—Held, a case within the statute; that defendant's term was put an end to on the 7th June; and that there was no dispute as to title to exclude the jurisdiction, which was clearly not ousted by the mere proof of the plaintiff's paper title. *Neads* v. *McMillan*, 29 U. C. R. 415.

Overholding Tenant.] — The Overholding Tenancy Act, 31 Vict. c. 26 (O.), gives jurisdiction to the county Judge in cases where the tenancy has been determined by forfeiture for breach of contract. *Nash* v. *Sharp*, 5 C. L. J. 73.

Overholding Tenant—*Colour of Right.*]—The intention of the Act 31 Vict. c. 26 (O.), was not to empower the Judge of the county court to determine the question of right between landlord and tenant on its merits; but, on its appearing that the tenant is holding under a bonâ fide belief of right, which the evidence in this case shewed, he should dismiss the case, and leave the right to be tried in ejectment. *Gilbert* v. *Doyle*, 24 C. P. 60.

Overholding Tenant—*Colour of Right.*]—The expression "colour of right" in the Overholding Tenants' Act, R. S. O. 1887 c. 144, means such semblance or appearance of right as shews that the right is really in dispute. The Act confers no authority upon the county Judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case. Gilbert v. Doyle, 24 C. P. 60, and Woodbury v. Marshall, 19 U. C. R. 597, not followed. Upon the proceedings before the county Judge being commanded to be sent up, the high court has power to stay proceedings upon the writ of possession under the Act. *Price* v. *Guinane*, 16 O. R. 264.

Partnership Accounts.] — A county court has jurisdiction, where the amount of the claim does not exceed the ordinary jurisdiction of the court, to entertain an action by a partner against his co-partners for a purely money demand, which is part of the partnership assets, although it may involve the taking of the partnership accounts. *Allen* v. *Fairfax Cheese Co.*, 21 O. R. 598.

Penal Actions.]—The county courts have no jurisdiction in penal actions, unless expressly given them by statute; and for this purpose they were held not to be included in the words "any court of record in Canada West," used in 4 & 5 Vict. c. 12. *O'Reilly* q. t. v. *Allan*, 11 U. C. R. 526.

But they were held to have jurisdiction in an action for the penalty imposed by s. 81 of C. S. U. C. c. 6, for selling spirituous or fermented liquors on polling days. *In re Medcalfe* v. *Widdifield*, 12 C. P. 411.

And, under C. S. U. C. c. 124, s. 2, to try an action for a penalty against a justice of the peace, where the penalty claimed does not exceed $80. *Brash* q. t. v. *Taggart*, 16 C. P. 415.

Punishing for Contempt.] — Every court of record has the power to punish for contempt; but if the court is one of inferior jurisdiction, the superior court may intervene and prevent any usurpation of jurisdiction by it. *Ex parte Lees*, 24 C. P. 214.

Quo Warranto.]—A county court Judge cannot grant a quo warranto during term time in the superior courts. *Regina ex rel. Gleeson* v. *Horsman*, 13 U. C. R. 140.

A county court Judge has power to give a fiat in term time for the issue of a writ of quo warranto to try a contested municipal election:—Held, that Rule 1 M. T. 14 Vict. has become inoperative by the effect of subsequent statutory enactments to which it is repugnant. *Regina ex rel. McDonald* v. *Anderson*, 8 P. R. 241.

Power of county court Judge to set aside writ of quo warranto when issued on his fiat. See *Regina ex rel. Grant* v. *Coleman*, 8 P. R. 497; *S. C.*, 46 U. C. R. 175; 7 A. R. 619; *Regina ex rel. O'Dwyer* v. *Lewis*, 32 C. P. 104; *S. C., sub nom. Regina ex rel. Dwyre* v. *Lewis*, 8 P. R. 497.

Reference.]—County court Judges acting under Rule 422, O. J. Act, have no jurisdiction under ss. 47 and 48 O. J. Act, to order references in opposed cases. *White* v. *Becmer*, 10 P. R. 531.

Removal of Assignee.]—A Judge of a county court, acting under the authority of 48 Vict. c. 26, s. 6 (O.), removed an assignee for creditors, and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the Judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the Judge, in acting under the statute, was not exercising the powers of the county court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Pacquette*, 11 P. R. 463.

See, also, *Re Young*, 14 P. R. 303.

School Trustees.]—Held, 1, that the citing of a trustee to appear before the Judge of the county court, under s. 130 et seq. of the School Act, C. S. U. C. c. 64, is not necessarily a bar to proceeding by arbitration under s. 29; 2, that under s. 130 the Judge of the county court has no jurisdiction, except where a secretary-treasurer "has in his possession, books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully holds and refuses to deliver up," &c., and such secretary-treasurer must be guilty of misdemeanour, contemplated by s. 130 before the Judge can interfere. *Ferris* v. *Chesterfield*, 10 C. P. 272.

Set-off.]—Where there are open running accounts between the plaintiff and the defendant, made up of divisible items, not exceeding in each £25, the defendant can only recover by way of set-off the difference between £25 and the amount due to the plaintiff. If the de-

fendant, however, desire to recover more than will balance the plaintiff's demand, he must give notice of or plead a set-off to the £25, and claim in his plea or notice to have the amount between the plaintiff's demand and the £25 allowed to him. *Russell* v. *Conway*, 5 U. C. R. 256.

Sheriff — *False Return.*] — The district courts have no jurisdiction in an action for a false return. *Bell* v. *Jarvis*, 6 U. C. R. 423.

Third Party — *Indemnity* — *Investigating Accounts.*]—In an action in a county court, on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party, the third party having appeared, the learned Judge of the county court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party, amounting to more than $10,000, upon which he found that a balance of more than $3,000 would be payable to the defendant, and he directed that the third party should out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for prohibition:—Held, that the order directing the issues between the defendant and the third party, with the proceedings taken under it, were right. Held, also, that as the only relief which could be given to the defendant against the third party, was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the county court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction. *Neald* v. *Corkindale*, 4 O. R. 317.

Tort—*Delivery up of Note.*]—In an action brought in the high court to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, it was determined that the note was wrongfully held by the defendants, who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment:—Held, that the action sounded in tort and not in contract, and could not have been brought in a county court: and the successful plaintiff was therefore entitled to tax his costs on the high court scale. Johnson v. Kenyon, 13 P. R. 24, distinguished. Robb v. Murray, 16 A. R. 502, followed. *Plummer* v. *Coldwell*, 15 P. R. 144.

Trying Validity of Division Court Judgment.]—The jury in a district court cannot try, as an issue of fact, whether the division court gave judgment on insufficient evidence, nor whether the plaintiff abandoned the residue of a large demand, so as to give the court jurisdiction. *Hynes* v. *Burrowes*, 5 U. C. R. 253.

Voters' Lists.] — Jurisdiction of county Judge to make order as to time for holding court to hear appeals from voters' lists. See *In re Voters' List for the City of St. Thomas*, *Re Boyes*, 13 O. R. 3.

Wages — *Amendment* — *Particulars.*] — The plaintiff sued in the county court, on the indebitatus count, for $375, claiming by his particulars, balance due from defendant to 1st November, 1877, $120; wages from 1st November, 1877, to 1st November, 1878, $360, less amount paid $160, $200. Balance, $320. On objection being taken at the trial to the jurisdiction of the county court, the plaintiff was allowed to amend by striking out all the items except the first:—Held, that the particulars were no part of the record, which shewed an amount within the jurisdiction of the county court; but:—Held, also, that judgment for that sum would be a bar to any future action for work done at any time before the commencement of this suit. *Davidson* v. *Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

Winding-up—*Sale of Assets by Liquidator.*]—The liquidator of a company which was being voluntarily wound up under the Ontario Winding-up Act, sold the assets thereof en bloc, without the sanction of the contributories, to a private individual, and then obtained from the county court an order approving of the sale and making certain provisions for the disposition of the purchase moneys. On appeal it was held that the order was made without authority, and that it was a nullity. *In re D. A. Jones Co.*, 19 A. R. 63.

Winding-up—*Ordering Liquidator to Pay Costs.*]—See *Re Cosmopolitan Life Association*, *Re Cosmopolitan Casualty Association*, 15 P. R. 185.

Writ of Attachment.]—The Judge of a county court who orders the issue of a writ of attachment out of the high court, under s. 2 of the Absconding Debtors' Act, R. S. O. 1877 c. 66, has no jurisdiction to entertain an application to set aside such writ. *Disher* v. *Disher*, 12 P. R. 518.

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2. *Equitable Jurisdiction.*

Administration.] — Where creditors whose claims in the aggregate were under $200, obtained the usual administration order, and it was shewn that the value of the estate including lands, was under $800, and although the real estate, which it was necessary to sell to satisfy such claims, was incumbered by mortgage to an amount which together with these claims exceeded $200, it was held that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the county court; and the plaintiffs were refused their costs. *In re Scott*, *Hetherington* v. *Stevens*, 15 Gr. 683.

Administration.] — An administration suit by a person interested to an amount less than $200 in an estate, which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, was held not to be within the equity jurisdiction of the county court. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

Defendants in Different Counties.]—A county court has no equitable jurisdiction where all the defendants do not reside in the county. *McLeod* v. *Millar*, 12 Gr. 194.

Defendant Out of Jurisdiction.]—The Act giving county courts equitable jurisdiction in relation to mortgages, when the sum does not exceed £50, does not apply when defendant is resident out of the jurisdiction. *Lawrason* v. *Fitzgerald*, 9 Gr. 371.

Foreclosure—*Defendant not Resident in County where Land Lies.*]—Where a plaintiff files a bill in the court of chancery to foreclose a mortgage for a sum within the jurisdiction of the county court, no costs will be allowed him. The fact that the defendant is resident in a county other than where the land is situate, will not vary this rule. *Connell* v. *Curran*, 1 Ch. Ch. 11.

Foreclosure — *Subsequent Incumbrance.*] —Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appear that there is an incumbrance beyond that sum. *Hyman* v. *Roots*, 11 Gr. 202.

Injunction.] — The county court, on its equity side, had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the county court on its equity side. *Rae* v. *Trim*, 8 P. R. 405.

Legacy under $200 Charged on Land.]—A county court has jurisdiction under s.-s. 13 of s. 3 of 59 Vict. c. 19 (O.), in an action brought by the legatee against the devisee of land, to recover a legacy of $5 charged on the land, as involving equitable relief in respect of a matter under $200. The subject-matter involved in such an action is the amount of the legacy and not the value of the land. *Rustin* v. *Bradley*, 28 O. R. 119.

Mortgage — *Account of Surplus.*] — A mortgagee exercised the power of sale contained in his security and realized $350. On a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $139. The plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350. *McGillicuddy* v. *Griffin*, 20 Gr. 81.

Mortgage — *Account of Surplus.*] — A county court has jurisdiction, whatever the amount of a mortgagee's claim at the time of the exercise of a power of sale, to entertain an action for the recovery of an alleged surplus derived from the sale and not exceeding $200, although the existence of the surplus is denied. *Reddick* v. *Traders' Bank of Canada*, 22 O. R. 449.

Mortgage — *Substitutional Service.*] — Where the plaintiff's claim on the premises, together with the amount of a subsequent mortgage, exceeded $200, it was held to be beyond the jurisdiction of the county court. Semble, the necessity for an order for substitutional service would appear to be sufficient reason for filing a bill in this court which might otherwise have been filed in the county court. *Scath* v. *McIlroy*, 2 Ch. Ch. 93.

Ratepayer's Action to Compel Payment of Costs—*Personal Action.*] — Since 32 Vict. c. 6, s. 4 (O.), the county courts have had common law jurisdiction only; the Judicature Act did not alter the jurisdiction of those courts, but only made applicable to matters cognizable by them the several rules of law thereby enacted and declared. An action by a ratepayer of a school section, on behalf of himself and all other ratepayers, against trustees of the section, seeking to compel the defendants to pay to the treasurer of the section such amount as might be disallowed upon taxation of a bill of costs paid by the trustees to a solicitor, is one of purely equitable jurisdiction, and is not cognizable by a county court, even though the amount in question is not more than $200. The term "personal actions" used in R. S. O. 1887 c. 47, s. 19, means common law actions. *Re McGugan* v. *McGugan*, 21 O. R. 289.

See SCALE OF COSTS, *ante*, col. 1386.

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3. *Liquidated or Ascertained Amount.*

Account Stated.]—The declaration contained three counts, claiming each £50, but the damages were laid only at £50, and the particulars were, for account rendered £55 15s., less by cash £22 10s.—£33 5s. At the trial the plaintiff relied on the count on account stated, and produced a draft by himself on defendant for £55 15s. 1d., "being the balance in full of your account;" and proved that when presented defendant acknowledged the amount to be correct, but refused to accept it, as he was afraid he would be sued. A verdict having been found for £34 3s. 3d.:—Held, that the claim was within the jurisdiction: and, semble, that the evidence of an account stated was sufficient. *McMurtry* v. *Munro*, 14 U. C. R. 166.

Amounts Evidenced by Drafts — *Several Unliquidated Claims.*]—The plaintiff purchased, by sample, from the defendant two lots of barley, consisting of ten and five car loads respectively. On receipt of the first lot, the plaintiff, alleging that the bulk did not correspond with the sample, claimed $200 for inferiority in quality. The defendant disputed any liability, and the plaintiff threatened to dishonour the draft which had been drawn on him for the price. In order to sustain his credit with the bank, the defendant telegraphed the plaintiff to accept, and that he would accept plaintiff's draft for the $200. The defendant's draft for the price, though the defendant was not aware of it, had then been paid by the plaintiff. A deduction of $100 from the price of the second lot of five car loads was subsequently demanded on the same ground, and the plaintiff refused to pay the defendant's draft for that lot unless he sent a cheque for that amount, and instructed the bank to pay the plaintiff's dishonoured draft for $200 claimed in respect of the first lot. The defendant telegraphed the plaintiff, "Accept my draft. Will be down Wednesday and pay you." The plaintiff having paid the second draft, sued the defendant in the county court for $300:—Held, per Burton and Patterson, JJ.A., that the sums of $200 and $100 were both liquidated by the act of the parties: that the whole demand was therefore within the jurisdiction of the county court, and that plaintiff was entitled to recover. Per Hagarty, C.J.O.—Without deciding that either demand was liquidated, the court in this case had jurisdiction. It cannot entertain any unliquidated cause of action over $200; but it has jurisdiction to try any number of unliquidated causes of action in debt, covenant or contract, so long as each does not exceed $200, and the aggregate does not exceed $400. *McLaughlin* v. *Schaefer*, 13 A. R. 253.

Bond—*Taxed Costs.*]—In an action on a bond for $500 given to secure payment of costs in the supreme court of Canada in a prior action, judgment was given for the plaintiff for $318.55, the amount at which such costs were taxed and certified in the supreme court:—Held, that the amount recovered was not ascertained by the act of the parties or by the signature of the defendants, within R. S. O. 1887 c. 47, s. 19, and the plaintiff was entitled to costs of the action on the scale of the high court. *Hager* v. *Jackson*, 16 P. R. 485.

Commission on Sale.]—An action was brought in a county court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability, and the action was tried by a jury, who found that the plaintiff was entitled to recover $250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury:—Held, that the amount was not ascertained within the meaning of R. S. O. 1887 c. 47, s. 19, s.-s. 2, and the county court had no jurisdiction. Robb v. Murray, 16 A. R. 503, followed. *Re McKay* v. *Martin*, 21 O. R. 104.

Goods Sold.]—The plaintiff, by special indorsement on his summons, claimed for cash lent and interest, and for a lathe sold, £63 13s. 8d., and in his particulars £91 1s. 4d. On the trial he produced a paper signed by the defendant, specifying that he was to pay plaintiff for the lathe the invoice price, and "the charges of freight, duties, &c.":—Held, clearly an amount liquidated by the act of the parties, and therefore within the jurisdiction. *Wallbridge* v. *Brown*, 18 U. C. R. 158.

Goods Sold.]—Action for the price of thirty hogsheads of goods. It appeared that K. sold to S., the defendants' testator, a quantity of goods, which K., in his evidence, said was a definite quantity, which he could not recollect, but not less than thirty hogsheads, and not more than forty, at the price of $10 per hogshead:—Held, that the demand was liquidated by the act of the parties at the time of sale, and the action was therefore within the jurisdiction of the county court. *Watson* v. *Severn*, 6 A. R. 559.

Per Patterson, J.A.—That it was not improper to leave to the jury the question whether the amount was ascertained by the act of the parties. *Ib.*

Goods Sold.]—The plaintiff agreed to sell the defendant a piano for $400, to be paid by notes at one and two years, with interest, with a rebate for cash. The piano was delivered at the defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the county court, claiming the $400 and interest. At the trial leave was given to strike out the words "with interest":—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay, either by notes or cash, the plaintiff was entitled to recover in an action for goods sold and delivered. *Greenizen* v. *Burns*, 13 A. R. 481.

Goods Sold.]—In an action for the price of goods sold and delivered, in which the plaintiff recovered $290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the county court, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation:—Held, not so. Thompson v. Pearson, 18 P. R. 420, distinguished. *Evans* v. *Chandler*, 19 P. R. 160.

Guarantee.]—An action on a guarantee for goods to be supplied to A. to a sum named, was held not a case in which the amount is ascertained by the signature of the defendant, within 8 Vict. c. 13, s. 51, so that a writ of trial might issue. The document itself, without further evidence, must be primâ facie proof of a debt. *Montford* v. *McNaught*, 3 L. J. 15.

Guarantee—*Abandoning Part of Claim.*]—The county court has no jurisdiction to entertain an action for more than $200 on a guarantee, in general terms, of payment of the price of goods, there being no liquidation or ascertainment of the amount as between the vendor and the guarantor, a liquidation or ascertainment by the debtor not binding the guarantor. Where an action was for two unliquidated claims each within but together beyond the jurisdiction of the county court, the plaintiff was allowed after judgment to amend by abandoning one of them. *Thomson* v. *Bede*, 22 A. R. 105.

Moneys Received on Sales.]—Pending negotiations for the sale by the plaintiff to the defendant of a certain business as a going concern the defendant entered into possession, made sales, and received moneys, entering the receipts in a cash book. The negotiations fell through and the plaintiff brought this action in the county court to recover "$271.03, the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff's shop, as follows:" setting forth the sums received on each day by the defendant:—Held, that this sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received. *Robb* v. *Murray*, 16 A. R. 503.

The increased jurisdiction applies only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount is liquidated or ascertained as being due from one party to the other on account of some debt, covenant, or contract between them; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them. *Ib.*

Services Performed or Goods Sold.]—Whenever a sum up to $400 is agreed on by the parties as the remuneration for a service to be performed, or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the county court, denial of the contract and price not availing to oust the jurisdiction. Robb v. Murray, 16 A. R. 503, considered. *Ostrom* v. *Benjamin*, 21 A. R. 467.

Set-off Credited.]—Upon the evidence in the county court it appeared that the plaintiff, under the common counts, was claiming an amount of $771, reduced to $304 by credit given, but not by payment or by set-off agreed to be taken as payment:—Held, that the $304 was not an amount liquidated or ascertained by the act of the parties, and that the claim

therefore was beyond the jurisdiction. A plaintiff cannot by giving credit for a set-off compel defendant to set it up, or give the county court jurisdiction. *Furnival* v. *Saunders*, 26 U. C. R. 119.

Set-off Credited.]—The plaintiff in a county court suit gave credit on a claim of $300 (for board, &c.) for $170, being the value of an article received by him from defendant:—Held, that although the agreement as to setting off the one against the other be made before the debt for which the action is brought is contracted, yet, if the amount to be allowed to defendant for the article can be treated as a payment of a portion of plaintiff's claim, and not merely an unliquidated set-off against it, or the transaction can be viewed as a sale first of the article upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant—the court has jurisdiction. *Fleming* v. *Livingstone*, 6 P. R. 65.

Work and Labour—*Interest.*]—Where the plaintiffs in an action in the high court of justice to recover a sum for work and labour and materials, the amount not being liquidated or ascertained, recovered $197.01 for debt, and $14.54 for interest from the issue of the writ of summons:—Held, that the amount recovered was not within the jurisdiction of a county court, and the plaintiffs were entitled to costs on the scale of the high court. *Malcolm* v. *Leys*, 15 P. R. 75.

See SCALE OF COSTS, *ante*, col. 1386.

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4. *Replevin.*

Action against Sheriff.]—To an action against a sheriff for taking an insufficient replevin bond, he pleaded that the goods replevied were worth more than £15, and that so the writ of replevin, being sued out of the district court, was void:—Held, plea bad. *Kirkendall* v. *Thomas*, 7 U. C. R. 30.

Distress for Rent—*Title to Land.*]—In replevin defendants avowed under a distress for rent, to which the plaintiff pleaded that he did not hold the land as tenant, &c., as in the avowry alleged:—Held, that the title upon this plea did not necessarily come in question, and that the record therefore did not shew a cause of action beyond the jurisdiction. *O'Brien* v. *Welsh*, 28 U. C. R. 394.

Replevin Act.]—The Replevin Act, 4 Will. IV. c. 7, gives jurisdiction to the district courts only in cases of seizure for distress. *Foster* v. *Miller*, 5 U. C. R. 509.

Trespasser ab Initio—*Goods in Another County.*]—In an action of replevin, brought in the county court of Haldimand, for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand, to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant, and detention there, were not, and constituted the defendant a trespasser ab initio, and therefore the county court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover* v. *Craig*, 12 A. R. 72.

Value Claimed not the Test.]—The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not shew that the action could not have been brought in a district court. The plaintiff, to entitle himself to Queen's bench costs, must prove at the trial that the goods are really of greater value. *Wheeler* v. *Sime*, 3 U. C. R. 265.

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5. *Title to Land.*

Conversion of Fixtures.]—Declaration for converting the plaintiff's dwelling-house, with the doors and windows, &c. Plea, that the goods were not the plaintiff's. At the trial in the county court, it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was whether the house was part of the freehold. A verdict having been rendered for the plaintiff, was afterwards set aside, on the ground that the title to the land came in question, and that the case should have been stopped upon the plaintiff's evidence:—Held, that this was right, and the judgment below was affirmed. *Portman* v. *Patterson*, 21 U. C. R. 237.

Damages for Cutting Timber.]—The plaintiff by his statement of claim alleged that he was, and had been for more than six years, the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant, by his statement of defence, disputed the plaintiff's claim, and set up certain facts by way of confession and avoidance. The action was brought in the high court, but the plaintiff only recovered $120 damages:—Held, that under the pleadings the plaintiff was obliged to prove his title to the land, and therefore the county court would have had no jurisdiction, and the costs should be on the scale of the high court. *Danaher* v. *Little*, 13 P. R. 361.

Denial of Title after Attornment.]—S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:—Held, that after such attornment and payment of rent, the defendant could not be heard to deny the plaintiffs' title, and they being the equitable owners of the land, were entitled to recover:—Held, also, that the title not being open to question by the defendant, the county court had jurisdiction. *Bank of Montreal* v. *Gilchrist*, 6 A. R. 659.

Dispute as to Timber.]—One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of

the land to the plaintiff. The defendant proceeded to take off the timber:—Held, that the title to land was not in question, and that an action for trespass to the land would lie in the county court. *Bailey* v. *Bleecker*, 5 C. L. J. 160.

New Trial — *Absence of Affidavit.*]—A plea was pleaded bringing title to land in question, and after a verdict for the plaintiff a new trial was granted, on the ground that the court had no jurisdiction. On appeal, the judgment was reversed, as the court having no jurisdiction could not grant a new trial. The absence of the affidavit required by the statute with such plea will not warrant the court in proceeding, but would be ground for setting aside the plea. *Campbell* v. *Davidson*, 19 U. C. R. 222.

Nonsuit.]—In trespass defendant pleaded pleas bringing the title to land in question, accompanying them with the affidavit required by 8 Vict. c. 13, s. 13. A nonsuit having been ordered:—Held, upon appeal, that the effect of the pleas was to oust the jurisdiction altogether: that the Judge should therefore have refused to entertain the case; and that the judgment of nonsuit must be reversed. *Powley* v. *Whitehead*, 16 U. C. R. 589.

Raising Question at the Trial.]—The statement of claim presented a cause of action within the jurisdiction, and the defendant could not have demurred; it depended upon his pleading whether the jurisdiction would be ousted, and therefore Rule 189 O. J. Act did not apply to prevent the raising of the question of jurisdiction at the trial. *Seabrook* v. *Young*, 14 A. R. 97.

It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions, and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences, and for mesne profits for a period of five or six months prior to the date of ejectment, and the admissions of title did not go further back than the ejectment:—Held, that the judgment against his tenants was evidence against the defendant, at the date of the writ of ejectment, but that title was really in question, and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment. *Ib.*

Rent.]—Declaration, that one A. devised the N. half of lot 15 to his son W. in fee, and the S. half to his wife J. for life, and after her death to W. in fee; that during W.'s life, he and his mother, J., leased to defendant the whole lot for five years at an annual rent, and that W. died soon after, having devised his land to the plaintiffs in fee. And the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J. after notice. Equitable plea, that W. by his will devised all his lands to the plaintiff in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent:—Held, that upon these pleadings the title to land was brought in question, and the jurisdiction ousted. *Fair* v. *McCrow*, 31 U. C. R. 599.

Right to Pasture Cattle.]—The defendants, by an agreement under seal with one S., acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others, to enter upon the land in question. The question, whether S. gave the defendants such an interest in the land as entitled them to impound cattle, was held not to be a question of title in the sense that it would oust the jurisdiction of the county court. *Graham* v. *Spettigue*, 12 A. R. 261.

Striking Out Plea.] — A county court Judge, at the trial of a case, upon the application of plaintiff's counsel, struck out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction, by bringing title to land in question:—Held, that he had the power to do so. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

Trespass to Chattels.]—Where in matters of tort relating to personal chattels, title to land is brought in question, though incidentally, the court has no jurisdiction. *Trainor* v. *Holcombe*, 7 U. C. R. 548.

Trespass — *Not Guilty.*] — Title to land does not, on mere suggestion, necessarily come in question under a plea of not guilty by statute. The general rule is, that it must not only be pleaded, but be verified by affidavit. In this case, which was an appeal from the county court:—Held, that though defendant might have shewn, upon the plea of not guilty, that for want of title the plaintiff could not maintain the action for injury to his premises, yet that in the absence of such proof, or a bonâ fide tender thereof, the mere suggestion of it did not preclude the county court from trying the real cause of action, which was within its jurisdiction. *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252.

Trespass—*Raising Question of Jurisdiction at the Trial.*]—Where, in an action of trespass for pulling down fences and for mesne profits, the plaintiff alleged his title at the time from which he claimed to recover mesne profits; and the defendant, in his statement of defence, denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liable in damages or otherwise on the alleged causes of action:—Held, that on these pleadings the title to land was expressly brought in question, and the jurisdiction of the county court ousted. Held, also, that the defendant was not estopped from raising the question of jurisdiction at the trial, because of his omission to file an affidavit under R. S. O. 1877 c. 43, s. 28, that his pleading was not vexatious, or for the mere purpose of excluding jurisdiction; such an omission being a mere irregularity, for which the plea might have been set aside, but not operating to confer jurisdiction where the defence in fact raised the question of title. Campbell v. Davidson, 19 U. C. R. 222, followed. *Seabrook* v. *Young*, 14 A. R. 97.

Trial in High Court.]—Where a county court cause is entered for trial at the assizes, under 32 Vict. c. 6, s. 17, s.-s. 2, the jurisdiction is the same only as if it had been tried in the county court. Where in such a case, therefore, the title to land came in question, and a verdict was entered for defendant:—Held, that the proceedings were coram non judice,

and the verdict was set aside. *Wetherall* v. *Garlow*, 30 U. C. R. 1.

See SCALE OF COSTS, *ante*, col. 1386.
See, also, DIVISION COURTS—PROHIBITION.

IV. PRACTICE AND PROCEDURE.

1. *In General.*

Attachment—*Issue Sent from High Court—Order to Produce.*]—Where, after judgment in an action in the common pleas division, an issue on a garnishee application was directed to be tried under Rule 373, O. J. Act, by a county Judge and jury:—Held, that such Judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane* v. *Morrison*, 10 P. R. 606.

Attachment.]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised:—Held, also, that the Judge of the county court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a county court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county. Semble, that the proper construction of Rules 917, 918, and 919 is, that the Judge of a county court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the county court or the division court, to order the garnishee to attend before the Judge of the county court or the clerk of the division within which he lives:—Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process. *Millar* v. *Thompson*, 19 P. R. 294.

Attorney's Status.]—Attorneys, not being barristers, cannot, as of right, be heard as advocates in the district courts. *In re Lapenotiere*, 4 U. C. R. 492.

Held, that county court Judges cannot allow attorneys who are not barristers to practise before them as advocates in county courts. *In re Brooke*, 10 L. J. 49.

Conflicting Decisions.] — When the courts of Queen's bench and common pleas are at issue on the construction of an Act of Parliament, the duty of a county Judge is to decide according to his own view of the law. *McInnes* v. *Benedict*, 8 L. J. 22.

Costs—*Tariff.*]—The new tariff established by the courts of Queen's bench and common pleas does not extend to the county courts. *Card* v. *Lount*, 2 P. R. 72.

Costs—*No Order as to Costs.*]—In an action in a county court, tried by a Judge without a jury, judgment was given for $36, no order being made as to costs:—Held, that no costs could be awarded, and a mandamus was granted to the county court clerk to enter up judgment for the plaintiff without costs, and without allowing defendant to set off against the judgment the difference between the county and division court costs. *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494.

Counterclaim—*Amount to be Set off.*]—In an action in a county court to recover an amount due for salary and travelling expenses there was a counterclaim for advances made to the plaintiff. The plaintiff recovered $308.55, and the amount found to be due under the counterclaim was $1,169.54, but the Judge allowed only $200 to be set off:—Held, that under ss. 28 and 29 of the County Courts Act, R. S. O. 1897 c. 55, the defendants were entitled to judgment on the counterclaim to the full amount of the plaintiff's claim. *Wallace* v. *People's Life Insurance Co.*, 30 O. R. 438.

Death of Judge—*Enlargement of Rule by Clerk.*]—A rule to enter a nonsuit having been granted in the county court in April term, was duly enlarged until the following term. The Judge died before the term began, and no successor was appointed till after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new Judge, who treated it as still pending, and gave judgment:—Held, that he was right. *Leslie* v. *Emmons*, 25 U. C. R. 243.

Defence Arising after Action — *Discharge of Part of Claim.*]—On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a division court claiming $64 from the plaintiff and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a county court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the division court. On the 6th September judgment was given in the division court for the primary creditor against the primary debtor (the plaintiff in this action) for $64 and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40:—Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to $57.50 by his payment into the division court was a defence which did not arise until the payment was made and judgment given in the division court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of the service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less

the $57.50, the action was properly brought in a county court, and the plaintiff was entitled to costs on the scale of that court. *Pickard* v. *Tims*, 19 P. R. 109.

District Court—*Effect of Judgment.*]—The judgment of a district court could not bind lands under 5 Geo. II. c. 7, for want of a docket. *Doe d. McIntosh* v. *McDonell*, 4 O. S. 195.

Effect of A. J. Act, 1873.]—See *Dain* v. *Gossage*, 6 P. R. 103.

Enlargement of Rule Nisi.]—Where a rule nisi in a county court was ordered by the Judge to stand over until the next term:—Held, that it was not necessary to take out a rule to enlarge the rule nisi to prevent it from lapsing. *In re Dean* v. *Chamberlain*, 8 P. R. 303.

Entering Verdict.] — On error from the county court, it appeared by the record that after issue joined a ven. fac. was awarded, and then the postea stated an agreement by the parties to leave the case to the Judge, the decision to be looked upon as the verdict of a jury. Afterwards it was entered that "the said Judge has determined, and the court is of opinion and has ordered," that the defendant should pay to the plaintiff a sum named. Then followed an entry of judgment for that sum and costs:—Held, that the judgment was erroneous, for no verdict was directed or entered to support it. Quære, whether the Judge had power to direct a verdict. *Jones* v. *Smith*, 23 U. C. R. 485.

Examining Proceedings in High Court.] — Quære, whether in a proceeding before him, a county court Judge can of his own motion examine proceedings pending in a division of the high court; but—Held, that the defendant should have been allowed to produce such proceedings in order to meet technical objections as to the state of the cause not being shewn. *Hollingsworth* v. *Hollingsworth*, 10 P. R. 58.

Immediate Execution.]—Under 16 Vict. c. 175, a county court Judge can certify for immediate execution in cases sent down to him by a writ of trial, as well as in other cases, the 53rd clause of 8 Vict. c. 13, being in effect overruled. *Riach* v. *Hall*, *Patterson* v. *Hall*, 11 U. C. R. 356; *McKay* v. *Hall*, *Johnston* v. *Hall*, 4 C. P. 145.

Injunction—*Threatened Sale of Goods.*]—Under the Judicature Act, R. S. O. 1897 c. 51, s. 57, s.-s. 4, and the County Courts Act, R. S. O. 1897 c. 55, s. 23, s.-s. 11, when a cause of action is within the jurisdiction of a county court an injunction may in a proper case be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not in as full and ample a manner as in a case in the high court. A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale. *Bradley* v. *Barber*, 30 O. R. 443.

Issue from County Court Sent to High Court — *Subsequent Proceedings.*]—An issue had been directed from a county court to one of the superior courts under R. S. O. 1877 c. 49, s. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the county court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to defendant, the grantee in the conveyance, who did not return it; and the plaintiff, after the time for trial had elapsed, applied in the superior court for an order absolute for sale of the land:—Held, such order could be made only in the county court, whence the issue had been directed, and that the superior court could only try the issue, and could make no final disposition of the matter:—Held, also, that the application was not in any event well founded, as the plaintiff should have proceeded with the trial of the issue. Quære, as to the granting of a new trial, or reviewing the verdict upon such an issue. *Merchants' Bank* v. *Brooker*, 8 P. R. 133.

Issue from Superior Court — *Adding Pleas.*]—Held, that the Judge of the county court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court. *King* v. *Glassford*, 11 C. P. 490.

Issue from Superior Court — *Execution.*]—in a case depending in one of the superior courts, and taken down for trial to the county court, under 23 Vict. c. 42, s. 4, the Judge of the court below can order immediate execution. *Gildersleeve* v. *Hamilton*, 11 C. P. 298.

Issue from Superior Court—*Mode of Trial.*]—Under s. 18 of the Law Reform Act, Judges of the county courts can try cases brought down from superior courts without the intervention of a jury. *Cushman* v. *Reid*, 5 P. R. 121.

Interpleader Issue Sent from High Court—*Setting Aside Verdict.*]—A verdict was entered for the plaintiff on the trial of an issue directed by the court of chancery to be tried at the sittings of the county court of the county of Dufferin. The county court Judge set aside the verdict, and entered a nonsuit, on grounds embracing matters of law as well as of fact and evidence:—Held, that he had no power to do so, and that the application should have been made to the court that directed the issue. *Barker* v. *Leeson*, 9 P. R. 107.

Interpleader Issue Sent from High Court—*Change of Venue.*]—In an action pending in the high court, an interpleader issue and all subsequent proceedings were transferred, under 44 Vict. c. 7, s. 1 (O.), to the county court of Middlesex. By a subsequent order made on consent, the trial of such issue was withdrawn from Middlesex, and a special case was agreed on, and the venue changed from Middlesex to York, where the special case was argued:—Held, per Patterson and Osler, JJ.A., that in strictness the appeal should be quashed. The transfer to the Middlesex county court was final, and there was no jurisdiction under the statute or otherwise to transfer the issue or any part of it, or to change the venue to any other county court. The proceedings in the county court of York could therefore only be regarded as a summary trial by consent from which no appeal lay. *Coyne* v. *Lee*, 14 A. R. 503.

Motion in Term.]—Reading s. 41 with s. 29 of the County Courts Act, R. S. O. 1887 c. 47, and having regard to the provisions of Rule 488 O. J. Act:—Held, that a party may move before the Judge in court against the verdict or judgment at the trial, either before, or during the first two days of the next quarterly sittings after the trial. The motion is not necessarily to be made at the usual fixed sittings; the Judge may entertain it at any previous time. Scope of s. 42, s.-s. 5, R. S. O. 1887 c. 47, as to moving before the county court to set aside the judgment at the trial, observed on. Smith v. Rooney, 12 U. C. R. 661, is not applicable to the existing law and practice. *Norton* v. *McCabe*, 12 P. R. 506.

Recognizance.]—Semble, that a recognizance taken in a district court may be sued on in the Queen's bench. *Cochrane* v. *Eyre*, 6 U. C. R. 289.

Where a recognizance has been taken in open court, and it is so averred:—Held, that under 8 Vict. c. 13, ss. 20, 23, and 50, the filing of the recognizance in the office of the clerk is not necessary to perfect it. *Ib.*

Rule Nisi not Signed.]—Defendant in the county court obtained a rule nisi to enter a nonsuit, with stay of proceedings; it was not signed by the clerk, but had at the side the words, "Rule nisi granted: W. Salmon, Judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the Judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff:—Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed. *Brown* v. *Cline*, 27 U. C. R. 87.

Setting Aside Verdict—*Entering Judgment.*]—At the trial, the jury answered all the questions left to them in favour of the plaintiff, and judgment was entered for him, which the county court Judge subsequently set aside and entered judgment for the defendants:—Held, that under Rule 490 O. J. Act, the same power is extended to the county courts as is possessed by the high court under Rule 321, and that the Judge of the county court was right in giving judgment in favour of defendants instead of submitting the question to another jury. See also, on the same point, Stewart v. Rounds, 7 A. R. 575, and Williams v. Crow, 10 A. R. 301. *McConnell* v. *Wilkins*, 13 A. R. 438.

Silence of Pleading.]—Under the system of pleading in the high court of justice, and in county courts, under the Judicature Act, Rules 128, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. Waterloo Mutual Fire Ins. Co. v. Robinson, 4 O. R. 295, approved of. *Seabrook* v. *Young*, 14 A. R. 97.

Term Business in Vacation.]—A county court Judge cannot, by arrangement with the bar of his county, transact term business in vacation. *Smith* v. *Rooney*, 12 U. C. R. 661.

Trial in High Court—*Motion to Arrest Judgment.*] — Held, under the Law Reform Act, 1868, s. 17, s.-ss. 4 and 5, as amended by 33 Vict. c. 71 (O.), that in a county court cause tried at the assizes the motion to arrest judgment was properly made in this court. *Edmunds* q. t. v. *Hocy*, 35 U. C. R. 495.

Trial in High Court — *Setting Aside Notice.*]—Where a county court case has been directed to be tried at the assizes, an application to set aside the notice of trial must be made to the county court. *Clark* v. *Clifford*, 7 P. R. 329.

Trial—*Sheep Act.*]—The right of action given by R. S. O. 1887 c. 214, s. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the county court it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages if an apportionment be required. *Fox* v. *Williamson*, 20 A. R. 610.

Vacation.] — The vacation succeeding a term is not to be considered for the purpose of charging a defendant in execution as part of the preceding term. The same rule governs in this respect in county courts as in the superior courts. *Reid* v. *Drake*, 4 P. R. 141.

Venue — *Appeal.*] — Held, that there is no appeal to the full court in term from an order of the clerk of the Crown and pleas, made on an application to change the venue in county court cases under R. S. O. 1877 c. 50, s. 155; but the only appeal in such cases is to a Judge in chambers under s. 31 of that Act:—Held, however, that if an appeal did lie to the full court, it might be made direct thereto without first going before a Judge in chambers. *Mahon* v. *Nicholls*, 31 C. P. 22.

Semble, in such cases the proper course is to follow, as laid down in the Act, the practice in force in the superior courts; and the mere fact of the cause of action having arisen in the county to which it is sought to change the venue, is not of itself sufficient to outweigh any actual preponderance of convenience arising from other causes in favour of retaining the venue where the plaintiff had laid it. *Ib.*

Venue — *Appeal.*] — Where an application is made to the master in chambers to change the place of trial in a county court action no appeal lies from his order thereon to a Judge in chambers, and no appeal lies from the decision of a Judge in chambers to a divisional court. *McAllister* v. *Cole*, 16 P. R. 105.

Venue — *Appeal — Second Application.*]—Where in a county court action an application has been made to the master in chambers, under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in chambers. McAllister v. Cole, 16 P. R. 105, followed. Milligan v. Sills, 13 P. R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to s. 9 (2) of the Law Courts Act, 1895. *Cameron* v. *Elliott*, 17 P. R. 415.

Venue—*Intituling Papers.*]—Where a motion is made to a Judge of the high court or the master in chambers under Rule 1260 to change the venue in a county court action,

the papers should not be intituled in the high court of justice, but in the county court. *Ferguson* v. *Golding*, 15 P. R. 43.

Venue—*Master in Chambers.*]—As to the power of the master in chambers to change the venue in county court actions. See *Brigham* v. *McKenzie*, 10 P. R. 406.

Venue—*Replevin.*]—Held, that the venue in an action of replevin in a county court, except for goods distrained, may be changed to any other county, under R. S. O. 1877 c. 50, s. 155. *O'Donnell* v. *Duchenault*, 14 O. R. 1.

Venue — *Replevin—Tax Collector.*]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. 1887 c. 73, and under s. 15 of that Act, and s. 4 of R. S. O. 1884, c. 55, a county court action against him for replevin of goods seized by him, and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place. The Consolidated Rules as to venue do not override these statutory provisions. Legacy v. Pitcher, 10 O. R. 620, distinguished. Arscott v. Lilley, 14 A. R. 283, applied. *Howard* v. *Herrington*, 20 A. R. 175.

Writs of Trial and Inquiry.]—Where the declaration claims £75 for work and labour, but the bill of particulars only £19, the case is within the limits of the 8 Vict. c. 13, and a writ of trial may be ordered. *Martin* v. *Gwynne*, 5 U. C. R. 245.

It is not necessary to obtain a rule of court or a Judge's order to warrant the issue of a writ of inquiry to the district court. A plaintiff enters his record at the assizes to assess damages; the cause does not come on in its order, and is made a remanet; the plaintiff subsequently sues out a writ of inquiry to the district court; the defendant moves to set this writ aside, and all subsequent proceedings, for irregularity, the cause having been made a remanet at nisi prius; but—Held, writ of inquiry regular. *Northcote* v. *Hodder*, 5 U. C. R. 635.

Under 8 Vict. c. 13, a writ of inquiry may issue from the Queen's bench to the district court, not only to try the issues to the country, but also to assess contingent damages upon demurrer. *King's College* v. *Gamble*, 1 C. L. Ch. 54.

Notice of trial of a Queen's bench cause in the county court, cannot be given by anticipation before the writ of trial has been obtained. *Riach* v. *Hall, Patterson* v. *Hall*, 11 U. C. R. 256.

The filing of the writ of trial with the verdict indorsed on it, signed by the Judge of the county court, is a sufficient compliance with the statute. *Ib.*

The want of a postea according to the form given in the rule of court of H. T. 10 Vict. was held no objection, and if indispensable the court would have allowed such postea to be afterwards filed. *Ib.*

Held, 1. that a defendant complaining of an insufficient service of notice of trial in a cause pending in a superior court, but sent to a county court for trial under 23 Vict. c. 42, s. 4, may, without waiving the irregularity, apply within four days after the trial to the county Judge for a stay of proceedings till the fifth day of the following term of the superior court of law. *Fisher* v. *Green*, 2 C. L. J. 14.

Held, also, that he may, within the like period, make a similar application to a Judge of one of the superior courts of law sitting in chambers. *Ib.*

Quære, if he delay for seven days after the verdict without making an application of any kind, has he not thereby waived the irregularity? *Ib.*

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2. *Appeal from County Court.*

(a) *When it Lies.*

Amendment.] — The order of a Judge upon an application to amend, is not appealable. *Branigan* v. *Stinson*, 10 U. C. R. 403.

Amendment.] — The court, having no power on an appeal from the county court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule nisi, upon the return of which, in the court below, the necessary amendment could be made. *Wilson* v. *Brown*, 6 A. R. 411.

Amendment.]—This case had been remitted to the court below, this court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (6 A. R. 411). The Judge of the county court instead of entering such a verdict, directed a new trial, the parties to apply to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability:—Held, that the direction of the Judge as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this court in the exercise of its appellate jurisdiction would not interfere. *Wilson* v. *Brown*, 7 A. R. 181.

Attachment.]—Appeal in garnishee proceedings. See *Van Norman* v. *Grant*, 27 Gr. 498; *Sato* v. *Hubbard*, 6 A. R. 546; *McKindsey* v. *Armstrong*, 11 P. R. 200.

Attachment of Debts — *Judgment on Issue.*]—Under s. 42 of the County Courts Act, R. S. O. 1887 c. 47, an appeal lies to the court of appeal from the order or judgment of a county court disposing of an issue directed by an order made in an action in such county court upon a garnishing application; and the claimant, the plaintiff in the issue, though not a party to the original action, is a "party" within the meaning of s. 42, and may be an appellant. Sato v. Hubbard, 6 A. R. 546, distinguished. *Henderson* v. *Rogers*, 15 P. R. 241.

Attachment of Debts—*Issue sent from High Court to County Court.*]—The master in chambers made an order in an action in the high court, by consent of parties, directing the trial in a county court, between an execution creditor and a claimant, of an interpleader issue with respect to the ownership of certain goods, which the sheriff had not seized or intended to seize, but which, by the consent of the parties recited in the order, were to be regarded as if the sheriff had seized them and applied for an interpleader order:—

Held, that there was no jurisdiction, under Rule 1163 or otherwise, to make the order for trial of the issue in the county court; and, as the absence of jurisdiction was apparent on the face of the order, all the proceedings under it were coram non judice, and there was no right of appeal to the court of appeal from the judgment of the county court upon the issue. *Teskey* v. *Neil*, 15 P. R. 244.

Consent Verdict.] — After the evidence had been taken, a verdict was entered by consent for plaintiff, subject to the opinion of the court upon the whole case, with power to reduce the verdict:—Held, that there was no right of appeal. *McColl* v. *Waddell*, 19 C. P. 213.

Costs.]—An order allowing the defendant in an action in which the plaintiff accepted in settlement of his claim $95 paid into court, to set off his costs in excess of such costs as he would have incurred in a division court, is in its nature final and subject to appeal. *Babcock* v. *Standish*, 19 P. R. 195.

Demurrer.]—See *Outwater* v. *Dafoe*, 6 U. C. R. 256; *Kerby* v. *Elliott*, 13 U. C. R. 367.

Discretion.] — Where the county court Judge had exercised his discretion in a case, a superior court Judge refused to interfere. *Molloy* v. *Shaw*, 5 P. R. 250; *Clark* v. *Hurlburt*, 6 C. P. 438.

Discretion.]—Although the jurisdiction of the court of appeal is not limited in appeals from the county court as it is in appeals from the superior courts, under s. 18, s.-s. 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the county court upon a matter of discretion only. *Campbell* v. *Prince*, 5 A. R. 330.

In an action for assault against a public officer, in which the jury had found a verdict of $100, and a new trial, asked for on the ground that the verdict was against evidence, was refused, the court of appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour, and there was reason to believe the jury had been misled by the charge. *Ib.*

Discretion.]—At the trial the Judge left several matters of fact in dispute to the jury, who found on one point only and the Judge granted a new trial owing to his dissatisfaction with the verdict; the court refused to interfere with his discretion, as it did not appear that he was clearly wrong. *Hunter* v. *Vanstone*, 6 A. R. 337.

Divisional Court — *Discovery of New Evidence — Motion for New Trial.*]—A divisional court has no jurisdiction under s. 44, s.-s. 3 of the Law Courts Act, 1895, to hear an appeal from a county court in term refusing a new trial on the ground of the discovery of fresh evidence, and this applies to a judgment given before the Act came into force. *Brown* v. *Carpenter*, 27 O. R. 412.

Entry of Verdict.]—The Judge, at the trial in the county court, entered a verdict for the plaintiff, instead of directing judgment to be entered, and afterwards refused a rule nisi to set aside such verdict. Rule 405 of the O. J. Act in effect forbids the granting of any rule to shew cause where the application is against the judgment of a Judge who tries a cause without a jury. Quære, as to the application of this rule to county courts by Rule 480 O. J. Act; but—Held, that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510 O. J. Act. *Williams* v. *Crow*, 10 A. R. 301.

An objection to an appeal from a Judge refusing such rule might be raised by motion in chambers, but it is not obligatory to raise it in that manner. *Ib.*

Finding of Fact.]—In an action of replevin, the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house keeper; and for a third, avowed for a lien on the goods of plaintiff under R. S. O. 1877 c. 147, s. 2. On the trial, the evidence as to whether the defendant was the keeper of a boarding-house was contradictory, but the learned Judge decided in favour of the plaintiff, holding that the defendant was not a boarding-house keeper. On appeal this finding of the county court Judge was affirmed, although, had the matter come before this court in the first instance, it would have decided otherwise, and under the circumstances, no costs of the appeal were given to the respondent. *Rees* v. *McKeown*, 7 A. R. 521.

Finding of Fact.]—The court will not entertain an appeal from a county court, where the decision turns wholly upon the evidence, and involves no point of law. *Fowler* v. *McDonald*, 3 U. C. R. 385; *Bradley* v. *Crane*, 4 U. C. R. 122; *Manning* v. *Ashall*, 23 U. C. R. 302; *Clark* v. *Hurlburt*, 6 C. P. 438; *McKinstry* v. *Furby*, 24 U. C. R. 176; *Harris* v. *Robinson*, 25 U. C. R. 247; *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140; *Regina* v. *McLean*, 22 U. C. R. 443.

Insolvent's Discharge.] — The decision of a county Judge on an application by an insolvent for his discharge from imprisonment is appealable. *Hood* v. *Dodds*, 19 Gr. 639.

Interlocutory Order — *Summary Judgment.*]—An order for leave to sign judgment under Rule 80 is in its nature final, and not interlocutory, and such an order made in the county court, or district court, is appealable. *Bank of Minnesota* v. *Page*, 14 A. R. 347.

Interlocutory Order—*Striking out Jury Notice.*]—The right or claim mentioned in s. 42 of the County Courts Act, R. S. O. 1887 c. 47, is that which forms the subject of the action, not the right to take any particular step in the course of the action; and an order made in chambers in a county court action, striking out a jury notice, is not an order finally disposing of a right or claim within the meaning of the section, but is in its nature an interlocutory order, and not appealable. *McPherson* v. *Wilson*, 13 P. R. 339.

Interpleader.]—An appeal will lie upon an interpleader. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

Interpleader — *Issue from High Court.*]—An interpleader issue, arising out of an action in the chancery division of the high court of justice, was sent to a county court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (O.), rather than under the interpleader jurisdiction of the old court of chancery; and that being so, that a divisional court of the high court

of justice had no jurisdiction to hear an appeal from the judgment of the county court on such issue, and that such appeal should have been to the court of appeal, under R. S. O. 1877 c. 54, s. 23. *Close* v. *Exchange Bank*, 11 P. R. 186.

Interpleader.]—The proviso at the end of s. 52, R. S. O. 1897 c. 55, as to the order being final governs the whole section, and an order made in county court chambers in an interpleader application directing an issue in the event of security being given, and in default a sale of the goods and payment of the proceeds to the execution creditor, was held not appealable. *Hunter* v. *Hunter*, 18 C. L. T. Occ. N. 114.

Interpleader—*Application of Stakeholder—Issue from High Court.*]—The court of appeal has no jurisdiction to entertain an appeal from the decision of a county court upon an interpleader issue sent for trial by an order made in an action in the high court, upon the application of a stakeholder. Rule 1163 applies only to the case of an application by a sheriff, and not to a case coming within the first clause of Rule 1141; and in the latter case the high court has no power by virtue of any of the Consolidated Rules to direct an interpleader issue, in or arising out of an action in the high court, to be tried in a county court; and, therefore, unless otherwise supportable, the proceedings under an order so directing are coram non judice. But if the high court has power to make such an order—and semble, it has—by force of s. 110 of the Judicature Act, irrespective of the Consolidated Rules, preserving the old jurisdiction of the court of chancery, the appeal from the decision upon the issue is, in the first instance at all events, to the high court, and not to the court of appeal. *Clancy* v. *Young*, 15 P. R. 248.

Judge of Another Court Sitting in Term—*Verdict.*]—An action in the county court of Carleton was tried without a jury by the junior Judge of that county, who, after consideration, entered a verdict for the defendant. A court composed of the senior and junior Judges of Carleton and the Judge of the county court of Prescott and Russell subsequently assumed to set aside the verdict, and to enter judgment for the plaintiff, dissentiente the junior Judge of Carleton:—Held, that the judgment of a court so constituted was invalid, and that the verdict at the trial was not affected thereby. Per Patterson, J. A., the verdict at the trial was a final judgment of the court, and could not be attacked except by an appeal to this court. Rule 510, O. J. Act, gives a party no right to move in the county court. Per Osler, J.A., the party dissatisfied with the judgment at the trial may, under Rule 510 O. J. Act, move against it before the Judge himself; and an appeal to this court may, under 45 Vict. c. 6, s. 4 (O.), as properly be brought from the decision on such motion as from the judgment at the trial. *Ferguson* v. *McMartin*, 11 A. R. 731.

Jury—*Motion for New Trial.*]—When a case in the county court has been tried with a jury, the only appeal given by R. S. O. 1887 c. 47, s. 41, direct to the court of appeal from the judgment at trial, is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial, on a motion for a nonsuit, or the reception or rejection of evidence, or the charge to the jury, must be brought from the decision of the Judge upon a subsequent motion for a new trial. The general language of s. 42 does not apply when the case is one coming within s. 41. *Weaver* v. *Sawyer*, 16 A. R. 442.

Motion to Set Aside Verdict.]—Where a verdict is taken for plaintiff, with leave to move to enter a verdict for defendants, an appeal will lie from the decision on such motion. *Haworth* v. *Fletcher*, 20 U. C. R. 278; *McLean* v. *Town Council of Brantford*, 16 U. C. R. 347.

Objection not Taken at Trial.]—The verdict in this case was set aside by the Judge of the county court, and a nonsuit entered, upon a ground not taken as a defence at the trial, or in the rule nisi:—Held, that the Judge erred in giving effect to the objection, which, if taken at the trial, would have been met with an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule in the court below discharged. *Clarke* v. *Barron*, 6 A. R. 309.

Order Discharging from Arrest.]—An order of the Judge of a county court discharging the defendant from arrest under a ca. sa. is not in its nature final within the meaning of s. 52 of the County Courts Act, R. S. O. 1897 c. 55, and an appeal does not lie therefrom. *Gallagher* v. *Gallagher*, 31 O. R. 172.

Order Dismissing Motion for Judgment.]—An order in the county court dismissing an application by a plaintiff for summary judgment is not in its nature final and an appeal does not lie therefrom. *Fisken* v. *Stewart*, 17 C. L. T. Occ. N. 82.

Order Enlarging Sine Die Motion to Dismiss.]—An order of the county court enlarging sine die until after the happening of a named event, a motion by a defendant to dismiss an action for want of prosecution is not in its nature final and is not appealable. *Slater* v. *Trader*, 17 C. L. T. Occ. N. 83.

Order for Arrest.]—There must always be great reluctance to set aside the order of a county Judge directing bailable process, when there are reasonable grounds from which he might draw the conclusion that defendant was about to leave. *Swift* v. *Jones*, 6 L. J. 63.

Order for New Trial.]—In an action in a county court tried with a jury, a verdict was given in favour of the defendant. On motion in term the verdict was set aside, and a new trial ordered. The defendant appealed to a divisional court:—Held, that the appeal did not lie. *Irvine* v. *Sparks*, 31 O. R. 603.

Order for New Trial.]—Where, in a case of collision, the Judge reported that he thought he had not sufficiently directed the jury to the rule laid down in Tuff v. Warman, 5 C. B. N. S. 573, as to the effect of negligence on the plaintiff's part, and that he had therefore granted a new trial, this court on appeal refused to interfere. *Somers* v. *Livingston*, 24 U. C. R. 64.

Order for New Trial.]—Under s. 44, s.-s. 4, of the Law Courts Act of 1895, 58 Vict. c. 13 (O.), where a new trial has been granted in a county court action, the opposite party may appeal from the order directing the new trial to a divisional court of the high court of justice. *Cantelon* v. *Thompson*, 28 O. R. 396.

Order for New Trial and Refusing Nonsuit.]—Where defendants moved for a nonsuit on leave reserved, or for a new trial, and the rule was made absolute for a new trial, on payment of costs:—Held, that they might appeal from this decision as refusing the nonsuit, and need not first take out the rule absolute as granted. *Penton* v. *Grand Trunk R. W. Co.*, 28 U. C. R. 367.

Order in Term—*Reversal of Verdict.*]—In a county court action tried with a jury, a verdict was found for the defendant and judgment in his favour ordered by the trial Judge. Upon motion by the plaintiff to set aside the verdict and judgment and to enter judgment for the plaintiff or for a new trial, the county court, in term, made an order setting aside the verdict and judgment and ordering judgment to be entered for the plaintiff:—Held, that under the provisions of s. 51 of the County Courts Act, R. S. O. 1897 c. 55, an appeal by the defendant from the order of the county court, in term, lay to a divisional court of the high court. The county court Judge, in term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute. *Donaldson* v. *Wherry*, 29 O. R. 552.

Order Setting Aside Judgment on Terms.]—In a county court action the defendant made a motion to set aside a judgment by default as irregular, but the Judge held it regular, and, while he set aside the judgment, he did so upon terms of the defendant paying costs. The defendant appealed from this order upon the ground that the judgment should have been set aside unconditionally:—Held, that the order was not "in its nature final," within the meaning of s. 42 of the County Courts Act, R. S. O. 1887 c. 47, and the appeal did not lie. *O'Donnell* v. *Guinane*, 28 O. R. 389.

Order Without Jurisdiction.]—Where an action for not repairing the road, in which the venue is local, had been brought in the county court of a county different from that in which the road was situate, and a verdict for the plaintiff confirmed in term, this court allowed the appeal from such judgment, but made no order, as the court below, having no jurisdiction, could not be ordered to do anything in the case. *Ferguson* v. *Township of Howick*, 25 U. C. R. 547.

Partition.]—An appeal will lie under the Partition Act, 32 Vict. c. 33 (O.), from the judgment of a county court Judge on a special case stated. *In re Shaver and Hart*, 31 U. C. R. 603.

Persona Designata.]—By s. 30 of the Assignments Act, R. S. O. 1897 c. 147, an assignee for the benefit of creditors is enabled to take the proceedings authorized by s. 32 of the Creditors' Relief Act, R. S. O. 1897 c. 78, and, if he does so, the provisions of ss. 32 and 33 of that Act are to apply, mutatis mutandis, to proceedings for the distribution of moneys and determination of claims arising under an assignment:—Held, that an order of a county court Judge dismissing an application by a claimant, under s. 30, to vary the scheme of distribution made by the assignee of a debtor, was made by him as persona designata, and there was no appeal therefrom either by virtue of s. 38 of the Creditors' Relief Act or of s. 52 of the County Courts Act, R. S. O. 1897 c. 55, or otherwise. In re Pacquette, 11 P. R. 463, and In re Young, 14 P. R. 303, approved and followed. In re Waldie and Village of Burlington, 13 A. R. 104, distinguished. *Re Simpson and Clafferty*, 18 P. R. 402.

Pleading.]—Quære, whether the refusal of a re-pleader is an appealable matter. *Anglin* v. *City of Kingston*, 16 U. C. R. 121.

Quo Warranto.]—Appeal from an order of county Judge, setting aside fiat and writ of summons in the nature of a quo warranto. See *Regina ex rel. Grant* v. *Coleman*, 7 A. R. 619.

Registry Act—*Order Altering Plan.*]—Semble, that an appeal lies from the order of the Judge of the county court under the Registry Act, altering or amending a plan. *In re Waldie and Village of Burlington*, 13 A. R. 104.

Right to Address Jury.] — The court will not entertain an appeal from the court below upon the question whether plaintiff or defendant was entitled first to address the jury. *Hastings* v. *Earnest*, 7 U. C. R. 520.

The Judge of the county court granted a new trial on the ground that he was wrong in allowing the plaintiff to begin, and that it had prejudiced the defendant, as the verdict for the plaintiff was against the weight of evidence. This court held that though the verdict was wrong on the evidence, the ruling at the trial as to the right to begin was right, and an appeal was therefore dismissed without costs. *Neville* v. *Fox*, 28 U. C. R. 231.

Rule Nisi.]—An appeal will not lie from the granting of a rule nisi in the county court, before it has been made absolute or discharged. *Robinson* v. *Richardson*, 32 U. C. R. 344.

Security for Costs.]—In an action in a county court, after judgment therein dismissing the action with costs and notice of appeal therefrom to the high court given by the plaintiffs, an order was made by the Judge of the county court, upon the application of the defendants, requiring the plaintiffs, within four weeks, to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs:—Held, that this order was not in its nature final, but merely interlocutory, within the meaning of s. 52 (1) of the County Courts Act, R. S. O. 1897 c. 55, and no appeal lay therefrom. Held, also, that the provision of Rule 825, that no security for costs shall be required on a motion or appeal to a divisional court, applies to county court appeals; and it must be assumed that the security ordered was not

intended to extend to the costs of the appeal to the high court from the judgment dismissing the action, nor the stay to the appeal itself. *Arnold* v. *Van Tuyl*, 30 O. R. 665.

Settled Case.]—The decision on a case settled by consent in the county court without pleadings, is not appealable. *Harding* v. *Knowlson*, 17 U. C. R. 564.

Special Case.]—The plaintiff having commenced an action in the county court, at the trial a bill of exceptions was tendered, and it was then agreed that the pleadings and evidence should be stated as a special case for the Queen's bench, on which the court might order a verdict for plaintiff or defendants, or, at the election of the plaintiff, a nonsuit or new trial, the court to draw inferences as a jury. This was argued as a special case in the Queen's bench, and judgment given for the plaintiff, whereupon the defendants brought error. In the copy of the judgment roll transmitted immediately after pleadings and venire the evidence was set out, and then a statement of the contention on either side, and a formal entry of judgment for the plaintiff. The court of appeal refused to entertain the case, holding that if it was to be looked upon as an informal appeal from the county court to the Queen's bench, it was not a special case within ss. 150 and 157 of the Common Law Procedure Act, upon which error could be brought; that if it was to be treated as a cause in the Queen's bench, then the agreement of the parties to the special case, and a Judge's order allowing it, should have appeared on the roll, the facts and not the evidence only should have been stated, and the agreement of the parties should have been absolute, not giving the plaintiff an option to take a nonsuit or new trial instead of being bound by the judgment. *Holmes* v. *Grand Trunk R. W. Co.*, 29 U. C. R. 294.

Special Case.]—In a county court case, tried at the assizes, after verdict for defendant in that suit, the parties agreed upon a special case in the action in that court, and not upon a case originating in a superior court; the clerk, with the approval of the court, refused to receive it, on the ground that the only mode of bringing such a case before the superior court was the ordinary statutory one, by way of appeal. *Pattypicce* v. *Mayville*, 21 C. P. 316.

Winding-up.]—An order in a winding-up proceeding for the sale of assets is a "final order" as nothing further remains to be done under it and therefore is the subject of appeal. *In re D. A. Jones Co.*, 19 A. R. 63.

(b) *Procedure on Appeal.*

Action Dismissed on Plaintiff's Opening.]—There was a demurrer to the replication, and a verdict had been directed for defendant on the issue in fact on the opening address of plaintiff's counsel, from which the plaintiff appealed. Remarks as to the inconvenience of an appeal under such circumstances. *Sheriff* v. *McCoy*, 27 U. C. R. 597.

Appellate Court's Duty.]—The general rule in matters of appeal is, that unless the appellate court can say that the judgment of the court appealed against is clearly wrong, that judgment stands. *Keena* v. *O'Hara*, 16 C. P. 435.

Appellate Court's Duty.]—In appeals against the orders of the county court, this court will assume those orders to be correct until the contrary is shewn; and care must be taken to point out the defects on the pleadings and proceedings brought into this court. *Murphy* v. *Morrison*, 14 Gr. 203.

Bond not Given in Time.]—An appellant, having obtained the usual stay, omitted to give the bonds, and the opposite party, at the expiration of the four days, entered judgment. A mandamus to certify the proceedings in appeal upon a bond subsequently entered into was refused, upon the ground that no appeal would lie after judgment entered. *Murphy* v. *Northern R. W. Co.*, 13 C. P. 32.

Bond — *Immaterial Omission.*] — On the 18th of January proceedings were stayed for four days to allow defendants to give a bond for appeal, which was to be taken for $600. On the 18th the bond was filed, the proper penalty being inserted in the obligation, but in the recital of the Judge's order this sum was left blank. The Judge pointed out the omission to defendants' attorney, who inserted the sum; but the Judge afterwards required him to get the bond re-acknowledged, and he procured it from the clerk of the court for that purpose. The plaintiff's attorney finding it gone gave notice of taxation; but it was returned before judgment, which was nevertheless entered, and upheld on the ground that the bond when first filed was defective, and that it had not been refiled with an affidavit of execution after being corrected. The Judge afterwards refused to transmit the papers for appeal, and to a mandamus nisi returned the above facts: —Held, that the bond was sufficient when first filed, the omission being immaterial: that the sum might have been inserted without re-execution, and that it was therefore unnecessary to file any new affidavit. *Regina* v. *Wells*, 17 U. C. R. 545.

Bond—*Condition Defective.*] — A county court Judge having refused to certify the papers for appeal, because the bond was not conditioned to abide by the decision of the court above, as the statute requires, this court refused to interfere. *In re Keenahan* v. *Preston*, 21 U. C. R. 461.

Bond—*Condition Defective.*]—The condition of the bond not being in accordance with the statutes, the appeal entered for argument was struck out of the paper. *Pentland* v. *Heath*, 24 U. C. R. 464.

Bond—*Form.*]—As to the effect of 27 Vict. c. 14, regarding the form of bond, see *Tozer* q. t. v. *Preston*, 23 U. C. R. 310; *Darling* v. *Sherwood*, 2 C. L. J. 130.

Bond—*Not in Time.*]—This court will not refuse to hear an appeal properly entered, because the necessary bond was not given in time. *Haworth* v. *Fletcher*, 20 U. C. R. 278.

Certificate of Judge—*Objection to Security—Order for Committal of Judgment Debtor.*]—1. An appeal lies to the court of appeal from an order of the Judge of a county court, in a county court action, committing the defendant to gaol, upon his ex-

amination as a judgment debtor, for concealing or making away with his property in order to defeat or defraud his creditors. Such an order is in its nature final, and therefore comes within s.-s. 2 of s. 42 of the County Courts Act, R. S. O. 1887 c. 47, as controlled by the proviso at the end of the section. 2. It is not a valid objection to an appeal that the Judge of the county court has not, in certifying the proceedings, expressed in his certificate that they are certified "to the court of appeal." 3. The court of appeal will not entertain an objection to the security upon the appeal given in the county court appealed from. *Baby* v. *Ross*, 14 P. R. 440.

Costs in Court Below.]—Where a party filed a bill on the equity side of the county court, which on the hearing was dismissed with costs, and the plaintiff appealed to this court, when the ruling of the Judge was reversed, the court gave to the plaintiff the costs of the appeal, as well as of the court below. *Farquhar* v. *City of Toronto*, 12 Gr. 186.

Costs—*Appeal at Suggestion of Judge.*]—As the defendant might be said to have appealed in compliance with the wish of the learned Judge, costs were not given on dismissing the appeal. *Harris* v. *Robinson*, 25 U. C. R. 247.

Costs.]—Appeal allowed with costs, contrary to the previous practice. *Eddy* v. *Ottawa City Passenger R. W. Co.*, 31 U. C. R. 569, 576, note *a*; *In re Shaver and Harty*, *ib.* 609, note *a*. See, also, *Smith* v. *Rooney*, 12 U. C. R. 661.

Costs—*Appeal Instead of Motion.*]—The defendant, in a suit on the equity side of the county court, had, before being served with an injunction restraining the removal of a building, removed the same by direction of the city inspector as being a nuisance, having been erected partly on the public street; notwithstanding this, an order was made by the Judge of the county court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this court. In allowing the appeal, and directing defendant's discharge, the court did not give him the costs of the application. *Murphy* v. *Morrison*, 14 Gr. 203.

Costs—*Discretion.*]—As the judgment was varied on a matter of discretion, no costs of appeal were given. *Campbell* v. *Prince*, 5 A. R. 330.

Costs.]—See APPEAL, IX. 1., *ante* col. 47.

Cross-appeal.]—In county court cases notice of cross-appeal is not necessary. *Hutson* v. *Valliers*, 19 A. R. 154.

Delay in Setting Down—*Dismissal.*]—The fact that the appellant in a county court appeal has obtained from the Judge of the court appealed from, under R. S. O. 1887 c. 47, s. 46, a stay of proceedings to enable him to give security, does not absolve him from the necessity of complying with Rule 836, by setting the appeal down for hearing at the first sittings of the court which commence after the expiration of thirty days from the decision complained of, although such sittings commence before the expiration of the stay. And where judgment in a county court was entered on the 17th January, notice of appeal served on the 30th January, a stay of proceedings for thirty days granted on the 12th February, and security given on the 12th March, but the appeal was not set down for the March sittings of the court of appeal, nor the proceedings certified, an order was made dismissing it with costs, no sufficient excuse being given for the delay. *Paul* v. *Rutlidge*, 16 P. R. 140.

Delay in Setting Down—*Dismissal*—*Extending Time.*]—Section 46 of the County Courts Act, R. S. O. 1887 c. 47, providing that the county court Judge shall stay the proceedings for not more than thirty days to afford an appellant time to give security to enable him to appeal, and Rule 836, providing that a county court appeal shall be set down for the first sittings which commence after the expiration of thirty days from the decision complained of, are, to some extent, in conflict. Until, however, the proceedings in the court below have been sent up to the court of appeal by the county court Judge, as directed by s. 51 of the County Courts Act, the appeal is not lodged, and the court can neither dismiss it nor extend the time for setting it down for hearing. But the court can always extend the time, on application, where the appeal has been lodged, and will do so, as a matter of course, where there has been no wanton delay in giving the security within the time allowed by the county court Judge. Paul v. Rutlidge, 16 P. R. 140, commented on. *Gilmor* v. *McPhail*, 16 P. R. 151.

Directing Amendment in Court Below.]—In pleading the general issue by statute, any statute relied upon for the defence must be referred to in the margin as well as that by which such plea is allowed. But where such a statute had been omitted in the county court, this court on appeal directed the court below to amend by inserting it. *VanNatter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

District Court—*Writ of Error.*]—Where either party can appeal from a district court under s. 57 of 8 Vict. c. 13, the appellant must take that course and not by writ of error. *Thomas* v. *Hilmer*, 4 U. C. R. 527.

Exhibits.]—Where exhibits used in the court below are not produced before the appellate court, the appeal will not be heard, if the attention of the court be called to the fact. *Morse* v. *Thompson*, 19 C. P. 94.

Grounds of Decision to be Certified.]—It is the duty of a county court Judge to certify to the court above on an appeal the grounds of his decision. The statute is not complied with by certifying the decision simply. *Hayward* v. *Grand Trunk R. W. Co.*, 32 U. C. R. 392.

Habeas Corpus.]—Where a county Judge has jurisdiction in the premises, a superior court Judge will not in general, if at all, exercise a power of appeal by habeas corpus, which was never intended as a means of appealing from the discretion of a county Judge. *Runciman* v. *Armstrong*, 2 C. L. J. 165.

See, also, *In re Munn*, 25 U. C. R. 24.

Insolvency Appeal.]—A petition of appeal from the decision of a county court Judge, acting in insolvency, need not set out all the evidence, documents, and materials used before the Judge. What is needed is,

that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceeding appealed from, and the materials to be used on the argument of the appeal. *Hood* v. *Dodds*, 19 Gr. 639.

An order in insolvency was made on the 24th day of December, and the fifth day thereafter fell on a Sunday:—Held, that service of notice of appeal on the Monday following, was in time. *Ib.*

It is not necessary that the security to be given on an appeal in insolvency should be executed in presence of a Judge. *Ib.*

Insufficient Material.] — Observations on the manner of sending up cases from the county courts on appeal to the superior courts, and the insufficient materials furnished. *Arthur* v. *Monk*, 21 C. P. 76.

Irregularities in the Appeal—*Procedure—Effect of Judge's Certificate.*]—Semble, that until the bond has been filed with the clerk, he cannot refuse to enter the judgment. In this case the bond had been allowed and the opposite party notified thereof, but it was not deposited with the clerk until after the entry of judgment and issue of execution, though on the same day:—Held, 1. that such judgment was not a nullity; 2. that if irregular it should have been moved against in the court below. The proceedings in the cause having been improperly certified to this court, after the entry of such judgment the appeal was ordered to be struck out of the paper. *Wood* v. *Grand Trunk R. W. Co.*, 16 C. P. 275.

Where the bond allowed was for less than the verdict:—Held, insufficient; but this court will not go behind the certificate of the County Judge to inquire into the regularity of the prior proceedings. Pentland v. Heath, 24 U. C. R. 464, referred to. *McLellan* v. *McClellan*, 2 C. L. J. 297.

This court will not entertain objections to the hearing of county court appeals unless such objections appear or should properly appear upon the proceedings certified. They refused therefore to strike out an appeal entered, for objections to the form and amount of the bond, and to the sufficiency of the sureties and the affidavits of justification. *Penton* v. *Grand Trunk R. W. Co.*, 28 U. C. R. 367.

Judgment Entered.]—The right to appeal must be exercised before the entry of judgment in the cause. A bond having been allowed, and the appeal set down for argument, after judgment entered, the case was struck out upon motion. *Duffil* v. *Dickenson*, 14 C. P. 142.

New Evidence.]—The court refused to receive an affidavit, made by one of the witnesses examined at the trial, and put in after the argument of the appeal. *Bank of Upper Canada* v. *Tarrant*, 19 U. C. R. 423.

New Evidence.]—Under Rule 498 the court may entertain an application to admit new evidence in a proper case on a county court appeal, notwithstanding R. S. O. 1897 c. 55, s. 51, s.-s. 3, under which such an application must be made before the county court, and this although the time for applying for a new trial had expired. *Butler* v. *McMicken*, 32 O. R. 422.

Nonsuit.]—Where a nonsuit was granted in the county court, which this court thought could not be sustained, but the right of the plaintiff upon the evidence seemed very doubtful, the court on appeal ordered a new trial. *O'Rourke* v. *Lee*, 18 U. C. R. 609.

Pleadings to be Certified.]—Semble, that on an appeal the Judge should certify the original pleadings, &c., filed in the cause. *Murphy* v. *Northern Railway Co.*, 13 C. P. 32.

Reasons of Appeal.]—The grounds of appeal must be stated in the appeal books, independently of the objections set out in the rule nisi below. *Severn* v. *Street Railway Co.*, *Corbett* v. *Taylor*, 23 U. C. R. 254.

Appeals will not be heard unless such grounds are entered on the appeal books when delivered. *Eddy* v. *Ottawa City Passenger Railway Co.*, 31 U. C. R. 569.

Recovery on Bond.]—R., the plaintiff below, appealed, giving a bond to the defendant, W., to abide by the decision of this court of the cause, "and to pay all such sums of money and costs, as well as of the said suit as of the said appeal, as should be awarded and taxed to said W." The appeal having been dismissed, W. recovered judgment in the court below:—Held, that the bond compelled R. to pay W.'s costs of defence taxed there, not merely the costs of appeal. *Waddell* v. *Robertson*, 26 U. C. R. 376.

Where the decision of the court appealed to in effect sustains a judgment of the county court, which disposes of the cause in the respondent's favour, or directs a proceeding or judgment which has that effect, the bond is a security for any debt or damages awarded, and for the costs of the cause as well as of the appeal. *Ib.*

Declaration on a bond conditioned to abide by the decision of the common pleas in a county court suit of W. v. M., appealed to that court, and to pay all moneys and costs, as well of the suit as of the appeal. Breach, nonpayment of all sums of money and costs awarded and taxed to W. in the suit: that he recovered judgment in the county court against M. for $220 damages and $72 costs, which defendant had not paid. Plea, that no decision of the said cause was ever made by the common pleas nor any money or costs awarded or taxed by the court to the plaintiff:—Held, plea good, for the condition was only to abide by the decision of the common pleas, and if the appeal was not heard and the refusal to entertain it was a decision of that court, it should have been so alleged. The plaintiff replied, that the sums of $270 and $72 were within the true intent and meaning of the condition awarded and taxed to the plaintiff as and for his moneys and costs which M., within such intent and meaning, was liable to pay:—Held, bad, as tendering an issue on matter of law. *Waddell* v. *McColl*, 30 U. C. R. 260.

Reference Back to Assess Damages.]—The court of appeal directed a verdict to be entered for the plaintiff against a tavern-keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the county court Judge to assess the damages, declining to follow the course adopted in Denny v. Montreal Telegraph Co., 3 A. R. 628. *Austin* v. *Davis*, 7 A. R. 478.

Security.]—As to the time in which security for an appeal might be tendered to the county court Judge under s. 11 of 12 Vict. c. 66. See *Ford* v. *Crabb*, 8 U. C. R. 274.

Setting Down Appeal—*Former Practice.*]—See *Ruttan* v. *Vandusen*, 10 U. C. R. 620; *Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57; *Smith* v. *Foster*, 11 C. P. 161.

Staying Proceedings.]—Held, that an order staying proceedings to enable a party to appeal, under 33 Vict. c. 7, s. 13 (O.), beyond the ten days limited therein, is void; but held, also, that an appeal may be brought without any order staying proceedings at any time before it has been precluded by the proceedings of the other party, as by the entry of final judgment. Where, therefore, the Judge had stayed proceedings for more than ten days to enable the defendant to appeal, but the plaintiff had not signed judgment, and defendant had given the security, a prohibition against proceeding further with the appeal was refused. *In re Lawson* v. *Laidlaw*, 7 P. R. 166.

Technical Objection.] — Semble, effect must be given to a valid legal objection on appeal, though justice has been done. *Kelly* v. *Baldwin*, 4 U. C. R. 143.

Time.]—Semble, that no time is now limited for appealing from the county courts. *In re Tozer* q. t. v. *Preston*, 23 U. C. R. 310.

Time.]—When an appeal from a county court is set down too late, the court has no power to hear it, nor has the court or the Judge below power to extend the time; Con. Rule 353 neither in terms nor by inference applying so as to enable the court to extend the time limited by the statute. *McCarron* v. *Metropolitan Life Ins. Co.*, 35 C. L. J. 421, 19 C. L. T. Occ. N. 230.

Time.]—The County Courts Act, R. S. O. 1897 c. 55, s. 57, provides that "the appeal shall be set down for argument at the first sittings of a divisional court of the high court of justice which commences after the expiration of one month from the judgment, order, or decision complained of:"—Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date. If such opinion or decision is not pronounced or delivered in open court, it cannot be said to be pronounced or delivered until the parties are notified of it. Quære, whether, after a judgment has been settled and entered, the Judge has power to resettle it. *Fawkes* v. *Swayzie*, 31 O. R. 256.

Time.]—The provisions of ss. 55 and 56 of the County Courts Act, limiting the time in which an appeal from the county court to the divisional court must be set down are peremptory, and there is no power to dispense with such provisions, or to enlarge the time for setting down the appeal. Where, therefore, a Judge of a district court refused to certify the pleadings so as to enable an appeal to be set down for the divisional court, and an order was obtained from a Judge to allow such an appeal to be set down, such order was held to be of no avail, and the appeal was struck out. *Reekie* v. *McNeil*, 31 O. R. 444.

Time.]—Neither R. S. O. 1897 c. 55, s. 57, nor Con. Rule 795, prohibits a county court appeal being set down to be heard for a sitting of the divisional court, commencing within thirty days from the decision complained of. *Lees* v. *Ottawa and New York R. W. Co.*, 31 O. R. 567.

Undue Length of Books.] — The unnecessary length of the appeal books remarked upon in this case. *Phillips* v. *Findlay*, 27 U. C. R. 32.

Unsatisfactory Books.] — The manner in which the appeal books were written remarked upon. *Cloy* v. *Jacques*, 27 U. C. R. 88.

Writ of Error—*Former Practice.*]—See *Pope* v. *Reilly*, 29 U. C. R. 478.

See COURT OF APPEAL—INTERPLEADER.

V. TRANSFER TO HIGH COURT.

Ascertained Amount.]—An action was brought in a county court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability, and the action was tried by a jury, who found that the plaintiff was entitled to recover $250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury:—Held, that the amount was not ascertained within the meaning of R. S. O. 1887 c. 47, s. 19, s.-s. 2, and the county court had no jurisdiction. Robb v. Murray, 16 A. R. 503, followed:—Held also, that the Act 54 Vict. c. 14 (O.), passed after the determination that the county court had no jurisdiction, was retrospective, and enabled the action to be transferred to the high court. *Re McKay* v. *Martin*, 21 O. R. 104.

Equitable Relief.]—If a county court has no jurisdiction over the plaintiff's cause of action, the proceedings in respect thereof in that court are all coram non judice, and the Judge of that court has no power over them; s. 38 of R. S. O. 1887 c. 47, applies only where the action in which the equitable question is raised is within the jurisdiction of the county court. Prohibition granted to restrain a Judge from transferring to the high court an action brought in a county court for an equitable cause of action. *Re McGugan* v. *McGugan*, 21 O. R. 289.

Judgment Before Transfer.]—An action cannot be removed under 54 Vict. c. 14 (O.), from a county court to the high court after verdict or judgment in the county court in favour of the plaintiff, leaving that verdict or judgment in force, with the right to either party to move against it in the high court. Re McKay v. Martin, 21 O. R. 104, considered. *Sherk* v. *Evans*, 22 A. R. 242.

Removal to Court of Chancery.]—A suit in the county court is only removable into this court, under s. 57 of the County Courts Act (C. S. U. C. c. 15), where the county court has jurisdiction in the matter, but the "nature of the claim renders it a proper case to be withdrawn from the jurisdiction of the county court, and disposed of in the court of chancery." *Martin* v. *Mitchell*, 1 Ch. Ch. 384.

Scale of Costs of an Action Transferred from County Court to High

Court.]—The provisions of Rule 1219 are applicable to an action transferred from a county court to the high court by virtue of 54 Vict. c. 14 (O.), and the costs of the proceedings after the transfer should be taxed upon the lower scale where the case falls within s.-s. 4 of the Rule, by reason of the plaintiff seeking equitable relief, and the subject matter involved not exceeding $200. *Struthers* v. *Green*, 14 P. R. 486.

See CERTIORARI, I. 2—COURT OF APPEAL—CRIMINAL LAW.

COUNTY CROWN ATTORNEY AND CLERK OF THE PEACE.

Advising Jury.]—As to the propriety of a county attorney entering the jury room and advising coroner's jury as to the language of their verdict. See *Regina* v. *Sanderson*, 15 O. R. 109.

Appointment.] — In 1858 the plaintiff was appointed county attorney for W. In May, 1862, the person who had for many years been clerk of the peace for that county died, and in August following defendant was appointed to succeed him in such office. C. S. U. C. c. 106, s. 7, enacts that any clerk of the peace appointed after that Act "shall be ex officio county attorney for the county of which he is clerk of the peace :"—Held, that defendant upon his appointment as clerk of the peace became also county attorney, although the plaintiff's commission had been not otherwise revoked, and he had received no notice of any change in his position. *Robertson* v. *Freeman*, 22 U. C. R. 298.

Audit.] — The magistrates in quarter sessions, not the county auditors, are to audit the accounts of the clerk before payment, and the treasurer should pay them upon the chairman's order. *In re Poussett and County of Lambton*, 22 U. C. R. 80.

See, also, *In re Sheriff of Lincoln*, 34 U. C. R. 1.

County of York.]—Semble, that under the Jury Act, the Municipal Act, and the Act separating the city from the counties, the duty of selecting and drafting jurors for the city, now belongs to the clerk of the recorder's court, and not to the clerk of the peace for the counties. *In re McNab and Daly*, 22 U. C. R. 170.

County of York.]—The county attorney of York, though not clerk of the peace, is an officer coming within R. S. O. 1877 c. 85, whose expenses form part of the expenses of the administration of criminal justice. *In re Fenton*, 31 C. P. 31.

Fees.]—The payment of certain fees by a district council in accounts rendered for services in former years, will not prevent their disputing the charges in subsequent years. *Askin* v. *London District Council*, 1 U. C. R. 292.

The clerk of the peace cannot charge fees for any service for which no fee is given by 43 Geo. III. c. 11, or otherwise. *Ib.*

If he accept a salary in lieu of all fees, he is entitled only to such salary. *Ib.*

A municipal council, in 1850, assigned to a clerk of the peace a fixed salary for that year, "in lieu of all fees:"—Held, (the Jury Act 13 & 14 Vict. c. 55, having been subsequently passed,) that he could still claim the fees allowed by the statute for preparing the jury books for the following year. *Pringle* v. *McDonald*, 10 U. C. R. 254.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. *Hooker* v. *Gurnett*, 16 U. C. R. 180.

In this case the question was whether certain fees, classified in schedules in a special case submitted, could legally be claimed, and how far the county having paid them during several years upon accounts duly audited and passed, could recover back such as the clerk was not entitled to. Besides deciding as to the different charges the following general principles were laid down: Where the clerk, at the request of the justices or municipality, or of the county auditors, renders services which he is not bound to render, and for which no fee is allowed, though he might be unable to sue for his charges, yet, when they have been duly audited and paid under no misunderstanding, the municipality cannot recover them back; and the same rule is applicable to disbursements, as for stationery, office furniture, &c. *County of Lambton* v. *Poussett*, 21 U. C. R. 472.

C. S. U. C. c. 119, making it penal in the clerk to receive more than the legally established fee for services performed by him, does not apply to services or disbursements not properly belonging to his office; but the enactment is not confined to fees demanded of individuals for public services, nor does the penalty imposed interfere with the right to reclaim fees received contrary to the Act. *Ib.*

Where the fees are within that Act, and have been paid, they may be recovered back as money illegally received, though his accounts containing them have been audited and passed. *Ib.*

Under C. S. U. C. c. 120, the clerks of the peace and other officers are not to make out accounts against the government in the first instance, but against the county, who are to be paid or reimbursed by government after proper audit. *Ib.*

The schedule appended to that Act was not intended to embrace all the expenses of criminal justice chargeable against the government, but only to remove all doubt as to those specified. *Ib.*

The clerk under C. S. U. C. c. 124, and the tariff of 1862, No. 57, is entitled only to $1 for each quarterly return of convictions made by him to the minister of finance, not to $1 for the list of convictions sent to him by each justice included in such return. *In re Poussett*, 22 U. C. R. 412.

Drafting the panel from the jury list under C. S. U. C. c. 78, is not a special session of the peace, and the clerk therefore is not entitled to charge for it under No. 66 of the tariff. *Ib.*

The clerk is required by C. S. U. C. cc. 19, 120, to record and notify to the government and to the clerks of each division court only the acts of the quarter sessions with regard to the limits of the different divisions, not the orders of the Judge as to the times and places of holding the courts; and he is not entitled

therefore under the tariff, Nos. 38 to 43 inclusive, to charge for such last mentioned orders. *Ib.*

The table of fees established and promulgated by the courts contains all the services for which clerks are entitled to charge, in addition to such as are specially authorized and provided for by any statute. No local tariff or user in particular counties can give any additional right. *In re Dartnell*, 26 U. C. R. 430.

Where the quarter sessions have audited the account of such clerk, this court will not interfere by mandamus to compel the allowance of particular items. *Ib.*

Where the account of the county attorney of York, for the quarter ending 31st December, 1879, for expenses connected with the administration of criminal justice, was audited by the county board of audit, and paid, but certain of the items were disallowed by the provincial treasurer as not payable by the Crown out of the consolidated revenue fund, not being contained in the schedule, and the board of audit, therefore, in auditing the county attorney's account for a subsequent quarter, deducted therefrom the amount of said disallowed items, a mandamus was granted to the board to rescind their order for such deduction. *In re Fenton*, 31 C. P. 31.

Under an order in council the county attorney is entitled to $4 on receiving and examining all informations, &c., connected with criminal charges for the court of assize, &c., upon the certificate of the crown counsel that such fee should be allowed. One C. on being brought before the county Judge on twenty-five charges of larceny, having elected to be tried by a jury, was tried at the ensuing assizes, and convicted on three of them; but the remaining twenty-two cases were not tried. The plaintiff, a county attorney, obtained the Crown counsel's certificate for and charged a fee of $4 in each of the twenty-five cases, which was passed by the board of audit, and paid by the county treasurer, but upon the twenty-two untried cases being disallowed by the provincial treasurer and his decision communicated to the board they deducted the amount from a subsequent account:—Held, that a mandamus would not lie to the board of audit, to rescind their order, the ruling of the provincial treasurer being a good reason for deducting the amount, which was a matter for their discretion under R. S. O. 1877 c. 85. *In re Stanton*, 3 O. R. 86.

A fee of fifty cents is allowed to the county attorney for attendance in the county Judge's criminal courts, and making the necessary entries for each prisoner not consenting to be tried summarily. The plaintiff charged fifty cents for actual attendances and making the necessary entries in each of the twenty-five charges preferred against C., which were separately read over to him and his election taken thereon. The three cases only on which the prisoner was actually tried were allowed by the board of audit, on the ruling of the provincial treasurer:—Held, that for the same reasons as above, a mandamus would not lie to the board of audit to allow the fee in the other cases. *Ib.*

The plaintiff claimed $1 for an affidavit verifying the jurors' book, and $1 for a certificate drawn up by him for the county Judge to sign, of the receipt of such book, &c. The tariff allows $1 "for each certificate required to be entered in the jurors' book to verify the same:"—Held, that these fees could not be allowed, and that a mandamus would not lie. *Ib.*

Garnishing Salary.]—See *Harvey* v. *Stanton*, 13 C. L. J. 108.

Notice of Action.]—See *McDougall* v. *Peterson*, 40 U. C. R. 95.

Office Accommodation.]—A county attorney and clerk of the peace may maintain an action against the corporation of the county for breach of duty in not providing necessary and proper accommodation for him as such officer, as required by 29 & 30 Vict. c. 51, s. 419, and may recover, by way of damages in such action, rent paid by him to procure such accommodation. *Lees* v. *County of Carleton*, 33 U. C. R. 409.

The court house in which plaintiff previously had his office was burned, and the county council informally offered him certain rooms in another building leased by them. The plaintiff considering them insufficient, as in fact they were, hired others at $11 per month; and having sent in his bill to the council for seventeen months, they passed a resolution to pay him $93.50 (being one-half) in full of his claim, which sum he afterwards received, and signed the receipt and the cheque therefor, which purported to be in accordance with the resolution:—Held, that he was bound by such settlement, and could not recover more in respect of the seventeen months' rent; but that he might recover the full rent paid by him subsequent to the resolution. *Ib.*

Payment of Fees.]—Where the treasurer of the district council refused to pay the account of the clerk of the peace for certain services, and returned to a mandamus nisi that such charges were not shewn by the clerk of the peace to be connected with the administration of justice, or to have been specifically provided for by law, so as to render it necessary that they should be audited by the district council; and returned further, that there were no funds in his hands out of which he could pay those charges; the return was allowed. *Clerk of the Peace* v. *Western District Municipal Council*, 1 U. C. R. 162.

Persons Liable for Fees.]—It was decided in County of Lambton v. Poussett, 21 U. C. R. 472, that the clerk is not to look to the government for the expenses payable by them under C. S. U. C. c. 120, but to the county, who are to be reimbursed by the government. Where the clerk applied to the county auditors instead of to the sessions, and they refused on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus calling upon the county to pay. *In re Poussett and County of Lambton*, 22 U. C. R. 80.

Practising Law—*Certificate.*]—A county attorney practising law only so far as required by that office, need not take out a certificate. *Re Coleman*, 33 U. C. R. 51.

See NOTICE OF ACTION, I.

COUNTY ROADS AND BRIDGES.

See WAY, IV. 7.

COURTS.

Appellate Jurisdiction.] — Where the court of common pleas exercises an appellate jurisdiction, it will decide according to its own view of the law, notwithstanding an adverse decision in the Queen's bench. *McInnes* v. *Haight*, 8 L. J. 23.

British Columbia Court.] — The supreme court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England. *In re Sproule*, 12 S. C. R. 140.

Chamber Motion at Assizes.]—There is nothing to prevent a Judge sitting at the assizes hearing a chamber motion, if he is disposed, for the purpose, to treat the court room as his chambers. *Sarnia Agricultural Implement Manufacturing Co.* v. *Perdue*, 11 P. R. 224.

Commission of Assize.]—As to the power of the Crown to issue commissions to hold courts of oyer and terminer and assize. See *Regina* v. *Amer*, 42 U. C. R. 391.

Conflicting Decisions.] — When the Queen's bench and common pleas are at issue on the construction of an Act of Parliament, the duty of a county Judge is to decide according to his own view of the law. *McInnes* v. *Benedict*, 8 L. J. 22.

Where defendant, besides denying plaintiff's title, claimed title under a deed from the plaintiff to M. and under M.:—Held, that such notice did not relieve the plaintiff from proof of title. A contrary opinion had prevailed in this court, in opposition to the view taken by the common pleas, but each of the Judges now composing the Queen's bench, had, while sitting in the other court, concurred in their decisions:—Held, therefore, that the difference of opinion should no longer continue; and the cases in this court — Brandon v. Cawthorne, 19 U. C. R. 368, and Cartwright v. McPherson, 20 U. C. R. 251— were overruled. *McGee* v. *McLaughlin*, 23 U. C. R. 90.

Where the courts of chancery and common pleas had given different judgments upon the same point, the court of Queen's bench considered the question and expressed their own opinion. *Barber* v. *Maughan*, 42 U. C. R. 154.

Where the courts of Queen's bench and common pleas had given opposing judgments on the same question, this court, on affirming one of those judgments, dismissed the appeal without costs. *Sexton* v. *Paxton*, 2 E. & A. 217.

Contempt—*Judge in Vacation.*]—Semble, that a Judge sitting out of term under the A. J. Act, does not represent the full court so as to enable him to punish for a contempt of such court. *Regina* v. *Wilkinson*, *Re Brown*, 41 U. C. R. 47.

Contempt or Misdemeanour.] — Held, that the jurisdiction given to the Legislature by R. S. O. 1877 c. 12, ss. 45 to 48, to punish for a contempt does not oust the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the Legislature, and in another aspect a misdemeanour. *Regina* v. *Bunting*, 7 O. R. 524.

Delaying Judgment to Allow Legislation.] — The court delayed pronouncing judgment in order to enable Parliament, if they should think proper, to legalize certain orders of sessions on which large expenditure has been incurred. *Rex* v. *Justices of Newcastle*, Dra. 294.

See, also, *Forester and Township of Ross*, 24 U. C. R. 588.

Delegation of Judicial Functions.]—A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered to do so. *In re Queen City Refining Co.*, 10 P. R. 415.

Disqualification of Judge — *Sitting pro Formâ.*]—Three of the Judges in appeal being members of the church society, they held themselves disqualified to sit as Judges, except ex necessitate, though no objection to their sitting was taken at the bar; but there not being a quorum without them, they heard the case with the other Judges, in order that a judgment, legal in point of form, might be given by the court. *Boulton* v. *Church Society*, 15 Gr. 450.

Disqualification of Judge.] — Where a reference was made to a local master who had, prior to his appointment, been the counsel of one of the litigants, neither party objecting to his taking the reference, and on the contrary the master certified that he acted on the reference at the pressing instance of both parties, the court held that the other party, against whom the master reported, could not raise that objection on an appeal from the report, having taken the chance of the master finding in his favour. *Cotter* v. *Cotter*, 21 Gr. 159.

English Decisions.] — We are not to adopt as a rule the decisions of the Queen's bench in matters of practice, more than those of the exchequer or common pleas, but should adopt whichever will be most convenient and suitable for ourselves. *Hawkins* v. *Paterson*, 3 P. R. 254.

The court of chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient, where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on until the different doctrine lately held in England and Ireland, is adopted in appeal, either in England or here. *Moore* v. *Bank of British North America*, 15 Gr. 308.

If there be a series of decisions in this country leading one way, they should be followed in preference to a single decision or an English court, especially where in it there was a difference of opinion. *Scott* v. *Reikie*, 15 C. P. 200.

The decision of Humberstone v. Henderson, 3 P. R. 40, being upon a point of practice, was adhered to, though placing a construction on our statute different from that put upon substantially similar language in the

English Act. *Coulson* v. *O'Connell*, 29 C. P. 341.

When a decision of the court of appeal in England is at variance with a decision of the court of appeal of this Province, the latter should be followed here, as the former court is not the court of ultimate appeal for the Province. Sutton v. Sutton, 22 Ch. D. 511, not followed. *Macdonald* v. *McDonald*, 11 O. R. 187. See *McDonald* v. *Elliott*, 12 O. R. 98.

Equal Division of Judges.]—Observations upon the effect of a decision where the court is equally divided. *Clarkson* v. *Attorney-General of Canada*, 16 A. R. 202. See *In re Hall*, 8 A. R. 135; *Booth* v. *Ratte*, 21 S. C. R. 637.

False Verdict.] — 16 Car. I. c. 10, was intended only to apply to the court of star chamber and other courts therein mentioned, and not to such tribunals as the recorder's court for the city of Hamilton. Therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £500 stg., imposed by the 6th clause of the statute, was held not sustainable, and, at all events, the record, being unreversed, would have protected the defendant. *Stark* v. *Ford*, 11 U. C. R. 363.

Following Decision.] — The Judge, though having an opinion at variance with a decision in chambers, refused to hold contrary thereto until the practice was settled by the court. *Clark* v. *Galbraith*, 10 L. J. 296.

Where the construction of a will had been determined by the common pleas, this court held it to be settled by their decision, and conformed to it, without expressing any opinion on the question raised. *Scouler* v. *Scouler*, 19 U. C. R. 106.

Another action had been brought by the plaintiff in the common pleas against a different company, in which the pleadings and terms of the policy were similar, and this court conformed to the decision in that court, without entering into a consideration of the questions raised. *Meagher* v. *Ætna Ins. Co.*, 19 U. C. R. 530.

Held, that whatever might be the individual opinion of the present members of the court, and however inclined to take the opposite view, they were bound by the judgment previously pronounced, as to the meaning of the contract sued upon, until its reversal. *Thomson* v. *Leach*, 20 C. P. 241.

The practice of adopting and following the judgments of courts of co-ordinate jurisdiction has prevailed to a greater extent in our courts than it ever has in England. *Geraldi* v. *Provincial Ins. Co.*, 29 C. P. 321.

The contract declared on being for an assimilation of rates, and a division of the net profits on certain classes of traffic, between certain points, was objected to as illegal and contrary to public policy. The question having given rise to great difference of opinion in England, the court followed the latest decision—Hare v. London and North Western R. W. Co., 30 L. J. 517—and upheld the contract. *Great Western R. W. Co.* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 37.

Mandamus to Judicial Officer.]—It was contended in this case that the revising officer, under the Electoral Franchise Act, 48 & 49 Vict. c. 40 (D.), was an appointee of the Dominion Government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a provincial court to issue a mandamus to him:—Held, that the Dominion Parliament had, by the Electoral Franchise Act, interfered with civil rights in this Province, and having made no provision for a court to superintend the conduct of the officials appointed under that Act, and following Valin v. Langlois, 3 S. C. R. 1, that until such court is created, the provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Re Simmons and Dalton*, 12 O. R. 505.

Opinions in Case Stated.]—Quære, as to the propriety of asking the court to pronounce an opinion as to the construction of a contract for parliamentary printing, and whether an action would lie thereon against the postmaster-general. *Taylor* v. *Campbell*, 33 U. C. R. 264.

The court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings. *Ib.*

Right of Accused to be Heard.]—Right of persons accused to be heard before decision. See *Regina* v. *College of Physicians*, 44 U. C. R. 146.

Superior Court Judgment.] — Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a superior court. *Re Eberts* v. *Brooke*, 10 P. R. 257. Reversed, *S. C.*, 11 P. R. 296.

Superior or Inferior Court.]—Remarks as to what constitutes a superior or inferior court. See *Regina* v. *O'Rourke*, 32 C. P. 388.

Trinity Term.]—See *Rooney* v. *Rooney*, 29 C. P. 347; *S. C.*, 4 A. R. 255.

See also the TITLES OF PARTICULAR COURTS.

COURT OF APPEAL.

I. JURISDICTION, 1504.

II. PRACTICE AND PROCEDURE.

1. *Bond and Security*, 1508.
2. *Cross-Appeal*, 1514.
3. *Leave to Appeal*, 1515.
4. *Miscellaneous*, 1517.

I. JURISDICTION.

Cancellation of Bond — *Interlocutory Orders.*] — Held, reversing 11 P. R. 9, that the plaintiff was not entitled to have delivered out to him for cancellation a bond for security for costs of the action, after judg-

ment in his favour by the Queen's bench divisional court, before the time for appealing to this court had elapsed, and while an appeal was actually pending. The order of the court below, even if interlocutory, was appealable under the language of the Court of Appeal Act, and as the penalty of the bond was $1,000, and the defendants' costs exceeded that amount, the sum in controversy was sufficient to warrant an appeal, and it could not be said that it was a matter so entirely in the discretion of the court below, that this court would not interfere. The right of appeal conferred by the Judicature Act considered:—Quære, whether the order in appeal was interlocutory:—Quære, whether ss. 33 and 34 O. J. Act, apply to appeals from interlocutory orders. *Hately* v. *Merchants' Despatch Co.*, 12 A. R. 640.

See also *Boultbee* v. *Cochran*, 17 P. R. 9.

Chamber Order.]—Appeal to court of appeal, from order of Judge in chambers, affirming order of master to strike out jury notice, refused. *Adamson* v. *Adamson*, 12 P. R. 469.

Divisional Court.]—An appeal lies from an order of a divisional court affirming an order setting aside a judgment for default of appearance. *Schroeder* v. *Rooney*, 11 A. R. 673.

Divisional Court.] — Where the Judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a divisional court to set aside this direction and, by consent and without prejudice to the right of appeal, ask the divisional court to hear the case on the merits, either party may, without leave, appeal to the court of appeal for Ontario from the judgment of the divisional court. *Payne* v. *Caughell*, 24 A. R. 556.

Divisional Court Affirming Chamber Order—*Leave to Appeal.*]—An appeal lies to the court of appeal from an order of a divisional court dismissing an appeal from an order of a Judge in chambers, dismissing an appeal from an order of the master in chambers, dismissing a motion to set aside judgment by default of defence in an action for the recovery of land; but only upon leave to appeal being obtained. Construction of ss. 72 and 73 (as amended) of the Judicature Act, 1895. And leave to appeal was granted, where the omission to file the defence was a mere slip of the solicitor; the application for relief was made promptly; and it appeared that in a previous action the court had stayed proceedings under the power of sale contained in the mortgage upon which this action was brought, and had required an action of ejectment to be brought. Terms of payment of costs and security for costs imposed. *Bourne* v. *O'Donohoe*, 17 P. R. 274.

Divisional Court — *County Court Appeal.*]—No appeal lies, with or without leave, to the court of appeal, from the order of a divisional court made on appeal from an order in the county court discharging the defendant from the custody of his bail. *McLean* v. *Ridler*, 17 P. R. 353.

Divisional Court.]—An appeal does not lie without special leave from an order of a divisional court varying an order in chambers as to a solicitor's lien. *Walker* v. *Gurney-Tilden Co.*, 18 P. R. 471.

Dominion Controverted Election.] — Held, that an appeal does not lie to the court of appeal from a judgment of the court of common pleas overruling a preliminary objection as to the jurisdiction of the court to try a controverted election for the Dominion. *In re Niagara Election*, 4 A. R. 407.

Expropriation—*Award.*]—Under s. 161 of the Dominion Railway Act, 51 Vict. c. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding $400 either to the court of appeal or to the high court of justice, but if an appeal is taken to the latter tribunal, no further appeal lies by either party to the court of appeal. *Birely* v. *Toronto, Hamilton and Buffalo R. W. Co.*, 25 A. R. 88.

Habeas Corpus.]—An appeal does not lie to the court of appeal from a decision of a Judge sitting for the court out of term, on a motion to discharge a prisoner on habeas corpus, under either 29 & 30 Vict. c. 45, or R. S. O. 1877 c. 38, s. 18. *In re Boucher*, 4 A. R. 191.

Indictment for Nuisance.] — The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's bench division by certiorari, moved for a new trial, which was refused:—Held, that no appeal would lie to this court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by certiorari, and tried on the civil side. Regina v. Eli, 13 A. R. 526; Regina v. Laliberté, 1 S. C. R. 117, referred to. *Regina* v. *City of London*, 15 A. R. 414.

Interpleader.]—The decision of a Judge of the high court of justice (which by s. 28 of the O. J. Act 44 Vict. c. 5, is the decision of the court) in an interpleader issue to try the title to property taken under execution on a final judgment in the suit on which it is issued, is not an interlocutory order within the meaning of that expression in s. 35 of the O. J. Act, or if it is, it is such an order as was appealable before the passing of that Act, and in either case it is appealable now. *Horey* v. *Whiting*, 14 S. C. R. 515; 12 A. R. 119.

Judge Directing Reference.]—The objection that the Judge at the trial should himself have decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone* v. *VanAllen*, 12 A. R. 133.

Order Extending Time to Appeal.]—Held, that an appeal will not lie from an order of a Judge of the court of appeal extending the time for appealing to the supreme court of Canada. *Neill* v. *Travellers' Ins. Co.*, 9 A. R. 54.

Order for Discharge of Mortgage.]—An order was made by a Judge sitting in court, directing the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration:—Held, that an appeal to the court of appeal lay without leave, whether the order was to be regarded as interlocutory or not. Semble, that such an order is not in its nature interlocutory. *Bull* v. *North British Canadian Investment Co.*, 12 P. R. 284.

Order Quashing Conviction.]—The defendant, who was convicted by two justices under the Canada Temperance Act, removed the conviction by certiorari, and the same was quashed (10 O. R. 727). On appeal to this court:—Held, that there was no jurisdiction in this court to hear the appeal, and the same was therefore quashed, with costs, to be paid by the informant. *Regina* v. *Eli*, 13 A. R. 526.

Order Quashing Conviction—*Constitutional Question—Certificate of Attorney-General.*] — The Attorney-General certified his opinion, pursuant to s. 3 of R. S. O. 1897 c. 91, that the decision of the high court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the court of appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the court below not having been brought before him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a qui tam action. *Regina* v. *Reid*, 26 A. R. 181.

Order Quashing Conviction.]—No appeal lies to the court of appeal for Ontario from an order of a divisional court quashing a conviction by a police magistrate for breach of a municipal by-law. *Regina* v. *Cushing*, 26 A. R. 248.

Practice Court.]—Held, that an appeal lies from a judgment of the practice court to the court of appeal on a rule to set aside an award. *Carroll* v. *Stratford*, 12 C. L. J. 309.

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

Weight of Evidence.]—Held, that there is no appeal to this court where a verdict has been pronounced in the Queen's bench or common pleas under 33 Vict. c. 7, s. 6, reversing the verdict of the Judge at the trial, upon the weight of evidence. *Trumpour* v. *Saylor*, 1 A. R. 100.

Held, also, that s. 44 of the A. J. Act, 1873, only confers a right of appeal against judgments pronounced under the authority of that Act. *Ib.*

Winding-up.]—Appeal from an order of a Judge of the high court, for the winding up of a company under 45 Vict. c. 23 (D.). See *Re Union Fire Insurance Co.*, 13 A. R. 268, *S. C. sub nom. Shoolbred* v. *Union Fire Ins. Co.*, 14 S. C. R. 624.

See APPEAL—COUNTY COURTS—CRIMINAL LAW—DIVISION COURTS—INTERPLEADER.

II. PRACTICE AND PROCEDURE.

1. *Bond and Security.*

Allowance of Bond.]—*Read* v. *Smith*, 2 Ch. Ch. 326; *Heenan* v. *Dewar*, 3 Ch. Ch. 199.

Damages — *Vendor and Purchaser.*]—In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the court of appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes:—Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property. *Re Alger and Sarnia Oil Co.*, 23 O. R. 583.

Disallowance of Bond — *Refiling without Consent of Sureties.*] — A bond was filed by the defendant for the purpose of an appeal to the court of appeal. Leave to appeal was, however, necessary, and had not been obtained before filing the bond, which was, therefore, on the 4th April, 1891, disallowed. Leave to appeal was afterwards obtained, and the same bond was on the 18th September, 1891, refiled without the consent of the sureties, and was again disallowed:—Held, rightly so; for the sureties might object that the bond had been improperly used by the defendant; and the respondent was entitled to a security free from any objections of that nature. The plaintiff objected to the bond on the ground of the insufficiency of one of the sureties, and in support of that objection read the sworn statements of such surety in another action:—Held, that such statements were admissible against the defendant, who was putting forward the surety as a person of substance. *Jones* v. *Macdonald*, 14 P. R. 535.

Discontinuance of Appeal.]—The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal, and pay such costs and damages as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. 1877 c. 35, s. 41, which enacts that "thereupon the respondent shall at once be entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the court below, and may take all further proceedings in that court as if no appeal had been brought." The registrar, to whom the matter was referred, assessed the damages at the respondent's costs of opposing the appeal:—Held, that the judgment had been affirmed by the discontinuance,

and that these costs had been awarded to the respondent by virtue of s. 41:—Quære, as to the meaning of the expression "effectually prosecute." *Hughes* v. *Boyle*, 5 O. R. 395.

Form of Bond.]—The bond and the affidavits of execution and justification were all entitled in the name of the original plaintiffs, one of whom had died, and both were named as obligees in the bond:—Held, irregular. *McFarlane* v. *Dickson*, 1 Ch. Ch. 377.

The bond should be styled in the court of error and appeal. The style of the cause in the court below, if adopted, should be the style in full, and the parties should be described as they become appellants and respondents, but they may be given in the same order as in the style of the original cause. *Weir* v. *Matheson*, 2 Ch. Ch. 73.

An appeal bond is properly intituled in the cause in the court below. *Campbell* v. *Royal Canadian Bank*, 6 P. R. 43.

In the case of bonds for carrying a case to the court of appeal, an affidavit of justification is necessary. *Donelly* v. *Jones*, 4 Ch. Ch. 48.

Injunction.]—See *McLaren* v. *Caldwell*, 29 Gr. 438.

Insolvency of Surety.]—An application for further security for costs of appeal, on the ground of the insolvency of one or more of the sureties, should be made to the court appealed from. *Lumsden* v. *Davis*, 10 P. R. 10.

Where one of the sureties in a bond given to secure the costs in the court below became worthless:—Held, that the respondent was entitled to a new one. *Gage* v. *Canada Publishing Co.*, 10 P. R. 169; *Saunders* v. *Furnivall*, 2 Ch. Ch. 159.

Mechanics' Lien Act.]—Rule 826 is applicable to an appeal under s. 39 (2) of the Mechanics' Lien Act, R. S. O. 1897, c. 153, by the respondent in the court below from the order of a divisional court reversing the judgment upon the trial of a mechanic's lien action, where the amount in question is more than $100, and not more than $200; and therefore security for the costs of such an appeal must be given, unless otherwise ordered. *Sherlock* v. *Powell*, 18 P. R. 312.

Motion to Set Aside Bond.]—Affidavits in opposition to the affidavit of justification may be read on a motion to set aside a bond. *Campbell* v. *Royal Canadian Bank*, 6 P. R. 43; and the papers and affidavits used on the motion should be intituled in the court below. *Denison* v. *Denison*, 4 C. L. J. 45.

Objection to Bond.]—The court of appeal will not entertain an objection to the security upon the appeal given in the county court appealed from. *Baby* v. *Ross*, 14 P. R. 440.

Ontario Winding-up Act.]—An appeal under the Act respecting the winding-up of joint-stock companies, 41 Vict. c. 5, s. 27 (O.), cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Where a bond good in form, with proper sureties, was filed with the clerk of the county court on the last of the eight days, though not allowed by the Judge:—Held, to be within the words "given security before a Judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance, risks being deprived of his right of appeal in the event of the bond proving defective. *Ib.*

Order Allowing Payment in.]—An order allowing $400 to be paid into court by the appellant, in lieu of a bond, will be granted ex parte. *Connolly* v. *O'Reilly*, 8 P. R. 159. And money may be paid in in substitution for a bond previously given. *Townships of Chatham and Dover East* v. *Erie and Huron R. W. Co.*, 7 P. R. 399.

Parties to Bond—*Non-execution by some of the Parties.*]—An appeal bond for the purpose of an appeal by the plaintiffs to the court of appeal was drawn up with the names of all the plaintiffs as parties thereto, and was executed by the sureties and some of the plaintiffs in that form, and an order was afterwards obtained dispensing with the execution of the bond by the other plaintiffs, except two, who had withdrawn from the appeal. The bond was also defective in the condition:—Held, that the order should have been obtained before the execution of the bond, and that only those of the appellants actually executing it should have been named as parties to it; and the bond was set aside. *Grothe* v. *Pearce*, 15 P. R. 195.

Payment into Court.]—An application for leave to pay into court $400 as security for costs of an appeal from a certificate of title under the Quieting Titles Act having been granted by the referee ex parte, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife and the other by the husband alone; it was held that the order was bad; as these facts should have been made known to the referee and the order under such circumstances made upon notice. *Re Howland*, 4 Ch. Ch. 16.

Payment in for Specific Purpose.]—Where money has been paid into court for a specific purpose, and that purpose has been answered in favour of the party paying it in, it will be paid out to that party. *McLaren* v. *Caldwell*, 9 P. R. 118.

Poverty of Appellants.]—Upon an appeal by the defendants to the court of appeal from an order of a divisional court reversing the judgment at the trial and ordering judgment to be entered for the plaintiffs for possession of land with costs:—Held, that the fact that the appellants had no means or money or resources other than the land in question, and were unable to procure sureties, was not a ground for dispensing with security for costs of the appeal. Until it is reversed, there is a presumption in favour of the correctness of every judgment of the court of competent jurisdiction. If the defendants had a lien on the land for a sum exceeding $400 for improvements made by them, in the belief that the land was their own, security

might be dispensed with or the lien charged by way of security. But in this case the plaintiffs would be entitled to mesne profits as against the improvements, and the defendants had mortgaged the land for the money laid out, and the lien, if any, was the mortgagee's. *Thuresson* v. *Thuresson*, 18 P. R. 414.

Privy Council Appeal.] — Where the plaintiffs were appealing to the privy council from a judgment of the court of appeal dismissing with costs an appeal from the judgment of the Queen's bench division in favour of the defendants with costs, and had given security in $2,000, as required in s. 2 of R. S. O. 1887 c. 41:—Held, that the order of a Judge of the court of appeal, under s. 5 allowing the security should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded:—Held, also, that the plaintiffs not having given security to stay execution for the costs in the courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by s. 4 of the Act:—Held, also, that if an order for payment out of the high court of money therein, awaiting the result of the litigation, was "execution" within the meaning of s. 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the court of appeal had no jurisdiction to stay proceedings in the court below; and it was for the high court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

Reversal of Judgment — *Recovery of Payments.*]—On appeal to the court of appeal, from the judgment of the court of Queen's bench in favour of one P. against the Citizens' Insurance Company, the company paid into court a sum of money as security for the amount of the judgment, as well as for interest and costs, and also for the costs of the appeal. The appeal was dismissed with costs, and the company then appealed to the supreme court, and paid a further sum into court as security for the costs of such appeal. The supreme court dismissed the appeal with costs. A Judge's order was then obtained, under which the moneys were paid out of court to G. and M., to whom P. had assigned them. The company afterwards appealed to the privy council, when the appeal was allowed and the judgment of the supreme court reversed. On an action brought therefor:—Held, that the company was entitled to recover back the moneys so paid out of court on the Judge's order with interest thereon from that payment at six per cent.; and also all sums paid for costs, but without interest. *Citizens' Ins. Co.* v. *Parsons*, 32 C. P. 492.

Special Order for Security.] — Under s. 77 of the Judicature Act, 1895, security was specially ordered to be given by the plaintiffs, in the sum of $200, on their appeal to the court of appeal from the judgment of the trial Judge dismissing their action for the recovery of land of which the defendants and those under whom they claimed had been in undisturbed possession for nearly thirty years, where two of the plaintiffs resided abroad, and the other two, who resided in this Province, had no property exigible under execution, the taxed costs in the court below being unpaid, and execution therefor having been returned nulla bona. *Donnelly* v. *Ames*, 17 P. R. 106.

Standing alone, the appellant's poverty is not a circumstance, within the meaning of s. 77 of the Judicature Act, 1895, entitling the respondent to a special order for security for costs. *McCormick* v. *Temperance Life Assurance Co.*, 17 P. R. 175.

Where there was no reason to suppose that the defendants were not intending to prosecute their appeal to the court of appeal in good faith, where they were conforming to an injunction obtained by the plaintiffs at an early stage, and where their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability to pay the plaintiffs' costs, in case the appeal should prove unsuccessful, rested in great measure upon statements founded upon information and belief, a special order for security for costs under s. 77 of the Judicature Act, 1895, was refused. *Welsbach Incandescent Gaslight Co.* v. *Stannard*, 17 P. R. 486.

Where both the appellants were domiciled out of Ontario, and one of them, an incorporated company, was in process of winding up in the Province of Quebec under R. S. C. c. 129:—Held, having regard to ss. 17, 39, and 66 of that Act, that the property of the company in Ontario was beyond reach of the process of the court; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (803) of the 1st January, 1896, taken from s. 77 of the Judicature Act, 1895. Grant v. Banque Franco-Egyptienne, 2 C. P. D. 430, and Whittaker v. Kershaw, 44 Ch. D. 296, followed. *Boyd* v. *Dominion Cold Storage Co.*, 17 P. R. 545.

Staying Action on Bond.]—An action against the sureties upon a bond given by the defendants in the action of McLaren v. Canada Central Railway Company, upon the appeal of the defendants to the court of appeal in that case. The defendants in that case appealed from the court of appeal to Her Majesty in council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren* v. *Stephens*, 10 P. R. 88.

Staying Proceedings—*Costs of Unsuccessful Motion.*] — Upon an appeal to the court of appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed upon terms which may be just to both parties. Rules 826, 827. The plaintiff recovered a money judgment against the defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments which were transmitted abroad. The defendants appealed from the judgment to the court of appeal, and gave security for costs. Upon an application by the plaintiff under Rule 827 to remove the stay of proceedings it was admitted by the defendants that they had no assets in Ontario, but they said that they were advised that they had good grounds

for the appeal, and if it should fail, that the plaintiff's claim would be paid; and this was not contradicted:—Held, that the dues and assessments of members in Ontario, being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that the plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful. Boyd v. Dominion Cold Storage Co., 17 P. R. 545, distinguished. *Wintemute* v. *Brotherhood of Railway Trainmen*, 19 P. R. 6.

Staying Proceedings.] — Proceedings stayed pending appeal from report. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15.

Staying Proceedings.]—The bond for $800 given under the provisions of R. S. O. 1877 c. 38, s. 26, is a security for the costs of appeal only; in order to stay execution for the costs of the court below, further security must be given. *Powell* v. *Peck*, 8 P. R. 85. *Heward* v. *Heward*, 2 Ch. Ch. 245.

Staying Proceedings—*Manifold Judgment.*]—The defendant in appealing to the court of appeal from a manifold judgment of the high court in an action for specific performance directing the execution by him of a conveyance, the delivery of documents, &c., and also the payment of a sum for costs of the action, gave security for the costs of the court of appeal and for payment of the costs of the action, but did not execute the conveyance, deposit the documents in court, or otherwise comply with the judgment or the provisions of Rule 804, s.-ss. 1, 2, 3:—Held, that, upon the perfecting of the security, there was a stay of execution, amounting to a supersedeas, as to the costs of the action, by virtue of s.-s. 4 of Rule 804, although the defendant had done nothing with respect to the parts of the judgment falling under the other sub-sections; and garnishing proceedings taken for the purpose of collecting such costs were not sustainable. *Vigon* v. *Northcote*, 15 P. R. 171.

Staying Proceedings.] — Where an appellant who had given the statutory notice of appeal to the court of appeal, but had not served his reasons, moved to stay execution under R. S. O. 1877 c. 38, ss. 27, 28, the court examined the pleadings to ascertain whether the appeal was frivolous, but ordered the appellant to pay the costs of application. *Norral* v. *Canada Southern Railway Co.*, 7 P. R. 462.

Surety Holding under Unregistered Conveyance.] — Where, on a motion in chambers to disallow a bond given on an appeal, it appeared from the examination of one of the bondsmen that he had lands of sufficient value, but that the conveyances to him were unregistered, it was directed that the conveyances should be registered. *Adamson* v. *Adamson*, 9 P. R. 96.

Surety—*Solicitor.*]—It is irregular for a solicitor to become security for costs of appeal for his client. *Beckitt* v. *Wragg*, 1 Ch. Ch. 5.

Sureties.]—Where the statutory requirements are observed with respect to bonds given upon appeal, the bonds will not be disallowed on the ground that the sureties are "Standing sureties" of the appellants, in the absence of satisfactory evidence of their insufficiency. *Norral* v. *Canada Southern R. W. Co.*, 7 P. R. 313.

Taking Bond off the Files.]—A judgment of the court of appeal, in favour of a defendant appellant, puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the supreme court of Canada. *Burgess* v. *Conway*, 11 P. R. 514.

Notice should be given to the opposite party of a motion to take the appeal bond off the files. *Ib.*

Taking Bond Off the Files—*Payment Out of Court.*]—See APPEAL, IX. 4—COSTS, VII. 2 (c).

See APPEAL, IX. 6, 7—COSTS, VII.—COUNTY COURTS, IV.

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2. *Cross-appeal.*

Discontinuance of Main Appeal.]—A proceeding under Rule 821 by way of cross-appeal, taken by the respondent to an appeal to the court of appeal, is a mere branch or offshoot of the main appeal; and if the appellant discontinues his appeal, or the respondent causes it to be dismissed for want of prosecution, the cross-appeal is bound up in it, and cannot be retained for any purpose. The difference in the English practice pointed out. The Beeswing, 10 P. D. 18, distinguished. Semble, if a party does not wish his own objection to a judgment to be subject to the prosecution of his opponent's appeal his only course is to launch an independent appeal by giving notice and security, and under ordinary circumstances the two appeals would then be consolidated. *Pickering* v. *Toronto R. W. Co.*, 16 P. R. 144.

Enforcing Order.]—A respondent, in an appeal to the court of appeal, who desires to vary the decision appealed against, is in the same position as if he were an appellant, and whatever would be an answer to his contention if he had brought an independent appeal, would also be an answer to the same contention when urged by way of cross-appeal. And where, before the hearing of an appeal, the respondent moved in chambers for an order allowing him to enforce the order appealed against without prejudice to his cross-appeal:—Held, that it was not for a Judge in chambers, in advance of the appeal, to determine a question which might arise on the appeal itself, viz., whether the enforcement of the order would be an answer to the cross-appeal. *Re Charles Stark Co.*, 15 P. R. 451.

Notice — *Several Defendants — Plaintiff Successful against One—Cross-appeal against Others—Extension of Time.*]—In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff against one defendant, and the action was dismissed against the other two:—Held, that, upon the appeal of the first defendant to the court of appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825, but must proceed by way of an independent appeal. Freed v. Orr, 6 A. R. 690, not followed. Re Cavender's Trusts, 16 Ch. D. 270, followed. Under Rule 804, the time for service of notice of appeal runs from the day

on which the judgment appealed against is actually signed or entered, and not from the day upon which it is pronounced. Time for giving notice of appeal extended where the party proposing to appeal had from the first shewn his intention to appeal, but had been under a misapprehension as to the practice, and no session of the court had been lost. *Johnston* v. *Town of Petrolia*, 17 P. R. 332.

Third Parties.]—An order was made by a local Judge upon the ex parte application of the defendant, allowing him to serve a third party notice, but, upon the application of the third parties so called upon, this order was set aside by an order of the master in chambers, which was affirmed by a Judge at chambers and by a divisional court upon the appeal of the defendant. That court, however, at the same time made an order staying the proceedings until the plaintiffs should add the third parties as defendants, and from this order the plaintiffs appealed to the court of appeal, not making the third parties respondents. The defendant, however, served notice of cross-appeal upon the plaintiffs and the third parties, by which he asked that the order made by the local Judge might be restored; and the third parties moved to strike out this notice:—Held, that the word "parties" in Rule 821 means persons who are parties to the action or proceeding in question on the appeal; and that what the defendant sought by the cross-appeal was not a variation of the order appealed from, which is what Rule 821 speaks of, but the substitution of one of an entirely different character; and the notice was struck out. *Begg* v. *Ellison*, 14 P. R. 267.

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3. Leave to Appeal.

Appeal Launched without Leave.]—Where leave of the court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent, and where the appeal presented a fairly arguable question of law, and no sittings had been lost by the delay:—Held, that such an equity was raised in the appellant's favour as entitled him to relief after the three months. The rule laid down in Sievewright v. Leys, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time. *Langdon* v. *Robertson*, 12 P. R. 139.

Change of Venue—*Appellant Undertaking to Pay Costs.*]—Leave to appeal to the court of appeal from an order of the Queen's bench division changing the place of trial was asked by the plaintiff, because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal. *Greey* v. *Siddall*, 12 P. R. 557.

Cross-appeal.]—Cross-applications in respect of the same subject-matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz., the validity of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied, after the expiration of the time, to have it extended:—Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted. *Re Lake Superior Native Copper Co.*, 11 P. R. 36.

Importance of Case—*Novel Point.*]—By paragraph 7 of the schedule to the Law Courts Act, 1895, s. 73 of the Judicature Act, 1895, was amended so as to enable a divisional court and the court of appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained:—Held, that, being a matter of procedure, it applied to pending actions. Watton v. Watton, L. R. 1 P. & M. 227, followed: 2. that where at the time the amending statute was passed the judgment of the court had been pronounced, but had not been entered up, the action was still pending. Holland v. Fox, 3 E. & B. 977, and In re Clagett's Estate, 20 Ch. D. 637, followed. Leave granted to appeal to the court of appeal from an order of a divisional court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the court, the injury for which he sued being a serious one, and there being no authority upon the question of law decided by the divisional court. *Spence* v. *Grand Trunk R. W. Co.*, 17 P. R. 172.

Intention to Appeal.]—Where notice of appeal was given, but the appeal was not set down in due time, and a sittings of the court had been lost, the time for setting down was extended; as it appeared that there had all along been a bonâ fide intention of appealing, that security had been given for a large part of the debt and costs, and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed. *D'Ivry* v. *World Newspaper Company of Toronto*, 17 P. R. 543.

Laches.]—By the decree in question further directions were reserved, and it also appeared that the defendant resided in England, but it was not shewn that any attempt had been made to communicate with her, nor that if there had it would have been of any use, nor that the defendant had been prejudiced:—Held, not sufficient special circumstances to entitle the defendant to obtain leave to appeal after the lapse of the month within which notice of appeal is to be given. *Miller* v. *Brown*, 9 P. R. 542.

A plaintiff was advised by his solicitor on the 3rd July, of the judgment of the court given on the 30th June. He did not see his solicitor again until the 20th August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month from the rendering of the judgment:—Held, not a sufficient ground for

giving leave to appeal, and thus denying to the party who had obtained the judgment of the court the right to have it enforced as promptly as the rules and practice of the court will permit:—Held, also, that the fact that the plaintiff might be prejudiced in another action against another party in another division of the high court of justice, by this judgment, was not a ground for granting the indulgence sought. *Wilby* v. *Standard Fire Insurance Co.*, 10 P. R. 34, 40.

Mistake as to Time.]—An appeal was not made within the time required by Rule 461, as it was supposed that Christmas vacation did not count. On the facts stated in the judgment, leave was given to appeal on payment of costs. *Sievewright* v. *Leys*, 9 P. R. 200.

Representative Capacity.]—Upon an application by the churchwardens of St. James' church, for leave to appeal from the judgment of the chancery divisional court (7 O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further), as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the litigation; and that the applicants had not such an interest as entitled them to be made parties to the action; and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application was properly made to this court. *Langtry* v. *Dumoulin*, 11 A. R. 544.

See APPEAL, IX., 2, 8.

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4. *Miscellaneous.*

Allowing Further Evidence.]—The defendants, appealing from a divisional court, applied for leave to adduce further evidence in the court of appeal, to corroborate that already taken upon a point which was argued before the divisional court, and decided adversely to the applicants. The application was refused. Remarks on the reception of further evidence by appellate courts. *Merchants' Bank* v. *Lucas*, 12 P. R. 526.

After the judgment of the court of appeal affirming the judgment of the trial Judge dismissing the action, had been drawn up and entered, and while an appeal was pending therefrom to the supreme court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the court of appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said:—Held, that the application must be refused. Rule 498, which empowers the court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal. *Dueber Watch Case Manufacturing Co.* v. *Taggart*, 19 P. R. 233.

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

Amendments.]—This court is allowed, and required by law, to give judgment "according to the very right and justice of the case," and, up to the last moment, has the right to make any amendment proper for the attainment of that end. Therefore, where the defendants had by their answers admitted the truth of certain paragraphs of the bill, which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence. *Peterkin* v. *McFarlane*, 9 A. R. 429.

Assessment Appeal—*Non-prosecution.*]—Notice of an appeal to the court of appeal, under s. 84 (6) of the Assessment Act, R. S. O. 1897 c. 224, against the decision of a board of county court Judges with respect to a municipal assessment was served by the municipality upon the railway company whose assessment was in question, but the motion was not set down to be heard nor proceeded with in any way. Upon motion by the railway company for an order dismissing the appeal:—Held, that the appeal, by force of s. 84 (6), was lodged in the court of appeal in like manner as an appeal from a decision of a county court in an ordinary action becomes lodged—when the proper proceedings have been taken—in a divisional court, in which case Rule 790 or Rules 821 and 822 applied, and a motion to dismiss was unnecessary; or if not, that the appeal was not in the court of appeal at all, and no order could be made. *Re Toronto Railway Company and City of Toronto*, 18 P. R. 489.

Concurrent Appeals.]—As to separate appeals to court of appeal and divisional court. See *Hately* v. *Merchants' Despatch Co.*, 4 O. R. 723.

Costs—*Execution.*]—Held, that the plaintiff, after the judgment in appeal, should have amended the judgment below in accordance with the certificate of the court of appeal, and that the costs in the court of appeal should have been added to the costs of the action, and only one execution issued thereon. *Hoffman* v. *Crerar*, 18 P. R. 473.

Costs of Appeal.]—*See* APPEAL, IX. 1—COSTS—COUNTY COURTS—DIVISION COURTS—SURROGATE COURTS.

Costs of Motion.]—The costs of an unsuccessful motion should be paid by the applicant: there is no rule that costs of such a motion shall go to the successful party upon the appeal. *Wintemute* v. *Brotherhood of Railway Trainmen*, 19 P. R. 6.

Dismissal for Want of Prosecution.]—Motion to dismiss the defendants' appeal to this court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th September, following, and did not reach them till the 27th September. The period from that date till the 1st March, 1887, was occupied by correspondence between the solicitors for the parties, in an attempt to settle the appeal case, and at the end of that period it became apparent that there must be a motion to a Judge to settle the case. From the 1st March, however, till the 28th April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th May, 1887. The reason given for the delay after the 1st March was, that the appellants' solicitor thought it best to have the case settled by the Judge who tried the action, and that that Judge did not during the time in question hold chambers, he being away on circuit. It was shewn, however, on the other side, that he was not continuously absent during this period:—Held, in chambers, that no special circumstances were shewn to justify an extension of the time, and that the appeal should be dismissed for want of prosecution. *Platt* v. *Grand Trunk R. W. Co.*, 12 P. R. 380.

Held, on appeal, by the court, that the Judge in chambers had power to make the order dismissing the appeal, and that nothing was shewn to warrant interference with his discretion. *Ib.*

Division of Opinion.]—The court of appeal for Ontario, composed of four Judges, pronounced judgment in an appeal before the court, two of their lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal, it was objected that there was no decision arrived at:—Held, that the appellate court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four Judges had been equally divided in opinion, in which case the appeal would have been properly dismissed. *Booth* v. *Ratte*, 21 S. C. R. 637.

See In re Hall, 8 A. R. 135; *Clarkson* v. *Attorney-General of Canada*, 16 A. R. 262.

Enforcing Judgment.]—Held, that a certificate of the court of appeal may be acted on in the court below, without issuing a rule upon such certificate. *McArthur* v. *Township of Southwold*, 8 P. R. 27.

Semble, a motion to make a decree of the court of appeal an order of the court of chancery may be made in chambers if the order is to be in the terms of the decree, but if further directions or new terms are necessary to carry out the decree in appeal, the motion should be to the court. *Weir* v. *Matheson*, 2 Ch. Ch. 10.

The proper way of enforcing a judgment of the court of appeal is to have the judgment of the court below amended, if necessary, according to the judgment in appeal; and, when amended, to issue process thereon. Section 44 of the Appeal Act, R. S. O. 1877 c. 38, is not superseded by s. 14 of the O. J. Act. *Lawson* v. *Canada Farmers' Mutual Ins. Co.*, 8 A. R. 613. See *S. C.*, 9 P. R. 185.

An ex parte motion to make the certificate of judgment of court of appeal an order of the high court of justice was refused, the master in chambers being of opinion that such a course was unnecessary. *Freed* v. *Orr*, 9 P. R. 181.

Remarks as to the practice of making a certificate of the judgment of the court of appeal an order of the court of chancery, which has been the uniform practice of that court, and is not inconsistent with R. S. O. 1877 c. 38, s. 44. *Norvall* v. *Canada Southern R. W. Co.*; *Cunningham* v. *Canada Southern R. W. Co.*, 9 P. R. 339.

Entering Verdict.] — See *Herbert* v. *Park*, 25 C. P. 57; *Denny* v. *Montreal Telegraph Co.*, 3 A. R. 628.

Inferences of Fact.]—See *Hood* v. *Toronto Harbour Commissioners*, 37 U. C. R. 72.

Interest on Judgment.]—Section 43 of the Court of Appeal Act, R. S. O. 1877 c. 38, which provides "when on an appeal against a judgment in any action personal, the court of appeal gives judgment for the respondent, interest shall be allowed by the court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court on reversing the judgment gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by this court, nunc pro tunc, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Mistake in Certificate.] — Where the certificate of judgment of the court of appeal by inadvertence directed the dismissal of a county court action with costs, instead of merely setting aside the judgment in the county court for want of jurisdiction, the certificate was, on summary application, amended, and repayment of costs taxed and paid under it directed. *Sherk* v. *Evans*, 22 A. R. 242.

Where the certificate of a judgment of the court of appeal does not truly state the decision of the court it will be amended. *St. John* v. *Rykert*, 3 C. L. T. 119.

Mistake in Judgment Below.] — See *McEdwards* v. *Palmer*, 2 A. R. 439.

Notice of Appeal—*Omission to File.*]—By the oversight of a clerk of the appellant's solicitor, the notice of appeal required by R. S. O. 1877 c. 38 (s. 38 O. J. Act 1881), was not given to the registrar of the court appealed from, but it was duly served on the respondent, who had not been prejudiced. The notice was allowed to be filed within four days, upon payment of costs. *Re Lewis, Laws* v. *Laws*, 9 P. R. 72.

Notice of Appeal — *Time.*] — A notice served on Monday, 6th October, of an appeal to the court of appeal from a judgment given on the 4th September, was held too late. *Wright* v. *Leys*, 10 P. R. 354.

Notice of Appeal—*Setting Aside.*]—A notice of appeal to the court of appeal is not an initiation of the appeal. Where notice was served, but the security required by s. 38, O. J. Act, was not given:—Held, that there was no appeal pending, and a motion to set aside the notice of appeal, or to dismiss the appeal, was dismissed. *Smith* v. *Smith*, 11 P. R. 6.

Order not Issued.]—The court will not ordinarily quash or dismiss an appeal because the order or judgment appealed from has not been drawn up. *Henderson* v. *Rogers*, 15 P. R. 241.

Order Setting Aside Judgment — *Judges Unable to Agree.*]—The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them 850 therefor; and, on her application, an order was made allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application, an order was made setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the 850. This order was affirmed on appeal by the common pleas division:—Held, that an appeal lay from the order of the common pleas division, as it was, in effect, a final disposition of the whole matter, and a bar to the plaintiffs' further proceeding; but, although the members of this court were all of opinion for different reasons that the order below was wrong, they did not agree as to the extent to which it should be modified or reversed, and therefore the appeal was dismissed, without costs. *Schroeder* v. *Rooney*, 11 A. R. 673.

Order Setting Aside Nonsuit.]—As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton* v. *County of York*, 6 A. R. 181.

In an action for negligence in not keeping a county road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, the divisional court made it absolute to enter a nonsuit. On appeal the court allowed the appeal, but made no order as to that portion of the rule nisi to which a new trial was asked, leaving it to be disposed of by the divisional court:—Held, that the rule nisi was completely and finally disposed of, so far as the divisional court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial, had acquiesced in:—Held, also that the court of appeal have no power under s. 23 of the Court of Appeal Act, R. S. O. 1877 c. 38, to direct the divisional court to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton* v. *County of York*, 32 C. P. 35.

Printed Case.] — Except where for the convenience of the court appeal cases ought to be printed, the court will not, as a rule, force that course upon an unwilling appellant at the instance of the respondent, upon a motion under Rule 802 (3). If the respondent desires to have the appeal case printed, he may have it done at his own expense; and the appellant may be put upon terms, in the event of a further appeal by him, upon which a printed case will be necessary, as to the use of the books printed by the respondent. *Teetzel* v. *Dominion Construction Co.*, 18 P. R. 16.

Printing Formal Judgment.] — The formal judgment or order appealed from should be printed in the appeal book. *Thompson* v. *Robinson*, 16 A. R. 175.

Printing Reasons for Judgment.]—Where no written judgment has been delivered by the court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter, or from notes of counsel who attend to hear judgment, and should be inserted in the appeal book. *Blackley* v. *Kenny*, 16 A. R. 522.

Printing.] — The costs of printing unnecessary material disallowed. *Bryce* v. *Loutit*, 21 A. R. 100, and see *Parsons* v. *Standard Ins. Co.*, 4 A. R. 326.

Quashing.]—Where there is no right of appeal the respondent is not bound to move before the hearing to quash the proceedings. *In re Freeman*, 2 E. & A. 109.

Surrogate Court Appeal.]—Costs of an appeal from the surrogate court to the court of appeal should be taxed on the scale of the court appealed from, as provided by Rule 28 of the court of appeal, and not on the scale of county court appeals. *Regan* v. *Waters*, 10 P. R. 364.

Third Party — "*Party Affected by the Appeal.*"] — The defendants alleging that another person was liable to indemnify them against the plaintiff's claim, caused him to be served with a third party notice under Rule 209. The third party appeared, and an order was made under Rule 213 that he should be at liberty to appear at the trial and take such part as the Judge should direct and be bound by the result; that the question of his liability to indemnify the defendants should

be tried after the trial of the action; and that pleadings should be delivered between the defendants and him. The Judge who tried the case dismissed the action, but held the third party bound to indemnify the defendants against any costs they incurred in the action. The third party appealed from this judgment to a divisional court, and the plaintiff appealed to the court of appeal:—Held, that the third party was a "party affected by the appeal" of the plaintiff within the meaning of Rules 799 (2) and 811, and it was the plaintiff's duty to give the notices therein provided for; but there his duty as regards the third party ended, unless he was in a position to demand some relief against him; and the third party was not by the order made before the trial placed in the position of a defendant so as to entitle the plaintiff to relief against him. But, as the defendants, for their own convenience, brought the third party into the action, and did not procure him to be made a defendant, they should, if they desired to retain him before the court for the purposes of the plaintiff's appeal, do whatever might be necessary to that end beyond what was required of the plaintiff under Rules 799 and 811. *Eckenswciller* v. *Coyle*, 18 P. R. 423.

Time for Appeal.]—Where a decree was made at the hearing of a case, but certain questions were reserved for further directions:—Held, that the year within which an appeal could be brought ran from the making of the decree on further directions, and not from that on the hearing. *Freed* v. *Orr*, 6 A. R. 690.

Held, that s. 38, O. J. Act, did not affect the plaintiffs' right under R. S. O. 1877 c. 38, s. 46, to appeal within a year from the making of the decree, which had been pronounced on the 2nd April, 1881, before the first mentioned Act came into force. *Workman* v. *Robb*, 9 P. R. 169.

Semble, R. S. O. 1877 c. 38, s. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the court of appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment:—Semble, also, R. S. O. 1877 c. 38, s. 22, was not intended to apply to newly discovered evidence. Synod v. De Blaquiere, 10 P. R. 11, followed. *Bank of British North America* v. *Western Assurance Co.*, 11 P. R. 434.

Upon the true construction of Rule 484, the period of long vacation is not to be reckoned in the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the court of appeal. *Hespeler* v. *Campbell*, 14 P. R. 18.

Two Actions.] — Where similar motions are made to the same court in two actions, and the parties in the first agree that the decision in the second shall govern, there is nothing to preclude an appeal in the first action, even though there is no appeal in the second, unless it was agreed that the decision in the latter should be final. *Coutts* v. *Dodds*, 16 P. R. 273.

Two of Several Defendants Appealing—*Plaintiff Claiming Relief Against Other Defendants.*]—Two only of several defendants appealed. The respondent, by her reasons against the appeal, claimed relief over against two of the other defendants to the suit, and served them with reasons against appeal, and subsequently with the printed appeal book, and with notice of setting down the appeal for argument. These defendants had never been served with the statutory month's notice of appeal, nor furnished with security for the costs of appeal, nor afforded an opportunity of taking part in the settlement of the appeal book:—Held, that they were properly before the court. *Freed* v. *Orr*, 6 A. R. 690.

Unnecessary Party.]—The plaintiff served notice of appeal from the judgment of the common pleas division (15 O. R. 544) upon both defendants, and furnished both with security for costs of appeal, but disclaimed any relief against the defendant R., and brought him before the court only that the defendant L. might obtain any relief over against R. that he might consider himself entitled to. No notice of setting down or reasons of appeal were served on R. L. claimed no relief against R. in his pleadings or reasons of appeal:—Held, that R. was not a person who would or might be affected by a reversal of the decision complained of, and there was no reason for retaining him before the court. *O'Sullivan* v. *Lake*, 12 P. R. 550.

See APPEAL.

COURT OF CHANCERY.

Criminal Prosecution.]—This court has no jurisdiction to give relief to sureties on a recognizance in a criminal proceeding. *Rastall* v. *Attorney-General*, 18 Gr. 138; reversing *S. C.*, 17 Gr. 1.

Expulsion of Member.]—Where a member of a college council complains that he has been improperly expelled from the council, the court of chancery, under the A. J. Act, has jurisdiction in a proper case to decree relief; that Act giving jurisdiction to the court of chancery "in all matters which would be cognizable in a court of law," although the remedy in such a case in a court of law would be sought by mandamus. *Marsh* v. *Huron College*, 27 Gr. 605.

Removal from Surrogate Court.] — Where a will related to both real and personal estate, and the personal property was worth at least £2,000, and it was sworn that the questions to be tried and determined were of such importance and difficulty that they could be more effectually tried and disposed of in this court than in the surrogate court, which statement was uncontradicted, the court ordered the removal of the matter into this court. *Re Eccles*, 1 Ch. Ch. 376.

Trifling Amount.]—The rule and policy of the court is to discourage suits for trifling amounts, or brought vexatiously; where, therefore, a bill was filed in respect of a sum not exceeding $10, including interest, the court at the hearing, without reference to the merits of the demand, dismissed the bill, but without costs, as the defendant ought, under the circumstances, either to have demurred or moved to take the bill off the files. *Westbrooke* v. *Browett*, 17 Gr. 339.

The court of chancery will not entertain a suit where the subject-matter of litigation is a sum not exceeding £10. Where, therefore,

after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused. *Shaw* v. *Freedy*, 8 C. L. J. 136. See, also, *Gilbert* v. *Braithwaite*, 3 Ch. Ch. 413.

COURT OF QUEEN'S BENCH.

The proper style of this court is "before His Majesty's justices," not "before the King himself" — "coram vobis," not "coram nobis." *Boulton* v. *Randall*, Tay. 184.

Declaration upon a judgment giving the following description of the court of Queen's bench in Toronto: "For that whereas the plaintiff in the court of our Lady the Queen, before the Queen herself, by judgment of the same court recovered a judgment, &c., as by the record still remaining in the same court of our Lady the Queen, at Toronto, aforesaid, more fully appears:"—Held, on demurrer to this description as being uncertain, description good. *French* v. *Kingsmill*, 4 U. C. R. 215.

COURT OF REVISION.

See ASSESSMENT AND TAXES, V.—MANDAMUS, II. 2—PARLIAMENT, I. 12 (b).

COURTS AND CIVIL PROCEDURE.

See CONSTITUTIONAL LAW, II. 8.

COVENANT.

I. CONSTRUCTION.
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IV. MISCELLANEOUS CASES, 1572.

I. CONSTRUCTION.

1. *In General.*

Bill of Sale—*Proviso as to Default.*]—Plaintiff gave defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300, and interest, on a day named; and it was added, "but if default be made in payment of said £300 in part or in whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue:"—Held, on demurrer, that the deed did not import a promise to pay, and debt would not lie. *McLaughlin* v. *Brouse*, 11 U. C. R. 609.

Building Contract—*Sureties Completing on Principal's Default—Payment.*]—The plaintiffs were sureties to defendant for the performance by C. of an agreement whereby C. covenanted for himself, his executors, administrators, and assigns, to build certain cottages for £1,800, which defendant covenanted to pay to C., his executors, administrators and assigns, as follows: £800 to be advanced during the work, and the remaining £1,000 to be paid on the completion of the agreement, by the conveyance to C. of certain specified premises. C. failed to perform his contract, and assigned it to the plaintiffs, having received £800 on account. It was not shewn that defendant was any party to the assignment. The plaintiffs and defendant then entered into an agreement (to which C. was no party), reciting C.'s previous contract; the plaintiffs' liability as sureties for him; his non-performance and assignment to the plaintiffs; that the defendant, at the plaintiffs' request, had agreed to give further time for the completion of the contract; and that in consideration of the premises the plaintiffs covenanted to finish the work according to the first agreement; and the parties mutually bound themselves in £1,000 for the performance of this last agreement:—Held, that there was no covenant, either express or implied, on the part of the defendant to convey to the plaintiffs, or to pay them £1,000. *Hall* v. *Gilmour*, 9 U. C. R. 492.

Building Contract—*Penalty for Delay.*]—Upon a contract to do certain work within a specified time, with a penalty of £4 per week in case of default, as rent of the premises:—Held, that the condition to pay the £4 per week, although not incorporated in the specifications, formed a covenant on the part of the defendant to pay that sum for so long as his contract should remain unperformed after the day limited. *Gaskin* v. *Wales*, 9 C. P. 314.

Implying Covenant.]—A covenant must be express and distinct, and not gathered as arising consequently or morally by reason of something else in the deed. *Liddell* v. *Munro*, 4 U. C. R. 474.

Indemnity.] — Covenant to indemnify "generally and without exception" against a charterparty, which defendants had assumed:—Held, under the circumstances of the case, to mean rather without exception as to the description of claim, than as to time; and that the defendants would be liable only for moneys accruing due under it during their co-partnership, and thence to the expiration of the charter. *Jones* v. *Walker*, 9 U. C. R. 136.

Informal Deeds.] — Construction of informal deeds as to the parties liable as covenantors. See *McDonald* v. *Clarke*, 30 U. C.

R. 307; *Coghlan* v. *School Trustees of Tilbury East*, 35 U. C. R. 595.

Lease—*Proviso for Payment for Improvements.*]—A lessee covenanted to build on the demised premises during the term, "provided always, and it is the true intent and meaning of these presents, and the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," &c.: —Held, a covenant to pay. *McFattridge* v. *Talbert*, 2 U. C. R. 156.

Lease—*Proviso as to Improvements.*]—Plaintiff demised certain premises to defendant by lease, dated the 1st November, 1849, which lease contained a covenant to the effect that it should be "competent" for the defendant to remove the then front window sashes, &c., and to put the best plate glass windows in the room of those removed, &c., within one year from the date of the lease:—Held, that notwithstanding the introduction of the word "competent," the defendant covenanted to do the work specified. *McDonald* v. *Cochrane*, 6 C. P. 134.

Maintenance—*Place of Residence.*]—H. S. by deed dated 4th November, 1863, granted his farm and some chattels to his son T. S., in consideration of $300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., the said party of the second part covenants to feed, clothe, support and maintain the said party of the first part * * during the term of his natural life, * * ." T. S. having fulfilled the condition during his lifetime, died on the 5th October, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm, he treated the condition as broken and brought an action of ejectment, and recovered judgment: and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported part of the time on the farm by the defendant, and died in 1880. In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was:—Held, that the grantor was not bound to accept the offers made and that the conditions of the deed were broken and the land forfeited. Per Armour, J. (at the trial), the deed must be construed as being made upon condition and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made. Per Boyd, C., the parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited. Per Ferguson, J., it was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor, or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revest the estate. *Millette* v. *Sabourin*, 12 O. R. 248.

Mortgage—*Inconsistent Provisions.*]—M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerased in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay* v. *Howard*, 6 O. R. 135.

Mortgage—*Proviso for Payment.*]—Covenant cannot be sustained on the proviso in a mortgage deed, to pay the mortgage money. *Martin* v. *Woods*, T. T. 3 & 4 Vict.

The mere words, in the proviso of a mortgage "in three equal payments to be respectively made," do not create a covenant to pay the amounts specified. *Jackson* v. *Yeomans*, 19 C. P. 394.

Sale of Land—*Payment of Price.*]—The plaintiff demised to defendant certain premises at a yearly rent, which defendant covenanted to pay; and by the same instrument it was further witnessed, that "in consideration of £300, of which £50 was paid down at the ensealing hereof, the receipt whereof is hereby acknowledged, and the other moiety is to be paid on the 30th September, 1862, with interest in the meantime payable yearly, half yearly, or quarterly," the plaintiff sold to defendant the house on the land:—Held, that defendant was liable as on a covenant to pay the unpaid moiety of the purchase money. *Joseph* v. *Todd*, 23 U. C. R. 80.

Plaintiff and defendant entered into an agreement under seal, by which the plaintiff agreed to convey to defendant certain land "for $300," payable in the manner specified: —Held, to amount to a covenant by defendant to pay the money. *Berry* v. *Garrard*, 32 U. C. R. 173.

Sale of Machine.]—An agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine was delivered, but the inventor refusing to go, the vendors sent another competent person to set it up:—Held, that the vendors were never-

theless entitled to recover the price on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent but as a distinct covenant, the breach of which could be satisfied by damages. *Cowan* v. *Fisher*, 31 O. R. 426.

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2. Dependent and Independent.

General Rule.]—To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract. *Re Canadian Niagara Power Co.*, 30 O. R. 185.

Agreement for Service—*Conveyance of Land.*]—Where the plaintiff covenanted that his son should serve defendant for seven years, in consideration whereof defendant covenanted at the expiration of the time, to convey 200 acres of land to the son, his heirs and assigns:—Held, that the service for seven years was a condition precedent to the right to the conveyance. *Goodall* v. *Elmsley*, 1 U. C. R. 457.

Agreement to Lease—*Agreement to Sell Goods.*]—A. by deed, in consideration of the rents, &c., on the part of B., to be paid and performed, agreed with B. that he would on or before the 1st October, upon request to him in writing by B., grant unto him a lease to be prepared or approved by B.'s counsel of certain premises, to hold for five years at a rent named; the said lease to contain certain covenants; and said A. thereby agreed to deliver to said B. on the 1st October, 200,000 staves at the above premises, at a price specified, for which B. agreed to pay said A. on certain days; and it was thereby agreed that said lease should contain a covenant by said A. that he would deliver to the said B. in each of the two succeeding years staves, &c.: and further, that B. should furnish securities for the due performance of the above agreement on or before the 20th July:—Held, that a request by B. for, or the granting by A. of, such lease, was not a condition precedent to the right of B. to have the staves delivered, the covenants to grant the lease and to deliver the staves being independent. *Leonard* v. *Wall*, 5 C. P. 9.

Agreement to Sell Patent—*Covenant to bring Patent into Use.*]—Declaration on a deed, by which, in consideration of $1, defendant assigned to the plaintiff one-fourth share in an invention, for which he was applying for a patent in the United States, and covenanted to assign to him the same share in such letters patent to be issued: in consideration whereof the defendant covenanted to use his best endeavours to bring said patent into general use in the United States. Breach, that after the patent had been obtained, the defendant would not assign to the plaintiff, but wrongfully sold his whole interest to others. Plea, on equitable grounds, that the real consideration, as the plaintiff well knew, was not the $1, but the plaintiff's covenant to endeavour to bring the patent into use in the United States; that the plaintiff wholly neglected to do this, but spoke against and by his conduct prejudiced the invention. And so the defendant said that before any breach on defendant's part, or any sale by him, the plaintiff withdrew from and broke his agreement, whereby the consideration for the defendant's agreement wholly failed:—Held, on demurrer, no defence; for the two covenants were independent, the plaintiff was entitled to a transfer as soon as the patent issued, and the non-performance by him of something to be done afterwards could not defeat his right of action. *Storin* v. *Dean*, 26 U. C. R. 600.

Building Contract — *Agreement to Lease.*] — Declaration, that the plaintiffs agreed to complete the ballasting of a certain portion of defendants' railway, and to construct stone culverts and bridge abutments at certain points, and to do the grading necessary, &c., all to be completed before the 1st January, 1859, provided the company should furnish cash to meet the monthly estimates of the engineer; and that the plaintiffs commenced and were ready to complete the work, but defendants wrongfully prevented and discharged them. Plea, that by the same agreement it was provided, that whereas the plaintiffs had leased said railway from defendants by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was therefore agreed that the plaintiffs should work the road free of any charge for the use of it, and should expend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000; that the lease so made was for the express purpose of enabling the plaintiffs to work the road, and raising thereby enough to enable defendants to pay them for the work contracted to be done by them; that the plaintiffs, although they had the free use of the road, refused to work and abandoned the same, whereby they forfeited the contract, and the defendants therefore prevented them from proceeding with the work, as they lawfully might:—Held, on demurrer, plea bad, the agreements being independent. *Tate* v. *Port Hope, Lindsay, and Beaverton R. W. Co.*, 17 U. C. R. 354.

Building Contract — *Third Person's Covenant to Pay.*]—The declaration recited that the Desjardins canal company were indebted to plaintiffs in £13,000, which they had agreed to pay before the 1st January, 1854; that by 16 Vict. c. 54, defendants were authorized to become security to the plaintiffs on account of said company, for certain improvements on their canal to the extent of £15,000; and that after such statute defendants duly covenanted with the plaintiffs that the said company should pay them the said sum of £13,000 and interest, on or before the 1st January, 1854, and that in default thereof defendants would pay the same. Defendants pleaded, on equitable grounds: 3. That the plaintiffs had agreed to build for said canal company a certain bridge over a channel to be cut by the plaintiffs to their canal, in consideration whereof the company covenanted to pay them £13,000 on the completion of said work, which said sum and the said channel and bridge are the sum and the improvements mentioned in the declaration; that defendants

in pursuance of said statute entered into the covenant declared upon as security for the payment by the canal company of said sum; that the said agreement of the plaintiffs is subject to a condition precedent, that the work should be approved of by the engineers of the plaintiffs and the canal company, &c., who should report when the same were executed, and that no such report was made before this suit. 4. On equitable grounds, that the said channel and bridge were not completed before this suit. The plaintiffs replied, setting out the agreement in full, by which it appeared that the agreement of the canal company was to give security for the repayment of the money advanced by the plaintiffs "at the time and in manner as is stated in such securities:" —Held, on demurrer, both pleas bad, as shewing no equitable defence; for the covenant by defendants was absolute, that the canal company should pay on a certain day; and by the agreement the money was to be paid at the time mentioned in the security, not to be dependent on the completion of the work. *Great Western R. W. Co.* v. *Town of Dundas*, 20 U. C. R. 523.

Building Contract—*Payment.*]—Declaration upon defendant's bond, conditioned for the performance by one D. of his agreement, under seal, to construct a railway for the plaintiffs, to be completed by the 15th February, 1871, or within such further time as might be allowed. First breach, failure to complete by the 15th February. Second breach, failure to complete within the extension of time allowed. Plea to the first breach, that by the agreement the plaintiffs promised to pay D. for the work $200,000, of which $100,000 was to be paid in mortgage bonds of the plaintiffs, and the rest as specified, but ten per cent. was to be retained out of each payment of bonds until the completion of the work, and then to be paid with the last payment; and that, although the plaintiffs made certain payments according to the contract, they failed to make the residue, whereby D. was and is prevented from completing the work:—Held, plea bad, for the covenants were independent, and non-performance by the plaintiffs was no defence. *Port Whitby and Port Perry R. W. Co.* v. *Dumble*, 32 U. C. R. 36; 22 C. P. 39.

Lease — *Possession—Security.*]—Defendant leased to the plaintiff certain premises for three years from the 1st May; and the plaintiff covenanted that, on or before said 1st May, he would give to defendant two good and sufficient securities for the performance of plaintiff's covenants in the lease:—Held, that the giving such security, was a condition precedent to the plaintiff's right of possession under the lease. *Murphy* v. *Scarth*, 16 U. C. R. 48.

Lease—*Valuation of Furniture.*]—Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto, in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September, a lease containing the usual covenants to be prepared and executed by both parties; and that for the due performance of the agreement, the parties became bound to each other in $1,000, to be paid by the party in default, as liquidated damages. Fifth plea: that the valuation of the furniture, &c., was not finished on or before the 29th September, nor yet finished. Plaintiff replied that the valuation was prevented and not finished on or before, &c., solely by the acts and misconduct of the defendant:—Held, good, as the valuation was a condition precedent to the granting of the lease. *Walker* v. *Kelly*, 24 C. P. 174.

Sale of Land — *Payment.*]—Held, that under the agreement for the sale of land set out in this case, the covenants by defendant to pay, and by plaintiff to convey a good title, on receiving payment, were independent of each other, and that defendant was responsible on his covenant, notwithstanding the plaintiff's inability to perform his. *Tisdale* v. *Dallas*, 11 C. P. 238.

Work and Labour — *Payment.*]—The plaintiff sued in assumpsit for work and labour, and at the trial put in a sealed agreement under which he had agreed to perform the work, by which it appeared that defendant was bound to pay for the work at stated periods. The work was not done according to the contract, and the plaintiff consequently sued in assumpsit, but was nonsuited at the trial, on the ground that the covenants in the sealed instrument were independent, and that he could have sued on the agreement for the money although the work was not performed: —Held, that the nonsuit was wrong. *Barton* v. *Fisher*, 3 U. C. R. 75.

Work and Labour — *Payment.*]—Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part performance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming full performance, and to the satisfaction of their officer, as a condition precedent, the contract being in consideration of performance, and not in consideration of plaintiff's covenant to perform. *Coatsworth* v. *City of Toronto*, 10 C. P. 73.

Work and Labour — *Payment.*]—Upon a covenant to pay, in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract:—Held, that the performance of the work was not a condition precedent to payment. *Cullen* v. *Nickerson*, 10 C. P. 549.

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3. *For Title.*

Canada Company.]—The Canada Company, by their charter, are not exempted from giving to purchasers of the lands granted to them by the Crown the usual covenants against their own acts; and as to lands purchased from private individuals, the company will be required to give the same covenants as another vendor. *Scarlett* v. *Canada Company*, 1 Ch. Ch. 90.

Covenantee's Knowledge of Defects.]—Action on covenants for seisin and right to convey, contained in a deed by the defendants to one F., who had conveyed to the plaintiffs. Plea, on equitable grounds, that the conveyance to F. was voluntary, and he knew when the defendants executed it that they were not seised, and had not the right to convey; and the plaintiffs were aware of these facts when F. conveyed to them.—Held, on demurrer, no defence, for such covenants are not in equity confined to defects unknown to the vendee. The plaintiff replied equitably, that F.'s deed to the plaintiff was a mortgage, to secure money then lent to him by them, and defendants conveyed to F. for the express purpose of enabling him to execute such mortgage and obtain the loan, and the plaintiffs were induced to lend by their reliance on defendants' covenants, as the defendants well knew. Semble, that if the plea had been good, the replication would have been an answer to it. *Trust and Loan Co. of Upper Canada* v. *Covert*, 27 U. C. R. 120.

Deed and Mortgage.]—In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed and the vendee to execute a mortgage:—Semble, that it would be improper to insert a power of sale in such mortgage, and quære, if the deed merely contains qualified covenants, whether the mortgage should contain any others. *McKay* v. *Reed*, 1 Ch. Ch. 208.

Estoppel.]—It is a firmly established rule of property in Ontario, that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Casselman* v. *Casselman*, 9 O. R. 442.

Liability.]—Plaintiff purchased from defendant two lots of land, taking the following receipt: "Received, Goderich, 16th June, 1857, from A. C., in promissory notes and otherwise, the sum of £200 cy., for transfer of lots 11 and 12 in the 8th concession of the township of Turnberry, to be procured from the original locatee on or before one month from this date, and peaceable possession to be had of the land, or the consideration of transfer to be returned." R. had purchased from the Crown in 1854. He assigned to defendant, and defendant to plaintiff, who went into possession, but one F. immediately claimed one of the lots, and forbade him from working on it, whereupon the plaintiff desisted. The plaintiff soon afterwards, with defendant's consent, arranged verbally with one M. to assume his bargain, and M. went into possession in January, 1858, and remained until October, 1859, paying three instalments to the Crown in plaintiff's name. It was shewn that in November, 1854, two months after the date of R.'s purchase, a receipt was given by the Crown to H. for this lot, treating him as the purchaser; and it appeared at the trial, but by verbal evidence only, that in April, 1859, the commissioner of Crown lands decided in favour of H., and that he should pay M. for his improvements, which he had done. M. in consequence gave up possession, and the plaintiff then sued defendant as for a breach of the agreement for quiet possession:—Held, that he could not recover, for, 1. The contract was not a continuing one, but was satisfied when the plaintiff obtained peaceable possession: 2. When H. warned off the plaintiff, he had himself no right; and, 3. There was no sufficient evidence that the sale to R. had been effectually avoided. *Cochrane* v. *McDonald*, 11 C. P. 202.

Mortgagee's Action Against Mortgagor's Grantor.]—To a declaration on a covenant for quiet enjoyment, in a mortgage to the plaintiffs executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from the defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, the deed first. It appeared that there were two mortgages from T. to the plaintiffs, on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage T. found that a deed from defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August:—Held, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover:—Held, also, that if the mortgage had been delivered before the deed, defendants could not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants. *Trust and Loan Co.* v. *Covert*, 32 U. C. R. 222.

Quebec Law—*Timber Limits—Warranty.*]—On a sale of "timber limits," held under licenses, in pursuance of C. S. C. c. 23, a clause of simple warranty (garantie de tous troubles généralement quelconques) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. Judgment below, 6 S. C. R. 425, reversed. *Ducondu* v. *Dupuy*, 9 App. Cas. 150.

Sale of Timber—*Recitals—Right to Convey.*]—An indenture between plaintiff and defendant recited that defendant was the owner and occupier of certain timber limits, and had agreed to sell to the plaintiff all the square timber growing there of a specified length for $1,000, the receipt of which was acknowledged, and witnessed that the plaintiff "had a right to cut, make, and draw off the said timber until the 15th April next, and not longer:"—Held, that taken altogether the instrument contained a covenant by defendant that he owned the limits, and had power to sell and give the plaintiff a right to remove the timber. *Link* v. *Hunter*, 27 U. C. R. 187.

Short Forms Act—*Omission of Qualifying Words.*]—A covenant in a deed purporting to be made in pursuance of the Act respecting short forms of conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words "notwithstanding any act of the covenantor," contained in column 1 of schedule 2 of the Act:—Held, not a covenant within the statute; but to mean that the covenantor had the right to convey as he had conveyed, i. e., in fee simple. Held, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that the defendant had done no act to incumber, by making them absolute covenants, these covenants being in accordance with the form in column 1. *Brown* v. *O'Dwyer*, 35 U. C. R. 354.

Short Forms Act—*Omission of Qualifying Words—Covenantee's Mortgage to Covenantor Outstanding.*]—Action by the plaintiff against defendant as administratrix of one J. McK. for breach of covenant for title contained in a deed made by him to his son, the plaintiff. The deed purported to be under the Short Forms Act, and the covenant was that the grantor had the right to convey, omitting the words "notwithstanding any act of the said covenantor;" — Held, following Brown v. O'Dwyer, 35 U. C. R. 354, that although not in accordance with the statute, it bound the covenantor as an absolute covenant that he was seised and had a right to convey in fee simple. *McKay* v. *McKay*, 31 C. P. 1.

It appeared that, at the time of the transaction in question, the father was some seventy years old, and reposed great confidence in his son, the plaintiff, and was in the habit of relying upon his advice. Without any apparent reason for parting with the land, on which he lived, which was worth $6,000, he was induced by the plaintiff to sell it to him for $3,000, $1,000 of which consisted of alleged stale demands by the son against the father, barred by the Statute of Limitations, and the balance of $2,000 was secured by a mortgage, with interest at six per cent., neither principal nor interest being payable for ten years, the father being permitted to remain on the land during his life. The mortgage was produced, with the registrar's certificate of discharge indorsed thereon, but there was no evidence as to the execution of the discharge, or as to how the mortgage came into the plaintiff's possession. There was no corroboration of the plaintiff's statement of the existence of the debt of $1,000, except a receipt of $15, which the court refused to accept as genuine, while in corroboration of his assertion of the payment of the mortgage, some four receipts were put in by the plaintiff, which, though purporting to have been given at different intervals and different places, within four years from the execution of the mortgage, all appeared by the water mark to have been written on and torn from the same sheet of paper; and being of a very suspicious character, the court also refused to accept them as genuine:—Held, that the evidence having failed to prove that the mortgage had been paid off, and it being therefore outstanding, no action could be brought on the covenant in the deed. *Ib.*

Special Covenant.]—Defendant conveyed his equity of redemption in certain land to the plaintiff, subject to two mortgages, one made by himself, the other by a stranger, covenanting that notwithstanding anything done by him he was entitled to such equity, and had good right to grant the same to plaintiff; that the lands were not subject to any incumbrance but the mortgages mentioned, and that he had done or suffered nothing whereby such equity could be affected; and further, that the plaintiff might quietly enjoy the land after the 1st November next, without interruption from the defendant or any other person, and that free from all arrears of taxes, and from all former conveyances, mortgages (except the mortgages referred to), judgments, especially any and all undischarged judgments registered against the lands of the defendant, and of and from all manner of other charges and incumbrances whatsoever:—Held, that the last covenant was not restricted to judgments against the defendant, but extended to judgments against his grantor. *Austin* v. *Ferguson*, 25 U. C. R. 270.

Special Words.] — Held, that the full covenant for quiet enjoyment and freedom from incumbrances, contained in a deed for the conveyance of land, was not controlled by the restrictive words preceding the earlier covenants. *Wallbridge* v. *Everitt*, 22 C. P. 28.

Usual Covenants.]—"Usual covenants" in a conveyance to a purchaser extend only to the acts of the vendor, if himself a purchaser for value; if he take by descent, to the acts of himself and his ancestors; and if by devise, to the acts of himself and his devisor. *Gamble* v. *McKay*, 7 C. P. 319.

II. Performance and Breach.

1. *In General.*

Alternative.] — Defendant covenanted to pay £100 to plaintiff in three months after a certain day, or as soon as the defendant returned from the United States after having taken possession of certain land (which had been sold by the plaintiff to the defendant,) or disposed of any part thereof. The plaintiff assigned as a breach, that although the three months had elapsed, defendant had not paid the money, without averring that the defendant had returned from the United States, having taken possession, &c.:—Held, sufficient. *Hardy* v. *Johnston*, 2 U. C. R. 160.

Assignment of Mortgage — *Collateral Covenant—Covenantee Dealing with Lands.*] —The defendant M. had in his possession, as executor of J. D. C., a mortgage of one R., which the agent of M. had deposited with H. as collateral security for moneys advanced to such agent, in all about $400. Some years after M. executed an assignment of this mortgage to S. C., a legatee under the will, for the alleged purpose of securing payment of her legacy, at the same time giving a personal covenant for the same object. H. assuming to act as owner of such mortgage, wrote to the persons owning the equity of redemption, that he controlled the mortgage; that the lands were incumbered for more than their value; and suggesting that they should convey their right to him. This they did for $30, by conveying to a trustee for H., and subsequently H. in consideration of $500 obtained from S. C. an assignment of her interest in the R. mortgage, and also an assignment of the covenant of M. H. subsequently sold these lands for an alleged consideration of $5,000; accepting a conveyance of other lands, which he shortly afterwards sold for $6,500 cash. The whole amount of H.'s claim, including the $500 paid S. C., did not exceed $1,500:—Held, reversing the judgment of the common pleas division, 10 O. R. 58, that notwithstanding H.'s dealings with the lands, he was entitled to enforce payment of M.'s covenant. *Wilkins* v. *McLean*, 13 A. R. 467. But see *S. C.*, 14 S. C. R. 22, reversing the court of appeal and restoring the judgment of the common pleas division.

Bailiff's Misconduct—*Personal Judgment — Action against Sureties.*] — The plaintiff sued C., a division court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a fi. fa. on such judgment returned nulla bona

as to part, and claiming to recover the balance:—Held, that the declaration was bad, for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause of action. *Sloan* v. *Creasor*, 22 U. C. R. 127.

See McArthur v. *Cool*, 19 U. C. R. 476.

Building Contract—*Penalty for Delay—Waiver.*]—Declaration for work and materials in construction of a house for defendants. Sixth plea: that by deed, dated 31st July, 1871, plaintiff covenanted to finish the works before the 31st October, 1871, under a forfeiture of $20 per week for every week the work was left unfinished after that day: that the plaintiff did not complete the works till twenty weeks after said date, and thereby $400 became due from plaintiff to defendants, which defendants are willing to set off. Fourth replication, on equitable grounds, that by the said deed the work was to be done to the satisfaction of S. & G., architects, and if any dispute arose between the parties touching the works or the meaning of the contract, &c., it should be referred to S. & G., whose award should be final: that by the said deed defendants agreed to pay the plaintiff $3,037 on the certificate of S. & G., eighty per cent. on the work and materials, as done and provided, and the balance one month after the whole had been completed, subject to any deduction for the nonfulfilment of the terms of the deed: that the plaintiff completed said works to the satisfaction of S. & G., without objection as to the time within which it was to be done, either from the architects or the defendants: that the architects certified from time to time, as provided in said deed, and on completion certified that the whole had been completed, and that the plaintiff was entitled to be paid for the same: that more than a month had elapsed after the last certificate was given: that no complaint was made by defendants after or before that certificate, or before suit, that the work had not been completed in time, and no deduction was sought to be made for nonfulfilment of the contract: that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and on completion of the work promised to pay the plaintiff notwithstanding anything in the said indenture to the contrary contained. And that upon the faith of said promise the plaintiff delivered possession of the premises to defendants, who accepted the same. Fifth replication, on equitable grounds, that after the breach in the plea alleged, the defendants, for good and sufficient consideration, by parol, discharged the plaintiff from the performance of the covenant and damages for the breach thereof:—Held, on demurrer, 1. Fourth replication bad, for it disclosed no equity, and was multifarious, inconsistent, and embarrassing: that the architects could only certify subject to defendants' right of deduction: that the omission to complain was immaterial: that the parol waiver, after breach and without consideration, could not avail: that the promise to pay, as alleged, might mean subject to the deduction; and that the delivering possession to the plaintiffs of their own building, as stated, could form no satisfaction: 2. that the fifth replication was good. *Simpson* v. *Kerr*, 33 U. C. R. 345.

City of Toronto—*Maintenance of Court House—Legislation.*]—In consequence of the separation of the city of Toronto from the county of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to use of gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act which came into force in February, 1869, the city was reunited to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of use of gaol, stating that as to the court house the action of the Legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half year's rent which would have become due on 21st March following. *County of York* v. *City of Toronto*, 21 C. P. 95.

Disposal of Business—*Transfer of Interest.*]—Where there was a covenant by defendant that one-half of the surplus proceeds of goods, transferred by the plaintiff to the defendant after deduction of liabilities, should be paid to the plaintiff by the defendant, by his promissory note at two years, with a proviso that should the defendant, or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due; and S. subsequently retired from the business and transferred to the defendant all his interest therein:—Held, that the transfer by S. to T. was not a breach of the covenant, and that the time of payment of the note was not thereby accelerated. *Masters* v. *Threlkeld*, 12 O. R. 645.

Hire of Vessel—*Loss of Vessel.*]—The plaintiff declared in covenant on defendant's agreement for the hire of a steamboat, for which certain sums were to be paid by instalments, and it was provided that the defendant should employ an experienced and competent captain, officers, and men, and that if from any other cause than carelessness or bad management on the part of the master or hands on board she should be lost during the term, then the instalments should not further be paid; and the plaintiff assigned a breach in the non-payment of £1,250, the instalment due on 1st December, 1842. Defendant pleaded that before that sum became payable, the steamboat from a certain cause other than such carelessness or bad management, to wit, because she was run into by a schooner called the Canada, was sunk and wholly lost, of which the plaintiff had notice, and the defendant was thereby discharged:—Held, plea bad, because the accident was not so described as to except the master and hands on board from being the occasion of the loss. *Counter* v. *Hamilton*, 6 O. S. 612.

Indemnity—*Release.*]—A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges, and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the

only person who could in any way damnify the vendor, he has satisfied his liability. *Smith* v. *Pears*, 24 A. R. 82.

Insurance Claim—*Proofs of Loss.*]—Defendants covenanted to pay the plaintiff $961, and by the same agreement it was made a condition that the plaintiff should allow his name to be used in prosecuting a claim in which defendants were interested, against an insurance company: that he would personally present his particulars of loss, with the usual affidavits and certificate required by the company, whenever requested in writing so to do by any of the parties to the agreement; and that if the claim should be defeated by any gross negligence of the plaintiff, then this agreement should be void. In an action upon defendant's covenant:—Held, that it was not necessary that the plaintiff should present the necessary papers in person to the company, or on the precise day named by defendants; and that he must be held to have performed the condition upon the evidence set out in the case, which shewed that the papers furnished by him were not objected to, and that the claim was not defeated owing to their insufficiency. *Rice* v. *Wells*, 20 U. C. R. 404.

Interference under Superior Authority—*Covenantee Himself to Blame.*]—By letters patent, bearing date in 1840, certain lands situate on the water's edge in the city of Toronto were granted to one A., the patent containing a condition for the erection of an esplanade according to a certain plan, within three years. A., by indenture, demised the said lands to M., of whom plaintiff was assignee, with full covenants against all the world, and M. covenanted to perform the condition in the patent. 16 Vict. c. 219, enacted that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it, and impose a special rate to defray the expense thereof; and by 20 Vict. c. 80, further powers were granted to the corporation. The corporation entered upon the premises, and by filling up the space between the water's edge and the esplanade, prevented the working of the plaintiff's mill. For this the plaintiff brought an action on the covenant against defendants, the assignees of the lessor:—Held, that as the act of the corporation was done under superior authority (the Legislature), although the statute did not exist at the time of the execution of the lease, and as the breach of covenant did not arise from the neglect, fraud, or procurement of the lessor, but from the non-fulfilment by the lessee of his own covenants, defendants were entitled to succeed. *Snarr* v. *Baldwin*, 11 C. P. 353.

Law Society — *Maintenance of Osgoode Hall—Increased Cost.*]—In 1846 the Law Society of Upper Canada entered into a covenant with the Crown, in conformity with 9 Vict. c. 33, to provide at their own cost, and without further charge to the Province, for all time to come, fit and proper accommodation for the superior courts of law and equity for Upper Canada, as then existing or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the Crown to repair, &c., and the outlay to become a charge on the society's land. On the execution of this covenant, the sum of £6,000 was paid over to the society by the Government, and proper accommodation was provided by the former for the then existing courts. Subsequently the court of common pleas was established, and it became necessary to enlarge the buildings in which the courts were held at greatly enhanced outlay. 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, were passed for raising funds for the purpose; and the moneys authorized thereby were expended in the erection of Osgoode Hall, for the accommodation of the courts. In 1865, at the request of the society, a certain sum was supplied by the Government for necessary repairs to the building, and by subsequent arrangement with the Ontario Government, the latter agreed to pay the society annually the sum of $3,000 for the purposes of heat and light:—Held, affirming 20 C. P. 490, that the law society was not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall," for the accommodation of the superior courts of common law and equity; and that no estoppel arose in favour of the society, against the Crown, in consequence of the several Acts of the Legislature that had been passed in relation thereto. *Regina* v. *Law Society*, 21 C. P. 229.

Lease of Chattels—*Loss by Fire.*]—Where the lessee of goods covenanted to restore them to the lessor "at the expiration of the term, in as good order as they then were, reasonable wear and tear only excepted," and the goods during the term were destroyed by fire without the lessee's default:—Held, that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term. *Chamberlen* v. *Trenouth*, 23 C. P. 497.

Held, also, that the exception "reasonable wear and tear excepted," referred to the order and condition of the goods, so as to exclude bad repair, breakages, &c., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods. *Ib.*

Mortgage—*Conveyance to One Mortgagee.*]—A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt. *Scarlett* v. *Nattress*, 23 A. R. 297.

Mortgage Sale—*Purchaser's Covenant to Indemnify.*]—The declaration set out that the plaintiff was assignee of a mortgage made by one A. to R., containing a power of sale, under which he sold to defendant for less than the mortgage money, and defendant covenanted that "in case any chancery or other law proceedings arising out of said sale payable by the plaintiff, he, the defendant, would pay that sum," to wit, any costs or charges incurred by the said plaintiff by reason of such chancery or other law proceedings: that afterwards R. filed a bill, to which the plaintiff and defendant were made parties, whereupon the sale was set aside, plaintiff being ordered to pay his own costs of defence, &c.; and these costs the plaintiff claimed to recover. Defendant, in a plea on equitable grounds, set out two agreements between himself and defendant, of the same date, which he alleged formed part of one transaction and constituted the sale. By the first the plaintiff agreed to sell the land to defendant for £400, £50 to be paid down, and forfeited on non-payment of the

balance within a month; a deed to be given on payment in full. By the second it was agreed that if the plaintiff should fail to make the balance of his mortgage money from A., defendant would pay it, and all costs to be incurred in suing on the covenant, "and in case any chancery or other law proceedings arise out of the sale payable by E.," (the plaintiff,) defendant covenanted to pay "that sum" to the plaintiff. The plea then stated the bill in chancery, and the setting aside the sale; that afterwards R. paid the money and interest to the plaintiff, who gave up to him all his interest in the land; and that in the chancery suit each party was ordered to pay his own costs: that the plaintiff never completed the sale, or gave defendant any title; and that the consideration for defendant's covenant failed, and his agreement was done away with by the decree:—Held, on demurrer, that the plea shewed no ground for absolving defendant from his express covenant, which was independent of the plaintiff's covenant to give the deed, and that he was liable to pay the plaintiff's costs incurred to his own solicitor, not merely costs given against him in favour of other parties. *Evans* v. *Turley*, 23 U. C. R. 282.

Relief against Breach — *Mortgage.*]—The defendant gave a mortgage to the plaintiff, in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to clear up and fence ten acres in each year for five years from the date of the mortgage, and to build a log house on the land within one year, and there was a proviso "that the mortgage should immediately become due and payable after default being made in building the house and clearing the land at the periods of time above mentioned." No default occurred in payment of the mortgage money, but the log house was not built until about a month after the expiry of the first year, nor were ten acres fenced, though more than ten were cleared:—Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of the covenants as to the erection of the house, and to judgment for redemption or foreclosure, but should have no costs. Relief is given against forfeiture for non-payment of rent, and in certain cases for neglecting to insure, but no case appears in which default like the present has been relieved against:—Semble, that if the only default had been the not putting up the fence, the forfeiture would be relieved against, for the clearing of the land was the substantial part of the covenant:—Semble, also, that in this Province equity will not relieve against a proviso in a mortgage that on default of payment of a part of the debt the whole shall become due. *Graham* v. *Ross*, 6 O. R. 154.

Renewal of Lease—*Illegality to Lessee's Knowledge.*]—To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it: and that before the term expired, a decree was obtained against them in chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *Town of Brantford*, 19 U. C. R. 207.

Rent Charge — *Sale under Execution.*]—Under a fi. fa. lands against the plaintiff in this suit, in favour of A., the sheriff sold to A. a rent charge which defendant in this suit had granted by deed to the plaintiff for her life. The deed contained a personal covenant of the defendant to the plaintiff to pay the rent charge. Quære, whether the sale to A. would not have the effect of discharging the defendant from his covenant. *Smith* v. *Turnbull*, 1 P. R. 38.

Sale of Factory—*Covenant not to Remove Machinery.*]—On the sale of a woollen factory and machinery, it was stipulated that until the purchase money should be fully paid the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, and the latter, to secure the unpaid purchase money, executed a mortgage which purported to be of the factory only, and did not mention the machinery:—Held, that the covenant against removing the machinery remained in force. *Crawford* v. *Findlay*, 18 Gr. 51.

Separation Deed — *Annuity.*]—An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent renunciation of the parties, or by the wife's leaving the husband without cause. *Walker* v. *Walker*, 19 Gr. 37.

Towage—*Tug Frozen in.*]—Semble, that it is no defence to an action against the commander of a steamboat for not towing, &c., that he could not perform his contract by reason of his towboat being unavoidably frozen in the ice. *Dorland* v. *Bonter*, 5 U. C. R. 583.

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2. *For Title.*

Dower.]—It is no breach of the covenant for seisin free from incumbrances that the covenantor's wife is alive and has not barred her dower; nor is it any breach of a covenant for further assurance that a deed of release of his wife's dower was tendered to the covenantor to be executed, and refused. *Bower* v. *Brass*, E. T. 5 Vict.; *Hoyt* v. *Widderfield*, 5 U. C. R. 180; *Back* v. *Currie*, 12 U. C. R. 334; *Wilson* v. *Biggar*, 26 U. C. R. 85.

Semble, that if the woman survive her husband, an action on the covenant for further assurance will only lie upon tender of an effectual conveyance to pass her estate. *Hoyt* v. *Widderfield*, 5 U. C. R. 180.

The plaintiff declared on the covenants for seisin and quiet enjoyment, alleging as a breach the prospective claim for dower of defendant's wife. The defendant by his plea set up a special agreement with defendant, by which the claim for dower was excluded from the operation of the covenants, and provided for by a certain bond. The bond having been set out on oyer, the plea was held bad, for not describing the bond correctly as regards the recital, or setting it out according to its legal effect; but the court gave judgment for defendant, on the ground that a prospective claim to dower is no breach either of the covenant for seisin or quiet enjoyment. Quære,

however, whether the intention of the parties did not sufficiently appear from the bond to enable the court to stay proceedings in this action as being against good faith, unless the plaintiff would swear that the agreement was not such as alleged by defendant. Quære, also, whether, taking the bond and award together as one instrument, the covenant might not be read as containing an exception of the claim for dower. *Thornhill* v. *Jones*, 12 U. C. R. 231.

One T. S. conveyed lands to one R. with full covenants. R. conveyed by a similar deed to plaintiff. T. S. died leaving a wife, who recovered judgment for her dower. R. paid her a certain sum in accord and satisfaction:—Held, that the recovery was a breach of the covenant for quiet enjoyment, which is prospective in its operation; and this though the plaintiff was never evicted, and no dower assigned. *Cuthbert* v. *Street*, 9 C. P. 115.

Declaration on a covenant for quiet enjoyment. Breach, that one F. G., as the widow of J. G., claimed dower to which she was entitled against plaintiff, and threatened to evict him from one-third of the land; and plaintiff, to protect himself from eviction, was compelled to pay $150, and other large sums, to settle said claim, and to procure a release from F. G.:—Held, on demurrer, declaration good: for that the plaintiff was not obliged to delay settling the claim until a judgment in dower had been obtained, much less until eviction. *McClure* v. *Grafton*, 19 C. P. 149.

Easement — *Interruption — Title.*]—On 3rd February, 1873, the company granted to A. T. P. (through whom S. P., the original plaintiff in this action, claimed), a mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river, high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.), an island in the river called "Island C," and two parcels of land, one on each bank, immediately opposite each other, and adjoining the property of the plaintiff, called respectively "The Great Meadow," and "Block F," all three of which were above the land granted to A. T. P., and subsequently became the property of H. Y. A. In an action by S. P. (who died after action brought, M. A. P. being made plaintiff by order of revivor), against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river, without submerging a great part of, if not the whole of "Island C," and penning back water and ice on "The Great Meadow," and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor of the said lands. It was contended, on the part of the defendants, that the mortgagees of the property should be made parties:—Held, that O. J. Act, s. 17, s.-s. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail:—Held, also, that in an action on a covenant for quiet enjoyment a plaintiff must shew an interruption or obstruction of the easement, in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment:—Held, also, as to the covenant for title, that as the supreme court of Canada had decided in Platt v. Attrill, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding here, although the company were not parties to the suit; and that the covenant was broken as soon as it was made, and the plaintiff was entitled to such damages as accrued during the life of S. P.; and, following Empire Gold Mining Co. v. Jones, 19 C. P. 245, that the damages would be the difference in money between the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted that they had a right to convey. It appeared that during S. P.'s ownership the Government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action:—Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the Government against their liability for damages for their breach of contract:—Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant. The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed. *Platt* v. *Grand Trunk R. W. Co. of Canada*, 12 O. R. 119.

Highway.]—Semble, a public highway is not an incumbrance within the covenant for quiet enjoyment. *Moore* v. *Boulton*, 10 U. C. R. 140.

Local Improvements.]—Action on covenants in a deed of land, whereby the defendant covenanted that he had done no act * * whereby or by means whereof the lands * * were, or should, or might be in anywise impeached, charged, or affected, or incumbered in title, estate, or otherwise however, and that the grantees should enjoy them free from all incumbrances. It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for ten years, as a charge upon the lands conveyed, to defray the expenses of the improvement, was undertaken, at the instance and upon the petition of the defendant and other property holders interested, under R. S. O. 1887 c. 184, s. 612, s.-s. 9. The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance. The by-law also contained a provision for commutation at the option of the owner:—Held, that the action of the defendant in joining in the peti-

tion, was the means by which an incumbrance was created on the property, and was a breach of the covenants for which the plaintiffs were entitled to recover:—Held, also, that the plaintiffs were entitled as damages in this action to a sum sufficient to remove the charge. Per Boyd, C.—Different would be the conclusion if the taxes had been imposed by municipal authority, without the intervention of the defendant: Moore v. Hynes, 22 U. C. R. 107, distinguished. *Cumberland* v. *Kearns*, 18 O. R. 151; 17 A. R. 281.

In a contract for sale and exchange of certain lands free from incumbrances, it was provided that "unearned fire insurance premium, interest, taxes and rental" should be "proportioned and allowed to date of completion of sale:"—Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-law passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively:—Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it under 53 Vict. c. 50, s. 38 (O.). The substantial charge as a whole came into existence upon the finishing of the work. Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract. In an action to recover instalments under the contract:—Held, that local improvement rates imposed by municipal by-laws after, the work having been done before, the date of the contract, were incumbrances to be discharged by the vendor; but rates imposed and work done after the contract were not so. Re Graydon and Hammill, 20 O. R. 199, followed. Ecclésiastiques de St. Sulpice de Montreal v. City of Montreal, 16 S. C. R. 400, distinguished. Held, also, that the covenant for payment of the instalments and the covenant against incumbrances were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into court so much of his purchase money as might be necessary to protect him against the incumbrances. McDonald v. Murray, 11 A. R. 101, and Tisdale v. Dallas, 11 C. P. 238, distinguished. *Armstrong* v. *Auger*, 21 O. R. 98.

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

Mortgages.] — Defendant conveyed to plaintiff certain land which had been previously mortgaged, covenanting for enjoyment free from incumbrances and for further assurance. Plaintiff sued upon these covenants; and it appeared that before action the mortgage had been satisfied, though no discharge was recorded, and that he had sold the land to a third party, who had not been disturbed in his possession, but who had refused to pay part of the purchase money, for want of such discharge:—Held, that the action could not be maintained. *Kennedy* v. *Solomon*, 14 U. C. R. 623.

A party giving an absolute covenant in a conveyance of real estate, and a bond conditioned that it should be void upon payment of a certain mortgage for £75 upon the land conveyed, is liable thereon, although no legal proceedings may have been taken upon the mortgage by which the party is damnified. *Carlisle* v. *Orde*, 7 C. P. 456.

P. conveyed certain lands to defendant, "subject to a mortgage," and with a covenant for quiet enjoyment free from all incumbrances. Defendant then demised the same land to P. and wife for the term of their respective natural lives, and P. granted and assigned to plaintiff all his right, title, and interest therein, to hold during the life of P. The mortgagees or their assignee brought ejectment against both plaintiff and P. when the plaintiff paid the amount due under the mortgage, and then brought an action against defendant for money paid to his use:—Held, that he could not recover in this form of action; but, semble, his remedy would be on the implied covenant for quiet enjoyment contained in the life lease to P. *Snyder* v. *Snyder*, 22 C. P. 361.

On the sale of land, subject to a prior mortgage by the vendor, not then due, the vendor covenanted with the purchaser, B., that he had not incumbered the property, and B. executed a mortgage for his unpaid purchase money. The intention was that the vendor should pay the prior mortgage, but he failed to do so. After it became due, he sold and assigned B.'s mortgage to the plaintiff, who had notice of all the facts; the plaintiff afterwards obtained an assignment of the prior mortgage, and B. paid off the same:—Held, that B. was entitled to apply on his mortgage the money so paid by him to the plaintiff. *Henderson* v. *Brown*, 18 Gr. 79.

Proceedings in Chancery.] — Plaintiff declared against executors, on a qualified covenant by their testator, that he had the right

to convey certain land, and for quiet possession, assigning as a breach of the first covenant that the testator at the time of making the deed was only a trustee of the land for one D., in whom the right to convey the same in fee as beneficial owner was vested, and by whom it had been conveyed to testator in pursuance of a conspiracy between the testator and D. to defraud one W., a creditor of D., who had then a writ in the hands of the sheriff against D.'s lands. The plaintiff then alleged that W., having purchased the land at sheriff's sale on the execution, filed a bill in chancery against defendants and the plaintiff, and was declared to have a lien on the land for the amount of his claim; and that although the defendants had paid the sum due to W., they had not paid the plaintiff's costs of defending the suit in chancery:—Held, that the declaration was bad, for the covenant for right to convey was qualified, and the writ being in the sheriff's hands before the deed to the testator, the sale and subsequent proceedings did not arise from any act of his in accepting that deed for the purpose alleged, but might equally have taken place without it; nor could they support a recovery on the other covenant, also qualified, if they had been assigned as a breach of it. *Shire* v. *Gates*, 21 U. C. R. 419.

The declaration alleged that W., defendants' testator, by indenture made under the Act, conveyed certain land to the plaintiff, in fee, covenanting for right to convey, and that he had done no act to incumber; and assigned as a breach, that before the execution of said deed the title was vested in the Bank of Upper Canada, who conveyed to W., being then a director and vice-president of, and as such a trustee for, the said bank; by reason whereof the said W. had not good right to convey, and the said lands were impeached in title and estate, and afterwards many persons to whom the plaintiff had agreed to sell parts of said land, refused in consequence thereof to perform their contracts; and the court of chancery, in a suit duly instituted, thereupon decreed the plaintiff's title to be defective for this cause, whereby the plaintiff was unable to enforce said agreements, or to sell the land, &c.:—Held, on demurrer, that the declaration shewed no cause of action, for, among other reasons, the legal estate passed to the plaintiff, the defect alleged being an equitable one only; no eviction or disturbance was shewn; and the alleged proceedings in chancery would not compel a court of law to hold the title bad. *Brunskill* v. *Wilson*, 25 U. C. R. 248.

Declaration, that defendant by deed conveyed land to one T. in fee, covenanting that he should quietly enjoy, without the let, suit, &c., of defendants or any person: that T. conveyed to the plaintiffs, who entered into possession; and afterwards a bill in chancery was filed against plaintiffs and defendants, and it was decreed in the suit that defendants had no right to convey, being trustees only; and that the plaintiffs were ordered to convey the land and give up possession thereof, and of their deeds, to two trustees named, whereby the plaintiffs had lost the land, and been compelled to pay costs of the suit, &c.:—Held, that a good cause of action was shewn: that it was unnecessary to allege an eviction: and that the proceedings in chancery constituted a breach of the covenant. *Trust and Loan Co. of Upper Canada* v. *Covert*, 30 U. C. R. 239.

One defendant pleaded that since action the plaintiffs had conveyed the land to C. and M.; and the other, that the plaintiffs had so conveyed in pursuance of the decree, C. and M. being the trustees appointed thereby:—Held, clearly no defence. *Ib.*

Sale of Land — *Mortgage Back — Breach of Proviso for Quiet Enjoyment by Mortgagor.*]—The plaintiff, on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st March, 1864, which was the plaintiff's only title to the land: that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction: that the plaintiff by the mortgage covenanted that he was seised in fee and had good right to convey; and that the eviction complained of was an action of ejectment brought by the heirs of L., on the ground that L. was of unsound mind when he executed the deed on the 31st March, 1864, which was proved at the trial, and the jury thereupon found for the heirs:—Held, that the plea was bad: for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the estoppel applicable to the deed extend to the mortgage; that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 U. C. R. 635.

Taxes.]—Taxes due upon land at the time of sale, are an incumbrance within the covenant for quiet enjoyment; but the plaintiff can recover only the arrears due at the date of the conveyance. *Haynes* v. *Smith*, 11 U. C. R. 57.

A sewerage rate imposed by by-law is not a tax upon the land, but a personal charge upon the owner. Where, therefore, the plaintiff purchased certain land from defendants, in respect of which this rate was for three months overdue, which the plaintiff paid, and also commuted for the entire rate as allowed by the by-law:—Held, that he had no right of action for either of these sums, under the covenants in his deed for seisin and quiet enjoyment, free "from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands." Semble, that even if the rate in arrear were an incumbrance on the land, the payment by way of commutation, being wholly optional, would not be recoverable under the covenant. *Moore* v. *Hynes*, 22 U. C. R. 107.

The declaration alleged that by indenture the defendant did (in pursuance of the Act respecting short forms of conveyances) grant to the plaintiff, in fee, certain land subject to the reservations, &c., in the original grant from the Crown; and covenanted with the plaintiff for right to convey, notwithstanding any act of the defendant; and for quiet enjoyment, free from incumbrances. Averment, that the defendant at the time of executing the indenture, was $71.32 in arrear for taxes,

which the plaintiff was obliged to pay, and was put to great trouble and expense in defending an action brought by one S. under a covenant for quiet enjoyment in a deed given by plaintiff to her:—Held, that the declaration was bad, because it did not aver that the taxes had accrued during the time the defendant held the land; because the covenants in defendant's deed to plaintiff, and plaintiff's deed to S., were not shewn to be the same, and therefore a recovery upon one might not give a like claim upon the other; and because the plaintiff had assigned his interest in the covenant before the commencement of this action. *Harry* v. *Anderson*, 13 C. P. 476.

Defendant conveyed land on the 13th April, 1863, covenanting for quiet enjoyment free from arrears of taxes. The property was assessed in February, and the by-law fixing the rate passed in July:—Held, that the taxes for the year could not be considered as in arrear at the date of the deed, for the amount had not then been ascertained, no rate having been fixed, and they therefore could not be paid. "Arrears" means something behind in payment; it implies a duty and a default. S. 16 of the Assessment Act C. S. U. C. c. 55, is intended only to fix the fiscal year as regards taxes, and to provide that no matter when the by-law imposing the rate is passed, they shall be considered as imposed for the year; it gives no retrospective existence to the tax. *Corbett* v. *Taylor*, 23 U. C. R. 454.

A declaration on a covenant against incumbrances by defendant or his wife, or any one claiming under them, alleged as a breach that at the time of making said covenant a large sum was in arrear for taxes duly imposed, without shewing that they accrued while defendant owned the land or were caused by his acts:—Held, bad. *Silverthorn* v. *Lowe*, 40 U. C. R. 73.

The purchaser of land gave back a mortgage to secure part of the purchase money, with absolute covenants for payment, &c. In fact a part of the land had been sold for taxes accrued before the vendor acquired title, and the time for redemption had elapsed at the time of the sale:—Held, no answer to a claim for the full amount secured by the mortgage, although the conveyance by the vendor contained covenants limited to his own acts only. Harry v. Anderson, 13 C. P. 576, followed, though doubted; Cockenour v. Bullock, 12 C. P. 138, doubted. *In re Kennedy, Wigle* v. *Kennedy*, 26 G. 33.

Warranty—*Impeachment by Warrantor.*]—The grantee of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given. *Powell* v. *Watters*, 28 S. C. R. 133.

III. Recovery in Actions on Covenants.

1. *By and Against Whom.*

(a) *In General.*

Assignment of Covenant by One Joint Covenantee to His Co-covenantees.]—One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. 1887 c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff. *Scarlett* v. *Nattress*, 23 A. R. 297.

Award—*Action for Breach.*] — Where the plaintiff has been awarded a certain sum in accordance with the terms of an instrument under seal, for the non-payment of such an award the plaintiff should sue in covenant: he cannot sue in assumpsit unless some new consideration, apart from the written instrument, can be proved. *Tait* v. *Atkinson*, 3 U. C. R. 152.

Beneficial Right — *Stranger.*] — Where the effect of a contract is to give a stranger to it a beneficial right thereunder, he may enforce such right by action. And where in an agreement for the exchange of certain lands between the sons of the defendant and a third party, which was carried out, and in which the defendant released her dower, and also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they jointly with her covenanted with such third party to pay her an annuity to be secured by mortgage, it was:—Held, that although not named as a covenantee, she was entitled to maintain an action to enforce such covenant, and that a judgment creditor of hers was entitled to have equitable execution against her, and a receiver appointed to receive payment of the annuity. *Moot* v. *Gibson*, 21 O. R. 248.

Beneficial Right—*Covenant with Mother —Action by Child.*]—The defendants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, inter alia, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant:—Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him. Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff. West v. Houghton, 4 C. P. D. 197, distinguished. *Faulkner* v. *Faulkner*, 23 O. R. 252.

See Roberts v. *Hall*, 1 O. R. 388.

Bond to Secure Salary—*Nature of Recovery.*]—The defendants gave a bond to the plaintiff in the sum of £45, conditioned to pay him £45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being raised. He then sued for the sixth year, and the question of defendants' liability was left to the court without pleadings: — Held, that covenant clearly would not lie; but that to a declaration on the bond the former payments, not having

been paid or received in satisfaction of the penalty, could form no defence; and that the defendants, therefore, were entitled only to have satisfaction entered on payment of the penalty and costs. *Nixon* v. *Jardine*, 23 U. C. R. 470.

Church Trustees — *Mortgage — Personal Liability.*]—The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description gave to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually. *Beaty* v. *Gregory*, 28 O. R. 60, 24 A. R. 325.

Covenant to Convey — *Heir.*] — Held, that an heir could not sue on a covenant with the ancestor to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's life-time. *Goodall* v. *Elmsley*, 1 U. C. R. 457.

Grant of Water Rights—*Conditions.*] —Where the plaintiffs, who had built mills on a stream, by indenture granted a license to the defendant to make a raceway over their lands for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby, nor any injury or damage occasioned to the plaintiffs' mills, and after the defendant's mill had been erected, by an accumulation of ice on the by-wash, the water was forced back on the plaintiffs' mill:—Held, that the plaintiffs might maintain an action for such injury, and that case, and not covenant on the indenture, was the proper form of remedy. *Eastwood* v. *Hellivell*, 4 O. S. 38.

Indemnity—*Assignment of Covenant to Indemnify.*]—*See Sutherland* v. *Webster*, 21 A. R. 228; *Ball* v. *Tennant*, 21 A. R. 602.

Indemnity—*Right of Action.*]—See INDEMNITY.

Joint Covenantors.]—Semble, the rule stated in Rawle on Covenants, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantors only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements, in the absence of language imputing such suretyship in regard to future acts or breaches. *Elliott* v. *Stanley*, 7 O. R. 350.

Mortgage—*Indemnity.*] — *See* MORTGAGE, XII. 10 (b).

Partners—*Covenant in Firm Name.*]—Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to a mortgage in favour of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgage, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgage:—Held, that this covenant bound only the partner who signed it. *Hamilton Provident and Loan Society* v. *Steinhoff*, 23 A. R. 184.

Rent Charge—*Sale.*]—Under a fi. fa. lands, against the plaintiff in this suit, in favour of A., the sheriff sold to A. a rent charge, which defendant in this suit had granted by deed to the plaintiff for her life. The deed contained a personal covenant of the defendant to the plaintiff to pay the rent charge:—Held, that A. was not entitled to sue on the covenant in the name of the plaintiff. *Smith* v. *Turnbull*, 1 P. R. 38.

Sale of Vessel—*Purchaser Bound by Vendor's Covenant.*]—The owner of several steamers, carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburg at any time thereafter; and also, that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburg. Afterwards the proprietor transferred his business as forwarder, and sold the two other steamers to persons having full knowledge of this covenant, who notwithstanding commenced running the vessels on the St. Lawrence below Ogdensburg. Upon a bill filed for that purpose, the court held the owners bound by the covenant entered into by the original proprietors, and granted an injunction restraining them from navigating the river below Ogdensburg with those vessels. *Holcomb* v. *Nixon*, 5 Gr. 278, 373.

Settlement of Accounts.]—Covenant to pay a sum to be ascertained on settlement of accounts—Construction—Right of action. See *Garland* v. *McDonald*, 41 U. C. R. 573.

Unexecuted Deed—*Acceptance of Benefit under Deed.*]—An action of covenant cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises but which has not been executed by the grantee, although she has accepted the benefit of the deed. *Credit Foncier Franco-Canadien* v. *Lawrie*, 27 O. R. 498.

See CONTRACT, IV. 3.

(b) *Covenants Running with the Land, and Covenants for Title.*

Building Restriction.] — Where D., the owner of certain lands, on selling part to B., inserted this clause in the conveyance: "Bellevue square is private property, but is always to remain unbuilt upon, except one residence with the necessary outbuildings, including porter's lodge," and the purchaser, on his part, covenanted not to allow any business of a certain kind to be carried on on the part conveyed:—Held, that the benefit of the restriction passed to the assignee of the purchaser, as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and though the benefit of it was not formally transferred to him. *VanKoughnet* v. *Denison*, 1 O. R. 349; 11 A. R. 699. See *S. C.*, 28 Gr. 485.

Where it is clearly intended to give some tangible benefit to a grantee by such a covenant in the conveyance to him, and it formed a part of the consideration which induced his purchase, the court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement. *S. C.*, 1 O. R. 349.

Where the person who was building the house objected to, held under an agreement for a lease, but had made no outlay on the property till after notice was served on her, nor paid any rent:—Held, that she was not in the same position as an innocent person holding for value under a completed instrument, and the erection of the house must be stopped. *Ib.*

Where the square had been built upon for years without objection by purchaser or his vendee, the plaintiff, but the building had been erected by purchasers under a mortgage executed by D. before he conveyed to B.:—Held, no proof of acquiescence, as they could not have objected with effect. *Ib.*

The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that D.'s liability under restrictive agreement not to build on Bellevue square, revived on his again acquiring the property. *S. C.*, 11 A. R. 699.

Covenant against Incumbrance — *Grantor Seized of Equity of Redemption.*]—Declaration stated that defendant, by indenture, conveyed lands to C. in fee, who on the same day re-conveyed same to defendant by way of mortgage; and defendant afterwards conveyed to one A. in fee, subject to the equity of redemption then existing, and covenanting in the assignment that he had done no act whereby said premises had been incumbered; that A. assigned to W., who assigned in fee to the plaintiff, whereby plaintiff is assignee of the premises, and entitled to sue on defendant's covenant. Breach, that defendant before conveying to C. had mortgaged to one J., who foreclosed, and plaintiff was thereby deprived of his security, &c. Demurrer, because the deed to C. conveyed only the equity of redemption, which alone passed to C., and defendant's covenant applies only to that estate:—Held, declaration good, as there was nothing to shew any intention of the mortgagor to limit his covenant to the equitable estate. Plea, that title in J., the first mortgagee, became absolute before the assignment to plaintiff and breach of the covenant and all damage accrued before the assignment to plaintiff:—Held, no defence, for the covenant for title in the original mortgage, by which the premises passed to plaintiff, was a covenant running with the land conveyed to plaintiff, and plaintiff was entitled to all the incidents thereto, and therefore to bring this action for breach of the said covenant. *Meredith* v. *McCutcheon*, 13 C. P. 209.

A covenant against incumbrances in a deed purporting to convey the legal fee simple, runs with the land, although the grantor was in fact seised only of an equity of redemption. *Empire Gold Mining Co.* v. *Jones*, 19 C. P. 245.

Declaration—1st count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance defendant had granted one of the lots to S.; 2nd, on the covenant for quiet possession in the same deed. Breach, that before making it defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in chancery and foreclosed his mortgage, by which the plaintiffs lost this lot; 3rd, that defendant, being possessed of a lot of land, mortgaged it to one S. for £250 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee for $22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs, &c.; 5th plea, to the first three counts: that before the alleged breaches, the plaintiffs by deed conveyed all their estate in the land in those counts mentioned to one D., and they have not and had not at the commencement of this suit got back or become seised of their former or any estate in said land, whereby the causes of action in those counts could not and did not accrue to the plaintiffs. On demurrer:—Held, plea good, as to the first, but bad as to the second and third counts; for the plaintiffs, as those counts shewed, had only an equity of redemption, and the right to sue on the covenants would not pass with it to their assignee. *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498.

Covenant for Title—*Assignment After Breach.*]—The usual covenant for good title runs with the land, and it is no objection therefore to an action by the assignee of the covenantee, that because according to the statement in the declaration, "the grantor was not seised in fee when he gave his covenant," the covenant was broken as soon as made, and could not inure to the benefit of the assignee. *Gamble* v. *Rees*, 6 U. C. R. 396; *Scott* v. *Fralick*, 6 U. C. R. 511.

Quære, what would the effect be, if when the covenant was given a third party had been in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee. *Gamble* v. *Rees*, 6 U. C. R. 396.

Defendant conveyed with absolute covenants to plaintiff, who before action conveyed to one D.:—Held, that the covenants ran with the land, and the plaintiff could not sue, though they were broken as soon as made. *Scriver* v. *Myers*, 9 C. P. 255.

Covenant for Title—*Life Estate.*]—In the covenant for good title, it is only the assignee of the fee who can represent the covenantee; the devisee of a life estate cannot sue on the covenant. *Clark* v. *Robertson*, 8 U. C. R. 370.

Covenant for Title—*Devisees.*]—An action will not lie on a covenant for title against the devisees of the covenantor. *Sickles* v. *Snyder*, 10 U. C. R. 209.

The declaration set out that in 1837 one W. conveyed land to E., giving absolute covenants for title and quiet enjoyment: that E. entered and died seised, having made his will in 1840, devising "all his messuages, lands, and real estate" to B., in trust: that B. entered, and in 1843 conveyed to the plaintiff, without covenants: that the plaintiff soon after conveyed to D., with the usual covenant

for quiet enjoyment. The deed from W., and the plaintiff's deed to D., both contained the usual reservation of the rights of the Crown as expressed in the original grant. The declaration then averred that when W. conveyed to E. he was not seised according to his covenant, but that part of the land was the property of the Crown, and was granted in 1846 to one J.: that J. afterwards conveyed to R., who brought ejectment against D., and recovered: that the plaintiff, in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges, and these damages he claimed from the defendant in this action as surviving executor of W. Quære, as E. devised to R. only all his real estate, and this land, not being owned by him, was not therefore in words devised, whether B. could be treated as holding the covenant of W. as assignee, and as a covenant running with the land. *Bown* v. *Hart*, 10 U. C. R. 228.

Covenant Limiting Supply of Water.]—Plaintiff conveyed land to M., with the privilege of drawing off from the mill race on the adjoining land of the plaintiff a certain quantity of water for purposes specified, leaving always sufficient to supply the mill on the plaintiff's land. And by the same indenture M. covenanted for himself, his heirs, executors, administrators and assigns, to restrict themselves to the use of the water for the purpose mentioned, and not to take such water unless there should be enough without it to supply the plaintiff's mill:—Held, a covenant running with the land, on which the plaintiff might sue M.'s assignees. *Warren* v. *Munroe*, 15 U. C. R. 557.

Death of Covenantee.]—Plaintiffs, administrators of R., sued defendants, executors of M., on their covenants for seisin in their own right contained in a conveyance of land by them to R. It appeared that defendants' only claim to the land was as executors, under a power to sell for payment of debts, contained in M.'s will:—Held, 1. That if the power was well exercised the estate passed to R.'s heir, who must sue on the covenant, not the plaintiffs: 2. that there would be a breach of the covenant, defendants not being seised, for which, however, only nominal damages would be recoverable. A new trial was granted, to enable defendants to prove the existence of debts, in order to warrant the sale. *Macdougall* v. *Macdonell*, 5 C. P. 355.

Death of Covenantee—*Person Entitled to Sue.*]—S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order it was now sought to set aside on the ground that the right of action did not survive to her:—Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which:—Semble, the heir, or devisee, might bring an action. *Platt* v. *Grand Trunk R. W. Co.*, 11 O. R. 246.

In the case of such covenants running with the land, where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Ib.*

Executors—*Personal Liability.*]—Where executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, &c., in the deed, for good title:—Held, that they were personally liable on that covenant, and that the grant by them as executors could not control their express contract. *McDonald* v. *McDonell*, 6 O. S. 109.

Forum.]—The plaintiff sued defendants on their covenants for title in a conveyance of land to the plaintiff, alleging as the breach, that at the time of the execution of the deed one H. was possessed of part of the land under a demise from defendants, on which part was a stone wall, whereby the plaintiff was unable to build on said wall, and his premises were injured. Defendants pleaded that the plaintiff had reconveyed the land to them by way of mortgage, with the usual covenants for title, which was still in force and unpaid. The plaintiff replied, on equitable grounds, that the mortgage provided for possession by him until default, and that no default had been made:—Held, on demurrer, that the action could not be maintained, nor transferred to the court of chancery, under s. 2 of the A. J. Act of 1873, not being for a purely money demand. *Kavanagh* v. *City of Kingston*, 39 U. C. R. 415.

Lease—*Repairs.*]—In a lease for years of premises made to G., and assigned by G. as to the residue of the term of defendants, was contained, after the usual covenant to yield up the same in good repair, a proviso that nothing therein contained should be taken in any way to compel the said G. to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they now are, "but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to be done and performed by the said G. at his own proper cost and charge:"—Held, that these words constituted a covenant running with the land, and bound the assignees of the lease, though assignees were not expressly mentioned. *Perry* v. *Bank of Upper Canada*, 16 C. P. 404.

Maintenance.]—On the 1st December, 1870, A. M., by deed, conveyed certain lands to his grandsons W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and in the event of any disagreement between W. M., D. M., and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her $55 a year in lieu of such board, &c., and, if not paid, to be recoverable by suit at law; the covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th October, 1872, the defendant W. M., for a nominal con-

sideration of $1,000, conveyed his undivided half interest to the plaintiff, but of which she said she was not aware; and on 1st March, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th January, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried though. On 27th September, 1883, D. M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882:

Held, that the agreement did not create a rent charge, as no power of distress was conferred; that if either a rent service or rent seck there would be a right of distress and apportionment, but if neither, but covenant charged on land, performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. & S., who the evidence shewed were purchasers with notice. *McCaskill* v. *McCaskill*, 12 O. R. 783.

Mortgagor's Action Against Prior Vendor.]—Held, that a mortgage in fee made subsequently to a breach of a covenant for quiet enjoyment, and to an action for substantial damages therefor, does not estop the mortgagor from suing the vendor of the party from whom he purchased, on the covenant contained in the vendor's deed for the property. *Cuthbert* v. *Street*, 9 C. P. 386.

Partial Assignment.] — An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant and recover damages in proportion to his interest. *Keyes* v. *O'Brien*, 20 U. C. R. 12.

Party Wall.]—C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed, by writing under seal, to erect a party wall on the dividing line and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion thereof whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee, by deed containing the usual statutory covenants, and the plaintiffs entered into possession. Some years later, defendant erected a building on his lot, making use of the rear part of such party wall, by reason of which he became liable to pay $98.65, and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:—Held, that the plaintiffs were not entitled as vendees of C. to recover, the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs. *Kenny* v. *Mackenzie*, 12 A. R. 346.

Privity at Time of Breach.]—An action on covenants running with the land, can only be maintained by the party between whom and the covenantor there is privity of estate at the time of the breach. *Rowe* v. *Street*, 8 C. P. 217.

Sale of Land — *Covenantee's Mortgage Outstanding.*]—Defendant conveyed land to the plaintiff by deed, made under the Act to facilitate the conveyance of real property, containing covenants for right to convey, for quiet possession, and that he had done no act to incumber, and on the same day took back a mortgage in fee to secure the purchase money, in which it was provided that the plaintiff should retain possession until default. Before making the deed, defendant had leased land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession:—Held, that this sum could not be recovered as money paid, and that the plaintiff could not sue upon the covenants in the deed while the mortgage continued in force. *Proctor* v. *Gamble*, 16 U. C. R. 110.

Where a purchaser mortgages the same lands to his vendor in fee, to secure payment of the purchase money, he cannot sue the vendor for breach of covenant for good title, while the mortgage continues in force. *Huyck* v. *McDonald*, 3 O. S. 292; *Rees* v. *Strachan*, 14 U. C. R. 53.

Sheriff's Sale.]—Quære, whether a purchaser at sheriff's sale acquires a right to sue on covenants running with the land. *Campbell* v. *Burley*, 19 U. C. R. 204.

Plaintiff sued defendant on a covenant for seisin and right to convey, and defendant pleaded only that he was seised and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one M., so that he was not the proper person to sue, if the action had been properly resisted; but he recovered a verdict, and on motion for a new trial it appeared on affidavit that he was in fact suing for the benefit of the person entitled. The court, under these circumstances, refused to interfere, the verdict being just. *Ib.*

Sub-purchaser against Vendor.] — A. conveys to B., conveyanting that "at the time of making the conveyance he was lawfully seised of a perfect and absolute estate of inheritance in fee simple." B. afterwards conveys to C., reciting that he was then possessed in his own right of the land in question:—Held, in an action brought by C., the assignee of B., against A. upon his covenant, that C. was not estopped by B.'s recital. *Gamble* v. *Rees*, 6 U. C. R. 393.

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is that he has not the interest he supposed he was acquiring, and which he would have had if the title of the covenantor, who executed the first deed, had been good. *Ib.*

In covenant for good title brought by the assignee against the original covenantor, it is no objection to the declaration that it does not shew that the covenantor or assignee may not have been seised of a good estate in the land at the time of action brought. *Ib.*

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2. *Damages.*

(a) *In General.*

Assignment for Creditors — *Covenant to Reconvey.*]—A debtor, whose business was the manufacture of reaping machines, conveyed his personal property to trustees; and

having afterwards compounded with them and his other creditors, the trustees entered into a covenant to re-assign to him the property on certain terms and conditions. The debtor filed a bill, alleging, amongst other things, a breach of the covenant, and claiming damages: — Held, that he might be entitled to damages for the detention of the machinery necessary for carrying on his business; and it was referred to the master to inquire into the nature of the personal property withheld, and, if it was machinery or chattels of a like nature, to inquire and report as to damages. *Scott* v. *Wilson*, 16 Gr. 182.

Assignment of Lease—*Covenant to Repurchase.*]—Where A. purchased a lease from B., and B. covenanted to re-purchase it in three years for more than he paid, and after the three years A. tendered an assignment of the lease, which B. refused:—Held, that in an action on the covenant A. was entitled to recover as the amount of damages the price agreed upon by B. for the re-purchase. *Gibson* v. *Cubitt*, E. T. 2 Vict.

Costs Incurred.] — Upon a foreclosure suit upon a mortgage for £350, and on which only £250 had been in fact advanced, the court disallowed the additional £100 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Bitner*, 11 C. P. 102.

A. having mortgaged land to B. sold it to C., giving covenants against his own acts. B. foreclosed, making C. a party to the suit, who employed a solicitor and incurred £10 costs, which he claimed in an action against A. for breach of his covenant:—Held, that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A. *Parker* v. *McDonald*, 11 C. P. 478.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon:—Held, that H. was not entitled to solicitor and client, but only to party and party, costs of an action on the covenant. *Hutton* v. *Wanzer*, 11 P. R. 302.

Covenant not to Assign Lease.] — Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health. Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500. Williams v. Earle, L. R. 3 Q. B. 739, followed. *Munro* v. *Waller* (2), 28 O. R. 574.

Covenant to Pay Mortgage — *Part Payment.*] — In an action upon defendant's covenant to pay off a mortgage executed by the plaintiff to one G., upon land sold by the plaintiff to defendant, it appeared that G. had sold under the mortgage in chancery in a suit against defendant, the costs of which amounted to £43, and that for the mortgage money remaining, after deducting the proceeds of sale and these costs, he had obtained a judgment against the plaintiff. The defendant had paid £20 to G. before the chancery suit was begun, but had not obtained credit for it:—Held, that this sum of £20 should not go to reduce the plaintiff's claim, for it was the defendant's duty to have obtained credit for it in taking the accounts; and that the plaintiff could recover for the chancery costs, as G. had properly deducted them, and the plaintiff, being liable to pay G. the deficiency then remaining on the mortgage, was entitled to be paid it by defendant. *Stephens* v. *Boulton*, 23 U. C. R. 16.

Covenant to Pay Mortgage — *Set-off against Mortgage for Purchase Money.*]—A purchaser who had taken a conveyance and given a mortgage for the purchase money had been compelled to pay off a prior mortgage, under threat of proceedings being taken against the land by the prior mortgagee. The purchaser had taken a covenant from the vendor for the discharge of this prior mortgage:—Held, overruling Henderson v. Brown, 18 Gr. 79, that as against an assignee of the mortgage made by the purchaser with notice of these facts, the purchaser had no equity to set off or deduct from the mortgage assigned what he has paid on the first mortgage, subsequent to the assignment. *Egleson* v. *Howe*, 3 A. R. 566.

Indemnity — *Recovery before Payment.*] —See INDEMNITY.

Liquidated Damages — *Several Breaches.*] — The plaintiffs being indebted to the defendant in the sum of $80,000, and to other parties (whether partnership or individual debts) in an amount not exceeding $2,160, by deed dated October, 1859, in consideration of a release of the debt of $80,000, and of $4,000 paid, assigned to defendant all their stock in trade, book debts, and assets (except household furniture) with a covenant on defendant's part, that he would indemnify and save harmless the plaintiffs from all debts and demands not exceeding the amount of $2,160, and a further covenant by both plaintiffs and defendant for $4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed. Upon an action brought upon the covenant to indemnify, and reference to arbitration, it appeared that the defendant had paid plaintiffs' liabilities to the amount of $1,857, and claimed the sum of $356, he having settled that sum by setting off against the same with the creditors of the plaintiffs to whom the said debts were due sums of money due from those creditors to the plaintiffs, being partnership debts due to plaintiffs and assigned to defendant by the deed above stated:—Held, that the sum to be set off ($356) was not properly defendant's property, and that the plaintiffs were entitled to a verdict for that amount. Held, also, that the sum of $4,000 so claimed was not a debt due as liquidated damages upon each breach of the covenant. *Rutherford* v. *Stovel*, 12 C. P. 9.

Money Demand.]—In an action brought to reform a lease, and claiming damages for a breach of a covenant:—Held, that such claim for damages was not a "purely money demand" under the A. J. Act, R. S. O. 1877 c. 49, s. 4. *Gowanlock* v. *Mans*, 9 P. R. 270.

Quebec Law — *Refusal to Issue Debentures.*]—The corporation of the county of Ottawa, under the authority of a by-law,

undertook to deliver to the Montreal, Ottawa and Western R. W. Co., for stock subscribed by them, 2,000 debentures of the corporation, of $100 each, payable in twenty-five years from date, and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation, solely for damages for their neglect and refusal to issue said debentures: — Held, that the corporation, apart from their liability for the amount of the indebtedness and interest thereon, was liable under Articles 1065, 1073, 1840, and 1841 Civil Code (Q.), for damages for breach of covenant. *County of Ottawa* v. *Montreal, Ottawa and Western R. W. Co.*, 14 S. C. R. 193.

(b) *Covenants for Title.*

Amount Paid in Settlement—*Value of Land.*]—W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land was subsequently claimed by one R., who brought ejectment, and D. sued B. under the covenant. W. then gave B. a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R.:—Held, that W.'s estate was only liable for the value of the piece of land so claimed, and not the amount paid by his vendee on the compromise. *Hart* v. *Bown*, 7 Gr. 97.

Concealment of Incumbrance—*Set-off against Unpaid Purchase Money.*]—Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances, and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee — unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor himself. *Lovelace* v. *Harrington*, 27 Gr. 178.

Costs Incurred.] — Covenant for title: breach, that defendant had no title and no right to convey, charging eviction, and claiming damages for costs incurred by the plaintiff in his defence against a person having paramount title:—Held, that the plaintiff was entitled to recover the costs paid in defending himself in the suit of ejectment under which he had been dispossessed. *Brennan* v. *Servis*, 8 U. C. R. 191.

A purchaser, who had been ejected, suing upon his covenant for a good title, may recover as damages the costs of defending an ejectment brought against him, even though he has not actually paid them, in addition to the purchase money and interest. *Stubbs* v. *Martindale*, 7 C. P. 52.

A. purchases from B. a lot of land (to which B. had no title) and conveys it to C., taking back a mortgage for the balance of the purchase money. C. ascertains that he has no title, and claims a deduction in the mortgage money on that account. They arbitrate and a deduction is made by the arbitrators. The costs of the arbitration, &c., amounting to £51 4s. 9d., A. has to pay. He then sues B. for the purchase money of the lot, and these costs:—Held, that such costs were the consequence of his own act, inasmuch as if he had not sold the property they would not have been occasioned, and were not recoverable. *Forsyth* v. *McIntosh*, 9 C. P. 492.

In an action brought against the executors of a grantor on a full covenant deed, to recover damages sustained by the plaintiff, by reason of the payment of a sum of money in an action for dower, defendant pleaded that the deed was not the deed of the grantor in his lifetime and plene administravit. To the first plea the plaintiff joined issue, and to the second replied lands. It appeared on the trial that an action had been brought against one G. S. B. for the recovery of this dower, and a release obtained for $120; but not until after a defence and some $20 of costs were incurred, and that the only amount paid by plaintiff was $50:—Held, that the jury should have been directed that the defence of the dower suit was not justifiable, the deed containing the release of dower executed in May, 1835, not being signed by the wife, although certified to by two magistrates, and the costs thereof should have been disallowed; and that the plaintiff was only entitled to recover the amount paid for the release of dower and interest. *Hunter* v. *Johnson*, 14 C. P. 123.

The plaintiff having been ejected by the heirs of H. L., sued under the covenant for quiet enjoyment in a deed from H. L., and under a covenant in a mortgage subsequently made by the plaintiff to H. L. by which the plaintiff was to be undisturbed until default in the mortgage, and a verdict was rendered for the plaintiff with 1s. damages on the second count:—Held, that plaintiff was not entitled to increase these damages by the costs of the ejectment suit, for it appeared that the mortgage was not set up by the plaintiff in that suit, and if it had been he might have been successful in it. *Eccles* v. *Lowry*, 34 U. C. R. 75.

Defendants having conveyed land to T. with full covenants, T. mortgaged to the plaintiffs. The children of T. filed a bill in chancery against the plaintiffs and others, under which a decree was made directing the plaintiffs to convey the land to the plaintiffs named in the bill, who shewed a good title as against both plaintiffs and defendants herein; and the plaintiffs thus lost the land, and were obliged to pay their own and the plaintiffs' costs in the suit in chancery. The plaintiffs thereupon sued defendants upon the covenant for quiet enjoyment contained in their deed to T.:—Held, that they were entitled to recover all the costs incurred by them in defending the chancery suit, either as between party and party, or as between attorney and client, it not appearing upon the evidence that such costs were either needlessly or unreasonably incurred. *Trust and Loan Company of Upper Canada* v. *Covert*, 39 U. C. R. 327.

Covenantee's Knowledge.] — Semble, that where heavy damages are given in an action of covenant for good title, and it appears

that the plaintiff knew the state of the defendant's title, the court will grant a new trial, and will intend that in that case excessive damages have been given contrary to evidence. *Emery* v. *Miller*, Tay. 336.

Defendant being seised in fee of certain land in trust for his son, at the request of the son mortgaged it to B. and V. for $400, the son receiving the money and agreeing to pay it off. Afterwards the defendant conveyed to his son, the consideration stated being $4 000, but in reality it was a gift, and the deed by inadvertence and mistake contained a covenant for the right to convey, notwithstanding defendant's acts, and that he had done no act to incumber the land. On the 21st October, 1866, the son mortgaged the land to the plaintiff for $400, and this mortgage was foreclosed by the plaintiff, who was compelled to pay off the mortgage to B. and V. It did not appear that the plaintiff had any knowledge of the trust between the father and son or of the arrangement between them as to the mortgage to B. and V., or that he knew of this mortgage until after the foreclosure, but it appeared that it, together with the other conveyances, had been duly registered and that the land was worth both the mortgages. The plaintiff having sued defendant on the covenant contained in the defendant's deed to the son, to recover the amount paid to B. and V.:—Held, that the plaintiff could not recover, for that the facts would constitute a good defence on equitable grounds to an action brought against defendant by the son; and the title of the covenantor and covenantee being equitable only, the plaintiff, as assignee of the covenant, could stand in no better position than his assignor. *Claxton* v. *Gilbert*, 24 C. P. 500.

Crown Grant Defective.]—The declaration set out that in 1837, one W. conveyed land to E., giving absolute covenants for title and quiet enjoyment; that E. entered and died seised, having made his will in 1840, devising "all his messuages, lands, and real estate" to B. in trust; that B. entered, and in 1843 conveyed to the plaintiff without covenants; and that the plaintiff soon afterwards conveyed to D. with the usual covenant for quiet enjoyment. The deed from W., and the plaintiff's deed to D., both contained the usual reservation of the rights of the Crown as expressed in the original grant. The declaration then averred that when W. conveyed to E. he was not seised according to his covenant, but that part of the land was the property of the Crown, and was granted in 1846 to one J.; that J. afterwards conveyed to R., who brought ejectment against D. and recovered; that the plaintiff, in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges, and these damages he claimed from defendant in this action as surviving executor of W.:—Held, that under the facts alleged, the action was not maintainable. *Bown* v. *Hart*, 10 U. C. R. 228.

Delay and Expense in Obtaining Possession.]—No action will lie on the covenant for title when the grantor had a good title at the time of conveying, although the plaintiff experienced delay and expense in getting into possession. *Carr* v. *Dunn*, 9 U. C. R. 246.

Dower—*Costs.*]—In an action on a covenant for quiet enjoyment, the breach alleged was the recovery of a judgment for dower, and eviction of defendant from one-third of the land. Defendant allowed judgment to go by default:—Held, that the plaintiff was entitled, in assessing damages, to recover the costs of the dower suit, and to the whole value of the dower estate, not merely damages to the bringing of this action. *Stuart* v. *Mathieson*, 23 U. C. R. 135.

Dower — *Crops—Costs.*] — The plaintiff's father by indenture of bargain and sale conveyed to him certain land (the dower of the grantor's wife not being barred), covenanting for quiet enjoyment in consideration, among other things, of 5s. Upon his death his widow recovered judgment in dower against plaintiff, and the plaintiff sued his executors for breach of the covenant for quiet enjoyment. Upon a special case:—Held, that the measure of damages on a covenant for quiet enjoyment was not to be governed by the consideration money in the conveyance; and that the plaintiff was entitled to the value of the crops which he had lost by the eviction. The court being of opinion that the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action of dower were disallowed him. *Hodgins* v. *Hodgins*, 13 C. P. 146.

Easement of no Value.]—The defendants granted to the predecessor in title of the plaintiff, with covenants for title under the Short Forms Act, certain lands with the right and easement of erecting a dam at a certain spot. It was afterwards held that they had no power to grant such a right, but it was shewn that it was not, in any event, practicable to maintain a dam at the spot in question:—Held, that the defendants were not liable to repay the full purchase money less the actual value of the land without the supposed right, but only the actual practical value of the supposed right, which was nothing. *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

Eviction or Ouster.]—In an action on the covenants for seisin and right to convey the plaintiff is not entitled to substantial damages without shewing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages. *Snider* v. *Snider*, 13 C. P. 157; *Graham* v. *Baker*, 10 C. P. 426; *Bannon* v. *Frank*, 14 C. P. 295.

Executors Covenanting for Seisin in Their Own Right.]—Plaintiffs, administrators of R., sued defendants, executors of M., on their covenants for seisin in their own right contained in a conveyance of land by them to R. It appeared that defendants' only claim to the land was as executors, under a power to sell for payment of debts, contained in M.'s will:—Held, that there would be a breach of the covenant, defendants not being seised, for which, however, only nominal damages would be recoverable. *Macdougall* v. *Macdonell*, 5 C. P. 355.

Improvements — *Increased Value.*] — In an action for breach of covenant of good title the measure of damages is the purchase money paid with interest. No allowance is to be made for the improvements or increased value. *McKinnon* v. *Burrows*, 3 O. S. 590; *Clark* v. *Robertson*, 8 U. C. R. 370.

Incumbrances — *Disturbance of Possession.*]—The right to damages is not lessened by the fact that the plaintiffs have never been disturbed in their possession, if an incumbrance really do exist. *Gibson* v. *Boulton*, *Hackett* v. *Boulton*, 3 C. P. 407.

Incumbrances — *Assignee.*]—A covenant against incumbrances in a deed purporting to convey the legal fee simple, runs with the land, although the grantor was in fact seised only of an equity of redemption, and can be sued upon by the assignee of the covenantee, who will be entitled to substantial damages, represented by the amount for which the mortgage stands as security, though it may not be yet due. *Empire Gold Mining Co.* v. *Jones*, 19 C. P. 245.

Incumbrances—*No Eviction.*] — Where the evidence shewed that when the grantor conveyed, there was a mortgage on the land by a prior owner, unpaid; but the grantee, the plaintiff, had taken possession and left after a month, not having been evicted, and no one else had been in possession since; and it did not appear that he had been unable to sell, nor that defendant, the covenantor, had been guilty of any fraud:—Semble, that only nominal damages could be recovered, the covenant being in effect the same as a covenant for seisin, and a continuing one. *Brown* v. *O'Dwyer*, 35 U. C. R. 354.

Incumbrances—*Other Lands Included.*] —In an action on a covenant that the defendant had done no act to incumber contained in a conveyance of land by the defendant to the plaintiff, for a consideration of £150:—Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it. *Connell* v. *Boulton*, 25 U. C. R. 444.

Incumbrance Larger than Value of the Land.]—Where the vendee of lands, who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances; and the mortgage, constituting the breach, covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into court to insure its reaching its proper destination. *McGillivray* v. *Mimico Real Estate Security Company*, 28 O. R. 265.

Qualified Covenant — *Incumbrances by Prior Owner.*] — After a conveyance incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts and the acts of those claiming under him:—Held, that the vendor was not bound to pay off the incumbrances; and therefore that the purchaser was not entitled to set off against them a balance of his purchase money remaining unpaid and secured by mortgage. *Re Buck*, *Peck* v. *Buck*, 6 P. R. 98.

Sale for Taxes—*Covenantee's Neglect to Redeem.*]—A party is liable only for such damages as are the natural consequences of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes accrued during his vendor's time, and neglected to redeem it within the year:—Held, on a covenant for a right to convey, and freedom from incumbrances, that he could not as of right recover the value of the land so allowed to be sold. *McCollum* v. *Davis*, 8 U. C. R. 150.

Sub-purchaser—*Price on Resale.*]—Defendant agreed to sell land to P. for £150, and gave him a bond for a deed: P. sold to O., who sold to plaintiff; and at his request defendant executed a deed in fee to plaintiff, the consideration expressed being £425, with covenants in fee. Plaintiff being dispossessed:—Held, entitled to recover the full consideration in the deed. *Graham* v. *Leslie*, 4 C. P. 176.

Two Parcels—*Eviction from One.*]—The deed with absolute covenants for title contained two several parcels of land, and the plaintiff was evicted from one, but was still owner of the most valuable parcel:—Held, that the measure of damages was not the whole purchase money, but only the proportionate value of that part to which the title failed. *McKay* v. *McKay*, 31 C. P. 1.

Vendor Acquiring Title After Breach.]—In an action for breach of an absolute covenant for title to land:—Held, that the plaintiff (the vendee) was entitled only to nominal damages where defendant (the vendor) had, after action brought, acquired the outstanding title; for by estoppel as held in Doe Irvine v. Webster, 2 U. C. R. 224, a perfect title to the land passed to the plaintiff through the defendant's former conveyance to him immediately upon the outstanding title becoming vested in defendant. *Boulter* v. *Hamilton*, 15 C. P. 125.

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3. *Evidence.*

Onus of Proof.]—In covenant for title, the breaches assigned were, want of seisin in fee, and an eviction by a stranger, to which the defendant pleaded a seisin in fee in himself:—Held, that on the plaintiff proving an eviction by a stranger, without shewing his title, it was incumbent on defendant to give evidence of a seisin in fee in himself. *Varey* v. *Muirhead*, Dra. 486.

Where to a declaration in covenant for title generally, and a breach that defendant had no title, the defendant pleaded a seisin in fee:—Held, that the issue lay upon him, and that he must shew such seisin by proof of actual possession at some time as primâ facie evidence of his estate in fee, although the plaintiff offered no evidence. But the rule is otherwise when the covenant is only against the party's own acts. *McKinnon* v. *Burrows*, 3 O. S. 114.

In an action on a covenant for title, where defendant pleads that he was seised in the terms of the covenant, the onus of proof lies upon him, and the plaintiff need not first prove a breach to entitle himself to a verdict. *Lemesurier* v. *Willard*, 3 U. C. R. 285.

Where the plaintiff sues upon a covenant for right to convey land, alleging as a breach

that defendant had no such right, and defendant pleads that he had, the proof of title lies upon defendant. *Mills* v. *Wigle*, 22 U. C. R. 168; *McCollum* v. *Davis*, 8 U. C. R. 150.

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is, that he has not the interest he supposed he was acquiring, which he would have had if the title of the covenantor, who executed the first deed, had been good. *Gamble* v. *Rees*, 6 U. C. R. 396.

Where a party binds himself to make a good and effectual conveyance of land, he must prove that he has the legal title, and that the land did actually pass by his deed. *Toland* v. *Bruce*, 8 U. C. R. 14.

Pleading — *Amendment.*] — Plaintiff declared that defendant, by his deed, covenanted not to commit waste, not stating with whom:—Held, that the plaintiff could not shew that he was suing as assignee of the reversion, but must prove a covenant with himself; and an amendment was refused at nisi prius. *Brennan* v. *Whitley*, 15 U. C. R. 277.

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4. *Pleading.*

In an action on covenant for quiet enjoyment, it is sufficient to state that one B. was seised before conveyance to the plaintiff, and that the plaintiff was obliged to pay him a named sum to obtain possession, without stating eviction by B. *Bleecker* v. *Myers*, Tay. 285.

A plea that the plaintiff enjoyed the estate without eviction, was held no answer. *Sherwood* v. *Johns*, Tay. 232.

In an action on a covenant that plaintiff was the lawful owner, and had a good title, a plea that defendant was the right owner, &c., and that the plaintiff has had possession since the conveyance, and never has been evicted:—Held, bad. *Vanderburgh* v. *Vanalstine* 5 O. S. 454.

Where in an action on a covenant for quiet enjoyment without the hindrance, &c., of defendant (the grantor), or any one claiming under her, the plaintiff declared that A. and others, who had title from the defendant at the execution of the covenant to the plaintiff to the lands conveyed, expelled the plaintiff under such title; and that the defendant pleaded that A. and the others had not such title to the lands and woods at the time of the conveyance to the plaintiff:—Held, on special demurrer, that the allegation of title in A. and the others at the time of the conveyance was immaterial; and that the plea was bad in denying the title of A. and the others to the lands and woods, conjunctively, and not disjunctively. *Gwynne* v. *Brock*, 6 O. S. 271.

In covenant, plaintiffs agreed to deliver 200 toises of stone for building a wall, defendants to pay 6s. 9d. per toise, i.e., for every 216 feet cubic measure, when the wall was erected. Plaintiffs averred delivery of 195 toises laid in the wall, but omitted to aver how many toises, at the rate of 216 cubic feet to a toise, had been laid in the wall and measured there:—Held, bad on general demurrer. *Howe* v. *Newman*, Dra. 90.

In an action of covenant for not making a lease of premises, it is no ground for arresting the judgment that the premises are not particularly set forth, if the breach be as definite as the terms of the covenant require. *Rowcand* v. *Tyler*, 4 O. S. 257.

Where the declaration set out that the money was to be paid according to the condition of a certain bond, the balance due on which was alleged to be ascertained, and the breach assigned was, that the money was not paid according to the covenant, but did not state the balance due, the judgment was arrested. *Martin* v. *Woods*, T. T. 3 & 4 Vict.

Declaration on a covenant by defendant to transfer to plaintiff certain land to which defendant was entitled as the son of a U. E. Loyalist, provided the plaintiff should locate the land, perform settlement duties, and procure the patent thereof, at his own costs, defendant in his covenant agreeing to furnish the plaintiff with full power to do so. The breach was held bad, for not averring a demand of authority to locate, perform settlement duties, &c., with time and place. *Dettor* v. *Keogh*, 1 U. C. R. 226.

Where in covenant for quiet enjoyment free from incumbrances, the breach assigned was, that £15 was due upon the land for arrears of taxes, without stating of what nature:—Held, bad, on special demurrer. *Wilson* v. *Rorke*, 2 U. C. R. 437.

In an action upon the covenant for further assurance the covenantee must aver in his declaration that the conveyance which he required was prepared by himself or his counsel, and tendered to the party to be executed. *Hoyt* v. *Widderfield*, 5 U. C. R. 180.

Declaration for payment of money by instalments, alleging that a sum became due on one day for two instalments:—Held, good, on special demurrer. *Thompson* v. *Chambers*, 2 U. C. R. 191. See, also, *Courtney* v. *Sinclair*, 5 U. C. R. 311.

Where a payment is to be a condition precedent, or a concurrent act, and is to be made in a certain manner, the plaintiff must aver readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everado*, 3 U. C. R. 154.

To an action of covenant, the fraud of the plaintiff may be pleaded in general terms. *Lacey* v. *Spencer*, 3 U. C. R. 169.

Declaration on a covenant to pay money. Plea, that the defendant had not broken his covenant:—Held, bad on special demurrer. *Mitchell* v. *Linton*, 5 U. C. R. 331.

Construction of conveyance, as to the necessity of averring affirmatively, in declaring thereon, that the plaintiff had sold lands, or why he had not sold them, before he could entitle himself to sue upon the covenant for the non-payment of a sum of money. *Kay* v. *Gamble*, 6 U. C. R. 267.

Quære, whether the first count of the declaration, set out in the case, was in covenant

or in tort. *Warren* v. *Monroe*, 15 U. C. R. 557.

In covenant upon articles of agreement, to recover payment for certain works therein specified, the defendants pleaded in general terms denying the doing of the work and the performance of the covenants mentioned in the articles:—Held, good, without specifying what works the plaintiffs had not performed, or wherein they had not performed the covenants. *Dunn* v. *Zimmerman*, 6 C. P. 346.

Amendment of declaration in covenant, by allowing plaintiff to claim as assignee of the reversion, instead of proving a covenant with plaintiff, refused. *Brennan* v. *Whitley*, 15 U. C. R. 277.

The breach assigned of a covenant to convey free from incumbrance was that the land was at the date of the covenant subject to a claim for a dower in favour of one R., the wife of one J., a former owner of said land:—Held, bad, for it could not be assumed that J. was dead at the date of the covenant. *Wilson* v. *Biggar*, 26 U. C. R. 85.

Part of the land included in a conveyance was inserted by mistake, the vendor not being or pretending to be the owner of it. To an action on the covenants for title defendant pleaded these facts as an equitable defence:—Held, that the plea was good as pleaded. *Belgea* v. *Muir*, 5 P. R. 273.

The devisee of a grantee suing upon the grantor's covenant, that "the land was free from incumbrances," must aver that the incumbrance was unsatisfied when the devisee took the estate. *Managan* v. *Fraser*, 8 U. C. R. 11.

The plaintiff sued on the usual covenant for quiet enjoyment, alleging as a breach a highway over a portion of the land conveyed:—Held, bad; for the exception in the covenant for title of any limitation, proviso, or condition contained in the original grant from the Crown, extends equally to the covenant for quiet enjoyment, and it was not averred that no highway was reserved in the original grant. *Moore* v. *Boulton*, 10 U. C. R. 140.

A plea to an action on the covenants for title and right to convey:—Held, bad, as being only an argumentative assertion of the defendant's title; and because defendant should have averred directly that he himself was seised, and need not have set out a derivative title. *Shanahan* v. *Sheerin*, 10 U. C. R. 600.

Action on covenants for seisin and right to convey, a mortgage to C. being specially excepted. Breach, that defendants were not seised, with the exception of said mortgage, and had not good right to convey; but that one G. H. was seised of a portion of said lands, and one J. B. and T. B. of another. Pleas, 2. That said mortgage was a mortgage in fee, and that by the indenture declared on, defendants covenanted for seisin, except said mortgage, which is still unpaid; 3. same defence, applied to the covenant for right to convey; 4. that defendants were seised, in accordance with their covenants; 5. that they had good right to convey as covenanted for; 6. that before the execution of the indenture declared on, defendants agreed with the plaintiff for the sale of lands to him at a specified sum, of which part was to be paid down, and the residue secured by mortgage, and that the plaintiff then mortgaged the same lands in fee to the defendants, to secure such residue, which is still unpaid; 7. that said G. H. was not seised as alleged; 8. that said J. B. and T. B. were not, nor was either of them seised:—Held, on demurrer—2nd, 3rd, 4th, 5th, 7th, and 8th pleas bad; 6th plea good. *Rees* v. *Strachan*, 14 U. C. R. 53.

Declaration on a covenant contained in a mortgage to plaintiffs, to which the defendant pleaded equitably that the plaintiffs gave their bond, binding themselves to execute a good and sufficient bond to defendant of the premises comprised in the said mortgage, and alleging that the plaintiffs had not done so, &c., and averring that the plaintiffs had not at the time of giving their bond, nor at any time since, a good title to the said land, &c.:—Held, plea, bad, as it did not shew what defect there was in the plaintiffs' title, nor that the plaintiffs' bond would not fully indemnify defendant against loss, nor that there was any fraud or misrepresentation; and as this court could not do ample justice between the parties, they would not interfere. *Dauphin* v. *Lesperance*, 14 C. P. 133.

The declaration stated that one W. G. mortgaged to the plaintiff and two others, as trustees of S., his unexpired term in certain lands, to secure £400 and interest, which he thereby covenanted to pay them at certain times specified: that W. G. also mortgaged said term to the plaintiff, to secure £226 7s. 6d.; that under a power of sale in said last mentioned mortgage, the plaintiff duly sold the mortgaged premises to defendant at the following price—that is to say, that defendant should pay the mortgage to said trustees, and £150 to the plaintiff; that the plaintiff thereupon assigned said premises to defendant, and defendant, by the assignment, covenanted with the plaintiff to perform the covenants in the mortgage to said trustees; and the plaintiff alleged that defendant had not paid the price so to be paid by him for his purchase, and had not paid the last instalment of the mortgage money payable to the trustees. Defendant pleaded, 1. As to so much of the declaration as relates to the price or sum of money to be paid by defendant to plaintiff, that he did not promise as alleged; 4. as to said price, a set-off for moneys due by plaintiff to defendant; 5. as to the plaintiff's claim in respect of the mortgage from W. G. to the trustees, a similar set-off:—Held, on demurrer, pleas bad, for the first was not a denial of the covenant sued upon, but an attempt to put in issue its legal effect: the fourth and fifth were pleaded to a cause of action not advanced, as the declaration was for the non-payment of money to the trustees, not to the plaintiff; and as to the fifth plea, the claim under the covenant to pay the trustees was not one to which a set-off could be pleaded, the debts not being mutual. *Martin* v. *Clark*, 20 U. C. R. 419.

A plea of leave and license:—Held, bad, as no answer to an action of covenant. *McDonald* v. *Great Western R. W. Co.*, 21 U. C. R. 223.

Declaration that plaintiffs covenanted with defendants to do certain works within a lim-

ited period, with power to defendant by six days' notice to take the works out of plaintiffs' hands in default of sufficient progress to ensure completion of the said works within the time; but, omitting to set out the words, "It is also understood that the work is to be carried on unceasingly night and day with sufficient force to ensure its completion within the limited time." Averment, that though plaintiffs fulfilled the conditions precedent, defendants did take the works out of the plaintiffs' hands without notice or just cause, &c., whereby, &c.:—Held, on motion for nonsuit to be no variance, as by s. 106 of C. L. P. Act, 1856, the averment of performance by plaintiff of conditions precedent, not denied by defendant, is sufficient. *Hennessey* v. *Weir*, 11 C. P. 179.

Declaration, by executor of S., on a covenant made by defendant on the 10th January, 1855, to pay S. £240, with interest, by instalments. The second and third pleas set up payment of £210 under a previous agreement to secure the fulfilment of which the deed declared on was given, and these pleas were:—Held, bad, for it was not alleged that the £210 formed any part of the £240 for which the covenant sued on was made, or that there was no other consideration for such covenant than to secure the £210. *Robison* v. *Flanigan*, 22 U. C. R. 417.

Fifth plea, that before breach of the covenant declared on, S. accepted from defendant £210 in goods in full satisfaction of said sum of £240, and of the cause of action declared on, and by deed released defendant therefrom. On demurrer to this plea, except as to the allegation of release:—Held, that the rest might be rejected as surplusage, and that it shewed a good defence. *Ib.*

The plea was that A. S. did not at the request of defendant sign and seal, and as his act and deed deliver to the insurance company the covenant mentioned in the first count:—Held, that by this plea the question of A. S. having entered into the covenant at the request of the defendant was put in issue, and there being no evidence to support the issue, a new trial was ordered without costs. *Stewart* v. *Clark*, 13 C. P. 203.

Declaration on a covenant to pay $1,400 on a day named, if defendant did not make a deed in fee simple, clear of all incumbrances, of certain land specified, to the plaintiff, his heirs and assigns. Breach, that defendant did not make a deed in fee simple, clear of all incumbrances, of the said land to the plaintiff, his heirs and assigns, nor did he pay the $1,400. Demurrer, that the breach is uncertain, as it might mean either that defendant made no deed, or not one free from incumbrances, in which case the incumbrances should be stated:—Held, that the breach was sufficient. *Cully* v. *Winter*, 25 U. C. R. 34.

Declaration, that the defendant, by deed, covenanted (not saying with the plaintiff) to pay to the plaintiff, &c.:—Held, good on demurrer. *Hennessy* v. *Hennessy*, 30 U. C. R. 38.

Declaration, that the plaintiff and defendant and one D. entered into an agreement under seal, set out, which was in substance as follows: D. has sold to defendant his interest in certain land and mills (described) for £1,350, which was held in trust by said D. for the plaintiff, and has conveyed it to defendant to be held in trust for the plaintiff, as it was held by D. The lien therefore which defendant has on said property is said sum of £1,350 paid by him to D. Plaintiff agrees to pay defendant said £1,350, with interest, as follows (setting out the times of payment). And further, D. delivers to defendant all the chattels on the premises, to be held in defendant's name, but for the plaintiff's benefit, and the business to be done in defendant's name, but the profits to go to the plaintiff. It was then alleged that the said agreement being in full force, the defendant, in breach thereof, distrained upon the plaintiff's goods, as his tenant, in the house he then dwelt in on the said premises, for £306, being, as the warrant of distress falsely alleged, the amount of rent due to defendant for the same on the 1st October then last, whereby the plaintiff, in order to obtain possession of his goods, was obliged to replevy them, and was put to great loss and expense, &c.:—Held, that the declaration was bad, as not shewing a breach of any covenant contained in the agreement set out; for it was not alleged that the goods distrained were those mentioned in the deed, nor that the plaintiff was not defendant's tenant, nor that no rent was due, nor what proceedings were had in the replevin suit. *Scott* v. *McCabe*, 31 U. C. R. 220.

To a declaration on a covenant in a lease alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow thereon, and charging as a breach, that defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it acording to the true intent and meaning of the added part:—Held, on demurrer, plea bad. *Shier* v. *Shier*, 22 C. P. 147.

To an action of covenant in a lease, defendant pleaded in substance on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, plea bad. *Ib.*

To an action in covenant defendant pleaded never indebted:—Held, not a nullity, but merely an irregularity. *Abell* v. *Glen*, 6 P. R. 64.

Treating a pleading as a nullity does not prevent it afterwards being attacked as an irregularity. *Ib.*

IV. Miscellaneous Cases.

Acceleration Clause.]—Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mort-

gagor, in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside. The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties. Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. 1887 c. 107, schedule B., s. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

Assignment of Covenant — *Compelling Re-assignment.*]—The plaintiff transferred a covenant for the payment of $4,000, executed by four persons in his favour, to the defendant, by an absolute assignment, as security for $2,000; the defendant giving to the plaintiff a separate agreement to "re-assign" on payment of the loan and interest. On a bill to obtain a re-assignment, alleging that such loan had been repaid, the court made a decree for redemption in favour of the plaintiff, with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston* v. *Wood*, 27 Gr. 515.

Chattel Mortgage to Defeat Creditors—*Covenant for Payment.*]—Declaration on a covenant made by the defendant to the plaintiff, whereby he covenanted to pay the plaintiff £37 10s. and interest. The defendant pleaded that the covenant was contained in a chattel mortgage made by him at the plaintiff's request, and to hinder, defeat, and defraud his creditors, and without consideration. Upon demurrer:—Held, that a covenant executed as above is only void as against third parties, and not between the parties to it; and that the plaintiff, therefore, was entitled to judgment. *Scoble* v. *Henson*, 12 C. P. 65.

Covenant Not to Sue.]—Covenant not to sue in deed of composition. See *Andrews* v. *Bank of Toronto*, 15 O. R. 648.

Partial Illegality.]—The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void, but where you can sever them, whether the illegality be created by the statute, or by the common law, you may reject the bad part, and retain the good. *Kitching* v. *Hicks*, 6 O. R. 739.

Restraint of Trade.]—See CONTRACT, II. 3.

Sale of Patent Rights—*Covenant to Protect Against Infringement.*]—In 1875, J. R. obtained letters patent for improvements in "harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "harvesters" in certain counties, he paying $10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease. Per Hagarty, C.J. O., and Morrison, J.A., that the plaintiffs, under this covenant, were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrongdoers. Per Burton and Patterson, JJ.A., that the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present. The court being equally divided, the appeal from decision of Ferguson, J. (2 O. R. 627) was dismissed. *Green* v. *Watson*, 10 A. R. 113.

Surety — *Reservation of Remedies.*] — A covenant not to sue entered into by the creditor with the principal debtor without the surety's consent, but with a reservation of remedies against other parties, does not discharge such surety. *Hall* v. *Thompson*, 9 C. P. 257.

Two Debtors—*Covenant not to Sue One.*] —A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other. *Dewar* v. *Sparling*, 18 Gr. 633.

See BOND—CONTRACT—DEED—INDEMNITY —LANDLORD AND TENANT, II. 1—MORTGAGE.

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I. Accessories.

Accessory After the Fact—*Evidence.*]—See *Regina* v. *Smith*, 38 U. C. R. 218.

Extradition.]—See *Regina* v. *Browne*, 31 C. P. 484, 6 A. R. 386.

Fraudulent Appropriation—*Unlawful Receiving—Simultaneous Acts.*]—A fraudulent appropriation by a principal and a fraudulent receiving by an accessory may take place at the same time and by the same act. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

Stakeholder—*Illegal Bet.*]—See *Walsh* v. *Trebilcock*, 23 S. C. R. 695.

See, also, Specific Offences, sub-title IX., *post.*

II. Arrest.

Arrest before Indorsement of Warrant—*Detention After.*]—A warrant for the arrest of the plaintiff, who had made default

in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine:—Held, that the only damages recoverable by the plaintiff were for the trespass up to the time of backing the warrant:—Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge under a proper warrant was lawful. Distinction between subsequent civil and criminal proceedings in such cases pointed out. *Southwick* v. *Hare*, 24 O. R. 528.

Arrest without Warrant.]—The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and indorsed by a Judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country; and, semble, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina* v. *McHolme*, 8 P. R. 452.

A justice of the peace, who issues his warrant for the arrest of a person charged with felony without the information having been sworn, is liable in trespass. Sections 22 and 23 of the Criminal Code are a codification of the common law, and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant. *McGuiness* v. *Dafoe*, 23 A. R. 704.

Assault.]—Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. *Forrester* v. *Clarke*, 3 U. C. R. 151.

Central Prison—*Warden's Responsibility—Handcuffing.*]—The plaintiff, a workman in the central prison, in the employment of a contractor therein, was detected conveying tobacco to a convict, contrary to the rules in force and to the provisions of the Central Prison Act, whereupon the warden directed a constable to arrest him, which he did, and though under no apprehension of plaintiff making an attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted:—Held, that the plaintiff was subject to an indictment and therefore the arrest was legal:—Held, however, that under the circumstances the handcuffing was not justifiable, and the constable was liable in trespass therefor, but no liability attached to the warden as the evidence failed to shew that he was a party to it. *Hamilton* v. *Massie*, 18 O. R. 585.

Detention of Accused—*Proceedings in Quebec.*]—Section 752 of the Criminal Code only applies where the court or Judge making the direction as to further proceedings and inquiries mentioned therein has power to enforce it, and a Court or Judge in Ontario has no power over a Judge or Justice in Quebec to compel him to "take any proceedings or hear such evidence," &c. *Regina* v. *Defrics*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Gaoler's Duty.]—The gaoler of a common gaol is bound to receive and detain until released a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment without shewing what the particular felony was with which the plaintiff was charged. *McKellar* v. *MacFarland*, 1 C. P. 457.

Right to Handcuff and Search.]—See *Gordon* v. *Denison*, 22 A. R. 315.

See CONSTABLE—INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

III. ATTAINDER.

The property of a person attainted for high treason, is not forfeited until the attainder is complete. Quære, as to the effect of a defendant becoming attainted between the seizure and sale of his goods under a fi. fa. *Eastwood* v. *McKenzie*, 5 O. S. 708.

Semble, that the wife of an attainted traitor cannot defeat the recovery in ejectment of the purchaser at sheriff's sale, in an action against the traitor on a bond entered into before his attainder, by setting up the title by forfeiture in the Crown, which the Crown had forborne to assert. *Doe d. Gillespie* v. *Wixon*, 5 U. C. R. 132.

The estate of a traitor concerned in the rebellion of 1837, and who accepted the benefit of the Provincial statute 1 Vict. c. 10, is at once by such acceptance as much vested in the Crown, under the operation of 33 Hen. VIII. c. 20, s. 2, without office found, as afterwards. *Ib.*

Though by 33 Hen. VIII. c. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands would only vest in the commissioners under 59 Geo. III. c. 12, as should be found by inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seised of. And held, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition. And semble, that the inquisition was void for want of certainty. *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. 105.

A statute was passed reversing the attainder of A.S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted: provided, always, that nothing in the

Act contained should affect any property sold or conveyed by the commissioners of forfeited estates, or any public officer acting for the Crown in that behalf, but that such property should remain as if the Act had not been passed. In the preamble it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown:—Held, that the plaintiffs, claiming as devisees of A. S., must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe d. Stevens* v. *Clement*, 9 U. C. R. 659.

IV. Bail.

General Rule.]—The guilt or innocence of a prisoner is not the question to decide on application for bail on a criminal charge. The seriousness of the charge, the nature of the punishment and evidence, and probability of the prisoner appearing to take his trial, are the important questions to be considered:—Held, where it was shewn that the prisoner attempted to bribe the constable to allow him to escape, that the probability of his appearing to take his trial was too slight for the Judge to order bail. *Regina* v. *Byrnes*, 8 L. J. 76.

Bail refused, although it was some months before a criminal court competent to try the case would sit. *Ib.*

Assault.]—Upon a charge of assault, or aggravated assault, there being doubts as to the law, the fact being disputed, the prisoner was admitted to bail pending application for his discharge, which was to be renewed in term. *In re McKinnon*, 2 C. L. J. 324.

Case Reserved.] — Where the prisoners were convicted at the sessions of felony, and a case reserved for the Queen's bench, which had not been argued, the Judge in chambers refused to bail except with the consent of the attorney-general. *Regina* v. *Sage*, 2 C. P. 138.

Discretion.]—The evidence in this case warranted the magistrates in requiring bail. *Regina* v. *Mosier*, 4 P. R. 64.

Evidence on Application.] — Where a prisoner applies to a Judge in chambers to be admitted to bail for an indictable offence, under C. S. C. c. 102, s. 63, the copies of information, examination, &c., may be received, though certified by the county crown attorney, and not by the committing justice. *Regina* v. *Chamberlain*, 1 C. L. J. 157.

High Court Judge.]—Held, that a Judge of the high court has power under s. 83 of the Criminal Procedure Act, R. S. C. c. 174, to admit to bail in cases where the accused has not been finally committed for trial if he "think it right so to do;" but in this case, the charge being a serious one, the magistrate before whom the prisoner appeared, having refused to admit him to bail, and no depositions having been taken, an order for bail was refused. *Regina* v. *Cox*, 16 O. R. 228.

Larceny.] — A prisoner in custody for grand larceny may be admitted to bail. *Rex* v. *Jones*, 4 O. S. 18.

Murder.]—The court refused to discharge a prisoner on a habeas corpus, charged with having murdered his wife in Ireland, communication having been made by the Provincial to the Home Government on the subject, and no answer received, and the prisoner having been in custody less than a year; and bail in such a case will not be allowed until a year from the time of the first imprisonment, although no proceedings have been taken by the Crown. *Rex* v. *Fitzgerald*, 3 O. S. 309.

A prisoner charged with murder may in some cases be admitted to bail; and on such an application the court may look into the information, and if they find good ground for a charge of felony, may remedy a defect in a commitment, by charging a felony in it. *Rex* v. *Higgins*, 4 O. S. 83.

On an application by prisoner in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty. Where in such case there is such a presumption of the guilt of the prisoners as to warrant a grand jury in finding a true bill, they should not be bailed. The fact of one assize having passed over since the committal of the prisoners, without an indictment having been preferred, is in itself no ground for bail. The application is one of discretion and not of right, the prisoners not having brought themselves within 31 Car. II. c. 2, s. 7, by applying on the first day of the assize to be brought to trial. *Regina* v. *Mullady*, 4 P. R. 314.

Where the grand jury have found a true bill for murder bail will generally be refused. In this case there was evidence, if believed, sufficient to warrant a conviction, and only one assize had elapsed without a trial. An application to admit to bail was refused, and the prisoners left to their remedy under the Habeas Corpus Act. Remarks as to the considerations which should govern the exercise of discretion in granting or refusing bail. *Regina* v. *Keeler*, 7 P. R. 117.

One Justice Granting.] — Although a statute may require the presence of three justices to convict of an offence, yet one has power to bail the offender; and a second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal. *King* v. *Orr*, 5 O. S. 724.

Recognizance — *Form.*] — The recognizance entered into by the defendants on the removal of the proceedings from the sittings of oyer and terminer and general gaol delivery to the Queen's bench division of the high court provided that they should "appear in this court and answer and comply with any judgment which may be given upon or in reference to a certain indictment, &c., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required." Semble, that the practice and procedure before the Judicature Act should be maintained in its entirety; though possibly it might be varied by agreement. By the recognizance the defendants had not agreed to vary it, but they might thereunder elect to appear and answer to the indictment, or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing. *Regina* v. *Bunting*, 7 O. R. 118.

Recognizance — *Acknowledgment — Estreat—Writ of Fieri Facias and Capias.*]—A recognizance of bail is taken in open court by the clerk of the court addressing the parties, being then before him in open court, by name, and stating the substance of the recognizance; and the verbal acknowledgment of the parties so taken is quite sufficient without more. 2. In this case a recognizance was drawn up which stated that the principal and sureties personally came before the clerk of assize, in open court, and acknowledged, &c.; and also stated that it was taken and acknowledged in open court before the clerk of assize. As a matter of fact the parties actually came before the court, and properly acknowledged the debt to the Crown in open court:—Held, that the recognizance should have stated that the parties personally came before the court, and that the recognizance was taken and acknowledged in open court; and the name of the clerk should merely have been subscribed to it; but the errors made in drawing it up were not sufficient to avoid it. 3. Notice to the sureties of the recognizance is not necessary where it is taken as and where this one was. 4. The provision of R. S. C. c. 179, ss. 10 and 11, and R. S. O. 1887 c. 88, ss. 7 and 8, requiring the written order of the Judge for the estreating or putting in process of a recognizance, applies only to recognizances to appear to prosecute, or to give evidence, or to answer for any common assault, or to articles of the peace, and does not apply to a recognizance such as the one here in question, whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment for conspiracy. 5. The estreat roll was sufficiently signed by the clerk when he signed the affidavit at the foot of the roll. 6. It is no part of the duty of the clerk in making up the roll to instruct the sheriff as to what disposition he is to make of the money therein mentioned when collected. And where the clerk, making it up, stated it to be made in accordance with a Provincial statute, and also with two Dominion statutes, thus leaving it uncertain whether the moneys were to be paid over to the Provincial treasurer or to the Dominion minister of finance:—Held, that the words so used were surplusage, and did not affect the validity of the roll, and should be stricken out. 7. The estreat roll, as drawn up, stated that it was a roll of fines, issues, amerciaments, and forfeited recognizances, set, imposed, lost, or forfeited, by or before the court, &c., commenced, &c., and contained the names of parties, residences, &c., with the amounts for which the bail were bound, filled in under the heading "amount of fine imposed:"—Held, that the roll sufficiently shewed the recognizance to have been forfeited, and that it was fairly entered and extracted on the roll as a forfeited recognizance. 8. Held, that the proceedings to collect the debt due to the Crown, under the recognizances, were civil and not criminal proceedings, and were to be regulated by R. S. O. 1887 c. 88; and the writ of fieri facias and capias issued in this case, following the form given in the schedule to the Act, was not open to any objection. 9. Held, that, under the circumstances set forth in the affidavits, the court would not be justified in releasing the bail from their liability. *Re Talbot's Bail*, 23 O. R. 65.

Recognizance — *Affidavit.*] — Where the affidavit accompanying a recognizance filed on a motion for a rule nisi to quash a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that they were worth $100 over and above any amount for which they might be liable as sureties, it was held insufficient. The rule in force as to recognizances prior to the passing of the Criminal Code is still in force. *Regina* v. *Robinet*, 16 P. R. 49.

Refusal to Grant.]—Held (before the passing of 16 Vict. c. 179), that magistrates were not liable for refusing to admit to bail on a charge of misdemeanour in the absence of any proof of malice. *Conroy* v. *McKenney*, 11 U. C. R. 439.

Rescinding Order.]—Where a prisoner charged with felony had been admitted to bail upon an order of a Judge, and an application was subsequently made to rescind such order, and to recommit the prisoner, on the grounds that he had not been committed for trial at the time such order was granted, and that the bail put in was fictitious:—Held, that a Judge had power to make the order asked for; but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time. *Regina* v. *Mason*, 5 P. R. 125.

V. CRIMINAL INFORMATION.

1. *Against Judges and Magistrates.*

To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be intituled as in a suit pending. *Bustard* v. *Schofield*, 4 O. S. 11.

Notice must be given of complainant's intention to apply. *Ib.*

The motion should be made without unnecessary delay, and sufficiently early in term to admit of notice of it being given. *Ib.*

Application for leave to file an information against a Judge of a recorder's court, upon the grounds that he had falsified the records of the court and maliciously condemned the applicant as guilty of a felony upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts were that the jury came into court and the foreman pronounced a verdict of guilty. The counsel of the accused then questioned (not through the court) some of the jury as to the grounds of their verdict, when one stated that he did not concur in it. The attention of the court was not drawn to this dissent, nor did it appear the court was aware of it. A verdict of guilty was recorded by the presiding Judge; and when formally read to the jury by the clerk, no objection was made. The court refused the information. *Regina ex rel. Stark* v. *Ford*, 3 C. P. 209.

On application for leave to file a criminal information against a division court Judge, for his conduct in imposing a fine for contempt upon a barrister employed to conduct a case before him:—Held, that such leave should never be granted unless the court see plainly that dishonest, oppressive, vindictive, or corrupt motives influenced the mind, and prompted the act complained of, which in this case was clearly not shewn. *In re Recorder and Judge of Division Court of Toronto*, 23 U. C. R. 376.

Quære, whether such information is proper in the case of a Judge of an inferior court of

civil jurisdiction, in relation to a matter over which he has exclusive jurisdiction. *Ib.*

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2. *Miscellaneous Cases.*

A criminal information must be signed by the master of the Crown office. *Regina* v. *Crooks*, 5 O. S. 733.

On putting off the trial of an information for penalties, on the application of the defendant, costs will be imposed as in civil cases. *Rex* v. *Ives*, E. T. 3 Vict. IV.

It is not necessary that there should be fifteen days between the teste and return of a subpœna on a criminal information, where the venue is laid in the home district. *Regina* v. *Crooks*, E. T. 3 Vict.

An information to restrain a nuisance caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them had put up such a fence:"—Held, bad, on demurrer, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Gr. 402.

VI. EVIDENCE.

1. *Accomplice.*

Accessory After the Fact.]—Upon a trial for murder it appeared that the deceased was found dead in his stable in the morning, killed by a gunshot wound. The prisoner was a hired man in his house. His widow, the principal witness for the Crown, testified that she and her husband went to bed by ten o'clock: that afterwards her husband, being aroused by a noise in the stable, got up and went out: that she heard the report of a gun; that a few minutes after the prisoner tapped at the door, which she opened: that he said he had done it, and it was well done; that she asked him if he had killed her husband, and he said he had, and that it was for her sake he had done it: that he told her to keep quiet, and give him time to get into bed, which she did: that she waited a few minutes and then gave the alarm, calling the prisoner and another man who was sleeping in the house, who went out together and discovered the body. She also swore that the prisoner had previously told her he was planning the murder, but that she did not then consider him in earnest. There was evidence, apart from her own, of her improper intimacy with the prisoner; and a true bill had been found against her for the murder. The jury were told that there was no direct evidence corroborating her testimony; the rule requiring the evidence of an accomplice to be confirmed was explained to them, and they were directed that before convicting they should be satisfied that the circumstantial evidence relied upon by the Crown did corroborate her testimony. They convicted; and questions were reserved under C. S. U. C. c. 112, whether the widow was an accomplice, and whether there was sufficient evidence to submit to the jury:—Held, that, whether she was an accomplice or not, there was no ground for disturbing the verdict. Quære, per Harrison, C.J., whether the widow was an accessory after the fact, and whether, if so, she was such an accomplice as to require corroboration, according to the rule of practice. Per Morrison, J., and Wilson, J., she was an accessory after the fact. *Regina* v. *Smith*, 38 U. C. R. 218.

Cautioning Jury.]—A conviction of a prisoner for horse-stealing, upon the uncorroborated evidence of an accomplice, was held legal, although the Judge did not caution the jury as to the weight to be attached to the evidence. *Regina* v. *Beckwith*, 8 C. P. 274.

Cautioning Jury.]—The question whether or not a Judge, in charging a jury, should caution them that the evidence of an accomplice should be corroborated, is not a matter for a court to review on a case reserved, for it is not a question of law but of practice, though a practice which should not be omitted. Regina v. Stubbs, 7 Cox, C. C. 48, and Regina v. Beckwith, 8 C. P. 274, followed. *Regina* v. *Andrews*, 12 O. R. 184.

Cautioning Jury.]—When the jury have been cautioned as to acting upon the unconfirmed testimony of accomplices, no fault can be found with the admission of their evidence. *Regina* v. *Seddons*, 16 C. P. 389.

In this case being an indictment for soliciting P. and S. to steal money of the Gore Bank, the jury were told that the testimony of the accomplices was not sufficiently corroborated to warrant a conviction, whereupon they came into court stating that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but after a short interval they returned a verdict of guilty. Before recording their finding, the presiding Judge recommended them not to convict on the evidence, saying, however, that they could do so if they thought proper; they nevertheless adhered to their verdict:—Held, no ground for a new trial. *Ib.*

Corroboration.]—Semble, that a conviction on an indictment for conspiracy to procure by fraud the return of one F. to the Legislative Assembly, upon the evidence of an accomplice not corroborated by other testimony, is not illegal; but,—Held, that in this case such evidence was clearly confirmed, and that the verdict against all the defendants was warranted. *Regina* v. *Fellowes*, 19 U. C. R. 48.

Corroboration.]—Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices. See *Re Monteith, Merchants' Bank* v. *Monteith*, 10 O. R. 529; *United States Express Co.* v. *Donohoe*, 14 O. R. 333.

See, also, SPECIFIC OFFENCES, sub-title IX., *post* — INTOXICATING LIQUORS — JUSTICE OF THE PEACE.

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2. *Competent and Compellable Witness.*

Assault.]—Where a prisoner was indicted under 32 & 33 Vict. c. 20, s. 47 (D.), for an assault occasioning actual bodily harm:—Held, that he could not be deemed to be on his trial on an indictment for a common assault, so as to entitle him to be admitted and give evidence as witness on his own behalf, under 41 Vict. c. 18, s. 1 (D.). *Regina* v. *Bonter*, 30 C. P. 19.

The prisoner was indicted for an indecent assault. At the close of the case for the Crown the prisoner tendered himself as a witness in his own behalf. The Judge at the trial ruled that as upon the evidence adduced an indecent assault had been proved the prisoner could not be a witness, but reserved the point for the opinion of the court of Queen's bench, and that court affirmed the conviction. *Regina* v. *McDonald*, 30 C. P. 21 (n).

Canada Temperance Act.] — *See* INTOXICATING LIQUORS.

Convict.]—A writ of habeas corpus ad testificandum may be issued to the warden of the Provincial penitentiary to bring a convict for life before a court of oyer and terminer and general gaol delivery, to give testimony on behalf of the Crown in a case of murder. *Regina* v. *Townsend*, 3 L. J. 184.

Drunkenness.]—On the trial of an offence of being "unlawfully found drunk on the public street" contrary to the provisions of a municipal by-law, the magistrate cannot refuse to receive the defendant's evidence. *Regina* v. *Grant*, 18 O. R. 169.

Fraudulent Removal of Goods.]—See *Regina* v. *Lackie*, 7 O. R. 431.

Husband and Wife.] — See *Regina* v. *Bissell*, 1 O. R. 514; *Regina* v. *Meyer*, 11 P. R. 477; *McFarlane* v. *The Queen*, 16 S. C. R. 393.

Judge—*Juror.*]—Review of the cases on the questions whether either a Judge or a juror can be properly a witness in a case which he is trying. *Regina* v. *Petrie*, 20 O. R. 317.

Offences Under By-law.]—On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case, the defendant's evidence was received and a conviction made against him, it was quashed with costs. *Regina* v. *Hart*, 20 O. R. 611.

Practising Medicine.]—Upon trial of an information for practising contrary to the provisions of the Ontario Medical Act, R. S. O. 1877 c. 142:—Held, following Regina v. Roddy, 41 U. C. R. 291, that the defendant was properly rejected as a witness in his own behalf. *Regina* v. *Sparham*, 8 O. R. 570.

Presiding Magistrate.]—Calling magistrate as a witness in prosecution under the Canada Temperance Act, 1878, with a view of shewing his interest in the prosecution. See *Regina* v. *Sproule*, 14 O. R. 375.

Prisoner—*Prisoner's Wife.*]—The defendant on his trial upon an indictment cannot give evidence for himself, nor can his wife be admitted as a witness. *Regina* v. *Humphreys*, 9 U. C. R. 337.

Prisoner Acquitted.] — Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case. Quære, whether without such formal acquittal he may be called as a witness for his co-prisoner. Semble, not, unless it appear that he has been joined in order to exclude his testimony. It is in the discretion of the Judge at the close of the prosecution to submit such prisoner's case separately to the jury; but he is not bound to do so, and whether he has rightly exercised his discretion or not, cannot be reserved as a point of law:—Held, that in this case (being an indictment for arson) it could not be said that there was no evidence against E. H., one of the prisoners; and semble, that under the circumstances he could not be called as a witness for the other. *Regina* v. *Hambly*, 16 U. C. R. 617.

Prisoners Severing.] — Four prisoners being indicted together for robbery, one severed in his challenges from the other three, who were first tried: — Held, that he was a competent witness on their behalf. *Regina* v. *Jerrett*, 22 U. C. R. 499.

Rejection of Defendant's Evidence—*Appeal — Certiorari.*] — The defendant was convicted before two justices of the peace under the Weights and Measures Act, 42 Vict. c. 16, s. 14, s.-s. 2 (D.), as amended by 47 Vict. c. 36, s. 7 (D.), of obstructing an inspector in the discharge of his duty, and was fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing before the justices the defendant tendered his own evidence, which was excluded. The defendant appealed to the quarter sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed. On motion for certiorari:—Held, that the conviction having been affirmed in appeal certiorari was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the justices and the quarter sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by certiorari. That even if the determination on this point could be reviewed the justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime. *Regina* v. *Dunning*, 14 O. R. 52.

Traders' By-law.]—The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of s. 1 of 48 Vict. c. 40 (O.). The defendant, against the protest of his counsel, was called as a witness, and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W. but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, s.-s. 3, nor within 48 Vict. c. 40 (O.). 2. That defendant had been improperly compelled to give evidence against himself. 3. That the having a license is a matter of defence, and not of proof by the prosecution. *Regina* v. *McNicol*, 11 O. R. 659.

See SPECIFIC OFFENCES, sub-title IX., *post* —INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

3. *Confessions and Admissions.*

Information against Another Person.]—The prisoner, after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused, the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appeared to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case:—Held, following Regina v. Finkle, 15 C. P. 453, that both the information and deposition were properly received in evidence, as being statements voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that too, though made under oath. *Regina* v. *Field*, 16 C. P. 98.

The rule of law excluding the sworn statements of a prisoner under examination apply only to his examination on a charge against himself, and not when the charge was against another; for, in the latter case, a prisoner is not obliged to say anything against himself, but if he volunteer such a statement, it will be admissible in evidence against him. Explanation of the principle on which the statement of a prisoner under oath is excluded. *Ib.*

Persuading Prisoner to Confess.]—Where it appeared that a police constable gave the usual caution to the prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him: "The truth will go better than a lie. If any one prompted you to it you had better tell about it," whereupon the prisoner said that he did the act charged against him:—Held, that the admission was not receivable in evidence, and a conviction grounded thereon was improper. Regina v. Fennell, 7 Q. B. D. 147, followed. *Regina* v. *Romp*, 17 O. R. 567.

Questioning Prisoner — *Statements while in Custody.*]—Answers given by a prisoner under arrest in response to the officer in charge, are receivable in evidence, if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case. *Regina* v. *Elliott*, 31 O. R. 14.

Statements to Constable and Coroner —*Inducements.*]—The prisoner was convicted of arson. His admission or confession was received in evidence on the testimony of the constable, who said that after the prisoner had been in a second time before the coroner, he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was also evidence that on the third day of his incarceration he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and after an absence of a few minutes returned and made a full confession:—Held, that on these facts appearing, the statement made to the constable was primâ facie receivable, and that the Judge was well warranted in receiving as voluntary the confession made to the coroner after due warning by him. *Regina* v. *Finkle*, 15 C. P. 453.

Semble, however, that the more reasonable rule to adopt in such cases is, that notwithstanding the caution of the magistrate, it is necessary in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him. But in this case, it having afterwards appeared that the prosecutor had offered direct inducements to the prisoner to confess:—Held, that if the Judge was satisfied that the promise of favour thus held out had induced the confessions, and continued to act upon the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them. *Ib.*

Held, also, that if the Judge suspected the confessions had been obtained by undue influence, such suspicion should have been removed before he received the evidence. It is a question for the Judge whether or not the prisoner has been induced by undue influence to confess. *Ib.*

Semble, that when the names of other prisoners are mentioned in the confession, the proper course is to read the names in full, but to direct the jury not to pay any attention to them. *Ib.*

Statements to Detective.]—During the trial of the prisoner for murder questions arose as to the admissibility in evidence of statements made by him to certain detectives, in answer to questions put to him by them, he being at the time in their custody:—Held, upon a case reserved, that the statements were admissible in evidence. *Regina* v. *Day*, 20 O. R. 209.

In the course of a conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the former stating his desire to purchase counterfeit money; and upon the detective shewing prisoner the letter he admitted it was his:—Held, that the letter was admissible as in a sense forming part of the subject-matter of the conversation. *Regina* v. *Attwood*, 20 O. R. 574.

Statements to those Arresting.]—Held, that statements made by a prisoner to the parties who arrested him, he having been previously told on what charge he was arrested, were evidence. *Regina* v. *Tufford*, 8 C. P. 81.

Statements Made by Prisoner's Counsel at a Previous Trial.]—See *Regina* v. *Bedere*, 21 O. R. 189.

Value of Such Evidence.]—Remarks as to evidence of confessions, and an objection that the whole statement was not given. *Regina* v. *Jones*, 28 U. C. R. 416.

See, also, SPECIFIC OFFENCES, sub-title IX., *post*—INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

4. *Evidence in Other Proceedings.*

Committee of House of Commons.]—At the hearing of a criminal charge before a county Judge, sitting as police magistrate, evidence given before a special committee of the House of Commons, and taken by stenographers, was tendered before the magistrate and refused by him:—Held, that the court had no power to grant a mandamus to the county Judge directing him to receive such evidence. Rose, J., while concurring in the decision that a mandamus should not issue, was of opinion that Parliament, having ordered the prosecution, the evidence should have been received by the magistrate. Subsequent resolution of the House of Commons, authorizing the evidence to be given. *Regina* v. *Connolly*, 22 O. R. 220.

Consent.]—Upon the hearing of a charge under the sections of the Code relating to the summary trial of indictable offences, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel. *Regina* v. *St. Clair*, 27 A. R. 308.

Coroner's Inquest.]—At a trial for murder the prisoner's counsel proposed to prove by witness his own deposition at the inquest, and to shew by other witnesses that it contained a true statement of his evidence, although the witness alleged it to be incorrect. The learned Judge ruled that the coroner must be called to prove the depositions. He was afterwards called to prove them, and the evidence before offered was not again tendered:—Semble, that the ruling as to proof of the depositions was right, they having been taken before a coroner; but, held, that the point became immaterial when they were afterwards proved in accordance with it; and that it must be assumed that it was not intended to adduce the other evidence. *Regina* v. *Hamilton*, 16 C. P. 340.

The object of taking depositions is not to afford information to the prisoner, but to secure the testimony. *Ib.*

A coroner's court is a criminal court, and the depositions of a witness before such court, who is subsequently charged with murder, cannot, since the Canada Evidence Act, 1893, be received in evidence against him at the trial, notwithstanding privilege was not claimed by him at the inquest. *Regina* v. *Hendershott*, 26 O. R. 678.

The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, and who is subsequently charged with an offence, are receivable in evidence against him at the trial. Regina v. Hendershott, 26 O. R. 678, overruled. *Regina* v. *Williams*, 28 O. R. 583.

The coroner's court is a criminal court. Section 5 of the Canada Evidence Act, 1893, 56 Vict. c. 31 (D.), which abolishes the privilege of not answering criminating questions, and provides that no evidence so given shall be receivable in evidence in subsequent criminal proceedings against the witness, other than for perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege. Regina v. Williams, 28 O. R. 583, not followed. *Regina* v. *Hammond*, 29 O. R. 211.

Examination in Civil Action.]—The examination of the defendant C. in a civil action arising out of the matters in question, he not having claimed privilege therein, was allowed to be used against him on his trial for criminal conspiracy. *Regina* v. *Connolly*, 25 O. R. 151.

See, also, SPECIFIC OFFENCES, sub-title IX., *post*—INTOXICATING LIQUORS— JUSTICE OF THE PEACE.

5. *Procuring Attendance or Evidence of Witnesses.*

Appeal to Sessions—*Subpœna to Witnesses in Another Province.*]—Under the provisions of ss. 884 and 885 of the Criminal Code, 1892, it is competent for a Judge of the high court or county court to make an order for the issue of a subpœna to witnesses in another Province to compel their attendance upon an appeal to the general sessions from the action of the justices of the peace under ss. 879 and 881. *Regina* v. *Gillespie*, 16 P. R. 155.

Foreign Commission — *Prosecution for Indictable Offence.*] — A prosecution for an indictable offence is "pending" within the meaning of s. 683 of the Criminal Code, 1892, when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered. But the discretion of the Judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence. And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses whom the Crown proposed to examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of a statement of the third witness that he was with the defendant upon a certain occasion. *Regina* v. *Verral*, 16 P. R. 444.

An order for a commission, under s. 683 of the Criminal Code, to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or to any person accused thereof, may be made at any time after an information has been laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. Decision below, 16 P. R. 444, affirmed, but the order issued thereon varied. *Regina* v. *Verral*, 17 P. R. 61.

Police Magistrate—*Warrant to Compel Attendance of Witness—Right of Police to Search Witness Arrested.*]—Where a police magistrate acting within his jurisdiction under R. S. C. c. 174, s. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest. Judgment below, 24 O. R. 576, affirmed. The right of the police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered.

Judgment below, 24 O. R. 576, reversed. *Gordon* v. *Denison*, 22 A. R. 315.

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6. *Miscellaneous Cases.*

Certificate of Previous Conviction.] —Quære, whether a certificate of a previous conviction is sufficient primâ facie evidence of the identity of the accused with the person of the same name so previously convicted. *Regina* v. *Edgar*, 15 O. R. 142.

Character—*Prior Conviction.*] — An indictment for an assault occasioning actual bodily harm contained a second count charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after a previous conviction for felony, &c., additional punishment might be imposed. The first part of the indictment only, was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner in his defence gave evidence of good character. The Crown gave some general evidence in rebuttal, and then tendered, under s. 26 of c. 29, 32 & 33 Vict., a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction:—Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation evidence of a prior conviction going to the matter of punishment, and not to general character. Regina v. Rowton, 10 Cox C. C. 25, followed. *Regina* v. *Triganzie*, 15 O. R. 294.

Common Design — *Acts of Others.*] — Whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were at any time concerned in it. In this case, the prisoner being charged with being in arms in Upper Canada with intent to levy war against the Queen, evidence was admitted against the prisoner of an engagement between the body of men with whom he had been and the Canadian volunteers, although the same took place several hours after his arrest:—Held, that the evidence had been properly received, as shewing to some extent that the engagement in question had been contemplated by the parties while the prisoner was with them before his arrest. *Regina* v. *Slavin*, 17 C. P. 205.

Coroner's Inquest — *Discrediting Witness.*]—At a coroner's inquest evidence is properly receivable under R. S. C. c. 174, s. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment the improper reception of evidence is no ground for a certiorari to bring up the coroner's inquisition. Regina v. Ingham, 5 B. & S. at p. 269, specially referred to. *Regina* v. *Sanderson*, 15 O. R. 106.

Coroner's Inquest—*Juror — Constable.*] —L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness; and Y., a juryman, was also sworn and gave evidence as a witness:—Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him from giving evidence; and so also Y. was not precluded. *Regina* v. *Winegarner*, 17 O. R. 208.

Depositions — *Absence of Deponent.*] — Upon a prosecution for uttering forged notes, the deposition of one S. taken before the police magistrate on the preliminary investigation was read, upon the following proof that S. was absent from Canada:—R. swore that S. had a few months before left his (R.'s) house, where she (S.) had for a time lodged, that he had since twice heard from her in the United States, but not for six months. The chief constable of Hamilton where the prisoner was tried, proved ineffectual attempts to find S. by means of personal inquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:—Held, that the admissibility of the deposition was in the discretion of the Judge at the trial, and that it could not be said that he had wrongly admitted it. *Regina* v. *Nelson*, 1 O. R. 500.

Destroying Trees—*Other Acts of Same Nature.*] — Two indictments were preferred against the defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendants were put on their trial on the charge of destroying M.'s trees; and evidence relating to the offence charged in the other indictment, was admitted as shewing that the offences had been committed by the same person:—Held, that the evidence was properly received. *Regina* v. *McDonald*, 10 O. R. 553.

Dying Declarations.] — See *Regina* v. *McMahon*, 18 O. R. 502.

Habeas Corpus—*Affidavits — Locality of Offence.*]—A Judge cannot, upon the return to a habeas corpus, where a warrant shews jurisdiction, try on affidavit evidence the question where the alleged offence was committed. Sections 4 and 5, R. S. O. 1887 c. 70, are not intended to apply to criminal cases where no preliminary examination has taken place. *Regina* v. *Defries*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Identity.]—To identify defendant as a private prosecutor. See *May* v. *Reid*, 16 A. R. 150; *Jacobs* v. *The Queen*, 16 S. C. R. 433.

Liquor License Act.] — On motion to quash a conviction, it was objected that the evidence taken before the magistrates and returned by them was not shewn to have been read over and signed by the witnesses:—Held, that the maxim omnia præsumuntur esse rite acta applied, and, as the contrary was not shewn, it would be presumed to have been done. *Regina* v. *Excell*, 20 O. R. 633.

In proof of defendant being a licensed hotelkeeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged:—Held, sufficient, as the witness might have obtained his information from the defendant. *Regina* v. *Flynn*, 20 O. R. 638.

An objection that it did not appear that the evidence had been read over to the wit-

nesses was overruled, following Regina v. Excell, 20 O. R. 633. The direction in s.-s. 2 of s. 96, as to the witnesses signing their evidence, is not imperative but directory merely. *Regina* v. *Scott*, 20 O. R. 646.

For an offence under "The Liquor License Act," R. S. O. 1887 c. 194, the license inspector who lays the information is a competent witness. *Regina* v. *Fearman*, 22 O. R. 456.

And see INTOXICATING LIQUORS.

Medical Expert.]—A witness was called at the trial to give evidence as a medical expert, and in answer to the Crown prosecutor, he said, "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this — not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired, in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body:—Held, that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such indicia as stated, his evidence as to the distance at which the shot was fired, was properly received. *Preeper* v. *The Queen*, 15 S. C. R. 401.

Negative Evidence.] — On a trial for murder, the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day the prisoner parted with it to a person who held it until after the crime was committed. The learned Judge at the trial refused to admit this evidence:—Held, that the evidence was properly rejected. *Regina* v. *Herod*, 29 C. P. 428.

Orders in Council.]—Held, that a magistrate cannot take judicial notice of orders in council, or their publication, without proof thereof by production of the official Gazette, and therefore, that a conviction was bad, which was made without such evidence that the Canada Temperance Act of 1878 was in force in the county, pursuant to the terms of s. 96 thereof. *Regina* v. *Bennett*, 1 O. R. 445.

And see INTOXICATING LIQUORS.

Previous Inconsistent Statement.]—A witness for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel. He admitted such statement when shewn to him, but said it was all untrue, and made to save himself. Per Wilson, J.—The prosecutor's counsel was properly admitted to disprove the witness's assertion as to how the statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution and was therefore not a collateral matter, but relevant. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. *Regina* v. *Jerrett*, 22 U. C. R. 499.

Prostitution—*Evidence of Reputation of Bawdy House.*]—On an indictment for attempting to procure a woman to become a common prostitute, in corroboration of her evidence that for such purposes the prisoner had taken her to a bawdy house, evidence of the general reputation of the house is admissible. *Regina* v. *McNamara*, 20 O. R. 489.

Reply.]—The theory of the defence, on an indictment for murder, was that the death was caused by the communication of smallpox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject:—Held, that he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. *Regina* v. *Sparham and Greaves*, 25 C. P. 143.

Territorial Division—*Judicial Notice.*]—A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou,—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8), contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council:—Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division. *Ex parte James W. Macdonald*, 27 S. C. R. 683.

View by the Judge.]—The prisoner was tried without a jury by a county court Judge exercising jurisdiction under the Speedy Trials Act, upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel, the Judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present. The prisoner was found guilty:—Held, that there was no authority for the Judge taking a "view" of the place, and his so doing was unwarranted; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner, or of any one on his behalf, was unwarranted. Held, also, that the question whether the Judge had the right to take a view was a question of law arising on the trial, and was a proper question to reserve under R. S. C. c. 174, s. 259. *Regina* v. *Petrie*, 20 O. R. 317.

See also, SPECIFIC OFFENCES, sub-title IX, *post* — INTOXICATING LIQUORS — JUSTICE OF THE PEACE.

VII. Extradition.

1. *Application and Construction of the Acts and Treaties.*

General Rule.]—Judges are bound to construe the treaty in a liberal and just spirit, not labouring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect. *Re Burley*, 1 C. L. J. 34.

Remarks on the propriety of giving a liberal interpretation to the extradition treaty, and the inadequacy of its provisions to meet the class of felonies of most common occurrence in both countries. *Regina* v. *Morton*, 19 C. P. 9.

Accessory.]—An accessory before the fact is liable to extradition, but an accessory after the fact is not. *Regina* v. *Browne*, 6 A. R. 386, 31 C. P. 484.

Acts in Force.]—Held, that 40 Vict. c. 25 (D.) is not in force, but that the law and practice relating to the extradition of fugitive criminals between the United States and Canada, is to be found in the Ashburton Treaty, Art. X., 31 Vict. c. 94 (D.), 33 Vict. c. 25 (D.), and the Imp. Acts, 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60. Re Williams, 7 P. R. 275, approved of. *Regina* v. *Browne*, 31 C. P. 484, 6 A. R. 386.

Assault with Intent.]—A warrant charging that the prisoners "did feloniously shoot at, &c., with intent, &c., to kill and murder," sufficiently charges an "assault with intent to commit murder," the words used in the treaty and statute. *Regina* v. *Reno*, 4 P. R. 281.

The prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch, with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them:—Held, that this was not an "assault" within the statute. *In re Lewis*, 6 P. R. 236.

British Subjects Committing Offences in the United States.]—Held, that the Ashburton Treaty as to the extradition of fugitive felons, and our Acts passed to give effect to it, extend to British subjects committing the offences named in the treaty in the territory of the United States and becoming fugitives to Canada. *In re Burley*, 1 C. L. J. 20, 34.

Burglary.]—Burglary is not an offence within the Ashburton treaty or the statutes of Canada passed to give effect to it. *In re Beebe*, 3 P. R. 273.

Forgery.]—Held, that upon the facts set forth in the judgment the prisoner, who had been committed for extradition by the mayor of Toronto upon an alleged crime of forgery, had been committed upon insufficient evidence, and must be discharged. *In re Kermott*, 1 C. L. Ch. 253.

Held, that a person convicted of forgery or uttering forged paper in the United States, who escaped to Canada after verdict, but before judgment, was liable to be delivered over. *In re Warner*, 1 C. L. J. 16.

A prisoner was arrested here for having committed in the United States the crime of forgery, by forging, coining, &c., spurious silver coin, &c.:—Held that the offence as above charged, did not constitute the crime of "forgery," within the meaning of the Extradition Treaty or Act. Definition of the term "forgery," considered. *In re Smith*, 4 P. R. 215.

A prisoner was committed for extradition to the United States, on a charge of having forged a resolution of a city council relating to the issue of bonds, of having forged a bond of said city, and of uttering the same:—Held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the state in which the bond was issued, there was a primâ facie case made out against the prisoner, and that he should be remanded as to the charge of forgery. *Regina* v. *Hovey*, 8 P. R. 345.

The prisoner was a clerk in the employ of the mayor and common council of the city of Newark (in the state of New Jersey, U. S.), a portion of his duties being to receive payment of taxes payable to the city; and on the 18th November, 1881, a sum of $562.32, for taxes, &c., due upon certain lands in that city, was paid to him—such sum being included with other taxes in a cheque of the party assessed for $4,094. The $562.32 was composed of three items: costs $7.70, interest $72.08, and taxes $482.54—each of which required to be entered in a separate column of the cash book belonging to the office of the comptroller. The gross sum ($562.32) had apparently been entered first in the column headed "Totals," and subsequently in making the separate entries the sum of $482.54 was entered as $282.54, and the figure "3" in the total column substituted; the difference ($200) being abstracted by the prisoner from moneys paid to him on that day:—Held, per Osler, J. (9 P. R. 373), and Boyd, C., and Proudfoot, J. (3 O. R. 331), that the offence was forgery. On appeal:—Held (per Spragge, C.J. O., and Galt, J.), that this act amounted to the crime of forgery, and, as such, rendered the prisoner liable to extradition. Per Burton and Patterson, JJ.A., that such alteration was not forgery, though the act amounted to one of embezzlement, and therefore that the prisoner was entitled to be discharged, embezzlement not being one of the offences for which a party was at the time liable to be extradited under the Ashburton Treaty. *In re Hall*, 8 A. R. 31.

It is not necessary to constitute the crime of forgery that another's right shall have been actually prejudiced, the possibility of prejudice to another is sufficient; and if publication be necessary, the books in question being of a public character, the forged entry in them must be regarded as having been published as soon as made. *S. C.*, 3 O. R. 331.

P. was the superintendent of the Blocksley Almshouse, situated in and supported by the city of Philadelphia, U. S. A. Parties supplying provisions, &c., for the use of the charity were paid by warrants duly prepared and signed by the proper officers thereof. Three such warrants for the payment of certain persons or firms were in the hands of W., the secretary of the almshouse, to be delivered to

them on their respectively signing the stub or counterfoil of the warrants. P., who was well known to the secretary, applied to him for these warrants, stating that he had authority from the several parties to sign for them, which he did accordingly, and W. handed over to him the warrants, which were subsequently cashed at the office of the city treasurer. P. having fled to this Province, an application was made for his extradition before the Judge of the county court of Wentworth, when expert evidence was adduced, proving that according to the statute law of Pennsylvania, as also at common law as there interpreted, these facts constituted the crime of forgery:—Held, on appeal, per Spragge, C.J.O., and Patterson, J.A., affirming 1 O. R. 586, that the acts amounted to the crime of forgery, and so rendered P. liable to be extradited. Per Burton, J.A., and Ferguson, J., that in the absence of any suspicion of any complicity of W. in the fraud, the facts would not have made out the crime of forgery; but as the evidence afforded ground to infer that W. and P. were in collusion, and had combined together for the purpose of committing the fraud by means of the false documents, and was therefore sufficient to warrant the committal of P. for the crime of forgery at common law, the order for his committal for extradition should be affirmed. Per Spragge, C.J.O.—The forgery which is the subject of the treaty cannot be confined to the statutory felony of forgery. *In re Phipps*, 8 A. R. 77.

The prisoner, who was collector of the county of Middlesex, in the state of New Jersey, kept a book in which to enter the payment and receipt of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the collector's office, and was left by him at the close of his term of office; it was by statute open to the inspection of those interested in it, and contained the certificate of the county auditors as to the correctness of the matters therein contained:—Held, that the book was the public property of the county, and not the private property of the prisoner. After the book had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain false entries therein of moneys received and paid out, and changing the additions to correspond. Some of these entries were by the prisoner himself, and others by his clerk under his direction, but the clerk on finding that such entries were false changed them back:—Held, that this constituted forgery at common law, as well as under our statute 32 & 33 Vict. c. 19 (D.). *In re Jarrard*, 4 O. R. 265. Affirmed, 20 C. L. J. 145.

A cargo of oats was received at an elevator for the S. Co., of which the prisoner was a member, and also secretary and financial manager, with power to sign notes, &c. On the day of their receipt, a clerk of the S. Co., who was authorized so to do, prisoner having nothing to do with the buying and selling of the grain, signed an order for the delivery of 19,886 bushels of the oats to a railway company, consigned to the S. Co.'s agents in New York, on whom two drafts were drawn by the S. Co., signed by the prisoner, which were accepted and paid. Warehouse receipts transferable by indorsement were given to the S. Co., for these oats, though after the delivery thereof to the railway company, and were allowed to remain with the S. Co. without any demand being made for their cancellation. Subsequently, the prisoner, in the name of the S. Co., discounted two promissory notes at a bank, and indorsed the warehouse receipts as security for the payment thereof, the notes containing a statement that the receipts were pledged as such security with authority to sell, &c., in default of payment:—Held, in extradition proceedings, that the indorsement to the bank of the receipts did not constitute a forgery. *In re Sherman*, 19 O. R. 315.

In extradition proceedings, it is sufficient if the evidence disclose that the offence under the Extradition Acts is one which, according to the laws of Canada, would justify the committal for trial of the offender had the offence been committed therein, it not being essential to shew that the offence was of the character charged according to the laws of the foreign country where it was alleged to have been committed; and quære, whether evidence is admissible to shew what the foreign law is. In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the latter, under a fictitious name, on a bank in which an account had been opened by him in such fictitious name, there being, to the knowledge of the prisoner, no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash:—Held, that the cheque was a "false document," both at common law and under s. 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument. Regina v. Martin, 5 Q. B. D. 34, distinguished. Where, in such proceedings, the warrant of commitment stated that the prisoner had been "committed" for an extraditable offence, instead of his having been "accused" thereof, the fact that the evidence shewed such an offence will not warrant the court in remanding the prisoner for extradition; but the court may, if necessary, permit the return to be amended, and for such purpose allow it to be taken off the files and refiled. *Re Murphy*, 26 O. R. 163. See the next case.

The prisoner's brother opened a bank account in an assumed name and drew cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it:—Held, per Hagarty, C.J.O., and Maclennan, J.A.—That there was evidence from which it might reasonably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud and that there was, therefore, the fraudulent uttering of a false document which would constitute forgery. Per Burton, and Osler, JJ.A.—That as the account was a genuine one, and there was no false representation as to the drawer of the cheque, the offence of forgery was not made out. Held, also, per Hagarty, C.J.O., and Maclennan, J.A.—That it is not necessary to shew in extradition proceedings that the prisoner is liable to conviction of the crime

charged according to the law of the demanding country. Per Burton, and Osler, JJ.A.—That it must be shewn that the prisoner is liable to conviction of the crime charged, according to the law of both countries. In the result the judgment below, 26 O. R. 163, was affirmed. *In re Murphy*, 22 A. R. 386.

The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and after going through the form of taking an order for goods, obtained the indorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank:—Held, that this was forgery and that the prisoner should be extradited. *In re Lazier*, 30 O. R. 419, 26 A. R. 260.

Murder by Escaping Slave.]—A. being a slave in the state of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about 30 miles from his home he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed, but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace; any slave found more than twenty miles from his home is declared a runaway, and a reward is given to whoever shall apprehend and return him to his master. A. having made his escape to this Province was arrested here upon a charge of murder, and the justice before whom he was brought having committed him, he was brought up in this court on a habeas corpus, and the evidence returned under a certiorari. It was contended that as A. acted only in defence of his liberty, there was no evidence upon which to found a charge of murder if the alleged offence had been committed here, and that he could not be demanded by the treaty:—Held, that under the Ashburton treaty, and our statute for giving effect to it, C. S. C. c. 89, the prisoner was liable to be surrendered. *In re Anderson*, 20 U. C. R. 124. See *S. C.*, 11 C. P. 9.

Neutrality—*Piracy.*]—Lawful acts of war against a belligerent cannot be either commenced or concluded in a neutral territory. *In re Burley*, 1 C. L. J. 34.

The fact that the person is charged with piracy committed in the foreign country, ought not to prevent the government of the country where the fugitive is found, from surrendering him on the charge of robbery made and proved in the latter country. *Ib.*

Offence at Date of Commission.]—It is not necessary for purposes of extradition that the crime charged should have been such an act as would have constituted that crime at the date of the Ashburton treaty. It is sufficient if it constituted the crime in question at the date of its alleged commission. *In re Hall*, 3 O. R. 331.

Offence by Laws of Each Country.]—Held, that, under the Extradition Act, 1877 (40 Vict. c. 25 [D.]), it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. *In re Jarrard*, 4 O. R. 265. See *In re Murphy*, 26 O. R. 163, 22 A. R. 386.

United States and Canada.] — Held, that the Ashburton treaty contains the whole of the law of surrender as between Canada and the United States, 3 Will. IV. c. 6, being superseded by it, and the Imperial Act 6 & 7 Vict. c. 76, and Provincial statute 12 Vict. c. 19; though in relation to other foreign powers, with whom no treaty or conventional arrangement existed, 3 Will. IV. c. 6, is still in force. *Regina* v. *Tubbee*, 1 P. R. 98.

Quære, how far the United States, Lower Canada, or England, would respect 3 Will. IV. c. 6, if a fugitive surrendered by Upper Canada to a foreign power were taken through those countries. *Ib.*

Held, that though the surrender must be by the executive government, yet a party committed under a magistrate's warrant may apply for a habeas corpus, and the court or Judge may determine whether the case be within the treaty. *Ib.*

The only existing law as to the extradition of criminals between the United States and Canada is the Imperial Act of 1870 (33 & 34 Vict. c. 53), modified by 31 Vict. c. 91 (D.), and 33 Vict. c. 25 (D.). The Canadian Extradition Act of 1877 40 Vict. c. 25 (D.), does not apply to criminals from the United States, as the operation of the Imperial Act of 1870 has not "ceased or been suspended within Canada." Proceedings taken for the extradition of the prisoner under 40 Vict. c. 25 (D.), and a warrant committing him under that Act, were therefore set aside, and the prisoner discharged. *In re Williams*, 7 P. R. 275.

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2. *Practice and Procedure.*

Admissions—*Rule as to Committal—Setting out Evidence—Requisition or Prior Proceedings.*]—Where the accused, on his examination before the magistrate, admitted the acts charged, which primâ facie amounted to robbery (one of the crimes enumerated in the treaty), and alleged by way of defence matter of excuse which was of an equivocal character:—Held, that the magistrate could not try the case, but was bound to commit the accused for trial before the tribunals of the foreign country. *In re Burley*, 1 C. L. J. 34.

If the magistrate sitting on a similar charge if committed in Canada would commit for trial, he is equally bound to commit for trial in the foreign country where the offence, if any, has been committed. *Ib.*

The warrant for committal till surrendered under the treaty need not set out the evidence taken before the committing magistrate, nor shew any previous charge made in the foreign country, or requisition from the government of that country, or warrant from the governor-general of Canada, authorizing and requiring the magistrate to act. *Ib.*

The adjudication of the committing magistrate as to the sufficiency of the evidence for committal may be by way of recital in the warrant of commitment. *Ib.*

It is not necessary to the jurisdiction of a magistrate in Canada, acting under the treaty

and statutes, either that a charge should be first laid in the United States, that a requisition should be first made by the government of the United States upon the Canadian government, or that the governor-general should first issue his warrant requiring magistrates to aid in the arrest of the fugitives; in other words, the charge may be originated before the magistrate in Canada. *Ib.*

Alibi—*Identity—Extradition Judge—Variance from Proof — Reading over Foreign Depositions to Prisoner.*]—Where evidence is given by the prosecution before an extradition Judge positively identifying the prisoner, the Judge cannot receive evidence on behalf of the prisoner to shew an alibi; for that would be in effect trying the guilt or innocence of the prisoner; if the evidence given by the prosecution is sufficient to justify the committal of the prisoner, he must be committed under s. 11 of the Extradition Act, R. S. C. c. 142. Semble, that a prisoner is entitled to go into evidence to disprove his identity; but that means his identity with the person named in the warrant; not his identity with the person who actually committed the extradition crime. The junior Judge of a county court is "a Judge of a county court," and has the functions of an extradition Judge. Re Parker, 19 O. R. 612, followed. R. S. C. c. 142, s. 6, s.-s. 2, is directory only; and the neglect of a Judge to forward to the minister of justice a report of the issue of a warrant, as required by the sub-section, is not a ground for the discharge of the prisoner. The information upon which a warrant issued committing a person to await extradition for forgery, stated the Christian name of the indorser of the forged instrument as Albert, whereas when the instrument was proved it appeared to be James: —Held, that the variance was immaterial under ss. 57 and 58 of R. S. C. c. 174, which are made applicable to extradition proceedings by s. 9 of R. S. C. c. 142. It was objected by the prisoner that certain depositions taken abroad and put in by the prosecution were not read over to the prisoner as required by s. 70 of R. S. C. c. 174:—Held, that the objection was not one which as a matter of law would entitle a prisoner to be discharged; and it should not be given effect to as a matter of discretion because it was entirely technical in its character. *Re Garbutt*, 21 O. R. 179. See the next case.

Alibi—*Identity—Extradition Judge—Forgery—Interested Witness—Corroboration.*] — In extradition proceedings for forgery of a draft on a bank in the United States:—Held, that a junior Judge of a county court of this Province is an extradition Judge within the Extradition Act, R. S. C. c. 142. Re Parker, 19 O. R. 612, followed. In extradition cases a warrant of commitment may be issued in proceedings instituted in this Province; the previous issue of a warrant in the country demanding extradition not being essential. Re Caldwell, 5 P. R. 217, followed. In such cases evidence in support of an alibi should be refused. A witness identifying the prisoner as the forger was the person who identified him at the bank when he procured the amount of the forged draft; but it did not appear that he had incurred any responsibility to the bank:—Held, that no interest was shewn in the witness so as to require corroboration; and further that the interest must be apparent on the face of the draft or immediately arise from the nature of the transaction or from his own acknowledgment. Regina v. Hagerman, 15 O. R. 598, followed. Semble, in extradition cases the evidence of interested parties need not be corroborated. *Re Garbutt*, 21 O. R. 465.

Amending Warrant.] — Held, that a magistrate, acting under the treaty and statute, after issue of a writ of habeas corpus, but before its return, might deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the court or Judge before whom the prisoner is brought. *In re Warner*, 1 C. L. J. 16.

Bail.]—A prisoner charged with forgery in Canada was arrested and surrendered by the government of the United States under the Ashburton treaty. Upon application for bail on the ground that there was no evidence of the corpus delicti:—Held, that the surrender of the prisoner by the United States government was sufficient evidence. *Regina* v. *Van Aerman*, 4 C. P. 288.

Conflicting Evidence.]—The magistrate cannot weigh conflicting evidence to try whether the prisoner is guilty of the crime charged. *Regina* v. *Reno*, 4 P. R. 281; *Re Burley*, 1 C. L. J. 20.

Corroboration.]—In extradition proceedings the evidence of interested parties need not be corroborated. *In re H. L. Lee*, 5 O. R. 583.

Depositions.]—Under 31 Vict. c. 94, the depositions must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing, and not depositions taken subsequently to the issue of the original warrant, and without any apparent connection therewith. *Regina* v. *Robinson*, 5 P. R. 189.

Held, that original depositions are admissible in proceedings under the Imperial Act 6 & 7 Vict. c. 34, and can be used in evidence against a prisoner upon proof of their identity and of their being properly taken, which in this case, upon the evidence set out, was held to be clearly shewn. *Regina* v. *Matthew*, 7 P. R. 199.

Held, also, that they may be clearly proved by the vivâ voce evidence of a witness competent to swear to the facts: that copies of the depositions can be proved by such testimony, as well as by the certificate prescribed by the Act: and that a certificate identifying the copies as copies of the original documents may be supplemented by vivâ voce evidence that the originals referred to in the certificate were the originals upon which the warrant issued. *Ib.*

Certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton county, Ohio. A certificate was attached, commencing, "I, Daniel J. Dalton, clerk of the court of common pleas for said Hamilton county," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county, and entitled to take depositions of witnesses, &c., and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Cincinnati, &c. D. J. Dalton, by Richard C. Rohner, deputy." To this was attached the certificate of the governor of the State of Ohio, under the great seal of the State, cer-

tifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation, was at the date thereof clerk of the said court," &c.: that "he is the proper person to make such attestation, which is in due form, and that his official acts are entitled to full faith and credit." The court, without specially pronouncing on the question, refused to allow an objection, which as a matter of fact was not taken, to the sufficiency of the depositions under 45 Vict. c. 25, s. 9, s.-s. 2 (*a*) (D.), for the official seal of D. J. Dalton was attached, and the governor certified that he was the proper person to make such attestation; and also there was viva voce evidence given in proof thereof, so that the "papers were authenticated by the oath of some witness" under s.-s. (*b*). *In re H. E. Lee*, 5 O. R. 583.

In extradition proceedings the information, warrant and depositions were certified under the hand and seal of a justice of the peace of Oscoda township, in the county of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio and the clerk of the circuit court for the said county and the official seal of the said circuit court, certifying that the said justice of the peace was, at the time of signing his certificate, a duly qualified justice of the peace, in the active discharge of the duties of his said office, and that his official seals were entitled to full credit. At the hearing before the county Judge, before whom the extradition proceedings were had, S. stated he was the prosecuting attorney for Josio county, and all criminal prosecutions therein came under his care. He identified the papers, and that they were the depositions and copies of depositions relating to the charge; and that the justices who took the depositions were justices of the peace as alleged, and had jurisdiction in the premises:—Held, that the documents were sufficiently authenticated. "Authenticated," as used in s. 9 of 40 Vict. c. 25 (D.), is in effect the same as "attested" in s. 2 of 31 Vict. c. 94 (D.). *In re Weir*, 14 O. R. 389.

Held, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant issued. *Ib.*

Held, that the depositions, &c., before the county court Judge disclosed sufficient evidence to warrant the defendant being placed on his trial for murder caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health as to hasten her death. *Ib.*

On a charge of forgery of a promissory note, alleged to have been committed in the State of Kansas, the justice before whom the depositions were made was certified to be a justice of the peace, with power to administer oaths:—Held, that he was a magistrate or officer of a foreign state within s. 10 of the Extradition Act: and also that it was not necessary that he should be a federal and not a state officer: and further that the depositions need not be taken in the presence of the accused. *In re Parker*, 19 O. R. 612.

Detaining Prisoner to Allow Case to be Strengthened.]—Quære, can a committing magistrate detain a prisoner upon evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case so as to bring it within the treaty. *In re Kermott*, 1 C. L. Ch. 253.

Divisional Court—*Reviewing Evidence.*]—The divisional court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence. *In re Weir*, 14 O. R. 389.

Evidence for the Defence.] — The magistrate should not go beyond a bare inquiry as to the primâ facie evidence of criminality of the accused, and should not inquire into matters of defence which do not affect such criminality. *In re Caldwell*, 5 P. R. 217.

It is in the discretion of the magistrate investigating into a charge under the treaty against a person accused of one of the crimes mentioned in the treaty, to receive evidence for the defence. *In re Burley*, 1 C. L. J. 20.

Remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence; and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime:—Semble, that the evidence here offered, as stated in the report of the case, was not improperly rejected. *In re Phipps*, 8 A. R. 77.

Foreign Indictment.] — Held, that the evidence against the prisoner of having uttered a forged instrument not being otherwise sufficient, the court could not look at an indictment against him found by the grand jury of an American criminal court. *Regina* v. *Hovey*, 8 P. R. 345.

Foreign Indictment — *Depositions.*] — On an application for the discharge of a prisoner committed for extradition under an order of the county Judge of Kent, on a charge of murder:—Per Wilson, C.J., that under the Ashburton Treaty, Art. X.; 31 Vict. c. 94 (D.), 33 Vict. c. 25 (D.), 33 Vict. c. 30, ss. 4, 5 (D.), and the Imperial Acts 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60, a certified copy of an indictment for murder found by the grand jury of Erie county, State of New York, U. S., was of itself sufficient evidence to justify the committal of such prisoner for extradition. Per Osler, J., that such indictment was not evidence for any purpose. Per Wilson, C.J., and Osler, J., that the other evidence taken before the county Judge, documentary and viva voce, set out in the report, was insufficient, as it shewed at most that the prisoner was an accessory after the fact, which did not come within the treaty. Per Galt, J., that if the case had turned on the indictment alone, he would have hesitated to accept it as conclusive against the accused; but that the other evidence together with the indictment, was sufficient to warrant his extradition. *Regina* v. *Browne*, 31 C. P. 484. See the next case.

Upon an application to the county Judge of Kent for extradition of the defendant, who was under indictment in the State of New York for murder, the coroner who had held the inquest there, proved by oral testimony before the county Judge here, the original depositions taken on oath before him, and also copies of the depositions certified by him to be true copies:—Held, that under s. 14 of the Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions is not qualified by 31 Vict. c. 94, s. 2 (D.); and that the evidence disclosed therein was sufficient to warrant the extradi-

tion of the prisoner as an accessory before the fact:—Held, also, that the foreign indictment was not admissible as evidence against the accused. It was shewn that the only warrant issued in this case was the warrant issued by the district attorney, after the grand jury had found a true bill for murder, which did not profess to be issued upon the depositions, nor was it proved upon what evidence the bill was found:—Semble, that the right given by s. 14 above referred to, to use copies of depositions is confined by the effect of s. 2 of 31 Vict. c. 94, to those cases in which a warrant has been issued in the United States upon the depositions. *S. C.*, 6 A. R. 386.

Forgery—*Form of Information.*]—In extradition proceedings the information charged that the informant "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee," the prisoner, "is accused of the crime of forgery," &c., "for that the said H. L. Lee," &c., "did feloniously forge" some seventy-eight orders for the payment of money. The 79th charge was, that the said H. L. Lee, at the aforesaid several times, &c., did feloniously utter, knowing the same to be forged, the said several orders, &c.:—Held, sufficient, for that the information charged that the prisoner "did feloniously forge," &c.; and the allegation that the informant believed that the prisoner "is accused," &c., might be treated as surplusage; but even if objectionable at common law, it was good under s. 11 of 32 & 33 Vict. c. 30 (D.), and 32 & 33 Vict. c. 27 (D.); and moreover the 79th charge was free from objection:—Held, also, that in these proceedings, a plea to the information is not required. *In re H. L. Lee*, 5 O. R. 583.

Forgery — *Identifying Forged Note.*]—The depositions produced and acted upon before the committing Judge failed to shew that the note, alleged to be forged, was produced and identified by the deponents or any of them:—Held, that this constituted a valid ground for refusing extradition; and that there was no power to remand the accused to have further evidence taken before the extradition Judge as to such identification. *In re Parker*, 19 O. R. 612.

General Rule of Procedure.] — The authority of the magistrate need not be shewn on the face of a warrant of commitment, and where the crime has been committed in a foreign country and the committing magistrate has (as in this case), jurisdiction in every county in Ontario, the warrant is not bad, though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, &c., of the county of Essex, and being signed by the police magistrate as such for the county of Essex. *Regina v. Reno*, 4 P. R. 281.

Under 31 Vict. c. 94 (D.), all that the committing magistrate or the court or a Judge has to do is, to determine whether the evidence of criminality would, according to the laws of Ontario, justify the apprehension and committal for trial of the accused if the crime had been committed therein. *Ib.*

Such decision, if adverse to the prisoner, does not conclude him; as the question of extradition or discharge exclusively rests with the Governor-General. *Ib.*

Evidence offered to a magistrate by a prisoner on an examination of this kind, by way of answer to a strong primâ facie case, may perhaps properly be taken, but would not justify the magistrate in discharging the prisoner. And, quære, whether it was not the intention of 31 Vict. to transfer to the Governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up. *Ib.*

Under the circumstances of this case, it was held that there was sufficient primâ facie evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of shooting, to commit a murder. *Ib.*

Information and Belief.]—Where the facts in evidence, though sufficient to warrant extradition if deposed to by witnesses who could really testify to their occurrence, were sworn to from information only, the prisoner was discharged. *In re Parker*, 9 P. R. 332.

Initiating Prosecution—*Private Prosecutor—Corroboration.*]—It is not necessary that it should appear on the face of the extradition proceedings under R. S. C. c. 142, or otherwise, that the information or complaint against the prisoner was laid or made by or under the authority of the foreign Government; but the extradition Judge may receive the complaint of any one who, if the alleged offence had been committed in Canada, might have made it. Canadian enactments and practice in this regard contrasted with those of the United States:—Semble, that if an act criminal according to the laws of both countries be committed, the guilty person can be extradited, although it constitute forgery under the laws of one, and larceny under those of the other, both being extraditable offences. Semble, also, that the provisions of the Criminal Code as to corroboration (55 & 56 Vict. c. 29, s. 684 [D.]) refer to the trial, and not to the preliminary inquiry before the magistrate. *In re Lazier*, 30 O. R. 419. See the next case.

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

Junior Judge.] — The expression "all judges, &c., of the county court," contained in s. 5 of the Extradition Act, R. S. C. c. 142, includes the junior Judge of said court. *In re Parker*, 19 O. R. 612; *Re Garbutt*, 21 O. R. 179, 465.

Murder—*Form of Warrant—Remand.*]—Held, that a warrant of commitment issued by a magistrate under the treaty and our statute, C. S. C. c. 89, which used the words "did wilfully, maliciously, and feloniously stab and kill," and omitted the words "murder," and "with malice aforethought," and

concluded by instructing the gaoler to "there safely keep him, the prisoner, until he shall be thence delivered by due course of law," did not come within the provisions of the treaty or statute, and was consequently defective. *In re Anderson*, 11 C. P. 9.

Held, that when a prisoner was brought before the court upon a writ of habeas corpus under our statute, the warrant of commitment upon which he was detained appearing on its face to be defective, the court had no authority to remand him, such power only being possessed by the court at common law, and the prisoner not being charged with any offence for which he could be tried in this Province. *Ib.*

Offence Referred to by Wrong Name —*Theft—Larceny.*]—Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name. Larceny is, by the Ashburton Treaty, the convention of 1889, and the Extradition Act, specified as a crime for which extradition to the United States will lie, but larceny is not, by that name, recognized as a crime, by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing:"—Held, that where there was evidence of the commission of the crime of theft the prisoner should be held for extradition, although in the proceedings for extradition the offence was described as larceny. *In re Gross*, 25 A. R. 83.

Power of County Court Judge—*Previous Discharge.*] — The jurisdiction of a county court Judge under the Extradition Act is limited only by the bounds of the Province and not by those of his county. An extradition Judge has power to inquire into a charge and commit a person for extradition, after a previous inquiry and committal by another Judge and discharge under habeas corpus. *In re Parker*, 10 C. L. T. Occ. N. 373.

Preliminary Proceedings — *Depositions.*]—Where a prisoner in custody under the Ashburton treaty obtained a habeas corpus and certiorari for his discharge, it was held that the argument as to the regularity or irregularity of the initiatory proceedings, such as information, warrant, &c., was a matter of no consequence, the material question being whether, being in custody, there was a sufficient case made out to justify the commitment for the crime charged. It was held, that certified copies of depositions sworn in the United States after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible evidence before the police magistrate. *Ex parte Martin*, 4 C. L. J. 198.

Reviewing Decision.]—The Judges of the superior courts in the country where the fugitive is found may, on a writ of habeas corpus and certiorari, consider if there was sufficient evidence before the committing magistrate to justify the committal, and so may review the decision of the magistrate on the evidence. *In re Burley*, 1 C. L. J. 34; *In re Warner*, 1 C. L. J. 16.

The duty of the court or a Judge on a habeas corpus, is to determine on the legal sufficiency of the commitment, and to review the magistrate's decision as to there being sufficient evidence of criminality. *Regina* v. *Reno*, 4 P. R. 281.

Reviewing Evidence.] — A Judge in chambers has power to review and decide on the sufficiency of the evidence returned by the committing magistrates, or, if necessary, to hear further testimony. *Regina* v. *Tubbee*, 1 P. R. 98.

Second Application — *Depositions.*]—Application for the discharge on habeas corpus of prisoners charged with robbery committed in the United States, and committed at Sandwich for extradition by Mr. McMicken, a police magistrate appointed under 28 Vict. c. 20. The prisoners, it seemed, had been previously arrested at Toronto on the same charge, and been discharged by the local police magistrate, after a lengthened investigation before him:—Held, that this did not prevent another duly qualified officer from entertaining the charge against them on the same or on fresh materials:—Held, also, that s. 373 of 29 Vict. c. 51, did not preclude M. from taking the information and issuing his warrant in Toronto, where there was already a police magistrate; for that the words of the section merely excluded him from jurisdiction there in local cases:—Held, also, that the appointment of M. might well have been made under 28 Vict. c. 20, for any one of or for all the counties of Upper Canada, including Toronto, and his powers made the same as a police magistrate in cities, except as regarded purely municipal matters; and that this Act was continued by 31 Vict. c. 17, s. 4 (O.), but that as nothing was suggested impugning his authority to act, the warrant must be treated as executed by an officer possessing such authority:—Held, also, that the depositions on which the warrant issued in the United States after the arrest in Canada, were properly admitted here as evidence of criminality, their admission being within both the letter and spirit of 31 Vict. c. 94. *Regina* v. *Morton*, 19 C. P. 10.

Several Theories.]—If the evidence present several views, on any one of which there may be a conviction, if adopted by the jury, the court will direct extradition. *Regina* v. *Gould*, 20 C. P. 154.

Strict Proof—*Depositions.*]—In extradition cases, the forms and technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with; and therefore,—Held, that depositions taken in the United States cannot be read unless certified under the hand of the magistrate who issued the original warrant as being copies of the depositions upon which such warrant issued, although attested by the party producing them to be such true copies; but, semble, the prisoner might be remanded to enable properly certified copies to be produced. *In re Lewis*, 6 P. R. 236.

Supreme Court Appeal.]—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135, s. 31), "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal:—Held, that the matter was coram non judice

and there was no necessity for a motion to quash. *In re Lazier*, 29 S. C. R. 630.

Trial only for Offence Charged.]—When surrendered to the government of the country from which he fled, the government of the latter are bound to try the accused for the offence for which he is surrendered, and not for any other or different offence. *In re Burley*, 1 C. L. J. 34.

Warrant in the United States—*Accomplices.*]—It is not necessary under the Extradition Treaty and Act, 31 Vict. c. 94 (D.), that an original warrant should have been granted in the United States for the apprehension in this country of the person accused, to enable proceedings to be effectually taken against him in this Province for an offence within the treaty. *In re Caldwell*, 5 P. R. 217.

The evidence of accomplices is sufficient to establish a charge for the purposes of extradition. *Ib.*

Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanour or a felony. *Ib.*

Warrant.]—Held, that the original warrant, within the meaning of 31 Vict. c. 94, s. 2 (D.), is not the first of two or more consecutive warrants, but is any warrant issued in the United States of America. *Re Phipps*, 1 O. R. 586. See *S. C.*, 8 A. R. 77.

VIII. Practice and Procedure.

1. *Amendment.*

Conviction.]—Amendment of conviction. *Regina* v. *Ross*, H. T. 4 Vict.; *In re Watts*, *In re Emery*, 5 P. R. 267.

Coroner's Warrant.]—Of coroner's warrant on habeas corpus. *In re Carmichael*, 10 L. J. 325.

Indictment.]—Of indictment. *Cornwall* v. *Regina*, 33 U. C. R. 106; *Regina* v. *Jackson*, 19 C. P. 280.

Information.]—Of information before a magistrate. *In re Conklin*, 31 U. C. R. 160.

Return to Certiorari.]—Semble, that if material evidence be given before a magistrate, but unintentionally omitted from a return to a certiorari, an amendment may be allowed to supply it, but only with the concurrence of the parties and of the witness by whom the deposition was signed in the correctness of the additions; but it cannot be supplied by affidavit. *Regina* v. *McNancy*, 5 P. R. 438.

Summary Trial.]—The provisions of the Code respecting amendment do not apply to summary trials. *Regina* v. *Randolph*, 32 O. R. 212.

See, also, Intoxicating Liquors—Justice of the Peace.

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2. *Appeal and Review.*

(a) *Appeal.*

Chancery Division.] — See *Regina* v. *Birchall*, 19 O. R. 697; *Regina* v. *Davis*, 22 O. R. 652.

Court of Appeal.]—See *Regina* v. *Eli*, 13 A. R. 526; *Regina* v. *City of London*, 15 A. R. 414; *Regina* v. *Cushing*, 26 A. R. 248.

Judicial Committee.]—The rule of the Privy Council is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place. *Riel* v. *The Queen*, 10 App. Cas. 675.

Public Health — *Conviction under By-law in Schedule.*]—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. 1887 c. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the sessions notwithstanding s. 112, which has no application. *Regina* v. *Coursey*, 26 O. R. 685. See *S. C.*, on appeal, 27 O. R. 181.

Sessions—*Appeal—Dismissal.*]—There is no appeal to the court of general sessions of the peace from an order of dismissal of a complaint for an offence against a city by-law passed under the authority of s. 551 of the Municipal Act, R. S. O. 1897 c. 223. The "order" referred to in s. 7 of R. S. O. 1897 c. 90, "The Ontario Summary Convictions Act," means an order against the party against whom the information and complaint is laid, and does not include an order of dismissal. *Regina* v. *Toronto Public School Board*, 31 O. R. 457.

Supreme Court.] — The only appellate power conferred on the supreme court in criminal cases is by s. 49 of the Supreme and Exchequer Courts Act which limits appeals in criminal cases to those of the highest importance, and does not impose on the court the duty of revisal in matters of fact of all summary convictions before magistrates. *In re Trepanier*, 12 S. C. R. 111.

Since the passing of 32 & 33 Vict. c. 29, s. 80 (D.), repealing so much of c. 77 of C. S. L. C. as would authorize any court of the Province of Quebec to grant a new trial in any criminal case; and of 32 & 33 Vict. c. 36 (D.), repealing s. 63 of c. 77, C. S. L. C., the court of Queen's bench of the Province of Quebec has no power to grant a new trial, and the supreme court of Canada, exercising the ordinary appellate powers of the court under ss. 38 and 49 of 38 Vict. c. 11 (D.), should give the judgment which the court whose judgment is appealed from ought to have given, viz.: to reverse the judgment which has been given, and order the prisoner's discharge. *Laliberté* v. *The Queen*, 1 S. C. R. 117.

Where the court appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, and is unanimous as to one of such grounds but not as to the other, the supreme court on appeal can only take into consideration the ground of motion in which there was dissent. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

An appeal to the supreme court of Canada does not lie in cases where a new trial has been granted by the court of appeal under the provisions of the Criminal Code, 1892, ss. 742 to 750 inclusively.—The word "opinion" as used in the second sub-section of s. 742 of the Criminal Code, must be construed as mean-

ing a "decision" or "judgment" of the court of appeal in criminal cases. *Viau* v. *The Queen*, 29 S. C. R. 90.

(b) *Error.*

Court of Appeal.]—Error, as distinguished from appeal, will lie in a criminal case from the court of error and appeal to the Queen's bench, and the writ of error may be as nearly as possibly in the form of a writ of appeal given by the orders of the court published in 1850. *Regina* v. *Whelan*, 28 U. C. R. 108. See *S. C.*, 28 U. C. R. 2.

Appeals under C. S. U. C. c. 113, s. 29, as distinguished from error, are in criminal cases confined to such as arise under the Act respecting new trials in criminal cases, 20 Vict. c. 61. *Ib.*

Defect in Indictment.]—The court will not arrest judgment after verdict, or reverse it in error, for any defect patent on the face of the indictment, as by 32 & 33 Vict. c. 29, s. 32, such defect must be objected to by demurrer, or by motion to quash the indictment. *Regina* v. *Mason*, 22 C. P. 246.

Jury—*Irregularities in its Choice or Constitution.*]—See *post*, sub-head 5.

Objections to Indictment.]—The Attorney-General refused his fiat for a writ of error in this case, upon objections taken to the indictment. *Regina* v. *Greenwood*, 23 U. C. R. 256, note *a*.

Police Court.]—Whether the police court is a court of justice within 32 & 33 Vict. c. 21, s. 18, or not, is a question of law which may be reserved by the Judge at the trial, under C. S. U. C. c. 112, s. 1, and where it does not appear by the record in error that the Judge refused to reserve such question it cannot be considered upon a writ of error. *Regina* v. *Mason*, 22 C. P. 246.

Right to have Commitment Reviewed.]—29 & 30 Vict. c. 45 had in view and recognizes the right of every man committed on a criminal charge to have the opinion of the Judge of the superior court upon the cause of his commitment by an inferior jurisdiction. *Regina* v. *Mosier*, 4 P. R. 64.

Sessions.]—The proper proceeding to reverse a judgment of the court of quarter sessions is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 U. C. R. 215.

(c) *New Trial.*

The court has no power to order a new trial in a criminal case reserved under 14 & 15 Vict. c. 13; but only to decide upon any legal exceptions raised, and whether there was legal evidence to sustain the indictment, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent. *Regina* v. *Baby*, 12 U. C. R. 346.

Quære, whether it is proper to grant a new trial, where an individual or a corporation has been once acquitted on an indictment, even in cases of misdemeanour. *Regina* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 121.

Where after conviction for a capital offence, the proceedings were discovered to have been illegal, there having been no associate Judge sitting in court during the trial, on motion on behalf of the Crown (the prisoner not moving in any way), the indictment and conviction, with the prisoner, were brought up on certiorari and habeas corpus, and an order made setting aside all such proceedings, and remanding the prisoner to custody, with a view to a new trial. *Regina* v. *Sullivan*, 15 U. C. R. 198.

Remarks, and review of authorities, as to granting new trials upon the evidence. *Regina* v. *Chubbs*, 14 C. P. 32; *Regina* v. *McElroy*, 15 C. P. 116; *Regina* v. *Fick*, 16 C. P. 379; *Regina* v. *Hamilton*, 16 C. P. 340; *Regina* v. *Seddons*, 16 C. P. 389; *Regina* v. *Slavin*, 17 C. P. 205.

The court declined to receive affidavits as ground for such applications. See *Regina* v. *Crozier*, 17 U. C. R. 275; *Regina* v. *Beckwith*, 8 C. P. 274; *Regina* v. *Fitzgerald*, 20 U. C. R. 546; *Regina* v. *Chubbs*, 14 C. P. 32; *Regina* v. *Hamilton*, 16 C. P. 340.

Under 20 Vict. c. 61, the court was not empowered to grant a new trial in criminal cases on any ground apart from what was done by either the court or the jury at the trial, such as the alleged discovery of new evidence, or a disappointment in obtaining witnesses. *Regina* v. *Gray*, 1 E. & A. 501.

The court was not authorized to grant a new trial on the discovery of new evidence, or for the misconduct of the jury. *Regina* v. *Oxentine*, 17 U. C. R. 295.

Upon motion for a new trial upon an information for conspiracy tried at nisi prius upon a record from the Queen's bench:—Held, that affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for new trial. *Regina* v. *Fellowes*, 19 U. C. R. 48.

Where several defendants have been convicted, a new trial, if granted, must be to all. *Ib.*

Where points of law were reserved under the Act, and the prisoner, besides relying upon them, moved for a new trial, the court refused to grant it, though the evidence was slight. *Regina* v. *Hambly*, 16 U. C. R. 617.

On motion for a new trial by a prisoner convicted of murder on circumstantial evidence only, Morrison, J., who tried the case, expressed himself as not dissatisfied with the verdict, and Draper, C. J., having reviewed the evidence at length, came to the conclusion that there was enough to go to the jury, and that their finding upon it could not be declared wrong. Hagarty, J., held that under the statute a Judge is called upon only to say whether there was evidence to go to the jury, not to express any opinion as to their verdict founded upon it. A new trial was therefore refused; and the court declined to grant leave to appeal. *Regina* v. *Greenwood*, 23 U. C. R. 255.

Held, that the withholding from the court confessions made before the coroner, for fear that they would prejudice the prisoner, would render the application for a new trial irregular. *Regina* v. *Finkle*, 15 C. P. 453.

The court on the return of the rule refused to receive new affidavits, stating that the deceased had been seen alive after the date of the alleged murder, and thus setting up an entirely new case. *Regina* v. *Hamilton*, 16 C. P. 340.

One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of the case, was suddenly seized with a fit and incapacitated from proceeding any further. No adjournment, however, was applied for, for the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by reason of his colleague's disability; it did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to:—Held, no ground for a new trial. *Regina* v. *Fick*, 16 C. P. 379.

The rule is the same in criminal as in civil cases, at any rate where the prisoner is defended by counsel, that any objection to the charge of the presiding Judge, either for non-direction or for misdirection, must be taken at the trial, and if not then taken, it cannot be afterwards raised, especially where the evidence fully sustains the verdict. *Ib.*

The defendants having been convicted on an indictment for a nuisance which had been removed into the Queen's bench by certiorari, moved for a new trial, which was refused:—Held, that no appeal would lie to this court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by certiorari, and tried on the civil side. Regina v. Eli, 13 A. R. 526; Regina v. Laliberté, 1 S. C. R. 117, referred to. *Regina* v. *City of London*, 15 A. R. 414.

Quære, whether in any case of misdemeanour a new trial can now be granted. C. S. U. C. c. 12, 112, 113—32 & 33 Vict. c. 29, s. 80 (D.). *Ib.*

(d) *Reserved Case.*

Challenge to the Array.]—To an indictment for murder, the prisoner pleaded, challenging the array of the jury panel, which plea was demurred to and judgment given in favour of the Crown by the Judge holding the court of oyer and terminer, who, at the request of the prisoner, reserved a case for the consideration of the common pleas division:—Held, not a matter which could be reserved under C. S. U. C. c. 112, and the case was therefore directed to be quashed. *Regina* v. *O'Rourke*, 32 C. P. 388.

See S. C., 1 O. R. 464; *Morin v. The Queen*, 18 S. C. R. 407.

Semble, that a writ of error was the proper remedy, and that, notwithstanding the Judicature Act, it would lie in the first instance to either the Queen's bench or common pleas division, and not to the court of appeal. *Ib.*

Defamatory Libel—*Right to have Jurors Stand Aside—Reserving Case After Ruling.*]—*Regina* v. *Patterson*, 36 U. C. R. 127.

Forum — *Evidence.*]—A Crown case reserved should be reserved for the consideration of the justices of one of the divisions of the high court, not of a divisional court, and when the court is asked whether on the evidence the defendants were lawfully convicted the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence. *Regina* v. *Gibson*, 16 O. R. 704.

Forum—*What may be Reserved.*]—Under C. S. U. C. c. 112, any question of law which may have arisen on a criminal trial, may be reserved for the consideration of the justices of either of Her Majesty's superior courts of common law. *Regina* v. *Bissell*, 1 O. R. 514.

Murder — *Right to Have Jurors Stand Aside.*]—*Morin* v. *The Queen*, 18 S. C. R. 407.

Police Court.]—Whether the police court is a court of justice within 32 & 33 Vict. c. 21, s. 18, or not, is a question of law which may be reserved by the Judge at the trial, under C. S. U. C. c. 112, s. 1, and where it does not appear by the record in error that the Judge refused to reserve such question it cannot be considered upon a writ of error. *Regina* v. *Mason*, 22 C. P. 46.

Police Magistrate.]—Held, that a police magistrate cannot reserve a case for the opinion of a superior court under C. S. U. C. c. 112, as he is not within the terms of that Act. *Regina* v. *Richardson*, 8 O. R. 651.

Right to Special Jury.]—*Regina* v. *Kerr*, 26 C. P. 214.

Sufficiency of Evidence.]—On a Crown case reserved it is not proper to reserve the question whether there is sufficient evidence in support of the criminal charge, that being a question for the jury; whether there is any evidence is a question of law for the Judge. The evidence against the prisoners here was the uncorroborated evidence of the woman charged to have been raped, which, in view of admissions made by her, and the circumstances, was unsatisfactory:—Held, that the evidence was properly submitted to the jury, but the court directed that the attention of the executive should be called to the case. *Regina* v. *Lloyd*, 19 O. R. 352.

Sufficiency of Indictment.]—The sufficiency of an indictment upon motion to quash is not a question of law which arises on the trial, and therefore cannot be reserved under R. S. C. c. 174, s. 259, and the court has no power to entertain it. *Regina* v. *Gibson*, 16 O. R. 704.

Wrong Person Summoned and Sworn as Juror.]—*Brisebois* v. *Regina*, 15 S. C. R. 421.

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3. *Costs.*

Conviction.]—There is no general power to award costs upon a conviction under an Ontario statute, where such power is not given by the statute itself; and therefore where on a conviction under s. 162 R. S. O. 1877 c. 174, for attempting to obtain information at a polling place as to the candidate for whom a voter was about to vote, costs were awarded against the defendant, the conviction was ordered to be quashed:—Held,

also, that there was no power to amend the conviction in this respect. *Regina* v. *Lennon*, 44 U. C. R. 456.

Nuisance.]—Upon an application for a rule to tax the costs of proceedings on an indictment for nuisance in obstructing a highway, under 5 & 6 Will. & Mary, c. 33, and that they should be allowed to a particular person, the court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina* v. *Gordon*, *Regina* v. *Robson*, 8 C. P. 58.

Summary Conviction — *Appeal.*] — On an appeal to a county court Judge from a summary conviction under the Act to provide against frauds in the supplying of milk to cheese, butter, and condensed milk factories (52 Vict. c. 43, s. 9), the Judge has the same power to award costs as the sessions of the peace under ss. 879-880 of the Criminal Code, 1892. Under the Criminal Code, s. 880, the court may, on appeal, award such costs, including solicitor's fee, as it may deem proper, and there is no power in the high court to review such discretion. *Regina* v. *McIntosh*, 28 O. R. 603.

See COSTS—JUSTICE OF THE PEACE.

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4. *Indictment.*

Aiding and Abetting.]—The indictment charged one B. with obtaining by false pretences from one J. T., two horses, with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanour aforesaid to commit:—Held, good, defendant being charged as a principal in the second degree:—Held, also, that the evidence, set out in the case, was not sufficient to sustain the charge. *Regina* v. *Connor*, 14 C. P. 529.

Alias Dictus.]—Where two or more names are laid in an indictment under an alias dictus, it is not necessary to prove them all. *Jacobs* v. *The Queen*, 16 S. C. R. 433.

J. was indicted for the murder of A. J., otherwise called K. K. On the trial it was proved that the deceased was known by the name of K. K., but there was no evidence that she ever went by the other name:—Held, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter. *Ib.*

Amendment.]—The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection taken the indictment was amended, by stating the goods to be the property of the mother, and no further evidence of her administrative character was given, the county court Judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury. On a case reserved:—Held, 1. That there was ample evidence of possession in R. M. to support the indictment without amendment; 2. that the Judge had power to amend under C. S. C. c. 99, s. 78; 3. that the conviction on the amended indictment could not be sustained, there being no evidence of the mother's representative character; nor any question of ownership by her, apart from such character, left to the jury. *Regina* v. *Jackson*, 19 C. P. 280.

Defendant was charged with having set fire to a building, the property of one J. H., "with intent to defraud." The case opened by the crown was that the prisoner intended to defraud several insurance companies, but the legal proof of the policies was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence shewed that different persons were interested as mortgagees of the building, a large hotel, and J. H. as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested. They found a verdict of guilty:—Held, that the amendment was authorized and proper, and the conviction was warranted by the evidence. *Regina* v. *Cronin*, 36 U. C. R. 342.

The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shewn on the trial. *Ib.*

"The merits of the case," with reference to amendments, under 32 & 33 Vict. c. 29, s. 71 (D.), means the justice of the case as regards the guilt or innocence of the prisoner; and "his defence on such merits" means a substantial and not a formal or technical defence. *Ib.*

Where a bridge was wrongly described in an indictment as being in two townships:—Held, that though this could have been amended at the trial it could not be amended on a motion to set aside the verdict or for a new trial. *Regina* v. *County of Carleton*, 1 O. R. 277.

Certainty.]—The indictment charged that the defendant "did receive, conceal, or assist" one W., a deserter from the navy. Semble, not sufficiently certain and precise. *Regina* v. *Patterson*, 27 U. C. R. 142.

Contra Formam.]—As to the averment, "contra formam statuti," see *Regina* v. *Deane*, 10 U. C. R. 464; *Regina* v. *Walker*, 10 U. C. R. 465; *Regina* v. *Cummings*, 16 U. C. R. 15; *Regina* v. *Carson*, 14 C. P. 309.

Copy.]—A copy of an indictment for high treason may be had by the consent of the attorney-general. *Rex* v. *McDonel*, Tay. 299.

Semble, that a person tried for felony and acquitted, can only obtain a copy of the indictment and record of acquittal, to be used in an action for malicious prosecution, on the fiat of the attorney-general; and the granting or refusing such application cannot be reviewed by this court. The application here was for a rule calling on the attorney-general to shew cause why judgment of acquittal should not be entered on the indictment:—Held, that the indictment not being a record of this court, or brought into it by certiorari, the court had no jurisdiction. *Regina* v. *Ivy*, 24 C. P. 78.

See MALICIOUS PROCEDURE.

Court Wrongly Described.] — On an indictment for not keeping a bridge in repair:—Held, no objection that the proceedings on the record were in the court of Queen's bench for the Province of Ontario, there being no

such Province when they were had, for the mention of the Province was surplusage; nor that there were no second placita or continuances on the record, for, if necessary, an amendment would be allowed. *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

Demurrer to Indictment.]—An indictment having been held bad upon demurrer, the judgment was that the indictment be quashed, so that another indictment might be preferred, but that defendants be discharged. *Regina* v. *Tierney*, 29 U. C. R. 181.

An indictment was found against the defendants in the high court of justice, at its sittings of oyer and terminer and gaol delivery, and on being called upon to plead, the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants, in obedience to which the indictment, demurrer, and joinder were removed to the Queen's bench division. Upon the return, the Crown took out a side-bar rule for a concilium, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown, on the ground that they should have been called upon to appear and plead de novo in this division:—Held, that the court of assize of oyer and terminer and general gaol delivery is now, by virtue of the Judicature Act, the high court of justice; that the indictment was found, and the defendants appeared and demurred thereto in the high court of justice; and that it was not necessary to plead de novo to the indictment. *Regina* v. *Bunting*, 7 O. R. 118.

Duplicity.]—Duplicity in an indictment on a summary trial before the county Judge, under 32 & 33 Vict. c. 35, is not a ground of error. *Cornwall* v. *Regina*, 33 U. C. R. 106.

Joinder of Counts and Defendants.]—An indictment charging a misdemeanour against a registrar and his deputy jointly is good if the facts establish a joint offence. A deputy is liable to be indicted while the principal legally holds the office, and even after the deputy himself has been dismissed. *Regina* v. *Benjamin*, 4 C. P. 179.

Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting:—Held, that they might be jointly convicted. *Regina* v. *Tisdale*, 20 U. C. R. 272.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32 & 33 Vict. c. 29, s. 32, (D.); and where there has been a demurrer to such allegations as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the court of error will not reopen the matter on the suggestion that there is misjoinder of counts. *Regina* v. *Mason*, 22 C. P. 246.

The prisoner in this case was indicted on two sets of counts, one charging him as a citizen of the United States, the other as a subject of her Majesty. The learned Judge at the trial refused to put the Crown to an election between the two sets of counts, and the court upheld his ruling. *Regina* v. *School*, 26 U. C. R. 212.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanours, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent assize, when the count for larceny only is read to the jury:—Held, no error, as the prisoner was only given in charge on the larceny count. *Regina* v. *Mason*, 22 C. P. 246.

Patent Defect.]—The court will not arrest judgment after verdict, or reverse judgment in error, for any defect patent on the face of the indictment, as by 32 & 33 Vict. c. 29, s. 32, objection to such defect must be taken by demurrer or by motion to quash the indictment. *Regina* v. *Mason*, 22 C. P. 246.

An indictment describing an offence within 32 & 33 Vict. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict. *Ib.*

Proof of Indictment.]—The production of the original indictment is insufficient to prove an indictment for felony; but a record must be made up, with a proper caption. *Henry* v. *Little*, 11 U. C. R. 296.

Variance.]—Where an indictment charged defendant with procuring certain persons to cut trees, the property of A., B., and C., growing on certain lands belonging to them, and the evidence shewed that the land belonged to them and to another as tenants in common:—Held, that a conviction could not be supported. *Regina* v. *Quinn*, 29 U. C. R. 158.

Variance between indictment and proof, in description of land. *Regina* v. *Baby*, 12 U. C. R. 346.

An indictment alleged a nuisance to be near lot 16, and the evidence shewed it to be on it:—Held, a fatal variance. *Regina* v. *Meyers*, 3 C. P. 305.

On a charge of stealing 2,200 bushels of beans for which he was committed for trial, the evidence before the magistrate disclosed that the prisoner had obtained certain cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse. At the assizes he was indicted for obtaining the cheques on the false pretence "that there was then a large quantity of beans, to wit 2,680 bushels," in his warehouse. During the progress of the trial the indictment was amended by striking out the words "a large quantity of beans, to wit," and the prisoner was convicted thereon:—Held, no such variation as prevented the indictment being preferred for a charge founded upon the facts or evidence disclosed within the meaning of s. 641 of the Criminal Code, 1892:—Held, also, that the prisoner not having been misled or prejudiced by the amendment, it was properly made. *Regina* v. *Patterson*, 26 O. R. 656.

See also, SPECIFIC OFFENCES, sub-title IX. *post.*

5. *Jury.*

Challenge for Cause.]—After some jurors had been peremptorily challenged by the prisoner, and others directed by the Crown to stand aside, and when only one had been sworn, one M. was called and challenged by the prisoner for cause. At the suggestion of the court, and with consent of counsel, M. was directed to stand aside by the Crown "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." After the prisoner had made nineteen peremptory challenges, a juryman was called whom the prisoner desired to challenge peremptorily. The counsel for the Crown then asked that the question of M.'s competency should be tried in the usual way. The prisoner's counsel objected, but the Judge ruled with the Crown, and he certified that he so ruled because it was in accordance with the arrangement under which the juror was directed to stand aside: that no exception was taken to this ruling: that he was not asked to note any objection to the mode of empannelling the jury; and that he was first asked to reserve the question after the assize had finished, when upon the consent of counsel for the Crown it was added to the other questions reserved:—Held, that the jury were properly empannelled. *Regina* v. *Smith*, 38 U. C. R. 218.

Clergyman Addressing Jury.]—In the course of a trial for murder by shooting, the jury attended church in charge of a constable, and the clergyman directly addressed them, referring to the case of a man hung for murder, and urging them, if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted:—Held, that although the remarks of the clergyman were highly improper, it could not be said that the jury were so influenced by them as to affect their verdict. *Preeper* v. *Regina*, 15 S. C. R. 491.

Conspiracy—*Challenge.*]—Upon an indictment for conspiracy to procure by fraud the return of one F. as a member for the Legislative Assembly:—Held, that the Crown was entitled to challenge any of the jurors peremptorily, without assigning a cause, until the panel had been exhausted. *Regina* v. *Fellowes*, 19 U. C. R. 48.

Defamatory Libel—*Crown's Right to have Jurors Stand aside.*]—37 Vict. c. 38, s. 11, enacts that the right of the Crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel;"—Held, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels; and that the fact of the prosecution being conducted by a counsel appointed by and representing the attorney-general would make no difference. *Regina* v. *Patterson*, 36 U. C. R. 127.

The Judge, at the trial, allowed the Crown counsel in such a case to direct jurors to stand aside, but, after the verdict, entertaining doubts, he reserved a case for the opinion of the court, as to the propriety of his having permitted it:—Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute. *Ib.*

Insolvent Act—*Special Jury.*]—Section 148 of the Insolvent Act of 1869, provided that all offences punishable under that Act should be tried by a special jury. Section 141 of the Act of 1875, directed that all offences punishable under that Act should be tried as other offences of the same degree; and by section 149, as respects matters of procedure merely, the provisions of that Act should supersede the Act of 1869. In this case, before the trial, the Crown gave notice of and struck a special jury, who were in attendance at the trial, but the Crown, notwithstanding, elected to call and try the case by a common jury. The prisoner's counsel objected thereto, and the case proceeded, the prisoners entering into a full defence, but subject to such objection, which was renewed at the close of the case, with the further objection that there had been a mistrial:—Held, that the case should have been tried by a special jury, for the offence was not punishable under the Act of 1875, and the matter was not one of procedure within s. 149; that there had therefore been a mistrial which the prisoners under the circumstances had not waived their right to insist upon; and that this was a "question of law which arose on the trial," which might properly be reserved, and not an objection to be raised by challenge to the jury. *Regina* v. *Kerr*, 26 C. P. 214.

Irregularities—*Error.*]—Semble, that under s. 139, C. S. U. C. c. 31, where no "unindifference" or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error. *Regina* v. *O'Rourke*, 1 O. R. 464.

Quære, whether, when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error. *Ib.*

Misdemeanour—*Crown's Right to Make Jurors Stand aside.*]—Upon the trial of a party indicted for misdemeanour, the Crown has a right to cause jurors to stand aside until the whole panel is gone through. *Regina* v. *Benjamin*, 4 C. P. 179.

Murder—*Challenge for Cause—Peremptory Challenge in Deference to Judge's View.*] On a trial for murder the prisoner desired to challenge one S., one of the jurors called, for favour, alleging sufficient cause. The Judge ruled that he must first exhaust his peremptory challenges, and this point was raised by plea and demurrer, and formally decided. The entry on the record then was, that in deference to the judgment the challenge was taken and treated by the prisoner, and by the attorney-general, as a peremptory challenge for and on behalf of the prisoner. Afterwards, having exhausted his twenty challenges, including S., he claimed to challenge peremptorily one H., contending that by the erroneous ruling he had been compelled to challenge S. peremptorily, and should not be obliged to count him as one of the twenty. This was also entered of record and decided against him:—Held, that the prisoner was entitled to challenge for cause before exhausting his peremptory challenges; that error would lie for the refusal of this right; and

that had S. been sworn there must have been a venire de novo; but, held, also, that by the peremptory challenge of S., which excluded him from the jury, the first ground of error was removed; and that error on the second challenge could not be supported, for the prisoner had in fact had twenty peremptory challenges, and the peremptory challenge of S. being in deference to the ruling of the Judge did not make it the less a peremptory challenge. *Whelan* v. *Regina*, 28 U. C. R. 2, 108.

Murder — *Juror Discharged after being Sworn.*]—Upon a trial for murder, after the usual notice of right of challenge, two jurymen were sworn without challenge. J. H. was then called, and a person came forward and was sworn. Others were called and challenged; and after another was called and sworn without challenge, the prisoner's counsel objected to J. H., as he was a witness in the case. Upon inquiry he was found not to be the person intended to be called on the jury, being not only a witness, but not a resident in the counties, and therefore not qualified as a juryman. Upon consent of counsel for the Crown and prisoner, he was allowed to retire, and others were called and sworn, the prisoner exercising the right to challenge, till the jury was chosen. After conviction, upon motion for a new trial:—Held, 1. That J. H. (improperly sworn) was legally discharged from the jury; 2. that the right of challenge as to those previously sworn was not thereby reopened, their reswearing not being rendered necessary; 3. that the prisoner was properly tried by the twelve, although thirteen were sworn to try him. *Regina* v. *Coulter*, 13 C. P. 299,

Provincial Jurisdiction.]—By 32 & 33 Vict. c. 29, s. 44 (D.), the selection of jurors in criminal cases is authorized to be in accordance with the provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By 42 Vict. c. 14, and 44 Vict. c. 6 (O.), the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed, by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these provincial Acts. Semble, that 32 & 33 Vict. c. 29 (D.) was not ultra vires the Dominion Parliament as being a delegation of their powers, and that the selection made in accordance with the provincial Acts was valid. *Regina* v. *O'Rourke*, 32 C. P. 388.

Quære, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.* See next case.

Provincial Jurisdiction — *Challenge to the Array.*]—By 32 & 33 Vict. c. 29, s. 44 (D.), every person qualified and summoned to serve as a juror in criminal cases according to the lay in any Province, is declared to be qualified to serve in such Province, whether such laws were passed before the B. N. A. Act or after it, subject to, and in so far as, such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vict. c. 14 (O.), and 44 Vict. c. 6 (O.), the mode of selecting jurors in all cases, formerly regulated by 26 Vict. c. 44, was changed. The jury was selected according to the Ontario statutes, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error:—Held, per Hagarty, C.J., that the Dominion statute was not ultra vires by reason of its adopting and applying the laws of Ontario as to criminal procedure. Per Armour, and Cameron JJ., that the objection raised by the prisoner was not a good ground of challenge to the array. *Regina* v. *O'Rourke*, 1 O. R. 464.

Qualification of Juror—*Wrong Person Summoned and Sworn.*] — B. having been found guilty of feloniously having administered poison with intent to murder, moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. The general panel of jurors contained the names of Joseph Lamoureux and Moïse Lamoureux. The special panel for the term of the court at which the prisoner was tried, contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moïse Lamoureux, and returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court and answered to the name of Joseph and was sworn as a juror without challenge when B. was tried. On a reserved case it was held, that the point should not have been reserved by the Judge at the trial, it not being a question arising at the trial within the meaning of s. 259, c. 174, R. S. C.:—Held, also, that assuming the point could be reserved, s. 246, c. 174, R. S. C., clearly covered the irregularity complained of. *Brisebois* v. *Regina*, 15 S. C. R. 421.

Right of Crown to Make Jurors Stand aside a Second Time.]—When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over of the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the Judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued:—Held, per Taschereau, Gwynne, and Patterson, JJ., that the question was one of law arising on the trial which could have been reserved under s. 259 of c. 174 R. S. C., and the writ of error should therefore be quashed. Per Ritchie, C. J., Strong, and Fournier, JJ., that the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. Brisebois v. The Queen, 15 S. C. R. 421, referred to. Per Ritchie, C.J., Strong, Fournier, and Patterson, JJ., that the Crown could not without shewing cause for challenge direct a juror to stand aside a second time. The Queen v. Lacombe, 13 L. C. Jur. 259, overruled. Per Gwynne, J., that all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mistrial. *Morin* v. *The Queen*, 18 S. C. R. 407.

Summoning Jury.] — By proclamation published on the 15th December, 1896, the

county of Peel was separated from York from and after the 1st January, 1867. On the 23rd November preceding, the usual precept had been sent to the sheriff of the united counties for the winter assizes for York, to be held on the 10th January, 1867, and the sheriff returned his panel to that precept, containing fifty-four jurors from York and thirty from Peel. Only those from York, however, attended, and the prisoner was tried by a jury de medietate, including six of these jurors, upon an indictment found and pleaded to at the previous assizes in October. On motion for a new trial, or venire de novo, because the precept and panel should have been for York only, not for the united counties:—Held, per Draper, C.J., that the objection, if available at all, must be taken by writ of error. Per Hagarty, J., no objection would lie. *Regina* v. *Kennedy*, 26 U. C. R. 326.

Venire Facias.]—It was objected on error to the record of a judgment on a conviction for murder that the only authority shewn being that of oyer and terminer, the award, "therefore let a jury thereupon immediately come," was unauthorized, and a special award of venire facias was requisite; but—Held, assuming, but not admitting, that in England there is a difference in this respect between the power of justices of oyer and terminer and of gaol delivery, and that the record shewed no authority to deliver the gaol,—that in this country by the Jury Act, C. S. U. C. c. 31, both have the same powers, the general precept to summon a jury being issued by both before the assizes. *Whelan* v. *Regina*, 28 U. C. R. 2.

See also, SPECIFIC OFFENCES, sub-title IX. *post*.

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6. *Trial.*

Capital Sentence — *Court of King's Bench.*]—A criminal convicted at a court of oyer and terminer of a capital felony, may be brought up to the court of King's bench for sentence. *Rex* v. *Kenrey*, 5 O. S. 317.

Commission of Assizes.] — Held, that the Crown, by prerogative right, could issue a commission to the Judge of the provisional judicial district of Algoma to hold a court of oyer and terminer, and general gaol delivery, for trial of felonies, &c. Semble, per Wilson, J., that such Judge having by s. 94 of C. S. U. C. c. 128, the same powers and duties as a county Judge in Upper Canada, he might have been appointed under C. S. U. C. c. 11, s. 2, to act as commissioner. *Regina* v. *Amer*, 42 U. C. R. 391.

Commitment for Trial—*Dies non Juridicus—Subsequent Trial—Court of Record—Habeas Corpus—Writ of Error.*]—The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the county court Judge in compliance with s. 766 of the Criminal Code, 1892, consented to be tried by the Judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment:—Held, upon the return to a writ of habeas corpus, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity could not affect the validity of the trial before the Judge under the Speedy Trials Act. Upon appeal the court of appeal held that the county court Judge's criminal court being a court of record, its proceedings were not reviewable upon habeas corpus, but only upon writ of error. *Regina* v. *Murray*, 28 O. R. 549.

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

Consent to Summary Trial — *False Pretences — Term of Imprisonment.*]—The plaintiffs in error were charged with having defrauded one C. by a game called three card monte. They consented to be summarily tried. When brought up for trial, the crown attorney asked for and obtained leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment:—Held, on error, that their consent to be summarily tried on the substituted charge should appear, and that in its absence the conviction was bad:—Held, also, that it was bad in adjudging the sentence of one year, the Act, 40 Vict. c. 32 (D.), only authorizing a sentence for any term less than a year. *Goodman* v. *Regina*, 3 O. R. 18.

Conviction for Offence not Charged.]—A county court Judge trying a prisoner summarily under 32 & 33 Vict. c. 35 (D.), has the same authority to convict of an offence under 32 & 33 Vict. c. 21, s. 110 (D.), instead of that charged, as a jury has. *Regina* v. *Haines*, 42 U. C. R. 208.

Court of Record — *Habeas Corpus.*]—The prisoner was convicted before a county Judge's criminal court on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced to im-

prisonment. On an application for a habeas corpus:—Held, that the court was a court of record, and that under R. S. O. 1877 c. 70, s. 1, there was therefore no right to the writ. *Regina* v. *St. Denis*, 8 P. R. 16.

Held, also, that the Judge had power to imprison. *Ib.*

The prisoners were committed for trial on a charge of gambling in a railway train. On the case coming before the county Judge for trial, an indictment was preferred, under 42 Vict. c. 44, s. 3 (D.), for obtaining money by false pretences. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, and the charge read over to the prisoners, and, on its being explained that they could be tried forthwith or remain in custody until the next sitting of oyer and terminer, &c., they pleaded not guilty, and said that they were ready for trial. The case then proceeded, and the prisoners were convicted; no question having been raised as to their having been tried without their consent, although their counsel took other objections to the proceedings. A writ of habeas corpus having been issued, and the prisoners' discharge moved for, on the ground of the absence of such consent:—Held, that the motion must be refused. *Regina* v. *Goodman*, 2 O. R. 468.

Election to be Tried by Jury—*Re-election—Mandamus to Sheriff to bring Prisoner before County Judge.*]—Where a prisoner is brought before a county court Judge under s. 766 of the Criminal Code, and elects to be tried by a jury, and is thereupon remanded under s. 767 to await such trial, although his election is made under a mistake or qualified by using the words "at present," there is no duty upon the sheriff to notify the Judge a second time under s. 766, or to bring the prisoner again before him to enable the prisoner to re-elect to be tried by the Judge. *Regina* v. *Ballard*, 28 O. R. 489.

Kidnapping — *Postponing Trial—Record — Amendment — Re-sentencing Prisoner.*] — The plaintiff in error, having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one B. without authority, with intent to transport him out of Canada against his will, was, on the 24th June, 1872, brought before the county Judge, by whom he consented to be tried under 32 & 33 Vict. c. 35. In the record drawn up under that statute, it was charged that he did feloniously and without authority, forcibly seize and confine one B. within Canada, &c., (without alleging any intent,) and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The Judge fixed the 3rd July for the trial, and on that day the prisoner said he was ready, but upon the request of counsel for the Crown the trial was postponed till the 15th July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the Judge, changing the name of R. B. to J. R. B. In the notice required from the sheriff to the Judge by 32 & 33 Vict. c. 35, s. 2, only the charge contained in the second count of the indictment was referred to. On errors being assigned:—Held, that the sessions had jurisdiction over the offence, and so the county Judge had power to try it:—Held, also, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed it should have been; and that the Judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment:—Held, also, that the Judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment. By 32 & 33 Vict. c. 20, s. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada against his will, or to be sold or captured as a slave, is guilty of felony:—Held, that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count, therefore, was defective in not stating any intent. Upon this ground the judgment was reversed, and under C. S. U. C. c. 113, s. 17, the record was remitted to the Judge to pronounce the proper judgment, which would be upon the second count only:—Held, also, that the amendment was authorized, under 32 & 33 Vict. c. 29, ss. 1 and 71 (D.):—Held, also, that the court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error:—Held, also, no objection that the jurisdiction conferred by 32 & 33 Vict. c. 35, was not shewn, for the record and judgment were in the form prescribed by that Act:—Held, also, that the sheriff's notice was sufficient, as 32 & 33 Vict. c. 35, s. 2, requires it only to state the "nature of the charge" preferred against the prisoner. The prisoner having been sent to the penitentiary, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 U. C. R. 106.

Mutiny Act.]—Held, per J. Wilson, J., that the Imperial Mutiny Act does not override C. S. C. c. 100, but that the latter was passed in aid of it, and is therefore in force. Per A. Wilson, J., that the punishment by fine and imprisonment, imposed by the Provincial Act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the court of oyer and terminer, under the Provincial Act, has not been taken away by the Mutiny Act; and therefore that the defendant in this case could not complain, as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and that though a fine of 10s. had also been imposed, this was merely nominal, in compliance with the Provincial statute, and would not entitle him to be discharged, as the court had power to pass the proper judgment, if an improper one had been given. *Regina* v. *Sherman*, 17 C. P. 166.

Nuisance — *General Verdict — Second Trial.*]—On an indictment for nuisance in obstructing a highway, judgment had been arrested, and a second trial had, in order to take the opinion of the jury on a particular question which the court thought material. The jury upon the second trial found a general verdict of acquittal, without answering such question, which was submitted to them by the Judge. The indictment had not been removed by certiorari, and—Held, therefore, that this court could not interfere by staying the entry

of judgment until a new indictment could be preferred. Semble, that the jury had a right to find generally as they did. *Regina* v. *Spence*, 12 U. C. R. 519.

Proof of Judge's Commission — *Caption.*]—On error brought, it was—Held, that on the record of a conviction for murder the authority of the justice sufficiently appeared, without any statement whether a commission had issued or been dispensed with by order of the governor; for such courts are now held, not under commission, but by virtue of C. S. U. C. c. 11, as amended by 29 & 30 Vict. c. 40; and as the record sufficiently shewed the absence of any commission, it must be presumed that it seemed best to the governor not to issue one. Semble, that if the court had been held by a Queen's counsel or county court Judge, it might have been necessary to shew whether a commission had issued or not, as he would derive his authority from a different source in each of the two cases. Semble, also, that if the caption had been defective it might have been rejected altogether, under C. S. U. C. c. 99, s. 52. *Whelan* v. *Regina*, 28 U. C. R. 2.

Right of Reply.]—It was held in a prosecution for conspiracy that although evidence was called by only one of the defendants, it might have enured to the benefit of both, and that the right to a general reply was with the counsel for the Crown. *Regina* v. *Connolly*, 25 O. R. 151.

Several Prisoners —*No Evidence against One.*]—Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case. *Regina* v. *Hambly*, 16 U. C. R. 617.

Speedy Trials Act—*Bail Surrendering—Right to Elect to be Tried Summarily.*]—The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to gaol for trial, has the effect of remitting them to custody, and enables them to avail themselves of the Speedy Trials Act, 52 Vict. c. 47 (D.), and to appear before the county Judge and elect to be tried summarily; and where defendants had so elected, indictments subsequently laid against them at the assizes were held bad and quashed, even after plea pleaded where done through inadvertence, s. 143 of R. S. C. c. 174 not being in such case any bar. Two indictments were laid against defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents representing them to be agreements, whereas they were in fact promissory notes:—Held, that several offences were not set up in each count of the indictments; that it was no objection to the indictments that the notes might not be of value until delivered to defendants; and further, that under s. 78 of R. S. C. c. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities. Rex v. Danger, 1 Dears. & B. 307, 3 Jur. N. S. 1011; Regina v. Gordon, 23 Q. B. D. 354, considered. *Regina* v. *Burke*, 24 O. R. 64.

Speedy Trials Act—*Territorial Jurisdiction.*]—The Speedy Trials Act, 51 Vict. c. 47 (D.), is not a statute conferring jurisdiction but is an exercise of the power of Parliament to regulate criminal procedure. By this Act jurisdiction is given "to any Judge of a county court" to try certain criminal offences:—Held, that the expression "any Judge of a county court," in such Act, means any Judge having, by force of the Provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a county court Judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature so to do. *In re County Courts of British Columbia*, 21 S. C. R. 446.

See also SPECIFIC OFFENCES, sub-title IX.—*post* — INTOXICATING LIQUORS — JUSTICE OF THE PEACE.

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7. *Venue.*

Acts in Two Counties.]—The attempt to procure a woman to make a false affidavit, consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting, but not proved, to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried at York. Semble, per Draper, C.J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there. *Regina* v. *Clement*, 16 U. C. R. 297.

Change of Venue.]—Held, that 32 & 33 Vict. c. 29, s. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure. *Regina* v. *McLeod*, 5 P. R. 181.

An order made pursuant to 32 & 33 Vict. c. 29, s. 11 (D.), directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order. *In re Sproule*, 12 S. C. R. 140.

Upon a motion made by the Crown under s. 651 of the Criminal Code to change the venue from the town of Napanee to some other place, for the trial of three persons charged with the offence of breaking into a bank in the town of Napanee and stealing money therefrom, upon the ground that the sympathy felt for two of the accused in the town and in the county of Lennox and Addington, of which it is the county town, was such that a fair trial could not be had:—Held, that the rule that all causes should be tried in the county where the crime is supposed to have been committed ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county; and mere apprehension, belief, and opinion are not to be relied on as evidence. And, under the circumstances appearing upon affidavits filed, the motion was refused. *Regina* v. *Ponton*, 18 P. R. 210.

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

Great Lakes.]—The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and any magistrate of this Province has authority to inquire into offences committed on said lakes although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.

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8. Miscellaneous Cases.

Autrefois Acquit.]—The prisoner being indicted under C. S. U. C. c. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit:—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence irrespective of national status, which would convict a foreigner, being insufficient as against a subject; and the prisoner therefore was not in legal peril on the first indictment. *Regina* v. *Magrath*, 26 U. C. R. 385.

Enforcing Payment of Fines.]—The Crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *Desjardins Canal Co.*, 29 U. C. R. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the Crown not being bound by 43 Geo. III. c. 1. *Ib.*

The court or a Judge may at any time interfere, as exercising the powers of the court of exchequer, to restrain undue haste or haste in the execution of such writ, although what is complained of may be strictly authorized. *Ib.*

Expenses of Administration of Criminal Justice.]—The liability of the Crown for payment of expenses connected with the administration of criminal justice in the Province out of the consolidated revenue fund is restricted, under R. S. O. 1877 c. 86, s. 1, to such expenses as are mentioned in the schedule to the Act; and the county, under R. S. O. 1877 c. 85, is required to pay all other proper expenses connected therewith. *Re Fenton and the Board of Audit of the County of York*, 31 C. P. 31.

Following Decisions.]—As the court of appeal for criminal cases is now constituted the decision of the Judges of one court is not binding on Judges sitting as another court of co-ordinate jurisdiction. *Regina* v. *Hammond*, 29 O. R. 211.

Provincial Criminal Law.] — *Special Case.*]—A magistrate has no power to state a case under s. 900 of the Criminal Code, for an alleged offence against an Ontario statute, not involving the constitutionality of the statute, the procedure by way of appeal to the sessions provided for by Ontario legislation applying in such a case. *Regina ex rel. Brown* v. *Robert Simpson Company (Limited)*, 28 O. R. 231.

Substituting New Charge.] — The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder, and they, not finding sufficient evidence to warrant them in committing for trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally. By the Criminal Code, s. 108, it is matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person. The return to a writ of habeas corpus shewed the detention of the defendant under a warrant of commitment based upon the above conviction.—Held, that the detention was for an offence unknown to the law; and, although the evidence and the finding shewed an offence against s. 108, it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid; and the prisoner was therefore entitled to be discharged. *Regina* v. *Mines*, 25 O. R. 577.

Uncertainty as to Charge — *Affidavits Questioning Magistrate's Conclusions.*] — It appeared, on an application for a habeas corpus, that the information laid before a police magistrate and warrant to apprehend were for an assaulting and beating, but it was disputed whether upon the examination and trial this was all the charge made, or whether he was not then charged with an aggravated assault; and whether, when he pleaded guilty, he did so to the former or the latter charge; numerous contradictory affidavits were filed. Four several warrants of commitment were in the gaoler's hands, upon one at least of which the prisoner was retained in custody. They were all for the same offence, one having been from time to time substituted for the other. Quere, whether, or how far or for what purpose, affidavits can be received against a conviction or warrant of commitment valid on the face of it. A Judge cannot inquire into the conclusions at which the magistrate arrived if he had jurisdiction over the offence charged and issued a proper warrant upon that

charge, but may inquire into what that charge was, or whether there was a charge at all. *In re McKinnon*, 2 C. L. J. 324.

Writ of Exigi Facias.]—A writ of exigi facias will be awarded by the court of Queen's bench upon the application of a prosecutor without its being applied for by the Attorney-General. *Rex* v. *Elrod*, Tay. 120.

IX. Specific Offences.

1. *Abortion.*

Evidence.] — The prisoner was indicted for unlawfully using an instrument on J. L., with intent to procure a miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination denied that she had told H. A., H. R., and M. T. that before the prisoner had operated on her she had been operated on by a doctor for the purpose of procuring a miscarriage. H. A., H. R., and M. T. were called for the defence, and swore that J. L. had so told them. The doctor was then called by the Crown, and he swore that he had not operated on J. L.:—Held, that the evidence of the doctor was properly admitted; but in any event the prisoner's case was not so affected by the evidence as to warrant a reversal of the conviction, even if the evidence were not strictly admissible. *Regina* v. *Andrews*, 12 O. R. 184.

Intent.]—The prisoner, with intent to procure abortion, supplied a pregnant woman with two bottles full of pills, with directions to take twenty-five at a dose, and that they would have that effect. The pills contained oil of savin, an article used to procure abortion, and it is said that a bottle full would contain about four grains, but the evidence was not very clear as to this. It was in evidence that such a quantity would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be most dangerous to give to a woman in that condition:—Held, under the circumstances, that there was a supplying of a noxious thing within the meaning of the Act, 32 & 33 Vict. c. 20, s. 60 (D.), with the intent to procure an abortion. *Regina* v. *Stitt*, 30 C. P. 30.

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2. *Arson.*

Attempt to Commit Arson.]—On an indictment for attempt to commit arson, the evidence shewed that a person, under the direction of the prisoner, after so arranging a blanket saturated with oil, that if the flame were communicated to it the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:—Held, that the prisoner was properly convicted under 32 & 33 Vict. c. 22, s. 12. *Regina* v. *Goodman*, 22 C. P. 338.

Building.]—The remains of a wooden dwelling house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floors so as to render it untenantable, and which was being repaired:—Held, not a building within s. 7 of 32 & 33 Vict. c. 22, so as to be the subject of arson. *Regina* v. *Labadie*, 32 U. C. R. 429.

Carpenter.]—A building used by a carpenter, who was putting up a house near it, as a place of deposit for his tools and window frames which he had made, but in which no work was carried on by him:—Held, not "a building used in carrying on the trade of a carpenter," within 4 & 5 Vict. c. 26, s. 3. *Regina* v. *Smith*, 14 U. C. R. 546.

Intent.]—Upon an indictment for arson, the prisoner was proved to have requested or procured one S. to set fire to the house, telling S. that he had his house insured, and asked if he would not set fire to it. He also stated that "his insurance would run out next day, and that he, S., must set the house on fire that night." The evidence also shewed that a sum had been awarded the prisoner for his insurance, in payment of which he was seen to have a bill of exchange on London in his possession:—Held, that under C. S. C. c. 93, s. 4, it is necessary, where the setting fire is to a man's own house, to prove an intent to injure and defraud, although the words "with intent thereby to injure or defraud any person," introduced into the Imperial Act, are omitted in ours. The indictment alleged that the prisoner did incite, &c., one F. S., the said felony in form aforesaid to do and commit, with intent then and there to injure and defraud a certain insurance company called, &c.:—Held, necessary to prove that the premises were insured. *Regina* v. *Bryans*, 12 C. P. 161.

In an indictment for arson, it is unnecessary to charge an intent, as our statute (differing from the English Act) does not make the intent part of the crime. This omission, however, if a defect, would not be ground for a new trial, under C. S. U. C. c. 113. *Regina* v. *Greenwood*, 23 U. C. R. 250.

But although the indictment is sufficient without alleging any intent, an intent to injure or defraud must be shewn on the trial. *Regina* v. *Cronin*, 36 U. C. R. 342.

The prisoner being indicted for unlawfully and maliciously attempting to burn his own house by setting fire to a bed in it, it appeared in evidence that the dead body of a woman was in the bed at the time; that her death had been caused by violence; that she had been recently delivered of a child, whose body had been found in the kitchen; and that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shewn that the prisoner had been indicted for the murder of this woman and acquitted, and the record of his acquittal was put in. This evidence was objected to as tending to prejudice the prisoner's case; but, held, admissible, for the house being the prisoner's, it was necessary to shew that his attempt to set fire to it was unlawful and malicious, and these facts might satisfy the jury that the murder being committed by another, the prisoner's act was intended to conceal it. *Regina* v. *Greenwood*, 23 U. C. R. 250.

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3. *Assault.*

Aggravated Assault.]—C. S. C. c. 91, probably applies only to common assaults,

&c. A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, though when the party is before the magistrate, the charge of aggravated assault may be made in writing and followed by a conviction therefor. *In re McKinnon*, 2 C. L. J. 324.

Arresting Offender.]—Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. *Forrester* v. *Clarke*, 3 U. C. R. 151.

Assault on Constable—*Evidence.*]—An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act, is an assault on a peace officer in the due execution of his duty, and indictable under R. S. C. c. 162, s. 34. On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf. *MacFarlane* v. *The Queen*, 16 S. C. R. 326.

See Regina v. *Triganzie*, 15 O. R. 294.

Assault with Intent to Commit Felony.]—An assault with intent to commit a felony is an attempt to commit such felony within the meaning of s. 183 of R. S. C. c. 174. On an indictment for rape a conviction for an assault with intent to commit rape is valid. On such conviction the prisoner was held properly sentenced to imprisonment under R. S. C. c. 162, s. 38. *John* v. *The Queen*, 15 S. C. R. 384.

Assault with Intent.] — The prisoner, who had been committed for extradition, was charged with assault with intent to commit murder, in that he had opened a railway switch, with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them:—Held, that this was not an "assault" within the statute. *In re Lewis*, 6 P. R. 236.

Attempt to Have Connection.]—On an indictment for attempting to have connection with a girl under ten, consent is immaterial: but in such a case there can be no conviction for assault if there was consent. *Regina* v. *Connolly*, 26 U. C. R. 317.

Bar of Civil Remedy — *Alteration of Charge.*]—Justices of the peace, before whom a charge of "shooting and wounding with intent to do grievous bodily harm" came on for preliminary hearing, changed it of their own motion to one of common assault and convicted and fined the accused. The information was laid by a peace officer, and the person aggrieved attended the hearing pursuant to subpœna and gave evidence, and did not object when the charge was changed:—Held, that the justices had no right to alter the charge to one of common assault, and that their certificate of conviction and payment of the fine was a nullity and no bar under s. 866 of the Code to an action by the person aggrieved to recover damages. *Miller* v. *Lea*, 25 A. R. 428.

Bar of Civil Remedy.] — Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the justice who tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded, shall be released from all further proceedings, civil or criminal, for the same cause, are intra vires the Dominion Parliament. *Flick* v. *Brisbin*, 26 O. R. 423.

Bar of Civil Remedy.]—Where a charge under s. 262 of the Criminal Code, 1892, of assault causing actual bodily harm is brought under Part 55 of the Code, by the election of the defendant under s. 786 to be tried summarily, a conviction releases, under s. 799, from further criminal proceedings, but does not bar civil proceedings. Flick v. Brisbin, 26 O. R. 423, distinguished. *Nevills* v. *Ballard*, 28 O. R. 588.

Constable Arresting Under Warrant Valid on its Face.]—A warrant of commitment issued by two justices of the peace, for nonpayment of a fine and costs imposed on J. D. who had been convicted of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common gaol of the county, to be kept there for two months, unless the fine and costs imposed, including the costs of conveying to the gaol, should be sooner paid: — Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, and that the defendant was properly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment may have been erroneous in directing imprisonment for the nonpayment of the fine and costs, including costs of conveying to gaol, as not authorized by the said Act. *Regina* v. *King*, 18 O. R. 566.

Defendant's Evidence.] — On an indictment for assault and battery, occasioning actual bodily harm:—Held, that the defendant is not a competent witness on his own behalf under 43 Vict. c. 37 (D.). *Regina* v. *Richardson*, 46 U. C. R. 375.

Detention.]—The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will:"—Held, that the conviction was bad in stating the detention as a conclusion, and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina* v. *McElligott*, 3 O. R. 535.

Evidence of Subsequent Conduct.]—Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her subsequent to the assault: — Held, that the evidence was admissible as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged. By the majority of the court:—The evidence was properly ad-

missible as evidence in chief. *Regina* v. *Chute*, 46 U. C. R. 555.

Firing Pistol.]—To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit, is an assault. It was held, here, that there was sufficient evidence of the prisoner having done this, and a conviction for assault was upheld. *Regina* v. *Cronan*, 24 C. P. 106.

Indictment for Manslaughter.]—Under C. S. C. c. 99, s. 66, there can be no conviction for an assault unless the indictment charges an assault in terms, or a felony necessarily including it, which manslaughter is not. Where, therefore, the indictment was for manslaughter, in the form allowed by that Act, charging that defendants "did feloniously kill and slay" one D.:—Held, that a conviction for assault could not be sustained. *Regina* v. *Dingman*, 22 U. C. R. 283.

Indictment for Murder.]—Held, following Regina v. Bird, 2 Den. C. C. 94, and Regina v. Phelps, 2 Moo. C. C. 240, that on an indictment for murder the prisoner cannot be convicted of an assault under 32 & 33 Vict. c. 29, s. 51. *Regina* v. *Gance*, 22 C. P. 185.

On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. c. 29, s. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault. *Regina* v. *Smith*, 34 U. C. R. 552.

But in this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death. *Ib.*

Indictment for Shooting with Intent.]—Upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of common assault. *Regina* v. *Cronan*, 24 C. P. 106.

Insult.]—The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one S., gone to the complainant's house at the hour of about ten o'clock p.m., and S. had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning:—Held, that there was no evidence of an assault, and the conviction must be quashed. *Regina* v. *Langford*, 15 O. R. 52.

Insulting Language and Menaces.]—Sci. fa. upon a recognizance to keep the peace and be of good behaviour towards Her Majesty and all her liege subjects, and especially towards H. M., charging an assault and breach of the peace. For the Crown a judgment of the court of quarter sessions was proved, affirming a conviction of defendant before magistrates on a charge of assaulting H. M. "by using insulting and abusive language to him in his own office, and on the public street, and by using his fist in a threatening and menacing manner to the face and head of said H. M.:"—Held, sufficient proof of a breach of the peace. Held, also, that defendant was properly convicted, for the offence charged amounted to an assault. *Regina* v. *Harmer*, 11 U. C. R. 555.

Quarter Sessions.]—The court of quarter sessions has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in case of default. *Owens* v. *Taylor*, 19 C. P. 49.

Riot and Assault.]—Defendant was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged:—Held, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed, although the defendant might have been guilty of riot or joining in an unlawful assembly. *Regina* v. *Kelly*, 6 C. P. 372.

Summary Conviction.]—On motion to quash a conviction by two justices of the county of Norfolk for an assault:—Held, 1, that stating the offence to have been committed at defendant's place in the township of Townsend was sufficient, for C. S. U. C. c. 3, s. 1, s.-s. 37, shews that township to be within the county; 2, that it was unnecessary to shew on the face of the conviction that complainant prayed the magistrates to proceed summarily, for the form allowed by C. S. C. c. 103, s. 50, was followed, and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit; 3, that it was clearly no objection that the assault was not alleged to be unlawful. *Regina* v. *Shaw*, 23 U. C. R. 616.

It had been previously held that the prayer for summary jurisdiction should appear on the face of the conviction, even if not necessary on the face of the information. *In re Switzer and McKee*, 9 L. J. 266.

A conviction for a common assault adjudged payment of a fine and costs, and in default imprisonment:—Held, good; and that it was not necessary to order that a distress warrant to compel payment be issued before imprisonment. *Regina* v. *Smith*, 46 U. C. R. 442.

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4. *Bigamy.*

Constitutional Law—*Second Marriage out of Canada—Evidence.*]—Held, that R. S. C. c. 161, s. 4, which enacts that every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not ultra vires the Dominion legislature either as being repugnant to Imperial legislation or on any other grounds. *Regina* v. *Brierly*, 14 O. R. 525.

In order to prove the second marriage, which took place in Michigan, the evidence of the officiating minister was tendered, who shewed that during the last twenty-five years he had solemnized hundreds of marriages, that he was a clergyman of the Methodist church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the secretary of state re-

garding these laws, and that this so called second marriage was solemnized by him according to the marriage laws of that State:—Held, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed. *Ib.*

In the case of a second marriage, it is not essential to prove the foreign law where British subjects are concerned, as in this case. Regina v. Griffin, 14 Cox C. C. 308, followed. *Ib.*

Conviction for bigamy quashed where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left there with the intent to commit the offence. The provisions of s. 275 of the Criminal Code, making such a marriage an offence, are ultra vires the Parliament of Canada. Macleod v. Attorney-General for New South Wales, [1891] A. C. 455, followed. *Regina* v. *Plowman*, 25 O. R. 656.

Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are intra vires of the Parliament of Canada. *In re Bigamy Sections of Criminal Code*, 27 S. C. R. 461.

First Wife's Absence.] — Where the prisoner relies upon the first wife's lengthened absence, and his ignorance of her being alive, he must shew inquiries made and that he had reason to believe her dead, more especially when he has deserted her; and this, notwithstanding that the first wife may have married again. *Regina* v. *Smith*, 14 U. C. R. 565.

Proof of First Marriage.]—On a trial for bigamy, in proof of an alleged prior marriage, a deed was produced executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying certain lands and premises to two trustees, in trust to receive and pay over the rents and profits to such wife and child; but with a power of revocation to the prisoner. B., one of the trustees, proved that at the time of the execution of the deed the prisoner informed him that he had quarrelled with his present wife, and had a law suit with her; that the place had been bought with the first wife's money, and he wished it to go to her; and that he requested B. to act as a trustee and to receive and pay over the rents and profits, but B. never paid anything over, nor had he ever written to or heard from such alleged wife:—Held, not sufficient evidence to prove the alleged prior marriage. *Regina* v. *Duff*, 20 C. P. 255.

Proof of First Marriage.] — Upon an indictment for bigamy the first marriage must be strictly proved as a marriage de jure. Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted. *Regina* v. *Ray*, 20 O. R. 212.

Proof of Foreign Marriage.] — The witness called to prove the first marriage swore that it was solemnized by a justice of the peace in the State of New York, who had power to marry, but this witness was not a lawyer nor inhabitant of the United States, and did not state how the authority of the justice was derived: — Held, insufficient. *Regina* v. *Smith*, 14 U. C. R. 565.

Second Marriage out of Canada.] — The prisoner was convicted of bigamy under 32 & 33 Vict. c. 20, s. 58, which enacts that whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony * * provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada, by any other than a subject of Her Majesty, resident in Canada, and leaving the same with the intent to commit the offence. The first marriage was contracted in Toronto, the second in Detroit, U.S. The Judge at the trial directed the jury that if the prisoner was married to his first wife in Toronto, and to the second in Detroit, they should find him guilty:—Held, a misdirection, and that the jury should have been told in addition that before they found him guilty they ought to be satisfied of his being at the time of his second marriage a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence; and, held, that it was incumbent on the Crown to prove these matters. Quære, whether the trial should or should not have been declared a nullity. *Regina* v. *Pierce*, 13 O. R. 226.

Solemnization of the Marriage.]—It is not necessary that marriage shall be solemnized in a church. Where banns have been published, and no dissent then expressed by parents or guardians, the husband being under age is no objection even by the English Marriage Act; but, quære, whether that Act is in force here. *Regina* v. *Secker*, 14 U. C. R. 604.

Wife's Evidence.]—The first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid. *Regina* v. *Madden*, 14 U. C. R. 588.

The evidence of the first wife is not admissible, nor is that of the second until the first marriage is proved. *Regina* v. *Tubbee*, 1 P. R. 98.

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5. *Bribery.*

Conspiracy to Bribe Members of Legislature.]—On demurrer to an indictment (set out in the report), for conspiracy to bring about a change in the government of the Province of Ontario, by bribing members of the Legislature to vote against the government: — Held, 1. That an indictable offence was disclosed; that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the Legislature by R. S. O. 1877 c. 12, ss. 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the Legislature and in another aspect a misdemeanour. 3. That the Legislative assembly has no criminal jurisdiction, and hence no jurisdiction over the matter, considered as a criminal offence. 4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged. *Regina* v. *Bunting*, 7 O. R. 524.

Giver and Receiver.]—The giver of a bribe as well as the receiver may be indicted for bribery. *North Victoria Election* (D.), *Cameron* v. *Maclennan*, 1 H. E. C. 584.

Municipal Election.]—Where a statute relating to municipal elections made no provisions to repress bribery:—Held, that it would no doubt be an indictable offence. *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140.

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6. *Burglary.*

Attempt.]—The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to Cooksville, and examined J. G.'s store with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself:—Held, that as those actually engaged were guilty of the attempt to steal, the prisoner, under 27 & 28 Vict. c. 19, s. 9, was properly convicted. *Regina* v. *Esmonde*, 26 U. C. R. 152.

The prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night, together with one C., but C. was kept away by his father, who had discovered their design. The two were seen about twelve that night to come within about thirteen feet of the house, towards a picket fence in front, in which there was a gate; but without entering this gate they went, as was supposed, to the rear of the house, and were not seen afterwards. Afterwards, about two o'clock, some persons came to the front door and turned the knob, but went off on being alarmed, and were not identified:—Held, that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution; and that a conviction, therefore, could not be sustained. *Regina* v. *McCann*, 28 U. C. R. 514.

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7. *Buying Offices.*

Sheriff.]—The statute 5 & 6 Edw. VI. c. 16, against buying and selling of offices, is in force in this country under 40 Geo. III. c. 1, as part of the criminal law of England. Any act done in contravention of that statute is indictable, though not specially made so:—Quære, whether it is also introduced by 32 Geo. III. c. 1, which adopts the law of England "in all matters of controversy relative to property and civil rights." 49 Geo. III. c. 126, clearly extends 5 & 6 Edw. VI. to Upper Canada, and to the office of sheriff. Foott v. Bullock, 4 U. C. R. 480, approved. *Regina* v. *Mercer*, 17 U. C. R. 602; *Regina* v. *Moodie*, 20 U. C. R. 389.

The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500 and an annuity of £300 a year if he would resign; R. accordingly placed his resignation in defendant's hands. The £500 was paid and certain lands conveyed to secure the annuity; and it was further agreed that in the event of the resignation being returned, and R. continuing to hold the office, the money should be repaid and the land reconveyed; but R. did not undertake in any way to assist in procuring the appointment for defendant. The defendant having been appointed by the government in ignorance of this agreement, an information was filed against him and sci. fa. brought to cancel his patent:—Held, an illegal transaction within 5 & 6 Edw. VI., and that an information might be sustained under that Act without reference to 49 Geo. III., which clearly prohibited and made it a misdemeanour. *Ib.*

Semble, that the agreement would also have been an offence at common law. The ignorance of the government, which was averred in the information, as to the illegal agreement, was immaterial. *Ib.*

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8. *Coin (Offences Relating to.)*

Foreign Coin.]—Section 18 of C. S. C. c. 99, makes it an offence to have possession of any coin counterfeited to resemble, or any dies for the purpose of imitating, any foreign gold or silver coin described in the 19th section of the Act. The gold or silver coin there described are any coin of coarse gold or silver resembling any coin made by the authority of any foreign state and then actually current there, though not current by law in this Province. An indictment under this section alleged, that there was a certain silver coin known as a half-dollar struck by and current in the United States, though not current by law in this Province, and that the defendants had in their possession counterfeited coin, each piece resembling a piece of the current coin of the United States of the value of fifty cents, and called therein half-a-dollar, and also dies used to counterfeit the current silver coin of the United States called half-a-dollar, &c.:—Held, on demurrer, that the indictment was bad, for not alleging that the counterfeit coin which the defendants had, resembled some gold or silver coin of the United States; but that the allegation as to the dies was sufficient, without alleging that the silver coin was not current in this Province. *Regina* v. *Tierney*, 29 U. C. R. 181.

Genuine Notes—*Believed to be Counterfeit.*]—A person indicted for offering to purchase counterfeit tokens of value cannot be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit, and offered to purchase under such belief. *Regina* v. *Attwood*, 20 O. R. 574.

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9. *Concealment of Birth.*

Temporary Concealment.]—On an indictment for concealing the birth of a child, it appeared that the prisoner, who lived alone, had placed the dead body of the child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child she denied it, saying she was suffering from cramps, and it was only after the doctor who was called in had informed her that he knew that she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until so pointed out the body could not be seen by any one in the room:—Held, that the evidence, more fully set out in the report, was sufficient to go to a jury; and the county court Judge, before whom the prisoner was tried by her con-

sent without a jury, having found her guilty, the court refused to interfere. *Regina* v. *Piché*, 30 C. P. 409.

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10. *Conspiracy.*

Defrauding Municipality.]—Indictment charging that defendants H., C., and D. were township councillors of East Nissouri, and F. treasurer; and that defendants intending to defraud the council of £300 of the money of said council, falsely, fraudulently, and unlawfully did combine and conspire, unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer as aforesaid:—Held, bad, on writ of error. *Horseman* v. *Regina*, 16 U. C. R. 543.

Defrauding Railway.]—It is a crime under s. 384 of the Code to conspire by any fraudulent means to defraud any person, and so a conspiracy to permit persons to travel free on a railway, as alleged in these cases, would be a conspiracy against the railway company. *Regina* v. *Defries*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Indictment of One of Two Conspirators.]—A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud. One of two conspirators can be tried on an indictment against him alone, charging him with conspiring with another to defraud, the other conspirator being known in the country. *Regina* v. *Frawley*, 25 O. R. 431.

Overt Acts—*Acts of Co-conspirators—Secondary Evidence — Examination in Civil Action—Present to Official—Fictitious Tenders.*]—L. C. & Co., a firm of contractors in Quebec, tendered to harbour commissioners for certain work to be done with the approval of the government, sending in three tenders, one in their own name, and two in the names of others, with a common mistake as to price of a portion of the work in all three. The defendant McG., whose brother had been admitted to the firm as a partner without the payment of any capital, was both a member of Parliament and of the harbour commission. The three tenders with others were received and opened by the commissioners, the defendant McG. being present, and were then forwarded to the Government at Ottawa, Ontario. The defendant McG. went to Ottawa and succeeded in obtaining from the government engineer particulars of the calculations and results of all the tenders sent in, of which he advised his brother by letters. When the mistake in the price was notified by the government engineer to the three tenderers, one tender was withdrawn, one was varied, so as to make it higher than others, and the firm's was allowed to remain as it was with the manifest error, and so became the lowest tender, and was thus accepted. One government engineer was given a situation on the harbour commission, and the chief engineer of the Public Works Department received a valuable present from the firm. As soon as the contract was executed, promissory notes to an amount of many thousand dollars were signed by the firm and given to the defendant McG., and he also received money from his brother, whose only means of paying were his profits as a partner. On an indictment for conspiracy against McG. and C., a member of the firm:—Held, that there is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individuals implicated are admissible in evidence, and that the letters written by the defendant McG. at Ottawa were overt acts there in furtherance of the common design, and admissible in evidence against all privy to the conspiracy for which they might be prosecuted in this Province, and as the defendant C. was, by his own admission, privy to the large payment after it was made, it was a matter for the jury to say whether he was not throughout a participator in the proceedings: Mulcahy v. The Queen, Ir. R. 1 C. L. 12, followed. (2) The transactions, conversations, and written communications between R. H. McG. (the partner) and his brother, the defendant McG., and the other members of the firm, were receivable in evidence in the circumstances of this case. If at first not available against both defendants they became so when the proof had so far advanced and cumulated as to indicate the existence of a common design. (3) Evidence as to the manner in which other contracts were obtained by the firm previous to the date mentioned in the indictment was properly received as introductory to the transaction in question. (4) Letters written by a member of the firm in the name of an employee, and purporting to be signed by him, were also properly in evidence. (5) The report of the government engineer recommending the acceptance of the firm's tender, was also properly in evidence as the object of all that was done was to obtain a report in favour of the firm. (6) Entries in the books of the firm were evidence against the defendant C., and statements prepared therefrom by an accountant were good secondary evidence in the absence of the books withheld by the defendants. Quære.—How far they were evidence against the defendant McG., who was not a member of the firm. (7) The examination of the defendant C. in a civil action arising out of these matters, he not having claimed privilege therein, could be used against him on this trial. (8) The evidence of an expert in calculating results on data supplied and proper for an engineer to work upon, was admissible. (9) Evidence of a present being made to an engineer in charge of the work with the knowledge of one of the defendants was proper to be considered by the jury as casting light on the relations between the firm and that officer. (10) The use of fictitious tenders was a deceit, and if done to evade the results of fair competition for the contracts it was "unlawful." *Regina* v. *Connolly*, 25 O. R. 151.

Proof of Acting in Concert.]—Upon an indictment for conspiracy to procure by fraud the return of one F. as a member of the Legislative Assembly:—Held, that it was clearly unnecessary to prove that all the defendants, or any two of them, actually met together and concerted the proceeding carried out; it was sufficient if the jury was satisfied from their conduct and from all the circumstances, that they were acting in concert. *Regina* v. *Fellowes*, 19 U. C. R. 48.

Trade-Union.]—Held, that the defendants, members of a trade-union, in conspiring

to injure a non-unionist workman, B., by depriving him of his employment, were guilty of an indictable misdemeanour, and that what they conspired to do was not for the purposes of their trade combination, within the meaning of R. S. C. c. 173, s. 13, s.-s. 2; and that upon the evidence the conviction of the defendants, for unlawfully conspiring together to injure B. in his trade, and to prevent him from carrying it on, was right. Semble, also, that the indictment in this case was sufficient. *Regina* v. *Gibson*, 16 O. R. 704.

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11. *Desertion. (Assisting Sailors or Soldiers to Desert.)*

Indictment.]—The Naval Discipline Act 29 & 30 Vict. c. 109, s. 25, authorizes a summary conviction before magistrates for this offence, but the 101st section expressly preserves the power of any court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the Act punishable by common or statute law:—Held, therefore, that defendant could be indicted under C. S. U. C. c. 100, s. 2. *Regina* v. *Patterson*, 27 U. C. R. 142.

Mutiny Act.]—The Imperial Mutiny Act does not override C. S. C. c. 100, but the latter was passed in aid of it, and is therefore in force. *Regina* v. *Sherman*, 17 C. P. 166.

Held, that the punishment by fine and imprisonment imposed by the Provincial Act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the court of oyer and terminer, under the Provincial Act, has not been taken away by the Mutiny Act, and therefore that the defendant in this case could not complain, as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and though a fine of 20 s. had also been imposed, this was merely nominal, in compliance with the Provincial statute, and would not entitle him to be discharged, as the court had power to pass the proper judgment if an improper one had been given. *Ib.*

Persuading Soldier to Desert.]—Held, that a warrant of commitment in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one H., a soldier in her Majesty's service, to desert, was bad, for it was impossible to say upon reading the warrant how many offences he had committed, or how the punishment was awarded. *In re McGinnes*, 1 C. L. J. 15.

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12. *Elections (Offences Connected With.)*

Misdemeanour — *Unlawful Voting at Elections.*]—A person who does an act which a statute on public grounds has prohibited generally is liable to an indictment for misdemeanour; and it is not necessary that the statute should prohibit such an act in express language. The defendant's name appeared on the voters' list used at the election of a member of the House of Commons, but before such election he lost his right to vote, but voted at the election without having at the time he so voted the qualifications prescribed by law:—Held, that he was guilty of a criminal offence, and was rightly indicted as for a misdemeanour. *Regina* v. *Sturdy*, 23 C. L. J. 87.

Omitting Names from List.]—Demurrer to an indictment. The first count charged that the defendant, after having made the alphabetical list of persons entitled to vote, &c., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace, and that in making out the certified list so delivered to the clerk of the peace of persons entitled to vote, &c., the defendant did feloniously omit from the said list the names, &c., which names or any or either of them ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first:—Held, that the omission charged having been from the certified list delivered to the clerk of the peace or "duplicate original," the words "said list," referring to the words "the certified list so delivered to the clerk of the peace," were a sufficient description to identify the list intended. *Regina* v. *Switzer*, 14 C. P. 470.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, &c., were persons entitled to vote, &c.:—Held, that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote. *Ib.*

As to the objection that it was not alleged that the list was made up from the last revised assessment roll:—Held, that by the indictment it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list. *Ib.*

Held, further, that both counts in the indictment were bad, as they should have shewn explicitly how and in what respects these names should or should not have been on the list, by setting out that they were upon or were not upon the assessment roll (as the case might be) or at any rate were or were not upon the alphabetical list. *Ib.*

Personation.] — Falsely personating a voter at a municipal election is not an indictable offence. Remarks as to the form of indictment in such a case. *Regina* v. *Hogg*, 25 U. C. R. 66.

Refusal to Administer Oath.]—An indictment against a deputy returning officer at an election, for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters, was held bad on demurrer, for omitting the name of the agent. *Regina* v. *Bennett*, 21 C. P. 235.

In the same indictment another count charged defendant with entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath prescribed by law:—Held, not an indictable offence, being a creature of the statute, which also prescribed the penalty and the mode of enforcing it. Remarks upon the otherwise objectionable character of the indictment, in setting out in the inducement a copy of the poll book containing a number of names, while none were mentioned in the indictment itself, a reference being merely made to the "said list." *Ib.*

Riots at Elections.]—Under the statute for repressing riots at elections, no power is given to magistrates to convict summarily: the offenders must be tried by a jury. *Ferguson* v. *Adams*, 5 U. C. R. 194.

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13. *Embezzlement and Frauds by Trustees, Agents, and Others.*

Agent.]—The prisoner was convicted upon an indictment under 4 & 5 Vict. c. 25, s. 41, charging that one W. entrusted to him for a special purpose, viz., for the purpose of exhibiting to B. and obtaining another note made by prisoner to and indorsed by B.—the said prisoner then being the agent of W.,—a promissory note made by prisoner payable to and indorsed by B., being a valuable security, without any authority to sell, transfer, &c., or convert the same to his own use; and that he unlawfully kept and converted it to his own use. It appeared that the prisoner gave an indorsed note, payable at Kingston, in payment of goods purchased, with an agreement that in case the payee should be unable to get it discounted at Kingston, he would procure for him a new note, with the same indorsers, payable at Belleville. The payee being unable to get it discounted at Kingston, sent the note to W. at Belleville, with instructions to get a new note from the prisoner as agreed on; W. entrusted the prisoner with the note, on his promise that he would take it to the indorsers, and either return it or bring back a new note at once. The prisoner, however, kept the note, and neither returned it nor procured another, though often requested to do so both by the payee and W.:—Held, that the prisoner was not an agent within the meaning of the statute, and that the conviction must be quashed. *Regina* v. *Hynes*, 13 U. C. R. 194.

Semble, also, that it could not be said that the prisoner was intrusted with the note without any authority to transfer or pledge the same; or that his retaining it was proof of converting it to his own use. *Ib.*

The indictment charged that one M. entrusted to defendant, then being an agent, a promissory note of one R., for $200, for the special purpose of receiving £6 thereon from A., and that defendant, contrary to the purpose for which said note was entrusted to him, did unlawfully negotiate and convert the same to his own use. It appeared that R. had made the note for A.'s accommodation, and A. being indebted to one C. in £6, it was agreed that he should deposit this note with M. to secure the payment. Defendant, by C.'s order, got the note from M. on condition that he should give it up to A. on the £6 being paid. A. afterwards paid this sum to defendant, but defendant kept the note and sued R. upon it, alleging that he was entitled to do so by some arrangement with R., which the jury found was not the case, and they convicted defendant:—Held, that the conviction could not be sustained, for defendant was not an agent within the meaning of the Act, which refers only to general agents of the descriptions specified; and—semble, that upon the evidence he was not M.'s agent, or guilty of any breach of trust towards him. *Regina* v. *Armstrong*, 20 U. C. R. 245.

Clerk.]—The prisoner being a clerk in the Bank of Upper Canada, was placed in an office apart from the bank, and entrusted with funds for the purpose of paying persons having claims upon the government, which payments were made upon the cheque of the receiver-general, whose office was in the same building. While so employed a deficiency was discovered in his accounts, which he at first ascribed to a robbery, but he afterwards confessed that he had lent the moneys entrusted to him to various friends. It also appeared that on a certain day he had received a cheque from the receiver-general for £1439 15s. for coupons on government debentures held by the bank, and had credited himself in account with that sum as if paid out by him on the cheque, making no entry of the coupons, thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the cheque in cash, when in fact he had paid nothing. The indictment contained two counts, the first charging that on, &c., the prisoner, being a clerk, then employed in that capacity by the bank, did then and there in virtue thereof receive a certain sum, to wit, £1439 15s., for and on account of the said bank, and the said money feloniously did embezzle. The second, that he as such clerk received a certain valuable security, to wit, an order for the payment of money, to wit, £1439 15s. for and on account of the said bank, and the said valuable security feloniously did embezzle. On this indictment he was convicted of embezzlement:—Held, that the prisoner had been guilty of embezzlement within 19 Vict. c. 121, s. 40; and the conviction was affirmed. *Regina* v. *Cummings*, 16 U. C. R. 15. Reversed on appeal, 4 L. J. 182.

Held, also, that the indictment was sufficient in form, the omission of the conclusion, contra formam statuti, being no objection. *Ib.*

Municipal Treasurer — *Civil Proceedings.*] — On an indictment against a treasurer of a county for embezzling £9 14s. 10d., received for taxes, it appeared that defendant received the money in October, 1858, and resigned in February, 1859, when his books were taken from him by the warden, although the usual time for making up his account with the county, 31st March, had not arrived. This sum was not entered in his books as received, nor was there any entry or other moneys received for taxes at a later date; but after his books had been taken he sent in a list of moneys received, including this, although before he did so it had been stated in a newspaper that this and other payments were not accounted for. There was no proof that he was indebted to the county on the whole of his accounts, and it was shewn that he claimed that they were in his debt; and that the question was pending before arbitrators, to whom several civil suits between himself and the council had been referred. The jury found defendant guilty:—Held, that the evidence did not warrant the conviction, and a new trial was granted. Held, also, that the money was not improperly charged to be the money of the county, though it was received for the township of Maidstone, and was to be accounted for to it by the county. *Regina* v. *Bullock*, 19 U. C. R. 513.

Municipal Treasurer — *Illegal Application of Funds.*]—Semble, that the treasurer of a municipality may be indicted for an appropriation of the funds clearly contrary to law, even though sanctioned by a resolution of the council. *Municipality of East Nissouri* v. *Horseman*, 16 U. C. R. 576.

Semble, that the treasurer of a municipality might be indicted for paying a member of the council for his attendance. *Ib.*

Postmaster.]—One D., being postmaster at Berlin, transmitted to defendant at Toronto several post-office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant having been convicted upon an indictment which charged him with unlawfully, fraudulently, and knowingly obtaining from our Lady the Queen these sums, of the moneys and property of our said Lady the Queen, with intent to defraud:—Held, that the indictment was good; that the 56th section of the Post Office Act, C. S. C. c. 31, was not applicable to the case; that the money was properly charged to be the money of the Queen, not of the postmaster; and that it was unnecessary to allege an intent to defraud any particular person. Remarks as to the extensive nature of the provision on which the indictment was framed, C. S. C. c. 92, s. 73. Semble, that defendant might also have been properly convicted under another count of the indictment, charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 U. C. R. 231.

School Trustee.]—A school trustee having money in his hands not as secretary and treasurer of a board, or in any official capacity, cannot embezzle such money, his duty as trustee not requiring or authorizing him to receive it. *Ferris* v. *Irwin*, 10 C. P. 116.

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14. *Escape.*

Prisoner Remanded.] — One W. was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanour, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail and send the case to the assizes. He said he could get bail if he had time to send for them, and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted:—Held, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper. *Regina* v. *Shuttleworth*, 22 U. C. R. 372.

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15. *Extortion.*

Two Magistrates.]—Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting:—Held, that they might be jointly convicted. Held, also, not indispensable that the indictment should charge them with having acted corruptly. *Regina* v. *Tisdale*, 20 U. C. R. 272.

16. *False Pretences.*

Aiding and Abetting.]—The indictment charged one B. with obtaining by false pretences, from one J. T., two horses, with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanour aforesaid to commit:—Held, good, defendant being charged as a principal in the second degree. Held, also, that the evidence set out in this case was not sufficient to sustain the charge. *Regina* v. *Connor*, 14 C. P. 529.

Altering Order.]—A municipality having provided some wheat for the poor, the defendant obtained an order for 15 bushels, described as "three of golden drop, three of Fife, nine of milling wheat." Some days after he went back, and represented that this order had been accidentally destroyed, when another was given to him. He then struck out of the first order, the words "three of golden drop, three of Fife," and presenting both orders, obtained in all 24 bushels. The indictment charged that defendant unlawfully, fraudulently and knowingly, by false pretences did obtain an order from A., one of the municipality of B., requiring the delivery of certain wheat by and from one C., and by presenting the said order to C., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, to wit, nine bushels of wheat, from the said C., of the goods and chattels of the said municipality, with intent to defraud:—Held, sufficient in substance, not being uncertain or double, but in effect charging that defendant obtained the order and by presenting it obtained the wheat by false pretences. Held, also, that the evidence set out in the case, was sufficient to sustain the conviction. *Regina* v. *Campbell*, 18 U. C. R. 413.

Attempt.]—Held, that a prisoner indicted for a misdemeanour (in this case it was for false pretences) may on such indictment be convicted of an attempt to commit the offence which is a misdemeanour. *Regina* v. *Goff*, 9 C. P. 438.

Attorney-General's Fiat.] — On an indictment, for obtaining money by false pretences, was indorsed: "I direct that this indictment be laid before the grand jury. Montreal, 6th October, 1880:—By J. A. Mousseau, Q.C.; C. P. Davidson, Q.C.; L. O. Loranger, Attorney-General." Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term. A motion was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by s. 28 of 32 & 33 Vict. c. 29, had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was held, that under 32 & 33 Vict. c. 29, s. 28, the attorney-general could not delegate to the judgment and discretion of another the power which the Legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the attorney-general gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams* v. *The Queen*, 6 S. C. R. 10.

Fraudulent Post-office Orders.]—One D., being post-master at Berlin, transmitted to

defendant at T. several post-office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant was held properly convicted of having obtained these sums with intent to defraud. And, semble, that defendant might also have been properly convicted under another count of the indictment, charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 U. C. R. 231.

Fraudulently Procuring Court Cheque.]—Defendant was indicted for obtaining by false pretences from M. an order for the payment of $806.69, the property of P., with intent to defraud. It appeared that a suit was pending in chancery, in which the defendant, who was a solicitor, but had been struck off the rolls, was acting for P. Defendant procured V., his clerk, to write a præcipe in the name of McG., who had acted as counsel on defendant's instructions, for $806.69 of the moneys standing to the credit of the cause, and to sign McG.'s name to it. V. left it with M., the accountant in chancery, who prepared a cheque payable to P. or order. Defendant then got one H., a solicitor, to get the cheque from the accountant and sign McG.'s name to the receipt, on which H. handed the cheque to defendant, who got P. to indorse it, and paid P. $400, keeping the rest for costs:—Held, that the defendant was rightly convicted, for he obtained the cheque from the accountant by fraud and forgery, and with intent to defraud him; and he was not the less guilty because P. was entitled to the money, and there was no sufficient proof of intent to defraud P. *Regina* v. *Parkinson*, 41 U. C. R. 545.

Indictment—*Form.*]—Held, that the indictment for false pretences in this case was clearly sufficient, as it followed exactly the form sanctioned by 18 Vict. c. 92. *Regina* v. *Davis*, 18 U. C. R. 180.

Indictment—*Form—Board.*]—An indictment that defendant by false pretences did obtain board of the goods and chattels of the prosecutor:—Held, bad, the term "board" being too general. *Regina* v. *McQuarrie*, 22 U. C. R. 600.

Indictment—*Variance.*] — An indictment for obtaining from A. $1200 by false pretences, is not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity. *Regina* v. *Brady*, 26 U. C. R. 13.

Larceny.]—A defendant indicted for a misdemeanour for obtaining money under false pretences, cannot under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorizes a conviction for the misdemeanour though the facts proved amount to larceny. *Regina* v. *Ewing*, 21 U. C. R. 523.

Where a defendant on such an indictment had been found guilty of larceny:—Held, that the court had no power under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Ib.*

Money Taken to Change.]—G., the prisoner, and another, were in a boat and they agreed to take M., the prosecutor, to meet a steamer, G. saying the charge would be 75 cents at the steamer. The prosecutor, according to his own account, took out a $2 bill at the steamer, saying he would get it changed. Prisoner said "I'll change it," upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money:—Held, that a conviction could not be sustained. *Regina* v. *Gemmell*, 26 U. C. R. 312.

See Regina v. *Campbell*, 18 U. C. R. 413.

Note of Third Person Given for Goods.]—Where a person tenders to another a promissory note of a third party in exchange for goods, though he says nothing, yet he should be taken to affirm that the note has not to his knowledge been paid, either wholly or to such an extent as almost to destroy its value:—Held, that on the evidence in this case it was properly left to the jury to say whether the note for $100, which defendant gave to the prosecutor for the full amount, had or had not been paid except the value of half a barrel of flour; and that the conviction was warranted. *Regina* v. *Davis*, 18 U. C. R. 180.

Note Procured Under a Fraudulent Contract.]—The defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay $240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his, H.'s, favour for the $240. The contract did not provide for the giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract. The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H. a certain valuable security:—Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C. c. 164, s. 78; but:—Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name, so that it might be afterwards used and dealt with as a valuable security; and the conviction of the defendant upon the second count could not stand. Rex v. Danger, Dears & B. C. C. 307, followed. *Regina* v. *Rymal*, 17 O. R. 227.

The defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note with like intent. The evidence shewed that on 4th May, 1887,

the defendant's agent called on H., and obtained from him an order addressed to defendant to deliver to H., at R. station, thirty bushels of Blue Mountain improved Seneca fall wheat, which H. was to put out on shares, and to pay defendant $240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting said amount. On 23rd May, defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat, and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, shewing that defendant was at the time engaged in practising a series of systematic frauds on the community. The defendant was found guilty and convicted:—Held, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H. not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *Regina* v. *Hope*, 17 O. R. 463.

Obtaining Payment of Note Previously Sold.]—The prisoner sold a mare to B., taking his notes for purchase money, one of which was for $25, and a chattel mortgage on a mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterward sued B. upon it, and obtained judgment:—Held, that the prisoner was properly convicted of obtaining the $25 by false pretences. *Regina* v. *Lee*, 23 U. C. R. 340.

Place of Offence.]—The prisoner, at Seaforth, in the county of Huron, falsely represented to the agent of a sewing machine company that he owned a lot of land, and thus induced the agent to sell machines to him, which were sent to Toronto, in the county of York, and delivered to him at Seaforth:—Held, that the offence was complete in Huron, and could not be tried in York. *Regina* v. *Feithenheimer*, 26 C. P. 139.

Promise—*Existing Fact*.]—The prisoner, with one D., whose note he held, came to the store of H. & F., where an agreement was entered into between the parties, that D. would pay for all the goods furnished by H. & F. to the prisoner, on the amount being indorsed on his (D.'s) note, held by the prisoner. The prisoner several times called at H. & F.'s store with the note mentioned, obtained goods, and had the amount indorsed on the note. Afterwards he called without the note and got goods, on his promising to bring the note within a day or two to have the amount indorsed thereon. Prisoner saw D. the day after, and directed him not to pay anything more than the amounts indorsed on the note, and he never after presented the note to have the amount indorsed thereon:—Held, that there was no false representation or pretence of an existing fact, but a mere promise of defendant, which he failed to perform. *Regina* v. *Bertles*, 13 C. P. 607.

Held, that defendant (who was indicted for false pretences) could not on the indictment and evidence in this case be convicted of larceny under C. S. C. c. 99, s. 62. Quære, as to the meaning of that clause. *Ib.*

Registration as Physicians.]—Procuring registration as a physician under 37 Vict. c. 30 (O.), by false or fraudulent representation. See *Regina* v. *College of Physicians*, 44 U. C. R. 146.

Vacant Land Represented as Improved.]—The prisoner represented to the prosecutor that a lot of land, on which he wished to borrow money, had a brick house upon it, and thus procured a loan, when in fact the land was vacant:—Held, that he was properly convicted. *Regina* v. *Huppel*, 21 U. C. R. 281.

Valuable Security.]—The term "valuable security," used in C. S. C. c. 92, s. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the Act. *Regina* v. *Brady*, 26 U. C. R. 13.

See FRAUD, sub-head 23—LARCENY, sub-head 28.

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17. *False Trade Description.*

Evidence.]—The defendants by an advertisement in a newspaper described certain teasets as "quadruple plate," stating that the regular price thereof was "$12.00 a set, Saturday at $6.00." The purchaser of one of the sets, before making his purchase, inquired, and was informed, by the saleswoman of the defendants, that it was one of the tea-sets advertised, and that the advertisement could be relied upon:—Held, (1) that the use of the words "quadruple plate" in the advertisement was an application of false trade description, in that the goods could not properly be described as such: (2) that there was evidence to shew that the advertisement applied to these goods. *Regina* v. *T. Eaton Co.*, 31 O. R. 276.

Procedure.]—A prosecution under s. 448 of the Criminal Code for selling goods to which a false trade description is applied must be by indictment. Prohibition granted to restrain summary proceedings before a magistrate. *Regina* v. *T. Eaton Co.*, 29 O. R. 591.

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18. *Forcible Entry.*

Evidence of Title in Defendant.]—On an indictment for forcible entry and detainer of land, evidence of title in defendant is not admissible. *Regina* v. *Cokely*, 13 U. C. R. 521.

Inquisition.]—An inquisition for a forcible entry, taken under 6 Hen. VIII. c. 9, must shew what estate the party expelled had in the premises, or the inquisition will be quashed and restitution awarded. The inquisition is also bad if it appear to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of 40s., or that the party complaining

was sworn as a witness. *Mitchel* v. *Thompson, Rex* v. *McKreacy*, 5 O. S. 620, 625.

Probability of Employment of Force — *Restitution.*]—Defendants, employees of the Great Western R. W. Co., in obedience to orders from the company, went upon the land in question, then in possession of the Stratford and Huron R. W. Co., and occupied by its employees. No actual force was used, but the latter had good reason to apprehend that sufficient force would be used to compel them to leave, and they left accordingly:—Held, that this was a forcible entry within the statutes relating thereto. The Judge at the trial having granted a writ of restitution:—Held, that such writ is in the discretion of the presiding Judge, which had been properly exercised here. *Regina* v. *Smith*, 43 U. C. R. 593.

Restitution.]—The court refused a writ of restitution after a conviction of forcible entry and detainer, where the premises were a Crown reserve, the lease of which had expired. *Rex* v. *Jackson*, Dra. 50.

The defendants applied for delay in order to give evidence of title, but on the prosecutor consenting to waive restitution in the event of conviction, they were compelled to go to trial, and were convicted. A writ of restitution was afterwards refused; though, semble, that it would in any case have been improper to delay the trial for the reason urged. *Regina* v. *Connor*, 2 P. R. 139.

Semble, also, that where the prosecutor has been examined as a witness, restitution should not be granted. *Ib.*

The defendant having been convicted at the quarter sessions on an indictment for forcible entry, was fined, but that court refused to order a writ of restitution, and the case was removed here by certiorari:—Held, that it was in the discretion of this court either to grant or refuse the writ; and under the circumstances it was refused. *Regina* v. *Wightman*, 29 U. C. R. 211.

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19. *Foreign Aggression.*

Acquittal as Foreign Citizen—*Subsequent Prosecution as British Subject.*]—The prisoner being indicted under C. S. U. C. c. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit:—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner, being insufficient as against a subject; and the prisoner, therefore, was not in legal peril on the first indictment. *Regina* v. *Magrath*, 26 U. C. R. 385.

Proof of Citizenship — *Admissions.*] — The prisoner, having been indicted under C. S. U. C. c. 98 (3 Vict. c. 12), as a citizen of the United States, was convicted of having as such joined himself to divers other evil disposed persons, and having been unlawfully and feloniously in arms against the Queen within Upper Canada, with intent to levy war against Her Majesty. It was sworn that the prisoner had said he was an American citizen, and had been in the American army, and there was no evidence offered to contradict this:—Held, evidence against the prisoner, as his own admissions and declarations, of the country to which he belonged. Held, also, that the evidence, set out in the report, was sufficient to prove the offence charged. The Imperial statute 11 & 12 Vict. c. 12, does not override 3 Vict. c. 12, of this Province, for the latter is re-enacted by the consolidation of the statutes, which took place in 1859. *Regina* v. *Slavin*, 17 C. P. 205.

Proof of Citizenship—*Carrying Arms.*] —The prisoner was convicted upon an indictment under C. S. U. C. c. 98, containing three counts, each charging him as a citizen of the United States. The first count alleged that he entered Upper Canada with intent to levy war against Her Majesty; the second that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of Her Majesty's subjects, with the same intent. The prisoner's own statement, on which the Crown rested, was that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States—but, held, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence. Held, also, upon the testimony set out in the case, that there was evidence against the prisoner of the acts charged. Held, also, that even if he carried no arms, on which the evidence was not uniform, yet being joined with and part of an armed body which had entered Upper Canada from the United States and attacked the Canadian volunteers, he would be guilty of their acts of hostility and of their intent; and that if he was there to sanction with his presence as a clergyman what the rest were doing, he was in arms as much as those who were actually armed. *Regina* v. *McMahon*, 26 U. C. R. 195.

In this case, the charge being the same as in the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf who proved that he was born within the Queen's allegiance: — Held, that the Crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be. The fact of the invaders coming from the United States, would be primâ facie evidence of their being citizens or subjects thereof. The prisoner asserted that he came over with the invaders as reporter only; but, held, that this clearly could form no defence, for the presence of any one encouraging the unlawful design in any character, would make him a sharer in the guilt. *Regina* v. *Lynch*, 26 U. C. R. 208.

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20. *Foreign Enlistment.*

A warrant of commitment under the Foreign Enlistment Act, 59 Geo. III. c. 69, s. 4, reciting that T. K. C. "was this day charged (not saying upon oath) before us," and without shewing any examination by the magistrates, upon oath or otherwise, into the nature of the

offence, and commanding the constables or peace officers of the county of Welland to take the said T. K. C. into custody:—Held, sufficient. *In re Clark*, 10 L. J. 331.

A warrant of commitment under the statute, committing the prisoner until "discharged by due course of law," sufficiently complies with the statute, which provides for a committal until delivered by due course of law. *Ib.*

A commitment under 28 Vict. c. 2, s. 1, stating the offence "for that he on, &c., at, &c., did attempt to procure A. B. to serve in a warlike or military operation in the service of the government of the United States of America," omitting the words, "as an officer, soldier, or sailor," &c.:—Held, bad. *In re Bright*, 1 C. L. J. 240.

Held, that a judgment for too little is as bad as a judgment for too much, and so a condemnation to pay $100 and costs, when the statute creating the offence imposes a penalty of $200 and costs, is bad. *Ib.*

Held, that a commitment on a judgment for a penalty and costs, not stating in the body of the commitment or a recital in it the amount of costs, is bad. *Ib.*

Quære, is the jurisdiction of the officers named in 28 Vict. c. 2, a general or a local one. *Ib.*

Held, 1. That to charge a prisoner in a warrant of commitment issued under 59 Geo. III. c. 69, with attempting or endeavouring to hire, retain, engage, or prevail on to enlist, a soldier in the land or sea service, for or under or in aid of "Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America," is sufficiently certain; 2. that the foreign power was sufficiently defined in the warrant, and one whose existence the court is bound judicially to notice, viz.: "The President of the United States of America"—the words relating to the Federal States being rejected as surplusage; 3. that in such a warrant it is unnecessary to allege that the accused is a British subject, the law presuming him to be such till the contrary appears; 4. that it was unnecessary in the warrant to negative a license from Her Majesty to do the act or acts complained of; 5. that the direction to the gaoler to keep the prisoner in the common gaol "until he shall thence be discharged by due course of law, or good and sufficient sureties be received for his appearance," &c., was sufficient, the latter words being read as surplusage; 6. that "I," in the text of the warrant, might be read as "I and I," so as to read "Given under my and my" hand and seal, &c., it being presumed that both magistrates used one and the same seal. *In re Smith*, 10 L. J. 247.

Held, 1. that a warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under 28 Vict. c. 2, averring that on a day named, "at the town of Chatham, in said county, he the said A. S. did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeding: "And whereas the said A. S. was duly convicted of the said offence before me the said police magistrate, and condemned," &c., sufficiently shewed jurisdiction. *In re Smith*, 1 C. L. J. 241.

2. That the direction to take the prisoner "to the common gaol at Chatham," the warrant being addressed "to the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," was sufficient. *Ib.*

3. That the warrant as above set out sufficiently contained an adjudication as to the offence, though by way of recital. *Ib.*

4. That the words "to enlist to serve" do not shew a double offence, so as to make a warrant of commitment bad on that ground. *Ib.*

5. That the offence created by the statute was sufficiently described in the warrant as above set out. *Ib.*

6. That the warrant was not bad as to duration or nature of imprisonment. *Ib.*

7. That the amount of costs was sufficiently fixed in the warrant of commitment. *Ib.*

8. That there is power to commit for non-payment of costs. *Ib.*

9. That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either. *Ib.*

A warrant of commitment reciting that F. M. was charged on the oath of J. W., "for that he F. M. was this day charged with enlisting men for the United States army, offering them $350 each as bounty," without charging any offence with certainty, and without stating that the men enlisted were subjects of Her Majesty, and without shewing that J. W. was unauthorized by license of Her Majesty to enlist:—Held, bad. *In re Martin*, 3 P. R. 298.

The Imperial statute, 59 Geo. III. c. 69, for procuring and endeavouring to procure enlistments in this country for the army of the United States:—Held, to be in force in this Province; and a conviction under it sustained. *Regina* v. *Schram*, *Regina* v. *Anderson*, 14 C. P. 318.

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21. *Forgery.*

Agreement to Sell—*Form of Indictment.*]—Indictment for offering, &c., the following instrument knowing it to be forged:—"I, J. H., do agree to W. C., of W., the full rite and privilege of all the whiteoke and elm and hickory lying and standing on lot 26, south part, on the 3rd confession Plymp, for the sum of $30, now paid to H. by C., the receipt whereof is hear by me acknowledged." The jury having convicted the prisoner:—Held, upon a case reserved, 1. that the instrument forged being set out in hæc verba in the indictment, the description of its legal character would be surplusage, and was unnecessary; 2. that under s. 29 C. S. C. c. 99, it is not necessary to allege an intent to defraud in an indictment for forgery; 3. that the averment of the offence being contra formam statuti was immaterial, (the objection being that there was nothing in the indictment, which contained this averment, to shew that the offence was against any statute); 4. that the instrument might be construed as an agreement or contract to sell the timber, or a receipt for the payment of money, and in either case came within 22 Vict. c. 94: and the conviction was sustained. *Regina* v. *Carson*, 14 C. P. 309.

Alteration of Bank Note.]—On an indictment for feloniously offering, &c., a forged

note commonly called a provincial note, issued under the authority of 29 & 30 Vict. c. 10, for the payment of $5, it appeared that the prisoners had passed off a note purporting to be a provincial note under the statute, knowing that the figure 5 had been pasted over the figure 1, and the word five over the word one. No evidence was given that the note so altered was a note issued by the government of Canada, but it was shewn further, that when the attention of the prisoners was called to the alteration they said "give it back if it is not good," and that on its being placed on the counter one of them took it up and refused to return it, or substitute good money for it:—Held, that looking at the particular character of the forgery—i.e., an alteration—and the conduct of the prisoners, the onus was on them to dispute the validity of the writing, if its invalidity would be a defence; and a conviction was sustained. *Regina* v. *Portis*, 40 U. C. R. 214.

Alteration of Dominion Note.]—Held, that the alteration of a $2 Dominion note to one of the denomination of $20, such alteration consisting in the addition of a cypher after the figure two, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor. *Regina* v. *Bail*, 7 O. R. 228.

Alteration of Indorsed Note.]—A promissory note had been drawn by the prisoner, payable two months after date to the order of one S., and afterwards indorsed by said S., and the prisoner then altered the note from two to three months, and discounted it at a bank. It was objected that the forgery or uttering, if any, was a forgery of or the uttering of a forged indorsement (the note having been made by himself), and that there was no legal evidence of an intent to defraud:—Held, that the altering the note while in his possession after it was indorsed was a forgery of a note, and not of an indorsement; and that the passing of the note to the third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. *Regina* v. *Craig*, 7 C. P. 239.

Alteration of Cheque.]—*Bank of Hamilton* v. *Imperial Bank*, 27 A. R. 590.

Assessment Roll.] — An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk. *Regina* v. *Preston*, 21 U. C. R. 86.

Bank Note.]—A forged paper purporting to be a bank note, is a promissory note within 10 & 11 Vict. c. 9, even though there is no such bank as that named. *Regina* v. *McDonald*, 12 U. C. R. 543.

Corroboration.] — Semble, that on the evidence, stated in the report, the testimony of the prosecutor, whose name had been forged to a note, was sufficiently corroborated. *Regina* v. *McDonald*, 31 U. C. R. 337.

Prisoner was indicted for forging an order for the delivery of goods. The only witnesses examined were the person whose name was forged, and the person to whom the order was addressed, and who delivered the goods thereon; and there was no corroborative testimony:—Held (under 10 & 11 Vict. c. 9, s. 21), not sufficient evidence. *Regina* v. *Giles*, 9 C. P. 84.

On an indictment for forgery of the prosecutor's name as indorser of a promissory note, the prosecutor swore that he had not indorsed the note: that it was not his writing: that he had never authorized the prisoner to sign his name to the note, and that he was himself unable to write his name, being in fact a marksman; and a son of his also swore that his father was unable to write his name, and was a marksman. The prosecutor also swore that on other occasions he had indorsed for the prisoner, making his mark, and had sometimes authorized the prisoner to write his name:—Held, that a sufficient primâ facie case was thus made out: that the prosecutor's evidence was duly corroborated within the meaning of 32 & 33 Vict. c. 19, s. 54 (D.); and that the onus was then on the prisoner to shew that he was authorized to use or write the prosecutor's name. *Regina* v. *Bannerman*, 43 U. C. R. 547.

By s. 218 of R. S. C. c. 174, "the evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting forgery,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution." The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co. on the Quebec Bank, which he had altered from $400 to $1,400. The evidence in support of the forgery was that of J., who though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.'s withdrawal:—Held, that J. was not a person interested, or supposed to be interested, within the meaning of the Act; and his evidence did not require corroboration. *Regina* v. *Hagerman*, 15 O. R. 598.

The defendant was convicted of uttering, with knowledge that it was a forgery, the indorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank, but given up and destroyed before maturity, upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave evidence of the forgery, and the three members of the firm of Taylor Brothers were also called as witnesses, and denied having indorsed the note, or having any knowledge of it:—Held, that the members of the firm of Taylor Brothers were not persons interested or supposed to be interested in respect of the indorsement, within the meaning of R. S. C. c. 174, s. 218, and their evidence therefore was sufficient to corroborate that of the other witnesses. *Regina* v. *Selby*, 16 O. R. 255.

On the trial of an indictment for uttering a forged note evidence was given by a person who had no interest therein of the note being forged. The wife of the person on whose behalf the note was received, and who, when receiving it, was in attendance in her husband's shop as his agent, proved the uttering. Per MacMahon, J. — The note having been proved to be forged by a person having no interest, the question as to corroboration of

the wife's evidence, on the ground of interest, did not arise under s. 218 of the Criminal Procedure Act, R. S. C. c. 174. Per Rose, J.:—The wife had no interest in the forged document; her interest, if any, was to prove its genuineness; but in any event there was abundant evidence of corroboration. *Regina* v. *Rhodes*, 22 O. R. 480.

Where on a charge of forgery, in addition to evidence of one witness that the forged documents were written by the accused, it was also proved by the same witness that certain names in a book written by the same hand as the forged documents, were in the handwriting of the accused:—Held, that this was not sufficient corroboration under s. 684 of the Criminal Code, 1892. *Regina* v. *McBride*, 26 O. R. 639.

Deed Executed in Name of Another.]—Semble, that the execution of a deed by prisoner in the name of and representing himself to be another, may be forgery, if done with intent to defraud, even though he had a power of attorney from such person, if he fraudulently conceal the fact of his being only such attorney, and assume to be the principal. *In re Regina* v. *Gould*, 20 C. P. 154.

Evidence of Other Forgeries.]—The prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; and the second with uttering it knowing it to be forged. The prisoner was charged as an accessory before the fact. Evidence was admitted shewing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes, printed from the same plate as those uttered by W.; that the prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel, and occupied adjoining rooms; that after F. and H. had been convicted on one charge, they admitted their guilt on several others; and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered, it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted shewing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as was alleged by him, after W. had been arrested:—Held, that the evidence was properly received in proof of the guilty knowledge of the prisoner. *Regina* v. *Bent*, 10 O. R. 557.

Fictitious Note Found by Prisoner.]—Defendant was convicted at the quarter sessions on an indictment for uttering a promissory note purporting to be made by one F., for £4 10s., with intent to defraud, knowing it to be forged. It appeared that some boys had been amusing themselves with writing promissory notes and imitating persons' signatures, and among them was one with F.'s name. The papers were put into the fire, but this note was carried up the chimney by the draught and fell into the street, where it was picked up by defendant. A person who was with him at the time, said that he thought it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good:—Held, that defendant was guilty of a felonious uttering, but the conviction was quashed, for the indictment was defective in not stating expressly that the note was forged, or that defendant uttered it as true; and the case should not have been tried at the quarter sessions. *Regina* v. *Dunlop*, 15 U. C. R. 118.

Incomplete Note — *Indorsement before Signature.*]—W., a division court bailiff, had an execution against the prisoner and H. M., and to settle the same they arranged to give a note made by A. M. and indorsed by A. D. M. W. then drew up the note in question, which was payable to the order of A. D. M., and which he handed to the prisoner, who took it away to obtain, as he said, A. D. M.'s indorsement, returning shortly afterwards with the name A. D. M. indorsed thereon. He then handed the note to A. M., who signed his name as maker and handed it to W., who took it away with him. The indorsement was a forgery. The prisoner was indicted for forging the indorsement on a promissory note, and convicted:—Held, following Regina v. Butterwick, 2 M. & Rob. 196, Regina v. Mopsey, 11 Cox 143, and Regina v. Harper, 7 Q. B. D. 78, that the conviction could not be sustained on the indictment as framed. The instrument, by reason of the maker's name not being signed to it at the time of the forgery, was not a promissory note; and neither could the conviction be sustained on the count for uttering, as after it was signed by A. M. it was never in the prisoner's possession, but was delivered by A. M. to witness. *Regina* v. *McFee*, 13 O. R. 8.

Incomplete Note — *Payee's Name in Blank.*]—Where, in an instrument in the form of a promissory note, a blank is left for the payee's name, it is not a complete note so as to support a conviction for the forgery thereof, or for the forgery of an indorsement thereon; nor is it a document, writing or instrument within ss. 46, 47, or 50 of R. S. C. c. 165. Semble, a conviction might have been sustained on an indictment for forgery at common law. *Regina* v. *Cormack*, 21 O. R. 213.

Order for Payment of Money.]—"Mr. W., please let the bearer, W. T., have the amount of £10, and you will oblige me. B. B. Mitchell:"—Held, on an indictment for forgery, to be an order for the payment of money, not a mere request. *Regina* v. *Tuke*, 17 U. C. R. 296.

"Mr. McK., Sir,—Would you be good enough as for to let me have the loan of $10 for one week or so, and send it by the bearer immediately, and much oblige your most humble servant. I. Almiras, P. P.:"—Held, not an order for the payment of money, but a mere request. *Regina* v. *Reopelle*, 20 U. C. R. 260.

"$3.50. Carick, April 10th, 1863. J. McL., tailor,—Please give Mr. A. S. to the amount of $3.50, and by doing so you will oblige me:"—Held, an order for the payment of money, and not a mere request. *Regina* v. *Steel*, 13 C. P. 619.

A writing not addressed to any one may be an order for the payment of money, if it be shewn by evidence for whom it was intended. In this case the order was for $15, in favour of "bearer or R. R.," and purported to be signed by one B. The prisoner in person presented it to M., representing himself to be the payee, and a creditor of B.:—Held, that it

might fairly be inferred to have been intended for M.; and a conviction for forgery was sustained. *Regina* v. *Parker*, 15 C. P. 15.

Quarter Sessions.]—The quarter sessions has no jurisdiction to try the offence of forgery. *Regina* v. *McDonald*, 31 U. C. R. 357.

Telegram.]—The prisoner, at Woodstock, with intent to defraud, wrote out a telegraph message purporting to be sent by one C. at Hamilton, to McK. at Woodstock, authorizing McK. to furnish the prisoner with funds, which was delivered to McK., and upon the faith of it McK. indorsed a draft for $85 drawn by the prisoner on C., on which the prisoner obtained the money:—Held, that the prisoner was guilty of forgery. *Regina* v. *Stewart*, 25 C. P. 440.

Uttering Forged Note.]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted:—Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest. Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

See, also, EXTRADITION, *ante*, col. 1595.

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22. *Fortune Telling.*

Imperial Act—*Decoy.*]—The statute 9 Geo. II. c. 5 is in force in this Province. By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim, but a decoy. *Regina* v. *Milford*, 20 O. R. 306.

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23. *Fraud.*

Fraudulently Depriving of the Use of Property—*Disputed Claim*—*Magistrate's Jurisdiction.*]—The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale, the term of hiring had not expired. At its expiry M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32 & 33 Vict. c. 21, s. 110 (D.):—Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily; and that it was bad also in not shewing the time and place of the commission of the offence. Remarks upon the improper use of the criminal law in aid of civil rights. *Regina* v. *Young*, 5 O. R. 400.

Fraudulent Removal of Goods by Tenant—*Defendant Compelled to Testify.*]—The fraudulent removal of goods, under 11 Geo. II. c. 19, s. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution. *Regina* v. *Lackie*, 7 O. R. 431.

A tenant is not liable to prosecution under 11 Geo. II. c. 19, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises. *Martin* v. *Hutchinson*, 21 O. R. 388.

Fraudulent Transfer to Defeat Creditors.]—Upon an indictment under 22 Vict. c. 96, for making an assignment of personal property to defraud creditors:—Held, that a money bond for the conveyance of land is personalty seizable on an execution under 13 & 14 Vict. c. 53, and 20 Vict. c. 57; and, further, that a transfer made to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the assignor less liable under this indictment. *Regina* v. *Potter*, 10 C. P. 39.

An action by the party aggrieved to recover the moiety of the penalty imposed by s. 3 of 13 Eliz. c. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes. Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act. Section 28 of R. S. C. c. 173 applies only to the concluding part of said s. 3, namely, that relating to imprisonment and conviction, &c. *Millar* v. *McTaggart*, 20 O. R. 617.

Under s. 28 of R. S. C. c. 173, every one who makes or causes to be made, amongst other things, any assignment, sale, &c., of any of his goods and chattels, with intent to defraud his creditors, or any of them, is guilty of a misdemeanour:—Held, it is not essential, under the Act, that the debt of the creditor should, at the time of the sale, &c., be actually due. *Regina* v. *Henry*, 21 O. R. 113.

Receiving Money on Terms.]—Section 308 of the Criminal Code does not mean "terms imposed by the person paying the money," but "terms on which the defendant when he receives it, holds it." *Regina* v. *Unger*, 14 C. L. T. Occ. N. 294.

See FALSE PRETENCES, sub-head 16—LARCENY, sub-head, 28.

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24. *Frontier (Outrages upon).*

Restoration of Property.]—Under s. 11 of 28 Vict. c. 1, for preventing outrages on

the frontier, the court can only order restoration of property seized when it appears that the seizure was not authorized by the Act; and in this case, on the facts stated, they refused to interfere. *In re Propeller "Georgian,"* 25 U. C. R. 319.

25. *Gaming.*

Becoming Custodian of Wager.]—The Act 40 Vict. c. 31 (D.), intituled an Act for the repression of betting and pool selling, does not forbid betting, and does not apply to stakeholders in any of the three cases mentioned in s. 2. *Regina* v. *Dillon*, 10 P. R. 352.

Becoming Custodian of Wager—*Election—Stakeholder—Accessory.*]—R. S. C. c. 159, s. 9, provides inter alia that "everyone who becomes the custodian or depositary of any money * * * staked, wagered or pledged upon the result of any political or municipal election * * * is guilty of a misdemeanour" and a sub-section says that "nothing in this section shall apply to * * * bets between individuals:"—Held, reversing 21 A. R. 55, that the sub-section is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R. S. C. c. 145. Regina v. Dillon, 10 P. R. 352, overruled. After the election when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him, the parties being in pari delicto and the illegal act having been performed. *Walsh* v. *Trebilcock*, 23 S. C. R. 695.

Becoming Custodian of Wager—*Restriction to Events to take Place in Canada.*]—R. S. C. c. 159, s. 9, provides that "every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour:"—Held, that this enactment does not extend to the result of any election, race, contest, &c., to take place outside of Canada. Wells v. Porter, 3 Scott 141, followed. *Regina* v. *Smiley*, 22 O. R. 686.

Betting—*Horse Race in Foreign Country.*]—The defendant occupied a tent in a village open to and frequented by the public, in which there was a telegraph wire to an incorporated race track in the United States, where horse racing and betting were legalized. In the tent was a blackboard on which were the names of the horses and jockeys taking part in the race, with the weights and the track quotations, and as the race was being run, an operator called off the progress thereof, giving the name of the winner and of the second and third horses, and marked them on the board. Duplicate tickets were furnished in the tent to applicants, which requested defendant to telegraph one B. at the race track to place a certain amount of money on a horse named by the applicant at track quotations, and upon transmission thereof, the applicant agreed to pay defendant ten cents, and that all liability on defendant's part should cease. On the tickets being handed in, one of them was stamped with the date of its receipt and returned to the applicant. The aggregate amount of the money so received was notified by telegram to B. and placed by him before the race with bookmakers on the track, B. paying defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting same to him or giving him orders on defendant for stated sums:—Held, that the defendant was properly convicted under ss. 197 and 198 of the Code, of keeping a common betting house, the place in question being opened and kept for the reception of money by defendant on behalf of B. as consideration for an undertaking to pay money thereafter to the depositor on the event of a horse race. *Regina* v. *Giles*, 26 O. R. 586.

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

Card-playing—*Penalty.*]—The defendant was convicted by the police magistrate for the city of Toronto for playing at a game of cards called faro, contrary to the statute 12 Geo. II. c. 28, and sentenced to pay £50 sterling, the penalty thereby imposed:—Held, that under 27 Geo. III. c. 1, s. 2, the jurisdiction of justices of the peace in such cases was taken away, and in lieu thereof the recovery of such a penalty was to be by civil action. The conviction was therefore quashed:—Semble, that the defendant could have been convicted under the Municipal Act, 46 Vict. c. 18, s. 49, s.-s. 33, against gambling, and the by-law of the municipality passed with reference thereto. *Regina* v. *Matheson*, 4 O. R. 559.

Confiscation of Gaming Instruments, Moneys, &c.—*Evidence.*]—Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the city of Montreal. The warrant would be good if issued on the report of a person who filled de facto the office of deputy high constable though he was not such de jure. In an action to revendicate the moneys so seized the rules of evidence in civil matters

prevailing in the Province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the Province of Quebec. *O'Neil* v. *Attorney-General of Canada*, 26 S. C. R. 122.

Guessing Contest.]—The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a $20 gold piece; the person making the next nearest guess, a set of harness; and the person making the third nearest guess, a $5 gold piece; any person desiring to compete to buy a copy of the newspaper, and to write his name and the supposed number of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. c. 95: —Held, that as the approximation to the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act. *Regina* v. *Dodds*, 4 O. R. 390.

Per Hagarty, C. J.—The Act applied to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to s. 3 of the Act, and therefore the conviction was bad on that ground. *Ib.*

Guessing Contest.] — The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar a pony and cart, which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods:—Held, that as the approximation of the number of buttons depended upon the exercise of judgment, observation, and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act:—Quære, whether defendant should not get the costs of quashing conviction made to test the law in such a case. *Regina* v. *Jamieson*, 7 O. R. 149.

Keeping a Common Gaming House *Offence in United States.*]—In a betting game called "policy," the actual betting and payment of the money, if won, took place in the United States; all that was done in Canada being the happening of the chance, on which the bet was staked, by means of implements operated in the house of defendant:—Held, there was no offence under s. 198 of the Criminal Code of 1892 of keeping a common gaming house within that section. *Regina* v. *Wettman*, 25 O. R. 459.

Keeping a Common Gaming House— *Penalty.*]—A conviction under the provisions of the Act respecting Gaming Houses, R. S. C. c. 158, s. 6, provided, in addition to fine and imprisonment, for distress in default of payment of the fine:—Held, that the punishment being in excess of that warranted by the statute, the conviction must be quashed:—Held, also, that, as the maximum penalty prescribed for the offence was imposed, the defect in the conviction in the provision for distress was not cured under R. S. C. c. 178, ss. 87 and 88. Regina v. Sparham, 8 O. R. 570, approved of. *Regina* v. *Logan*, 16 O. R. 335.

Keeping a Common Gaming House— *Contracts on Margin.*]—The Act 51 Vict. c. 42, s. 1 (D.), makes it an indictable offence to make or authorize contracts by way of gaming or wagering on the rise or fall of stocks and merchandise, and to habitually frequent any office or place where such contracts are made. By s. 3, the keepers of such places are to be held to be keepers of common gaming houses, the place of business to be a common gaming-house, and the instruments used instruments of gaming, "the whole within the meaning of R. S. C. c. 158, the Act respecting Gaming Houses, and shall be subject to all the provisions of the said Act." Section 6 of R. S. C. c. 158 enacts that persons playing or looking on while others are playing, are guilty of an offence under the Act; and by s. 9, authority is given to the police magistrate to try offences under the Act summarily. An information under R. S. C. c. 158, charging the defendant and others with unlawfully playing in a common gaming house, was heard before the police magistrate summarily, and the defendant convicted. The evidence shewed that the defendant was merely in a place where it was alleged that contracts in violation of 51 Vict. c. 42, were made:—Held, that s. 3 of 51 Vict. c. 42 (D.), was not incorporated into ss. 4 and 6 of R. S. C. c. 158, so as to make the fact of a person being in an office or place of business where such prohibited contracts were made equivalent to playing or looking on while others were playing in a common gaming house and so punishable by summary convictions. *Regina* v. *Murphy*, 17 O. R. 201.

Keeping Disorderly House — *Common Gaming House.*]—In order to obtain under s. 198 of the Code a conviction of a person for keeping a disorderly house, to wit a common gaming house, as defined by s. 196 (a), the Crown must shew by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house, room or place, and allowing games of chance to be played therein. *Regina* v. *Sanders*, 20 C. L. T. Occ. N. 213.

Lottery—*Art Association.*]—The defendant, an agent of an incorporated art society, was convicted by a police magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, selling, and otherwise disposing of certain property, to wit, pictures, or one-half the stated value of each picture in money, by lots, tickets, and modes of chance:"—Held, that "property" in s.-s. 1 (b) of s. 205 of the Code is not necessarily to be read "specific property," the essence of the enactment being in the disposal of any property by any mode of chance. Held, also, there being evidence of an option reserved to the society to give money instead of pictures to the winning tickets, that this destroyed the privilege in favour of works of art under s.-s. 6 (c) of the Code. *Regina* v. *Lorrain*, 28 O. R. 123.

Lottery.] — The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada. *L'Association St. Jean-Baptiste de Montreal* v. *Brault*, 30 S. C. R. 598.

Municipal Regulations.]—A clause in a by-law that no gambling, profane swearing, &c., should be permitted in any licensed tavern or shop:—Held, authorized by the Municipal Act, 36 Vict. c. 48, s. 379, s.-ss. 33, 36, and by the general police power of the council.

In re Brodie and Town of Bowmanville, 33 U. C. R. 580.

Sale of Betting Privileges on Race Course.]—The object of the Legislature in enacting the latter part of s.-s. 2 of s. 204 of the Criminal Code apparently was to reserve the race courses of incorporated associations as places where bets might be made during the actual progress of a race meeting, without the betters being subject to the penalties of that section. An agreement for the sale of betting and gaming privileges at a race meeting by an unincorporated association, who are the lessees of an incorporated association the owners of the race course, is not illegal. *Stratford Turf Association* v. *Fitch*, 28 O. R. 579.

Sale of Goods.]—Section 2 of R. S. C. c. 159 prohibits the sale of "any lot, card, or ticket, or other means or device for * * * selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever." The complainant went to the defendant's place of business, and having been told by the defendant that in certain spaces on the two shelves there were in cans of tea a gold watch, a diamond ring, or $20 in money, he paid one dollar and received a can of tea, which contained an article of small value; he handed the can back, paid an additional fifty cents, and received another can, which also contained an article of small value. He handed this can back also, paid another fifty cents, and secured another can, which also contained an article of small value. He then refused to pay any more money, and went away, taking the third can and the article in it with him. On a complaint laid by him before the police magistrate, the defendant was convicted, in that he, "unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, $20 in money, by a mode of chance, against the form of the statute," &c.:—Held, that the transaction came within the terms of s. 2, so as to make the defendant liable to conviction thereunder:—Held, also, that the Summary Convictions Act applied to cure any defect in the form of the conviction. *Regina* v. *Freeman*, 18 O. R. 524.

See GAMING.

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26. House of Ill Fame.

Evidence.]—Nature of evidence to prove a charge of being an inmate of a house of ill-fame, considered. *Regina* v. *St. Clair*, 27 A. R. 308.

Form of Commitment — *Certainty—Forum.*]—The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen street, in the said city," &c., and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the commitment, conviction, information, and depositions were brought up. On application for her discharge:—Held, 1. No objection that the commitment stated the offence to have been committed on the 10th August, instead of the 11th, as in the conviction, the variance not being material to the merits; 2. nor that the commitment charged that the prisoner "was the keeper of," &c., and the conviction "that she did keep," both differing from the statute, which designates the offence as "keeping any disorderly house," &c., for all those expressions convey the same idea; 3. nor that the commitment did not shew that the offence was committed within the police limits of the city, the words used in the Act C. S. U. C. c. 105, s. 14, for there was no ground for supposing any difference between these and the ordinary city limits; 4. nor that there was nothing in the commitment to shew whether the prisoner pleaded to the charge or confessed it; 5. it was held no objection that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house; for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence; 6. nor that no notice had been put up as required by s. 25 of the same Act, to shew that the court was that of the police magistrate, not of an ordinary justice of the peace; for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice; 7. nor that there was no evidence to warrant the conviction; for when a proper commitment is returned to a habeas corpus, and there was evidence, the court will never enter into the question whether the magistrate has drawn the right conclusion from it; 8. nor that the offence stated in the commitment, of keeping a common disorderly bawdy house, was not sufficiently certain; for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage. Semble, that on an application like this, affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but that such conduct may furnish ground for a criminal information. Quære, with regard to some of the objections, whether the court on such an application, can go behind the warrant of commitment. *Regina* v. *Munro*, 24 U. C. R. 44.

Inmate of House of Ill-fame—*Appeal to Sessions.*]—Where a woman has been prosecuted before the police magistrate of a city under s. 783 of the Code for being an inmate of a house of ill-fame and convicted under s. 788 of the Code, there is no appeal to the general sessions. *Regina* v. *Nixon*, 19 C. L. T. Occ. N. 344.

Procedure — *Pleading Guilty.*] — The offence of being a keeper of a house of ill-fame is an indictable offence, and it may be tried either before a jury in the ordinary way or before a police magistrate under the summary trial clauses or before a justice of the peace under the summary convictions clauses of the Code. A prisoner was convicted by a police magistrate, after pleading guilty to the charge that she did "unlawfully appear the keeper of a house of ill-fame," and was sentenced to be imprisoned for one year in the Andrew Mercer reformatory:—Held, that the conviction might be treated as having been made under the summary convictions clauses of the Code, although the sentence exceeded the power of the magistrate, and that such conviction might be supported and the sentence amended under those clauses. Held, also, that where a prisoner charged before a magistrate with unlawfully appearing the keeper of a house of ill-fame had pleaded guilty to such charge, there was a trial on the merits, and

that such person was to be deemed guilty of the offence of keeping a house of ill-fame. *Regina* v. *Spooner*, 32 O. R. 451.

Prostitute.]—A conviction under 32 & 33 Vict. c. 28 (D.), for that V. L. was, in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself, contrary to this statute:—Held, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily. *Regina* v. *Lecrecque*, 30 U. C. R. 569.

Semble, proceedings having been taken under 29 & 30 Vict. c. 45 (D.), that the evidence might be looked at; and if so, it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute. *Ib.*

Time—*Place.*]—A conviction for keeping a house of ill-fame on the 11th October, and on other days and times before that day:—Held, sufficiently certain as to the time. The information described the parties as of the township of East Whitby, and had "county of Ontario" in the margin. It charged that they kept a house of ill-fame, but did not expressly allege that they did so in that township or county. The evidence, however, shewed that their place, at which such house was kept, was in East Whitby, in which the justices had jurisdiction:—Held, sufficient. A certiorari to remove the conviction was therefore refused. *Regina* v. *Williams*, 37 U. C. R. 540.

Upon a motion on the return of a habeas corpus to discharge the prisoner, who was convicted of keeping a house of ill-fame:—Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed:—Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed. *Regina* v. *Cyr*, 12 P. R. 24.

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27. *Kidnapping.*

The plaintiff in error having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one Bratton without authority, with intent to transport him out of Canada against his will, was, on the 24th June, 1872, brought before the county Judge, by whom he consented to be tried under 32 & 33 Vict. c. 35. In the record drawn up under that statute, it was charged that he did feloniously and without authority, forcibly seize and confine one B. within Canada, &c., (without alleging any intent), and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The Judge fixed the 3rd July for the trial, and on that day the prisoner said he was ready, but upon the request of counsel for the Crown the trial was postponed till the 15th July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the Judge, changing the name of Rufus Bratton to James Rufus Bratton. In the notice required from the sheriff to the Judge, by 32 & 33 Vict. c. 35, s. 2, only the charge contained in the second count of the indictment was referred to. On errors being assigned:—Held, that the sessions had jurisdiction over the offence, and so the county Judge had power to try it. Held, also, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed it should have been, and that the Judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment. Held, also, that the Judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment. By 32 & 33 Vict. c. 20, s. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada against his will, or to be sold or captured as a slave, is guilty of felony:—Held, that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count therefore was defective in not stating any intent. Upon this ground, the judgment was reversed and under C. S. U. C. c. 113, s. 17, the record was remitted to the Judge to pronounce the proper judgment, which would be upon the second count only. Held, also, that the amendment was authorized, under 32 & 33 Vict. c. 29, ss. 1 and 71 (D.). Held, also, that the court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error. Held, also, no objection that the jurisdiction conferred by 32 & 33 Vict. c. 35, was not shewn, for the record and judgment were in the form prescribed by that Act. Held, also, that the sheriff's notice was sufficient, as 32 & 33 Vict. c. 35, s. 2, requires it only to state the "nature of the charge" preferred against the prisoner. The prisoner having been sent to the penitentiary, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 U. C. R. 196.

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28. *Larceny.*

Agent.]—The prisoner, being the agent of the American Express Company, in the state of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry in their books, of its receipt, as it was his duty to do, and afterwards absconded with it to this Province, where he was arrested:—Held, that he was guilty of larceny, and was properly convicted here under 32 & 33 Vict. c. 31, s. 112 (D.). *Regina* v. *Hennessy*, 35 U. C. R. 603.

Attempt.]—The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to Cooksville, and examined J. G.'s store with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself:—Held, that as those actually engaged were guilty of the attempt to steal, the prisoner, under 27 & 28 Vict. c. 19, s. 9, was properly convicted. *Regina* v. *Esmonde*, 26 U. C. R. 152.

Carrier—*Non-delivery of Money.*]—In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant he found that he had absconded: that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in gaol, charged with stealing the money:—Held, that this evidence sufficiently shewed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny, under C. S. C. c. 92, s. 55; and a nonsuit was ordered. *Livingstone* v. *Massey*, 23 U. C. R. 156.

Upon an indictment for stealing money, the property of certain persons (composing the firm of the American Express Co.), it appeared that the agent of the company in St. Mary's delivered two parcels containing $888, which had been sent by one K., addressed to E. & S. at St. Mary's, to the prisoner to deliver, and that he appropriated them to his own use. On the trial in the quarter sessions the counsel for the Crown asked the agent of the company when their (the company's) liability ceased, which was objected to by the prisoner's counsel:—Held, 1. that the inquiry aimed at was material to shew how far the company had undertaken to deliver, and therefore when their duty as carriers ceased, but that the question as put was objectionable. 2. That it was a question for the jury to say whether the contract of the company was to deliver to E. & S., and the property in the money therefore was properly laid in the indictment. 3. That if the undertaking was to deliver the money to E. & S. the prisoner was the agent of the company for that purpose. 4. That money is property, of which a person can be a bailee so as to make him guilty of felony, if he appropriates it to his own use. The case not having been properly submitted to the jury on these points, a new trial was ordered in the court below. *Regina* v. *Massey*, 13 C. P. 484.

Criminal Breach of Trust.]—A conviction under s. 85 of the Larceny Act, R. S. C. c. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under s. 65. Two bills of indictment were presented against A. and B. under ss. 85 and 83 of the Larceny Act. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same. The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under s. 85, c. 164, R. S. C., at the time when he so received the money. A., who was the executor of C.'s estate, and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving:—Held, that whether A. was a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under s. 85, c. 164, R. S. C., of receiving it knowing it to have been unlawfully obtained. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

Evidence.]—On an indictment for stealing cooper's tools on the 5th November, 1874, it appeared that the prisoner was not arrested for nearly two years afterwards. During that time—it was not shewn precisely when—he was proved to have sold several of the tools at much less than their value, representing that he was a cooper by trade, and was going to quit it, which was proved to be untrue. It was proved also that he was in the shop from which the tools were stolen the night before they were taken, and frequently; and that when arrested he offered the prosecutor $35 to settle and buy new tools, and offered the constable $100 if he could get clear:—Held, that though the mere fact of the possession by the prisoner, after such a lapse of time, might not alone suffice, yet that all the facts taken together were enough to support a conviction of larceny. *Regina* v. *Starr*, 40 U. C. R. 268.

Held, that the prisoner was properly convicted, on the evidence set out in the report, of the larceny of certain articles connected with a mill which he had rented from the prosecutor, and that in the manner in which the case was reserved, the only question for the court was, whether in any view of the evidence the prisoner could have been found guilty. *Regina* v. *Stewart*, 43 U. C. R. 574.

Excessive Penalty—*Amendment.*]—The defendant was prosecuted for stealing $5 in money, the property of one J. M., contrary to the form of the statute, &c., and the charge was heard and determined in a summary way by a police magistrate:—Held, that the prosecution fell under s. 783 (*a*) of the Criminal Code, the value of the property being less than $10, and it not being charged that the offence was "stealing from the person;" and therefore s. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months. The provisions of the Code respecting amendments to summary convictions do not apply to summary trials and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment. The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be discharged upon habeas corpus; and an order should not be made under s. 752 for his further detention. *Regina* v. *Randolph*, 32 O. R. 212.

False Pretences.]—A defendant indicted for misdemeanour in obtaining money under false pretences cannot, under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorizes a conviction for the misdemeanour, though the facts proved amount to larceny. Where a defendant on such an indictment had been found guilty of larceny:—Held, that the court had no power under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Regina* v. *Ewing*, 21 U. C. R. 523.

Held, that defendant, who was indicted for false pretences, could not, on the indictment and evidence in this case, be convicted of larceny, under C. S. C. c. 99, s. 62. Quære, as to the meaning of that clause. *Regina* v. *Bertles*, 13 C. P. 607.

Form of Information.]—The information charged that the prisoner at a named time and place "being a trustee of a sum of money * * * the property of the C. B. of C. (a corporate body) for the use of the said the C. B. of C., did unlawfully and with intent to defraud, convert and appropriate the same to his own use, contrary to the statute in that behalf;"—Held, that the prisoner was by this information charged with a criminal offence under the Larceny Act, R. S. C. c. 164. *Regina* v. *Cox*, 16 O. R. 228.

Fruit — *Overhanging Branch.*] — A party cannot be prosecuted under 4 & 5 Vict. c. 25, for stealing fruit "growing in a garden," unless the bough of the tree upon which the fruit is hanging be within the garden; it is not sufficient that the root of the tree be within the garden. *McDonald* v. *Cameron*, 4 U. C. R. 1.

Hiring Horses.]—Defendant hired a pair of horses from a livery stable to go to a particular place, and afterwards absconded with them. The jury found that at first he did not intend to steal, but having accomplished the object of hiring, he then made up his mind to convert them to his own use:—Held, that he was a bailee, within C. S. C. c. 92, s. 55, and properly convicted on an indictment for larceny in the ordinary form. *Regina* v. *Tweedy*, 23 U. C. R. 120.

Indian Act—*Cutting Wood—Larceny.*]—There can be no indictment of an Indian for larceny for cutting and removing wood from an Indian reserve from land of which he is in possession. The proper proceeding is by summary prosecution under ss. 26, 27 and 28 of the Indian Act, R. S. C. c. 43. The property in the wood should be laid in the Crown. *Regina* v. *Johnson*, 8 C. L. T. Occ. N. 334.

Indian Act—*Trees.*]—The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 66 (D.), and was convicted:—Held, that he ought not to have been convicted, because the wood, the subject of the alleged larceny, was not, in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act, and because the affidavit required by s. 64 had not been made, and was a condition precedent to a seizure. *Regina* v. *Fearman*, 10 O. R. 660.

Indictment— *Form.*] — In an indictment charging the prisoner with stealing bank bills, the words "of the moneys, goods, and chattels" may be rejected as surplusage. *Regina* v. *Saunders*, 10 U. C. R. 544.

Indictment—*Form.*]—An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishioners of the said church:"—Held, bad. They must be averred to belong to some person or persons individually. Such a defect is not within 18 Vict. c. 92, ss. 25, 26. *Regina* v. *O'Brien*, 13 U. C. R. 436.

Indictment — *Several Counts.*] — Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanours, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent assize, when the count for larceny only is read to the jury:—Held, no error, as the prisoner was only given in charge on the larceny count. *Regina* v. *Mason*, 22 C. P. 246.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer, or motion to quash the indictment, under 32 & 33 Vict. c. 29, s. 32; and where there has been a demurrer to such allegations, as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the court of error will not reopen the matter on the suggestion that there is misjoinder of counts. *Ib.*

An indictment describing an offence within 32 & 33 Vict. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict. *Ib.*

Larceny from the Person—*Sentence.*]—The prisoner consented to be tried, and was tried and convicted, by the police magistrate for a city, for stealing a purse containing $3.48 from the person, and was sentenced to three years' imprisonment:—Held, upon the return of a habeas corpus, that the offence was an indictable one under s. 344 of the Criminal Code, whether or not it fell also under the provisions of ss. 783 and 787, and was punishable by imprisonment for any period up to fourteen years, and the magistrate had jurisdiction by virtue of s. 785. *Regina* v. *Conlin*, 29 O. R. 28.

Money Voluntarily Handed to Prisoner—*Intent to Steal.*]—Defendant held the title of certain land belonging to one A., who lived in the United States. A. exchanged it with H. (the prosecutor) for other land, and gave an order on defendant to convey to H. When H. presented this order defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and defendant that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, where the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the baiance $1,150. Defendant, instead of returning the money and notes, ran away with them: Semble, that upon these facts an indictment for larceny might have been sustained, if the jury found that defendant when he obtained possession of the property intended to steal it. *Regina* v. *Ewing*, 21 U. C. R. 523.

The public interest being concerned, the principle of estoppel would not apply, so as to prevent H. from asserting that the payment which he professed to make in good faith was in fact only a pretence. *Ib.*

Proof of Title.]—The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection taken, the indictment was

amended, by stating the goods to be the property of the mother, and no further evidence of her administrative character was given, the county court Judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury:—On a case reserved, Held, 1. That there was ample evidence of possession in R. M. to support the indictment without amendment. 2. That the Judge had power to amend, under C. S. C. c. 99, s. 78. 3. That the conviction on the amended indictment could not be sustained, there being no evidence of the mother's representative character, nor any question of ownership by her, apart from such character, left to the jury. *Regina* v. *Jackson*, 19 C. P. 280.

Several Articles.]—Held, that if an indictment for stealing certain articles be sustainable as to some of the articles stolen, the conviction is good, although the indictment may contain any number of articles as to which an indictment could not be sustained. *Regina* v. *St. Denis*, 8 P. R. 16.

Toronto Police Court.]—Held, that the police court of the city of Toronto is a court of justice, within 32 & 33 Vict. c. 21, s. 18 (D.), and that the prisoner was properly convicted of stealing an information laid in that court. *Regina* v. *Mason*, 22 C. P. 246.

Trees—*Cordwood.*]—The conviction stated that "Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and stolen from him, and which said Joseph could not satisfactorily account for its possession:"—Held, that the conviction was bad, because 32 & 33 Vict. c. 21, s. 25, under which it was made, applies to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree" within the statute. *Regina* v. *Caswell*, 33 U. C. R. 303.

Semble, that the conviction was also bad, for not alleging that the property taken was of the value of twenty-five cents at the least; the direction in the conviction, that the defendant should pay seventy-five cents for said wood, not being a finding that it was of that value. *Ib.*

Semble, that the conviction sufficiently stated that defendant was in possession of the wood. *Ib.*

Trustees — *Conversion of Securities — Sanction of Attorney-General.*]—The defendant was indicted and convicted under the Larceny Act, R. S. C. c. 164, s. 65, for that he being a trustee of two negotiable securities for the payment of $5,250 each, the property of the C. bank, for the use and benefit of the C. bank, unlawfully and with intent to defraud, did convert and appropriate the two negotiable securities to the use and benefit of him, the defendant, &c. At the trial the following letter, written and signed by the defendant, dated 6th November, 1885, was produced: "I have this day been intrusted by A. (the cashier of the C. bank) with two notes of $5,250 each, for the specific purpose of paying two notes for $5,000 that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law." The securities produced at the trial as those converted by the defendant were two drafts, not promissory notes, for $5,250 each, dated 7th November, 1885; and two drafts for $5,000 each were also produced answering the description of the notes for that amount mentioned in the letter, except that they were not actually notes, and were due at Toronto on the 9th November instead of at Montreal on the 8th. It was shewn, however, that they were held by a person in Montreal. It also appeared in evidence that the defendant procured one B. to discount the two drafts for $5,250 each, B. retaining $1,000 for an old debt, and paying part of the balance of the proceeds to the defendant in diamonds. The defendant did not take up the two $5,000 drafts and retained the proceeds of the two new drafts. The drafts were identified by witnesses as to dates, amounts, &c., and entries in the defendant's memorandum book, also produced, shewed the nature of the transactions with the cashier and B. The trial Judge stated a case for the opinion of the court:—Held, upon the evidence, that the drafts were the property of the bank and not of the cashier in his private capacity; and upon the law and evidence, that the defendant was a trustee of the documents within the meaning of the statute; and that, notwithstanding the discrepancies as to the nature of the instruments, the due date, and place of payment, there was sufficient evidence to go to the jury of the identity of the drafts produced at the trial with the notes mentioned in the letter. It was contended that the defendant should have been indicted for converting the proceeds of the securities, inasmuch as the securities were intrusted to the defendant for a purpose which rendered necessary the conversion of the securities themselves:—Held, that the nature of the transaction with B. shewed an appropriation by the defendant of the securities themselves to his own use; and, per Falconbridge, J., even if it had been otherwise, the definition of property in s.-s. (e) of s. 2 of R. S. C. c. 164 shewed the sufficiency of the indictment. It was objected that no proof was given at the trial that the sanction of the Attorney-General, required by R. S. C. c. 164, s. 65, s.-s. 2, had been given:—Held, that this objection was not open to the court upon a case reserved, not being a question that could properly arise at the trial. Knowlden v. The Queen, 5 B. & S. 532, followed. *Regina* v. *Barnett*, 17 O. R. 649.

Unstamped Promissory Note.]—S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A. McC. and another. The evidence shewed that the promissory note in question was drawn by A. McC. and C. R., and made payable to S.'s order. The said note was given by mistake to S., it being supposed that the sum of $258.33 was due him by the drawers, instead of a less sum of $175.00. The mistake being immediately discovered, S. gave back the note to the drawers, unstamped and unindorsed, in exchange for another note of $175.00. An opportunity occurring, S. afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it:—Held, that S. was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the statute, and that the offence of which he was guilty was not correctly described in the indictment. *Scott* v. *The Queen*, 2 S. C. R. 349.

See FALSE PRETENCES, sub-head, 16—FRAUD, sub-head, 23.

29. *Libel.*

Pleading—*Setting Out Facts.*]—To an indictment for libel, the language of which was couched in vague general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him:—Held, that the plea was insufficient, because it did not set out the particular facts upon which the defendant intended to rely; and that the omission from 37 Vict. c. 38, s. 5 (R. S. C. c. 163, s. 4) of the words "in the manner required in pleading a justification in an action for defamation," which were contained in C. S. U. C. c. 103, s. 9, had not the effect of altering the rule:—Held, also, that this was a case in which the court should, in the exercise of its discretion, quash the plea upon a summary motion, without requiring a demurrer, a course permitted by s. 143 of R. S. C. c. 174, as interpreted by s. 2, s.-s. (c). *Regina* v. *Creighton*, 19 O. R. 339.

See DEFAMATION.

30. *Lord's Day Act.*

Amusements—*Imperial Act.*]—See *Regina* v. *Barnes*, 45 U. C. R. 276.

Cab-driver.]—A cab-driver is not within any of the classes of persons enumerated in s. 1 of the Lord's Day Act, R. S. O. 1887 c. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday. *Regina* v. *Somers*, 24 O. R. 244.

Foreman of Railway Elevator.]—The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Company elevator in superintending the unloading of grain from a vessel into the elevator on Sunday:—Held, that R. S. O. 1897 c. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee. Conviction quashed, with costs against the prosecutor. *Regina* v. *Reed*, 30 O. R. 732.

Government Official.]—See *Regina* v. *Berriman*, 4 O. R. 282.

Steamboat Excursions.]—See *Regina* v. *Doggett*, *Regina* v. *Fortier*, 1 O. R. 537.

See SUNDAY.

31. *Maliciously Injuring Property.*

Bona Fide Belief of Right.]—Defendant B. had buried a child in a graveyard near the remains of his own father. The complainant Nichol had a parcel of ground which the sexton of the church had appropriated to his exclusive use, without any authority from the incumbent or churchwardens. The complainant subsequently extended his fence, by the like consent of the sexton only, and enclosed more ground so that the fence crossed diagonally over the grave of the child. Defendant remonstrated, but obtaining no redress, nor a removal of the fence, proceeded to remove it himself. In process of doing so he broke a marble pillar of complainant's fence, for which he was summoned before the police magistrate of St. Thomas, for "wilfully and maliciously" destroying a fence under s. 29 of 32 & 33 Vict. c. 22 (D.). He was fined $10, and ordered to pay for the damages. From this conviction defendant appealed to the general sessions:—Held, that although defendant was guilty of trespass, for which he might be mulcted in damages in a civil action, he was not liable to a fine, and that, acting under a claim of right, the act was not necessarily malicious. *Regina* v. *Bradshaw*, 13 C. L. J. 41.

Bona Fide Belief of Right—*Trial by Jury—Malice.*]—On the 8th November, 1875, an information was laid against B. before the police magistrate of St. Thomas, by one N., under 32 & 33 Vict. c. 22 (D.), for having unlawfully and maliciously broken and injured a fence round the land of N. The defence set up was, that the fence encroached upon B.'s land, but there was evidence which, if believed, went to shew that B. did not commit the injury under a bonâ fide exercise or belief of right; and the magistrate convicted and fined him. B. appealed to the general sessions of the peace, where neither side asked for a jury; the court urged them to have one, but the respondent, N., refused; and the court having heard the evidence, decided that B. acted, though mistakenly, under a bonâ fide belief that he had a right to remove the fence, and without malice; and ordered the conviction to be quashed, with costs. N. then applied to quash the order, upon the ground amongst others, that the case could not be tried without a jury; but, held, that 32 & 33 Vict. c. 31, s. 66 (D.), which authorizes the court to try without a jury, is within the powers of the Dominion Parliament, and that the case having been properly before the sessions, this court could not review their decision upon the merits. Section 66 of 32 & 33 Vict. c. 22, does not dispense with proof of malice in such cases, but, read in connection with s. 29, merely means that the malice need not be conceived against the owner of the property injured. *Regina* v. *Bradshaw*, 38 U. C. R. 564.

Bona Fide Belief of Right.] — The honest belief of a person charged with an offence under R. S. O. 1897 c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief. The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats and persons," gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore, could not successfully assert, when charged under R. S. O. 1897 c. 120, s. 1, and the Criminal Code, s. 511, that he had "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Davy*, 27 A. R. 508.

Form of Conviction.] — A conviction, purporting to be under C. S. C. c. 93, s. 28, charging that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, &c., without alleging dam-

age to any property, real or personal, and without finding damage to any amount, was held bad, and quashed. *Regina* v. *Caswell*, 20 C. P. 275.

A summary conviction under R. S. C. c. 168, s. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company:—Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, &c., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, &c., was committed; and the conviction was quashed for uncertainty. *Regina* v. *Spain*, 18 O. R. 385.

Form of Indictment.]—In an indictment purporting to be under 32 & 33 Vict. c. 22, s. 45 (D.), for malicious injury to property, the word "feloniously" was omitted:—Held, bad, and ordered to be quashed. *Regina* v. *Gough*, 3 O. R. 402.

Form of Information.]—Quære, would a complaint against A. B. that he "was seen in the act of destroying or injuring private property," without alleging that the property belonged to another person, or that the act was wilfully or maliciously done, authorize a warrant as for a malicious injury to property under 4 & 5 Vict. c. 26. *Powell* v. *Williamson*, 1 U. C. R. 154.

Form of Warrant.]—Under s. 58 of the Malicious Injuries to Property Act, R. S. C. c. 168, the offence must be "unlawfully and maliciously" committed, and the damage must exceed twenty dollars. In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully":—Held, that this was fatal to the commitment, and it was directed to be quashed:—Held, also, that the commitment should have alleged that the damage exceeded twenty dollars. *Regina* v. *Fife*, 17 O. R. 710.

Police Court Information.] — Held, that maliciously destroying an information or record of the police court is a felony within 32 & 33 Vict. c. 21, s. 18. *Regina* v. *Mason*, 22 C. P. 246.

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32. *Maliciously Wounding.*

Form of Conviction—*Term of Imprisonment.*]—On motion to discharge prisoner on habeas corpus on conviction before a police magistrate, the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm:"—Held, that the addition of the words, "with intent to do grievous bodily harm," did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding:—Held, also, that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47 (D.). *Regina* v. *Boucher*, 8 P. R. 20. Affirmed, 4 A. R. 191. See *Cassels' Dig.* 325.

33. *Marriage (Offences Against Laws as to).*

Minister—"*Religious Denomination.*"]—"The Reorganized Church of Jesus Christ of Latter Day Saints," is a religious denomination within the meaning of R. S. O. 1887 c. 131, s. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage. Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed. Semble, the words of the statute "church and religious denomination' should not be construed so as to confine them to Christian bodies. *Regina* v. *Dickout*, 24 O. R. 250.

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34. *Menaces and Threats.*

Accusation.]—the word "accuses" in s. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, accuses that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code. *Regina* v. *Kempel*, 31 O. R. 631.

Demanding Property with Menaces—*Intent to Steal.*]—By s. 404, Criminal Code, 1892, "Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it." The defendant was convicted by a magistrate of an offence against this enactment. The evidence was that the defendant went, as agent for others, to the complainant's abode to collect a debt from him; that the defendant threatened the complainant that if the latter did not pay the debt, he would have him arrested; that the defendant demanded certain goods, part of which had been sold to the complainant by the defendant's principals, on account of which the debt accrued, but upon which they had no lien or charge; and the complainant, as he swore, being frightened by the threats and conduct of the defendant, acquiesced in the demand for the goods, part of which the defendant took away and delivered to his principals, who themselves took the remainder. The defendant swore that he demanded and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this:—Held, that there was no evidence of intent to steal. Conviction quashed. *Regina* v. *Lyon*, 29 O. R. 497.

Demanding Money Due.]—Demanding with menaces money actually due, is not a demand with intent to steal, under 4 & 5 Vict. c. 25, s. 11. *Regina* v. *Johnson*, 14 U. C. R. 569.

Reasonable Cause.]—32 & 33 Vict. c. 21, s. 43 (D.), makes it a felony to send "any letter demanding of any person with menaces, and without reasonable or probable cause," any money, &c.:—Held, that the words, "without reasonable or probable cause," apply to the money demanded, and not to the accusation threatened to be made. *Regina* v. *Mason*, 24 C. P. 58.

Threatening Letter — *Accusation of Abortion.*]—A crime punishable by law with

imprisonment for a term not less than seven years means a crime the minimum punishment for which is seven years; and, as no minimum term is prescribed for the crime of abortion, sending a letter threatening to accuse a person of that crime is not a felony within the meaning of R. S. C. c. 173, s. 3. *Regina* v. *Pooplewell*, 20 O. R. 303.

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35. Misbehaviour in Office.

Audit Department—*Pecuniary Damage.*] An officer in the public service of Canada having charge of the public dredging and whose duty it was to audit the expenditure therefor, used property of his own in connection with the dredging, having first placed it in the name of a third party, in whose name also he made out the accounts. No undue gains were made by him, but as such public officer he certified to the correctness of the accounts respecting the use of his said property as though for services rendered by contractors with the government, and thereby received for himself a payment for these services:—Held, that he had been guilty of misbehaviour in office, which is an indictable offence at common law, and that to constitute the offence it was not essential that pecuniary damages should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. *Regina* v. *Arnoldi*, 23 O. R. 201.

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36. Murder and Manslaughter.

Aiding and Abetting.] — The prisoner was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. and his wife on the river bank at Amherstburg, standing near a pile of wood. She saw M. standing behind the pile, who on deceased going up to him struck deceased with a stick, inflicting a wound of which he died; deceased ran, when two other men sprang out and followed him, but in a few seconds two of them returned and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw the blow struck and identified M.; and one witness, R., swore that about six on that evening deceased left his office with R. and his wife, and that about twenty minutes after he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that the three were together before the affray, and in a saloon together about nine o'clock afterwards:—Held, that there was not sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, and no evidence whatever that he and the others were together with any common unlawful purpose; and the words spoken were in themselves unimportant. *Regina* v. *Curtley*, 27 U. C. R. 613.

Assault.]—On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. c. 29, s. 51 (D.), cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault. *Regina* v. *Smith*, 34 U. C. R. 552.

In this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death. *Ib.*

Attempt to Murder—*Assault.*]—At the quarter sessions the prisoner was found guilty on an indictment charging that she, on, &c., in and upon one B., in the peace of God and of our Lady the Queen then being, unlawfully did make an assault, and him, the said B., did beat and illtreat, with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, &c. A count was added for common assault. The evidence shewed an attempt to murder, but it was moved in arrest of judgment that the court had not jurisdiction, for that it was a capital crime, under C. S. C. c. 91, s. 5:—Held, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but that the conviction might be sustained as for an assault at common law. *Regina* v. *McEvoy*, 20 U. C. R. 344.

Credibility — *Direction to Jury.*] — On a trial for murder, the Crown having made out a primâ facie case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter:—Held, that the learned Judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them, and if from her manner he derived the impression that she was under some undue influence it was not improper to call their attention to it in his charge. *Regina* v. *Jones*, 28 U. C. R. 416.

Remarks as to alleged misdirection, in not directing that the jury must be satisfied not only that the circumstances were consistent with the prisoner's guilt, but that some one circumstance was inconsistent with his innocence. *Ib.*

Discrepancies between Evidence at Inquest and Trial.]—The prisoner, having been indicted with two others acquitted, was convicted of the murder of one H., whose body was found in a field adjoining the railway, on Monday the 10th April, apparently about three days after death, which had clearly been caused by violence. One M., the chief witness for the Crown, swore that on the Friday night previously, he heard cries in this field, a quarter of a mile from his house, and that he saw three persons walk quickly past his house from that direction, whom he recognized as the prisoner and two of his sons. He also stated that on the following morning he saw the prisoner walking along the railway and stopping near where the body was afterwards found, his manner being strange and excited. At the coroner's inquest, held six months before, this witness had declared himself unable to identify the persons seen by him, and had not mentioned seeing the prisoner on Saturday. On motion for a new trial, on the ground, among others, of sur-

prise at these discrepancies, the court refused to interfere. *Regina* v. *Hamilton*, 16 C. P. 340.

Dying Declarations.]—On an indictment for manslaughter, it appeared that deceased died about midnight, December 16th, from the effect of severe bruises alleged to have been caused by the prisoner, her husband, striking her with a lighted coal oil lamp. Immediately after receiving the injuries, which was between eight and nine in the evening of the 15th December, she said to the prisoner and to a female relative that she was dying. Four physicians, who saw her almost at once, declared that there was no hope of recovery. One of them who had remained with her till three, a.m., on the 17th, returned in the forenoon of that day. He then told her that she would die, and asked her if she was afraid to die; she said "No," and asked him if she was dying then; he answered, "Yes, you are," and she replied, "God help me." He said from the manner of her answering he believed she thought she was dying. She then made the statement which was put in evidence. The doctor asked her how she had caught fire; she said, "Arthur" (the prisoner) "knocked me down with the lamp." He then asked if the prisoner had threatened her before he did it, and she said "Yes." She died about twelve hours after this, from the effect of her injuries. The parish clergyman, who was with her from six to nine o'clock on the morning of the 17th, said he addressed her as a woman who he thought was dying, and that she understood it in that way; that he recommended her to trust in Christ as her only hope, and she said "Yes, I look to him:"—Held, that the statement was admissible as a dying declaration; and that it made no difference that the second answer was given to a leading question. *Regina* v. *Smith*, 23 C. P. 312.

The prisoners were charged with the murder of one B., caused by attempting, by the use of an instrument, to procure abortion. The deceased died on the 28th December, 1874. On the 24th she made a statement commencing: "I am very ill. I have no hope whatever of recovery. I expect to die." She then narrated the facts, and added: "If I die in this sickness I believe it will have been caused by the operations performed on me by Dr. Sparham, at the instigation of William Greaves. * * * I make these statements in all truth, with the fear of God before my eyes, for I firmly believe that I am dying." On the 26th she was again examined, and the previous statement read to her. She confirmed its truth in every respect, and added that she then felt she was in the presence of God, and had no hope of recovery of any kind at the time; and her attention being called to the expression "If I die," she said, "I had no doubt whatever that I was dying, and I felt that I was dying, and did not by the form of the expression mean to doubt in any way that I was dying," &c.:—Held, that both statements were admissible; that the mere use of the words, "If I die" would not alone defeat the emphatic declaration of abandonment of all hope made on the same occasion; and that the second declaration was receivable in order to explain the first. *Regina* v. *Sparham and Greaves*, 25 C. P. 143.

At the trial of the prisoner upon an indictment for murder, a witness for the Crown swore upon direct examination that deceased lived about thirty rods from him, and that one night, about half an hour after he had heard shots in the direction of deceased's house, deceased came to the witness's house, and asked the witness to take him in, for he was shot. The witness did so and deceased died there some hours afterwards. Evidence of statements made by deceased after being taken into the witness's house was rejected. Upon a case reserved it was contended on behalf of the prisoner: (1) that his counsel was entitled to ask the witness in cross-examination whether deceased mentioned any particular person as the person who attacked him; (2) that statements made by deceased after he arrived at the witness's house were admissible as part of the res gestæ; (3) that such statements or some of them were admissible as dying declarations:—Held, (1) that the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where, as in such offences, the complainant has been examined as a witness; and moreover, in this case, when deceased asked the witness to take him in, for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant. (2) That the statements made by deceased after he was taken into the house were not admissible as part of the res gestæ, being made after all action on the part of the wrong doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased. Regina v. Bedingfield, 14 Cox 341, and Regina v. Goddard, 15 Cox 7, followed. (3) That upon the evidence, the statements made by deceased after being taken into the house were not made under a settled hopeless expectation of death, and were therefore not admissible in evidence as a dying declaration. *Regina* v. *McMahon*, 18 O. R. 502.

Joinder of Count for Manslaughter—*Evidence of Prior Assaults.*]—An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The grand jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only:—Held, that the indictment was sufficient. *Theal* v. *The Queen*, 7 S. C. R. 397.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, (17th October preceding) the prisoner had knocked his wife down with a bottle; she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On the reserved questions, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the

charge in the first count of the indictment:—Held, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner. *Ib.*

Malice.]—P. (the prisoner) and D. (deceased) being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering a scuffle began. While it was going on D. asked for the axe, and, when they let go, P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. While the scuffle was going on D. struck P. twice. On getting up, P. kicked him on the side and arm, and then ran across the garden, got over a brush fence into the road, and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence P. struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time, when he fell, and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself:"—Held, that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was, under the circumstances, a question for the jury. A conviction for murder was therefore upheld, and a new trial refused. *Regina* v. *McDowell*, 25 U. C. R. 108.

Medical Evidence — *Reply.*]—The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions:—Held, that a medical witness, previously examined for the Crown, was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned. *Regina* v. *Jones*, 28 U. C. R. 416.

Remarks as to the effect in criminal cases of a belief by the jury that false evidence has been fabricated for the prisoner, or false answers to questions. *Ib.*

The theory of the defence in an indictment for murder, was that the death was caused by the communication of small pox virus by a medical man who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. The medical man had not in his examination in chief or cross-examination been asked anything on this subject:—Held, that he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. *Regina* v. *Sparham and Greaves*, 25 C. P. 143.

Motive—*Insurance.*]—On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by the prisoner on the life of the deceased, evidence of a previous attempt by the prisoner to insure another person for his own benefit cannot be given in evidence against him. *Regina* v. *Hendershott*, 26 O. R. 678.

Motive — *Insurance.*] — On a charge of wife murder, the Crown sought to prove that the prisoner had been with evil design accumulating insurance on his wife's life:—Held, that evidence of various applications for insurance, though in some cases resulting in rejection of the risk, was admissible, all being made practically at the same time and forming part of one transaction which could be properly given in evidence as a whole. *Regina* v. *Hammond*, 29 O. R. 214.

Pagan Indian—*Evil Spirit—Delusion.*]—A pagan Indian who, believing in an evil spirit in human shape called a Wendigo, shot and killed another Indian under the impression that he was the Wendigo, was held properly convicted of manslaughter. *Regina* v. *Machekequonabe*, 28 O. R. 309.

Poisoning—*Death of Former Husband of Prisoner.*]—Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his last illness, it was proved that his death was due to arsenical poisoning. In order to shew that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning:—Held, that the evidence was admissible. *Regina* v. *Sternaman*, 29 O. R. 33.

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

Rejecting Evidence as to Alleged Accessory.] — Prisoner being indicted for the murder of one H., the principal witness for the Crown stated that the crime was committed on the 1st December, 1859, on a bridge over the river Don, and that the prisoner and one S. (who had been previously tried and acquitted) threw H. over the parapet of the bridge into the river. The counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the learned Judge rejected the evidence, saying that S. might be called, and if contradicted might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted D. was not examined:—Held, that the presence of S. was a fact material to the inquiry, and that D. therefore should have been admitted when tendered; and, the prisoner having been found guilty, a new trial was ordered. *Regina* v. *Brown*, 21 U. C. R. 330.

Threats.]—As to certain threats alleged to have been uttered by the prisoner:—Held, that they were clearly admissible, and if undue prominence was given to them in the charge, the attention of the learned Judge should have been called to it by the prisoner's counsel. *Regina* v. *Jones*, 28 U. C. R. 416.

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37. Neglecting to Provide for Family.

Facts to be Proved.] — An indictment under 32 & 33 Vict. c. 20, s. 25 (D.), alleged that S. was the wife of defendant, and was willing to live with him as such; that it was defendant's duty to provide the necessary food, clothing, and lodging for her sustenance; and that he, on, &c., and from thence hitherto, unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same, contrary to the statute, &c.:—Held, that the allegation that she was ready and willing to live with defendant was surplusage, and need not be proved; but that it must be shewn that she was in need, and that defendant had the ability to supply her wants; and as this did not sufficiently appear by the evidence a conviction was set aside. *Regina* v. *Nasmith*, 42 U. C. R. 242.

Former Marriage — *Proof of Death of First Husband.*]—The defendant, on the complaint of his wife, was convicted under s.-s. 2 of s. 210 of the Code, of refusing to provide necessaries for her. The evidence shewed the parties were married in 1890, but that the complainant had been married to another person in 1886, though she had never lived with him; that in 1888 she had received a letter stating he was dying in the United States, and that that was the last she heard of him, save that about a year after her marriage to the defendant she again heard that he was dead. No further proof of the death of the first husband was given:—Held, that there was evidence to go to the jury of the death of the first husband, and that the defendant was properly convicted. *Regina* v. *Holmes*, 29 O. R. 362.

Lawful Excuse—*Agreement.*]—Upon an indictment of the prisoner under s. 210, s.-s. 2, of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance. *Regina* v. *Robinson*, 28 O. R. 407.

Refusal to Hear Evidence.]—Under 32 & 33 Vict. c. 20, s. 25 (D.), as amended by 49 Vict. c. 51, s. 1 (D.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently, without further evidence, committed him for trial:—Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review:—Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court. *Regina* v. *Meyer*, 11 P. R. 477.

Wife as Witness.]—The evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32 & 33 Vict. c. 20, s. 25 (D.). *Regina* v. *Bissell*, 1 O. R. 514.

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38. Obtaining Money with Intent to Defraud.

Fraudulent Post-office Orders.]—One D., being post-master at Berlin, transmitted to defendant at Toronto several post-office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant having been convicted upon an indictment for obtaining from the Queen these sums, of the moneys and property of the Queen, with intent to defraud:—Held, that the indictment was good; that s. 56 of the Post-office Act, C. S. U. C. c. 31, was not applicable to the case; that the money was properly charged to be the money of the Queen, not of the post-master; and that it was unnecessary to allege an intent to defraud any particular person. *Regina* v. *Dessauer*, 21 U. C. R. 231.

Remarks as to the extensive nature of the provision on which the indictment was framed. C. S. C. c. 93, s. 73. *Ib.*

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39. Perjury.

Attempting to Procure False Affidavit of Bastardy—*Letter—Venue.*]—Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by defendant, dated at Bradford, in the

county of Simcoe, purporting, but not proved, to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried at York. Semble, per Draper, C.J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there. Quære, whether, if the woman had committed the offence, it should have been charged as a misdemeanour only, or as the statutory offence of perjury. *Regina* v. *Clement*, 26 U. C. R. 297.

Civil Proceedings Pending.] — The practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending, disapproved of. *Chadd* v. *Meagher*, 24 C. P. 54.

Fire Loss—*Production of Policy.*]—C. S. U. C. c. 52, s. 73, empowers any justice of the peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a mutual insurance company is interested, and to administer to him the requisite oath. Upon an indictment for perjury assigned upon an affidavit made in compliance with one of the conditions of a policy:—Held, that the policy must be produced, although the defendant's affidavit referred to the policy in such a way that its existence might be fairly inferred. *Regina* v. *Gagan*, 17 C. P. 530.

Form of Indictment.]—An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the court of quarter sessions, for the county of B., on the 11th June, 1867, on a charge of larceny:—Held, sufficient. *Regina* v. *Macdonald*, 17 C. P. 635.

Indictment—*Averment of Authority.*]—Where it appears on the face of the indictment that the statement complained of was made before a justice of the peace in preferring a charge of larceny committed within his jurisdiction, it is unnecessary to allege expressly that he had authority to administer the oath. *Regina* v. *Callaghan*, 19 U. C. R. 364.

Joint Affidavit.]—A joint affidavit made by the defendant and one D., stated * * * "Each for himself maketh oath and saith that, &c.; and that he, this deponent, is not aware of any adverse claim to or occupation of said lot." The defendant having been convicted of perjury on this latter allegation:—Held, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. *Regina* v. *Atkinson*, 17 C. P. 295.

Jurat — *Place not Mentioned—Proof of Taking Oath.*]—To sustain a conviction for perjury in an affidavit, it is not necessary that the jurat should contain the place at which the affidavit is sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. *Regina* v. *Atkinson*, 17 C. P. 295.

There was no statement in the affidavit as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, county of Grey, to wit:" but the contents shewed that it related to lands in that county, and it was proved that defendant subscribed the affidavit; that the party before whom it purported to have been sworn was a justice of the peace for that county, and had resided there for some years; that the affidavit had been received through the post-office, by the agent of the Crown lands there, by whom it was forwarded to the commissioner of Crown lands; and that subsequently a patent issued to the party on whose behalf the affidavit had been made:—Held, evidence from which the jury might infer that the affidavit was sworn in the county of Grey. *Ib.*

Held, also, that if the affidavit was sworn in the county of Grey, the proof of the swearing by the justice of the peace, and the taking of the oath by the defendant, were made out by proving their signatures. *Ib.*

Justices Hearing Charge without Jurisdiction.]—The prisoner being indicted for perjury in giving evidence upon a charge of felony against one E. G., it appeared that the felony was committed in the county of Middlesex, if at all. The justices before whom the examination took place entertained the charge and examined the witnesses within the city of London. Defendant's counsel objected at the trial that the justices, being justices of the county of Middlesex, had no jurisdiction, sitting in London, to examine into an offence committed outside the city limits:—Held, that the conviction was illegal. *Regina* v. *Roie*, 14 C. P. 307.

Held, also, that the Imperial statute, 28 Geo. III. c. 49, s. 1, is local in its character and not in force in this Province.

Magistrate's Jurisdiction.] — 32 & 33 Vict. c. 23, s. 8 (D.), applies to all cases of perjury, not merely to "Perjuries in Insurance Cases," which is the heading under which ss. 4 to 12 are placed in the Act. *Regina* v. *Currie*, 34 U. C. R. 582.

Held, therefore, that a magistrate in the county of Halton had jurisdiction to take an information, and to apprehend and bind over a person charged with perjury committed in the county of Wellington. *Ib.*

Held, also, that a recognizance to appear for trial on such charge at the sessions was wrong, as that court has no jurisdiction in perjury, but a certiorari to remove it was refused, as the time for the appearance of the party had gone by. *Ib.*

Municipal Election.]—An election under the Municipal Act is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded. Where, therefore, in an indictment for perjury, defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given previous to the election; and the notice appeared to have been given on the nomination of the candidate objected to:—Held, that the assignment was not proved. *Regina* v. *Cowan*, 24 U. C. R. 606.

Negative Averment — *Evidence.*]—D., in answering to faits et articles on the contestation of a saisie arrêt, or attachment, stated among other things, "1st, that he, D.,

owed nothing for his board; 2nd, that he, D., from about the beginning of 1880 to towards the end of the year 1881, had paid the board of one F., the rent of his room, and furnished him all the necessaries of life with scarcely any exception; 3rd, that he, F., during all that time, 1880 and 1881, had no means of support whatever." D. being charged with perjury, in the assignments of perjury and in the negative averments, the facts sworn to by D. in his answers were distinctly negatived, in the terms in which they were made:—Held, that under the general terms of the negative averments, it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on faits et articles, and the conviction could not be set aside because of the admission of such proof. Even if the evidence was inadmissible, there being other charges in the same count which were pleaded to, a judgment given on a general verdict of guilty on that count would be sustained. *Downie* v. *Regina*, 15 S. C. R. 358.

Oath Administered in Foreign Country.]—Semble, that if the county Judge in the course of an investigation under R. S. O. 1887 c. 184, s. 477, proceeded to the United States to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury. *In re Godson and City of Toronto*, 16 O. R. 275.

Proceedings Before Information — *Form of Indictment.*]—Upon an indictment for perjury committed upon the hearing of a complaint before a magistrate, the information having been proved:—Held, upon a case reserved, that it was unnecessary to prove any summons issued, or any step taken to bring the person complained of before the magistrate; for so long as he was present, the manner of his getting there was immaterial. *Regina* v. *Mason*, 29 U. C. R. 431.

The indictment was defective for not shewing the jurisdiction over the offence, by alleging where the liquor was sold, the sale of which without license was the complaint; but as judgment had been pronounced, this could be taken advantage of only by writ of error. Quære, whether it was not defective also, for not shewing that the person complained against was present, or that a summons issued, and that the magistrate was authorized to proceed ex parte. *Ib.*

Trial Without Jurisdiction.] — The clerk of a division court, acting under 13 & 14 Vict. c. 53, s. 102, issued an interpleader summons of his own authority, without the bailiff's request. Both parties attended before a barrister appointed by the Judge of the court, who was ill, and an order was made. The Judge afterwards ordered a new trial, which took place. The defendant was convicted for perjury committed upon that occasion:—Held, that both parties having appeared, the proceedings in the first instance could not be considered void for want of a previous application by the bailiff; but,—Held, also, that it was not competent for the Judge to order such new trial, the first order being made final by the statute; and that the conviction was therefore illegal. *Regina* v. *Doty*, 13 U. C. R. 398.

Variance between Indictment and Information.]—The court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that in the indictment, provided the indictment sets forth the substantial charge contained in the information. *Regina* v. *Broad*, 14 C. P. 168.

Voter's Oath.]—The swearing falsely by a voter, at an election of aldermen or common councilmen for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification to a declaration on the case for imputing perjury to plaintiff, on the ground of such false swearing, is bad on demurrer. *Thomas* v. *Platt*, 1 U. C. R. 217.

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40. *Rape.*

Cross-examination of Prosecutrix—*Previous Connection with Other Men.*]—The prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had not previously had connection with a man, other than the prisoner, whether she remembered having been in the milk-house of G. with two persons named M., one after the other:—Held, that the witness may object, or the Judge may, in his discretion, tell the witness she is or she is not bound to answer the question; but the court ought not to have refused to allow the question to be put because the counsel for the prosecution objected to the question. *Laliberté* v. *The Queen*, 1 S. C. R. 117.

Evidence—*Statements of Prisoner—Statements of Counsel.*]—On a trial for rape, the evidence of the prosecution was that the prisoner knocked her down, got on her, pulled up her clothes, and committed a rape on her. A witness proved that the prisoner stated that he did no more than her husband would have done. Evidence was admitted of a statement made by prisoner's counsel at a previous trial on behalf of prisoner, that prisoner had had connection with the woman with her consent, and that he had paid her $1.00:—Held, that there was sufficient evidence of the commission of the offence; and that the statement of the prisoner's counsel was properly admitted. *Regina* v. *Bedere*, 21 O. R. 189.

Finding of Fact—*Fear or Solicitation.*]—The defendant was indicted and convicted for committing a rape on his daughter. The learned Judge left it to the jury to say whether on the evidence the act of connection was consummated through fear, or merely through solicitation:—Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence to sustain the charge, and it having been left to them with the proper direction in such a case. *Regina* v. *Cardo*, 17 O. R. 11.

Idiot or Lunatic.]—In the case of rape on an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, e. g. that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape. *Regina* v. *Connolly*, 26 U. C. R. 317.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented:—Held, that the conviction could not be sustained. *Ib.*

On an indictment for attempting to have connection with a girl under ten, consent is immaterial, but in such a case there can be no conviction for assault if there was consent. *Ib.*

Indictment for Rape — *Conviction for Common Assault.*]—A prisoner indicted for rape may be found guilty of common assault, notwithstanding the complaint or information is not laid within six months under s. 841 of the Criminal Code. *Regina* v. *Edwards*, 29 O. R. 451.

Personating Husband.] — Having connection with a woman under circumstances which induce her to believe that it is her husband, does not amount to a rape. *Regina* v. *Francis*, 13 U. C. R. 116.

Seduction.]—A prisoner indicted and tried under s. 3, clause (*a*), of the Act respecting offences against public morals and public convenience. R. S. C. c. 157, with having seduced a girl under sixteen:—Held, properly convicted of such offence, although the evidence given, if believed in whole, would have supported a conviction for rape, an indictment for which has been previously ignored by the grand jury. *Regina* v. *Doty*, 25 O. R. 362.

Statement of Prosecutrix.] — On a charge of rape it was sought to give in evidence statements made by the prosecutrix on the day following the alleged assault to a police inspector who called upon her with reference to the matter:—Held, that the evidence was inadmissible. The statements were not made as the unstudied outcome of the feelings of the woman, nor as speedily after the occasion as could reasonably be expected. *Regina* v. *Graham*, 31 O. R. 77.

Violently and against her Will.]—The meaning of the words that the prisoner "violently and against her will feloniously did ravish," is, that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made the ravisher see and know that she really was resisting to the utmost, and in this case the evidence was held sufficient to warrant a conviction. The facts, as they appeared in evidence, were left to the jury, who were also told that they must be satisfied before convicting that the prisoner had had connection with the prosecutrix "with force and violence and against her will;" and further, that "some resistance should be made on the part of the woman, to shew that she really was not a consenting party:"—Held, a proper and full direction. *Regina* v. *Fick*, 16 C. P. 379.

41. *Receiving Stolen Goods.*

See Regina v. *St. Denis*, 8 P. R. 16.

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42. *Riot.*

Assault.]—Defendant was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault:—Held, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of riot or joining in an unlawful assembly. *Regina* v. *Kelly*, 6 C. P. 372.

Firing at Rioters.]—A procession having been attacked by rioters, the prisoner, one of the processionists, and in no way connected with the rioters, was proved, during the course of the attack, to have fired off a pistol on two occasions—first in the air, and then at the rioters. So far as appeared from the evidence the prisoner acted alone and not in connection with any one else:—Held, that a conviction for riot could not be sustained. The prisoner having been indicted jointly with a number of the rioters on a charge of riot and convicted, upon a case reserved after verdict, the conviction was quashed. *Regina* v. *Corcoran*, 26 C. P. 134.

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43. *Sacrilege.*

Stealing from a Church.]—An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishioners of the said church:"—Held, bad. *Regina* v. *O'Brien*, 13 U. C. R. 436.

They must be averred to belong to some person or persons individually. Such a defect is not within 18 Vict. c. 92, ss. 25, 26. *Ib.*

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44. *Treason.*

Forfeiture of Estate.]—The estate of a traitor concerned in the rebellion of 1837, who accepted the benefit of the 1 Vict. c. 10, is at once vested in the Crown under the 33 Hen. VIII., c. 20, s. 2, without office found. *Doe d. Gillespie* v. *Wixon*, 5 U. C. R. 132.

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45. *Unlawfully Pointing Firearms.*

Prisoner Testifying.]—On appeal to the divisional court, a conviction for unlawfully and maliciously pointing a loaded firearm at a person, was quashed on an objection taken for the first time, that the defendant who was called as a witness at the trial, was not a competent or compellable witness. Regina v. Hart, 20 O. R. 611, followed. *Regina* v. *Becker*, 20 O. R. 676.

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46. *Miscellaneous Offences.*

Blasphemous Language.]—A conviction by a magistrate, stated that defendant did on, &c., at &c., being a public highway, use blas-

phemous language, contrary to a certain by-law, which was passed almost in the words of C. S. U. C. c. 54, s. 282, s.-s. 4; but there was no statement of the words used:—Held, bad. Semble, also, that there was nothing in the evidence set out giving the magistrate jurisdiction to act. *In re Donelly*, 20 C. P. 165.

Hawkers — *Negativing Exception.*] — A by-law of a county council recited the provisions of s.-s. 14 of s. 583 of the Municipal Act, R. S. O. 1897 c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, peddler or petty chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.-s. 14, in favour of the manufacturer or producer and his servants:—Held, that the by-law was ultra vires the council, and a conviction under it was bad. Held, also, following Regina v. McFarlane, 17 C. L. T. Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not the defendant's acts came within it. The conviction was therefore quashed, but costs were not given against the informant. *Regina* v. *Smith*, 31 O. R. 224.

The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, s. 495 (3):—Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade" the conviction could not be supported, for he was "not carrying goods for sale." *Regina* v. *Coutts*, 5 O. R. 644.

"The Consolidated Municipal Act, 1883" (46 Vict. c. 18), s. 495, s.-s. empowered the council of any county to pass by-laws for licensing, &c., hawkers, &c., going from place to place, &c., with any goods, wares, or merchandise for sale, and by 48 Vict. c. 40, s. 1 (O.), the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods, or jewelry, or carry and expose samples of any such goods to be afterwards delivered, &c.:—Held, that electrotype ware was not jewelry within the above enactment, and a conviction for selling this without license was therefore bad, and was quashed, though the fine imposed had been paid:—Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina* v. *Chayter*, 11 O. R. 217.

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, s. 3 of which was a copy of s. 1 of 48 Vict. c. 40 (O.). The defendant, against the protest of his counsel, was called as a witness, and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W. but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. that defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, s.-s. 3, nor within 48 Vict. c. 40 (O.); 2. that the conviction was defective in not stating that P. W. was non-resident within the county, and that the expression "of the city of London," was not sufficient; 3. that defendant had been improperly compelled to give evidence against himself; 4. that the having a license is a matter of defence, and not of proof by the prosecution; 5. that the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina* v. *McNicol*, 11 O. R. 659.

The defendant, a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes which are now R. S. O. 1887 c. 184, s. 495, s.-s. 3 (a) and (b), for carrying on a petty trade without the necessary license therefor:—Held, that the conviction could not be sustained, and must be quashed. *Regina* v. *Henderson*, 18 O. R. 144.

Practising Medicine without License.]—A conviction for practising medicine without license or being registered as a medical practitioner, under R. S. O. 1877, c. 142, s. 40, omitted to add "for hire, gain, or hope of reward," and it did not appear that the defendant had appeared and pleaded, and that the merits had been tried, and that the defendant had not appealed, or that the conviction had been affirmed on appeal, so that the 32 & 33 Vict. c. 31, s. 73 (D.), was not applicable:—Held, that the conviction must be quashed. A conviction should, if possible, state the facts necessary to bring it within that section, and it should not be drawn up until the four days for giving notice of appeal have elapsed. *Regina* v. *Hessel*, 44 U. C. R. 51.

A conviction under the "Ontario Medical Act," R. S. O. 1877 c. 142, s. 40, for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded:—Held, that s. 57 of 32 & 33 Vict. c. 51 (D.), does not apply, as by s. 46 of the Medical Act provision is made for enforcing payment. *Regina* v. *Sparham*, 8 O. R. 570.

Held, that a justice of the peace, on a conviction under ss. 40 and 46 of R. S. O. 1877 c. 142, intituled an Act respecting the profession of Medicine and Surgery, has no jurisdiction on default by the defendant of payment of fine and costs, to direct his confinement for the space of one month, unless, in

addition to the payment of the fine and costs, he paid the charges of conveying him to jail. *Regina* v. *Wright*, 14 O. R. 668.

A conviction under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 45, for practising medicine for hire:—Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising. Re Donnelly, 20 C. P. 165; Regina v. Spain, 18 O. R. 385; and Regina v. Somers, 24 O. R. 244, followed. And the court refused to amend, and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man indicated, and selling him some of it. Costs against the informant refused. Regina v. Somers, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

Provincial Fisheries Act—*Prosecution for Penalty Exceeding $20.*]—The defendant was convicted before one justice of the peace on an information under 55 Vict. c. 10, s. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish:—Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded $20, and, therefore, under ss. 25 and 26 of the Act, the prosecution should have been before a police magistrate or two or more justices of the peace, or one justice and a fishery overseer. Only one offence is created by s. 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken. *Regina* v. *Plows*, 26 O. R. 339.

Public Health.]—Held, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law, amending the by-law appended to the Public Health Act, R. S. O. 1887 c. 205, and prohibiting the unloading of manure on said part of said premises; that the use of the word "manure" in the amending by-law was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health. A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed. *Regina* v. *Redmond*, *Regina* v. *Ryan*, *Regina* v. *Burk*, 24 O. R. 331.

Public Morals—*By-law against Swearing in Street or Public Place—Private Office in Custom House.*]—A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous or grossly insulting language, or be guilty of any other immorality or indecency in any street or public place:—Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street or a public place ejusdem generis with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

Refusal to Pay Toll.]—Defendant, in a private carriage, refused to pay toll, on the ground that he was in uniform, and adjutant of the military train, and therefore exempt:—Held, that the conviction could not be quashed on the ground of his being on duty, as the exemption had not been claimed on that account. *Regina* v. *Dawes*, 22 U. C. R. 333.

Refusal to Pay Tolls.]—A conviction under C. S. U. C. c. 49, s. 95, stating that defendant wilfully passed a gate without paying, and refusing to pay toll:—Held, good. Quære, whether it would be sufficient to allege only that he wilfully passed without paying, without in any way shewing a demand. *Regina* v. *Caister*, 30 U. C. R. 247.

Held, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction. *Ib.*

Held, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith. *Ib.*

Held, also, that it was clearly not requisite to shew that defendant was summoned or heard, or any evidence given. *Ib.*

Secondhand Shops and Junk Stores.]—R. S. O. 1887 c. 184, s. 436 (R. S. O. 1897 c. 223, s. 481), which provides that "the board of commissioners of police shall in cities license and regulate second-hand shops and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store and junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years." Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification. *Regina* v. *Levy*, 30 O. R. 403.

Transient Traders.]—A by-law of a city provided that "No person not entered upon the assessment roll * * or who may be entered for the first time in the said assessment roll * * * and who at the time of commencing business * * has not resided continuously in said city * * at least three months shall commence business * * for the sale of goods or merchandise * * until such person has paid * * the sum of * * by way of license;"—Held, that the statute under which the by-law was framed, R. S. O. 1897 c. 223, s. 583, s.-ss. 30 and 31, relates to transient traders who occupy premises in a municipality, and that clause (b) of s.-s. 31 defining the term "transient traders" does not modify the provision as to occupation, and that the by-law was defective and invalid in being directed merely against persons not entered upon the assessment roll and who had resided continuously for three months in the municipality, and was silent as to these persons being in occupation of premises. Conviction quashed. *Regina* v. *Applebe*, 30 O. R. 623.

Transient Traders—*Trading Stamps.*]—The defendant arranged with various retail merchants that each should receive from him trading stamps the property in which, however, was to remain in him, and should pay him fifty cents per hundred stamps, and give one to each customer for every ten cents of cash purchases, while the defendant should advertise the merchants in certain directories and otherwise. A blank space was left in these directories for pasting in such stamps, and every customer who brought to the defendant one of the directories with a fixed number of stamps pasted in was entitled to receive in exchange any article he might select out of an assortment of goods kept in stock by the defendant. Apart from this the goods were not for sale:—Held, that these transactions did not constitute a selling or offering

for sale by the defendant within the meaning of a municipal by-law, passed under R. S. O. 1897 c. 223, s. 583, s-ss. 30, 31. *Regina* v. *Langley*, 31 O. R. 295.

Transient Traders — *Penalty — Costs— Imprisonment — Distress.*] — The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry-goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of $50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of $11.45 for his costs in that behalf; and if these sums were not paid forthwith, she was adjudged to be imprisoned. The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law, and that, in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress:—Held, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction. Regina v. Caton, 16 O. R. 11, followed. Held, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty. The conviction was quashed, and costs were given against the informant. *Regina* v. *Roche*, 32 O. R. 20.

Transient Traders.]—The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall * * offer goods, wares, and merchandise for sale * * within the limits of the town of M., without, or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandise, contrary to the by-law:—Held, that the want of an allegation in the conviction that the defendant was a transient trader whose name had not been duly entered on the assessment roll for the current year, was fatal. *Regina* v. *Caton*, 16 O. R. 11.

On the trial of a charge of being a transient trader without a license contrary to a municipal by-law, no copy thereof certified by the clerk to be a true copy, and under the corporate seal, as required by s. 289 of R. S. O. 1887 c. 184, was given in evidence. A by-law stated by the solicitor for the complainant to be the original by-law, was, however, read to the defendant in court:—Held, that the requirements of s. 289 not having been complied with, the conviction was invalid, and must be quashed. *Regina* v. *Dowsley*, 19 O. R. 622.

Trespass—*Railway.*]—Section 283 of the Railway Act of Canada, 51 Vict. c. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice. A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

Weights and Measures Act.] — Held, that although irregularly directed imprisonment was justified in default of distress by s. 62 of 32 & 33 Vict. c. 31 (D.), incorporated in the Weights and Measures Act by s. 53 thereof; but that if such imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment. *Regina* v. *Dunning*, 14 O. R. 52.

See Intoxicating Liquors — Justice of the Peace—Municipal Law.

X. Suspension of Civil Right of Action.

Arson.]—Held, that where the original holder of a policy had been indicted for arson, it would not be in the interest of justice to postpone a suit by the assignee of the policy until after the criminal trial. *Whitelaw* v. *National Ins. Co.*; *Whitelaw* v. *Phœnix Ins. Co.*, 13 C. L. J. 199.

Assault.]—To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with feloniously, &c., wounding the plaintiff with intent to do him grievous bodily harm, thereby charging the defendant with felony; that defendant was brought before the magistrate, and committed for trial, which had not yet taken place; that the subject of both the civil and criminal prosecution was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of:—Held, plea good, and an order was accordingly made staying the civil action in the meantime. *Taylor* v. *McCullough*, 8 O. R. 309.

Assault—*Bar of Civil Remedy.*]—See Assault, *ante* col. 1633.

Embezzlement — *Money had and Received.*]—In an action for money had and received:—Held, that an exemplification of an indictment upon which defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible to shew that defendant had been acquitted of the felony, so that the civil action would lie. *Macdonald* v. *Ketchum*, 7 C. P. 484.

Embezzlement— *Trust — Partnership — Imperial Act.*]—The Imperial Act, 20 & 21 Vict. c. 54, s. 12, provides that "nothing

in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed * * ; and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated;"—Held, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts. Semble, that the section only covered agreements or securities given by the defaulting trustee himself. Quære, is the said Imperial Act in force in British Columbia? If in force it would not apply to a prosecution for an offence under R. S. C. c. 164 (The Larceny Act), s. 58. An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 164, s. 58, which was not re-enacted by the Criminal Code, 1892:—Held, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions and the covenant could not be enforced. Further, the partnership property not having been held on an express trust the civil remedy was not preserved by the Imperial Act. *Major* v. *McCraney*, 29 S. C. R. 182.

Felony.]—The rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded does not apply where the Crown and not a private person is the plaintiff. *Regina* v. *Reiffenstein*, 5 P. R. 175.

Felony.]—Under the Temperance Act of 1864, where the deceased had been assaulted and killed by a person who became intoxicated by drinking to excess in defendant's inn, it was held that the legal representative might maintain an action under C. S. C. c. 78, before prosecution for felony. *McCurdy* v. *Swift*, 17 C. P. 126.

Felony—*Foreign Country.*]—To an action on promissory notes the defence was that they were given to procure the withdrawal of a charge of felony which the plaintiff had made against defendant in Utah territory in the United States. Per Wilson, J., the plaintiff would not have been bound first to take criminal proceedings for the felony before suing here on the notes, the suspension of the civil remedy being a matter of purely local policy. *Topance* v. *Martin*, 38 U. C. R. 411.

Theft.]—In an action against a carrier for the non-delivery of a package of money, where the evidence sufficiently shewed a felony a nonsuit was ordered. *Livingstone* v. *Massey*, 23 U. C. R. 156.

Theft.]—The person upon whom a robbery has been committed, is even before conviction entitled to be considered as a creditor of the party committing the robbery, although the remedy for the recovery of the amount may be suspended until after conviction. *Reid* v. *Kennedy*, 21 Gr. 86.

XI. Miscellaneous Cases.

Administration of Justice—*Constable's Services and Expenses.*]—The gist of s. 12 of R. S. O. 1897 c. 101, is to empower a warden and county attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county, and so to render the county liable for the payment for such special services, and that whether the account is certified by the warden and county attorney as required by the said section or not. *Sills* v. *Counties of Lennox and Addington*, 31 O. R. 512.

Bench Warrant—*Seal.*]—A bench warrant issued at the quarter sessions, tested in open sessions, and signed by the clerk of the peace:—Held, not invalid for want of a seal. *Fraser* v. *Dickson*, 5 U. C. R. 231.

Criminal Liability for Act of Servant.]—The owner of the shop is criminally liable for any unlawful act done therein, in his absence, by a clerk or assistant; as, for instance, in this case, for the sale of liquor without license by a female attendant. Secus, semble, if it appeared that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business. *Regina* v. *King*, 20 C. P. 246.

See Intoxicating Liquors.

Expenses of Criminal Justice.]—The schedule appended to C. S. U. C. c. 120, was not intended to embrace all the expenses of criminal justice chargeable against the government, but only to remove all doubt as to those specified. *County of Lambton* v. *Pousett*, 21 U. C. R. 472.

Great Lakes.]—Held, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this Province has authority to inquire into offences committed on said lakes, although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.

Inspector of Prisons—*Rules.*]—As to authority of inspector of prisons to make rules creating an indictable offence. See *Hamilton* v. *Massie*, 18 O. R. 585.

Interference with Electric Wires.]—Quære, as to whether one company using electric wires is liable to indictment for interfering with the wires of another company. See *Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 O. R. 571.

Municipal By-Law — *Name of Informant.*]—Where proceedings are taken by the chief of police of a town and in his name for an offence against a by-law of the town, his name and not that of the town should appear throughout the proceedings as the informant. *Re Bothwell and Burnside*, 31 O. R. 695.

Possessing Distilling Apparatus.]—The offence of possessing distilling apparatus without having made a return thereof, contrary to the Inland Revenue Act, 31 Vict. c. 8, s. 130, is a "crime." *Re Lucas and McGlashan*, 29 U. C. R. 81.

Private Prosecutor—*Costs.*]—Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and the defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. *Regina* v. *Hart*, 45 U. C. R. 1.

The court, however, has power to make payment of costs a condition of any indulgence granted in such a case, such as the postponement of the trial or a new trial. *Ib.*

Evidence that defendant was private prosecutor in an action by plaintiffs to recover costs under R. S. C. c. 8, s. 111. See *May* v. *Reid*, 16 A. R. 150.

Ratification of Criminal Act.] — See *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277.

Repair of Bridge.]—As to whether indictment or mandamus is the appropriate remedy to compel a municipality to repair an existing bridge or erect a new one. See *In re Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

Returns of Fines.]—Returns of convictions and fines for criminal offences being governed by 32 & 33 Vict. c. 31, s. 76 (D.), and not by the Law Reform Act of 1868, are only required to be made semi-annually to the general sessions of the peace. *Clemens* q. t. v. *Remer*, 7 C. L. J. 126.

Semble, that the right to legislate upon this subject belongs to Parliament, and is not conferred upon the Provincial Legislature by the B. N. A. Act, 1867. *Ib.*

Sci. Fa. on Recognizance.]—A proceeding by sci. fa. on a recognizance to keep the peace is a civil, not a criminal, proceeding. *Regina* v. *Shipman*, 6 L. J. 19.

Theft—*Action for Money Taken.*]—Right of action to recover money robbed from plaintiff by defendant, and the expenses of prosecuting defendant. See *Pettit* v. *Mills*, 12 C. L. J. 224.

Theft—*Trespass to Stolen Goods.*] — The plaintiff's horse had been stolen, and sold at public auction, but the thief was unknown. The plaintiff afterwards seeing the horse took possession of it, and the purchaser retook it from him:—Held, that the plaintiff might maintain trespass against the purchaser, without shewing a prosecution to conviction. *Bowman* v. *Yielding*, M. T. 3 Vict.

Writ of Exigi Facias.]—A writ of exigi facias will be ordered upon the application of the prosecutor, without its being applied for by the attorney-general. *Rex* v. *Elrod*, Tay. 120.

See CERTIORARI, II. — CONSTITUTIONAL LAW, II. 9—CORONER — DEFAMATION, V. — INTOXICATING LIQUORS — JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS.

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I. Expropriation.

1. *Assessment of Damages.*

(*a*) *In General.*

Enhancement of Future Value of Property by Railway — *Tender by the Crown—Bare Indemnity—Costs.*]—Upon an expropriation of land under the provisions of 50 & 51 Vict. c. 17 (D.), the measure of compensation is the depreciation in the value of the premises assessed, not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation. 2. Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant upon an expropriation, but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the court did not consider this a sufficient ground upon which to reduce the amount of compensation to which the claimant was otherwise entitled. 3. In assessing the value of lands taken or injuriously affected by a public work the owner should be allowed a liberal, not a bare indemnity. 4. Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered. *McLeod* v. *The Queen*, 2 Ex. C. R. 106.

Imperial Lands Clauses Consolidation Act, and Railway Clauses Consolidation Act—"*The Government Railways Act, 1881.*"]—In so far as "The Government Railways Act, 1881," re-enacts the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. (Imp.) c. 18, and the Railway Clauses Consolidation Act, 8 & 9 Vict. (Imp.) c. 20, where the latter statutes have been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts in Canada. Trimble v. Hill, 5 App. Cas. 342, and City Bank v. Barrow, 5 App. Cas. 664, referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Lessee's Claim Against Owner.]—The government of Canada, having taken the land of the defendant's testator for the purposes of the Welland canal, paid into court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, &c., and on payment of the money to convey free from all other incumbrances, including taxes. The plaintiff was lessee of the property so taken, and claimed compensation for disturbance:—Held, that the plaintiff was entitled to compensation out of the money paid into court, and that his claim was one which the owner was liable, under 37 Vict. c. 13, s. 1 (D.), to pay. *In re Welland Canal Enlargement, Fitch* v. *McRae*, 29 Gr. 139.

Market Value—*Real Value to Owner at Time of Expropriation.*]—In an expropriation matter the court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Minerals—*Tests.*] — In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. Brown v. Commissioner for Railways, 15 App. Cas. 240, referred to. Where, however, such tests or experiments have not been resorted to, the court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Municipal Assessment Rolls.] — The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based where such valuation is made arbitrarily, and without consideration of the trade carried on upon the property or the profits derivable therefrom. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Offer to Settle Claim.]—Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

Official Arbitrators — *Jurisdiction.*] — Section 34 of 31 Vict. c. 12 (D.), the Public Works Act, which provides for the reference to the board of official arbitrators of claims for damages arising from the construction, or connected with the execution of any public work, only contemplates claims for direct or consequent damages to the property, and not to the person or to the business of the claimant. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Potential Advantages Derived from a Public Work.]—Notwithstanding the generality of the terms of 44 Vict. c. 25, s. 16 (D.), re-enacted by R. S. C. c. 40, s. 15, and 50 & 51 Vict. c. 16, s. 31, which provides that the official arbitrators shall take into consideration the advantages accrued, or likely to accrue to the claimant, or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefits shared in common with all the neighbouring estates. *The Queen* v. *Carrier*, 2 Ex. C. R. 36.

Profits.] — The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property within the meaning of s. 34 of 31

Vict. c. 12. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

Profits.]—Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works. Jubb v. Hull Dock Co., 9 Q. B. 443, and Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 Eq. 221, L. R. 5 H. L. 418, referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Prospective Capabilities of Property — *Value to Owner — Unity of Estate — Advantage to Paper Town from Railway.*]—In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character; 2. in awarding compensation for property expropriated, the court should consider the value thereof to the owner and not to the authority expropriating the same. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, followed; 3. in assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation; 4. the advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50 & 51 Vict. c. 16, s. 31 (D.). *Paint* v. *The Queen*, 2 Ex. C. R. 149.

Prospective Capabilities of Property.]—Under the provisions of 31 Vict. c. 12, s. 34 (D.), in assessing compensation in respect of damage to property arising from the construction or connected with the execution of any public work, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. Mayor of Montreal v. Brown, 2 App. Cas. 168, referred to. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

Quebec Law—*Interest.*]—Apart from any legislation of the Dominion Parliament, where lands have been expropriated for any purpose, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England. Under the law of the Province of Quebec where interest is allowed on an award by the official arbitrators, a claim for loss of profits or rent cannot be entertained by the court on appeal, as such interest must be regarded as representing the profits. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Sales of Similarly Situated Properties.]—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

(b) *Lands Injuriously Affected.*

Damage Peculiar to Property in Question.] — To entitle the owner of property alleged to be injuriously affected by the construction of a public work to compensation, it must appear that there is an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public. *Robinson* v. *The Queen*, 4 Ex. C. R. 439.

Deprivation of Access — *Interference With Navigation.*]—An interference with the right of navigation in a harbour, which the owner of a wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situate resulting from the construction of a public work; 2. but where the interference affects a private right of access which the owner has to and from the water of the harbour, or with the use of such water for the lading and unlading of vessels at his wharf, the claimant is entitled to compensation. *Magee* v. *The Queen*, 5 Ex. C. R. 391.

Destruction of Highway—*Obstruction to Navigation.*]—Where lands are taken for a public work, and other lands, held with those so taken, are injuriously affected by the construction of the work, the measure of damages is, in general, the value of the lands taken and the depreciation in value of such other lands; 2. the claimant's lands were situated upon an island connected with the mainland by a highway carried over a structure in waters that were, in law, navigable, but had not been used for the purpose of navigation, being only some five or six feet in depth. The obstruction had been acquiesced in for many years. The Crown had repaid to the land owners on the island money the latter had expended in repairing the highway over this structure, and the municipality had also expended money in repairing the highway where it crossed such waters. By the construction of a public work this highway was flooded and destroyed. The Crown, however, treated it as a public way, and substituted another way for it that mitigated, but did not wholly prevent the depreciation in value of the claimant's property:—Held, that even if the legislature had not authorized the obstruction in such navigable waters, the claimant was entitled to compensation for the depreciation caused by the construction of the public work, inasmuch as such depreciation did not arise from any proceeding taken by the Crown for the removal of such obstruction. *The Queen* v. *Moss*, 5 Ex. C. R. 30.

Drainage—*Prospective Damages—Acquittance by Predecessor in Title.*] — Where, by the construction of a railway, the claimant is put to greater trouble and expense in carrying off surface water from his lands through the boundary ditches between his farm and the farms adjoining he is entitled to compensation therefor; 2. the injury thereby occasioned to claimant is one that could have been foreseen at the time when part of his land was taken for the purposes of the railway, and was discharged by an acquittance given to the com-

pany of all damages resulting from such expropriation. *Simoncau* v. *The Queen*, 2 Ex. C. R. 391.

Easement—*Diminution in Value of Part of Land not Taken.*]—The statute 48 Vict. c. 21 (D.), authorized the taking of land for the purpose of a public park, and defined land, as including "any parcel of land, stream, * * and any easement in any land." There was no express provision for compensation for lands injuriously affected, the compensation, price, or value mentioned in the Act, being only for the land taken. Fourteen acres of an estate of thirty three acres owned by B. were taken for the park. The thirty three acres were separated by a road from another property owned by B. and leased by him for the purposes of an hotel for a term of twenty years from February, 1881. The water supply for the hotel was, and had been for thirty years, derived from springs on the fourteen acres. An appeal as to the amount of compensation was dismissed, except as to the question of the supply of water for the hotel property. As to that, it being an easement which passed to the tenant under the lease, and being "land" within the meaning of the Act, the fourteen acres might be expropriated, leaving the easement to be enjoyed by B. as appurtenant to the hotel property; or it might be extinguished, in which case it would be a proper subject for compensation, and it not appearing upon the evidence whether this had been considered, the award was referred back without costs to either party. *Re Bush and Commissioners of Niagara Falls Park*, 14 A. R. 73.

Fire—*Increased Risk from Fire by Railway—Depreciation from Nature of Expected User.*]—Damage resulting from increased risk from fire by reason of the intended user of the expropriated property is a proper subject for compensation. Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418, and Cowper Essex v. Local Board for Acton, 14 App. Cas. 153, referred to. 2. Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. *Straits of Canseau Marine R. W. Co.* v. *The Queen*, 2 Ex. C. R. 113.

Frightening Horses—*Interfering with Work—Market Value.*] — A portion of the claimant's property, although not damaged by the construction of the railway, was injuriously affected by its operation, inasmuch as near a certain point thereon trains emerged suddenly and without warning from a snow-shed, frightening the claimant's horses and thereby interfering with the prosecution of his work:—Held, that this was a proper subject for compensation. Where certain land remaining to the owner was not appreciably affected in respect of the value it had to him for the purposes of occupation, the damages were ascertained and assessed in respect of its depreciation in market value. *Vezina* v. *The Queen*, 2 Ex. C. R. 11.

Injury Done—*Lands Clauses Consolidation Act.*]—The phrase "injury done" in 31 Vict. c. 12, s. 40 (D.), is commensurate with, and has the same intendment as, the phrase "injuriously affected" in 8 & 9 Vict. c. 18, s. 68, Imperial Lands Clauses Consolidation Act, and, in so far as the similarity extends, cases decued under the Imperial Act may be cited with authority in construing the Canadian statute. *McPherson* v. *The Queen*, 1 Ex. C. R. 53. See also, *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Navigable Stream — *Public Easement——Riparian Rights.*]—The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof; 2. defendants, who were prosecuting a milling business on certain waters forming part of the Trent Valley Canal, asserted a claim against the Crown for a quantity of land taken for the improvement of the navigation of such waters, and also claimed a large sum for damages alleged to have been sustained by them (1) as riparian owners by reason of the taking of the land on both sides of a head-race preventing any future enlargement of the width of such head-race, and (2) from the fact that they would not be able in the future to use to the full extent all the power which the mill-pond contained, because they could not cut raceways from the pond into the river through the expropriated part:—Held, that while the defendants were entitled to compensation for the quantity of land taken by the Crown they could not recover for any injury to the remaining land arising from the utilization of the waters of the stream for the purpose of improving the navigation. Semble, that where no particular estate was sought to be expropriated in a notice and tender to claimants under s. 10 of 50 & 51 Vict. c. 17 (D.) (repealed by 52 Vict. c. 13 (D.)), it is to be presumed that the Crown intended to take whatever estate, &c., claimants had in the lands expropriated. *The Queen* v. *Fowlds*, 4 Ex. C. R. 1.

Obstruction of Access—*Construction of Railway Siding on Sidewalk Contiguous to Land.*]—Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the Government Railways Act, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade; 2. the construction of a railway siding along the sidewalk contiguous to a claimant's lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation. Quære, whether the rule that compensation in cases of injurious affection only, must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under the Government Railways Act, 1881? *The Queen* v. *Barry*, 2 Ex. C. R. 333.

Obstruction of Access.] — The defendant was the owner of a dwelling-house and property fronting on a public highway. In

the construction of a government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed:—Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Act. Beckett v. Midland R. W. Co., L. R. 3 C. P. 82, referred to. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

Obstruction of Canal.]—See *Fairbanks* v. *The Queen*, 24 S. C. R. 711.

Potential Advantage of Railway to Remaining Property.]—On appeal from an award of the official arbitrators, the court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed. *Charland* v. *The Queen*, 1 Ex. C. R. 21.

Profits—*Danger of Fire.*]—Although a claimant is entitled to reasonable compensation for the damage sustained in respect of the injury to, and depreciation in value of, his property arising from the construction and operation of a railway in its immediate vicinity, he is not entitled to damages for loss and injury to his business consequent thereon; nor for extra rates of insurance it might become necessary for him to pay upon vessels in course of construction in his shipyard by reason of increased risk from fire from the operation of the railway. Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, followed. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Profits.]—In assessing damages for injury occasioned to a property by the construction of a railway, the annual loss of profits since the commencement of the injury as well as the permanent decrease in the value of the property, must be taken into consideration. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Undertaking to Give Right of Way—*Future Damages—Increased Value by Reason of Public Work.*]—Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purposes of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. c. 28, s. 3 (D.), filed an undertaking to build and maintain a suitable road or right of way across the property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from the deprivation of access; and the court assessed damages for the past deprivation only. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the court took cognizance of such agreement in pronouncing judgment. In respect to the land taken the court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, and Paint v. The Queen, 2 Ex. C. R. 149, 18 S. C. R. 718, followed. *The Queen* v. *Harwood*, 6 Ex. C. R. 420.

Water Rights—*Prospective Capabilities of Property—Unnavigable Stream of Water Running through Claimant's Land.*]—Where the Crown in the construction of a public work had forever destroyed the milling capabilities of a property and deprived the owner of a future income derivable from the property as applied to such a use, and had rendered useless certain mills and their machinery situate thereon:—Held, in assessing compensation in respect of damage to property arising from the construction, or connected with the execution, of any public work, under the provisions of 31 Vict. c. 12, s. 34, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. Mayor of Montreal v. Brown, 2 App. Cas. 168, referred to. (2) The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

(c) *Lands Taken.*

Assessment — *Valuation of Property.*] — The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based where such valuation is made arbitrarily, and without consideration of the trade carried on upon the property or the profits derivable therefrom. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Building Purposes.]—The Crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had theretofore been sold for building purposes. There was evidence, however, to shew that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town:—Held, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation. *Kearney* v. *The Queen*, 2 Ex. C. R. 21. Judgment varied by the supreme court by increasing the compensation; see *Cassels' Dig.* 313.

Building Purposes—*Sales of Similarly Situated Properties—Crossings.*]—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. (2) There is no legal liability upon the Crown to give a claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claim-

ant, the court assessed damages in view of the fact that there were no means of enforcing the performance of such undertaking. (3) Where claimant for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings the court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

Character of the Title.] — Claimants' title to a water lot, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec, prior to Confederation. The grant contained, inter alia, a provision that, upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water lot for the purpose of public improvement:—Held, the property being situated in a public harbour, this power of resuming possession for the purpose of public improvement, would be exercisable by the Crown as represented by the Government of Canada. *Holman* v. *Green*, 6 S. C. R. 707, referred to. (2) Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of the Government Railways Act, the claimants were entitled to recover the fair value of the lot at the date of expropriation. The value, however, should be determined with reference to the nature of the title. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Interest.]—Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date. *Drury* v. *The Queen*, 6 Ex. C. R. 204.

Lease—*Lessees' Loss of Profits—Increased Cost of Carrying on Business.*]—The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them, for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession, the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which even the suppliants were to be paid two thousand five hundred dollars for the improvements they had made:—Held, that the measure of compensation to be paid to the suppliants was the value at the time of the expropriation of their leasehold interest in the lands and premises. Apart from the sum payable for improvements, there was no direct evidence to shew what the value was, but it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased. The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them, or to any person in a like position, of their interest in the premises. The suppliants also contended that if they had not been disturbed in their possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed. *Gibbon* v. *The Queen*, 6 Ex. C. R. 430.

Market Value.]—It is the real value of the land to the owner at the time of the expropriation that must be taken as the basis of compensation; and where claimant sought to recover damages in respect of a portion of his farm as a gravel pit, but failed to shew that it had a value quoad hoc at the time of the taking, the court declined to assess its value otherwise than as farm land. *Vezina* v. *The Queen*, 2 Ex. C. R. 11.

Market Value—*Real Value to Owner at Time of Expropriation.*]—In an expropriation matter the court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him, that should be the basis of compensation. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Possession of Buildings on Expropriated Property—*Use and Occupation—Interest.*] — Where the Crown had expropriated certain real property for the purposes of a railway, but had for a number of years left the owner in the use and occupation of several buildings thereon, two of which, an hotel and a store, were burned uninsured before action brought, compensation was allowed him for the value, at the time of the expropriation, of all the buildings together with interest on the value of the hotel and store from the time they were so destroyed. *The Queen* v. *Clarke*, 5 Ex. C. R. 64.

Prospective Capabilities of Land for More than One Purpose—*Basis of Valuation.*]—B. & Co. were owners of uncleared land in a parish in the Province of Manitoba, upon which certain agents of the Dominion Government had entered at different times, under the provisions of s. 25 of 31 Vict. c. 12 (D.), and taken therefrom large quantities of sand and gravel:—Held, that the official arbitrators were wrong in assessing the damages in respect of the agricultural value of the land; and that such assessment should have been made in respect of its value as a sand and gravel pit. Semble, where lands are taken which possess capabilities rendering them available for more than one purpose, under s. 40 of the Public Works Act, 31 Vict. c. 12, compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value. *Burton* v. *The Queen*, 1 Ex. C. R. 87.

Prospective Capabilities of Property — *Advantage Accruing to Projected Town from Railway.*] — In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character. (2) In awarding compensation for property expropriated, the court should consider the value thereof to the owner, and not to the authority expropriating the same. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, followed. (3) In assessing damages where land has been expropriated, the unity of the estate must be considered, and if by the severance of one of several lots so situated that the possession and control of each gives an enhanced value to them all the remainder is depreciated in value, such depreciation is a substantive ground for compensation. (4) The

advantage resulting to the owner of a paper town from the Crown making it the terminus of a government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50 & 51 Vict. c. 16, s. 13 (D.). *Paint* v. *The Queen*, 2 Ex. C. R. 149, 18 S. C. R. 718.

Siding.]—On appeal from an award of the official arbitrators, the court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed. *Charland* v. *The Queen*, 1 Ex. C. R. 291.

Special Value to Owners—*Advantages Derived from a Public Work — Nature of Title.*]—In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should therefore be indemnified in respect of any loss which, in consequence of the expropriation, he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purpose of his business; and in that case should be indemnified for any depreciation in its value to him for the purpose for which he has been accustomed, and still desires to use it. (2) Notwithstanding the generality of the terms of 44 Vict. c. 25, s. 16 (D.), re-enacted by R. S. C. c. 40, s. 15, and 50 & 51 Vict. c. 16, s. 31 (D.), which provides that the official arbitrators shall take into consideration the advantages accrued, or likely to accrue, to the claimant or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefit shared in common with all the neighbouring estates. (3) In assessing compensation to be paid to a claimant whose land has been expropriated, the court will look at the nature of his title as one of the criteria of value. *The Queen* v. *Carrier*, 2 Ex. C. R. 36.

Temporary Enhancement in Value—*Interest.*] — The temporary enhancement in the value of lands by reason of their being adjacent to the site of a projected railway terminus which had been abandoned, was not taken into consideration by the court in assessing compensation under s. 31 of The Exchequer Court Act (prior to its amendment by 54 & 55 Vict. c. 26, s. 37 (D.)), for the expropriation of such lands. (2) Where the Crown has gone into possession of lands sought to be expropriated for the purposes of a public work, interest upon the sum awarded as their value may be computed from the date of entering into possession, notwithstanding the fact that the Crown may not have acquired a good title to the lands until a date subsequent to that of such entry into possession. *The Queen* v. *Murray*, 5 Ex. C. R. 69.

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2. *Crossings.*

Damage Occasioned by Want of Crossing.] — By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her:—Held, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing. *Kearney* v. *The Queen*, 2 Ex. C. R. 21.

Damage Occasioned by Want of Crossing.]—Where, upon the expropriation of land for the right of way of a government railway through a claimant's property, a crossing over the railway is not provided by the Crown, damages will be allowed for the depreciation of his property resulting from the absence of such crossing. *Guay* v. *The Queen*, 2 Ex. C. R. 18.

Offer to Give Crossing.]—There is no legal liability upon the Crown to give a claimant a crossing over any government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the court assessed damages in view of the fact that there were no means of enforcing the performance of such undertaking. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

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3. *Miscellaneous Cases.*

Agreement to Accept a Certain Sum as Compensation.]—Defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of R. S. C. c. 39. Upon the defendants refusing to carry out their agreement on the ground that the damages were greater than they anticipated, and the matter being brought into court on the information of the attorney-general, the court assessed the damages at the sum so agreed upon:—Quære—Is the Crown in such a case entitled to specific performance? *The Queen* v. *McKenzie*, 2 Ex. C. R. 198.

Annuity Dependent on Ownership.]—A testator devised his residential estate, with the islands, lands, and grounds appertaining, to his nephew, whose grandmother, by her will, directed her executors to pay him $2,000 a year so long as he should remain the owner and actual occupant of the property, "to enable him the better to keep up, decorate, and beautify the property known as * * *, and the islands connected therewith:"—Held, that the expropriation, under an Act of the Legislature, of a part of the property, did not in any way affect the right to this annuity; and therefore in awarding compensation to the nephew for the lands expropriated the arbitrators properly excluded the consideration of any contemplated loss by him of this annuity. *In re Macklem and Commissioners of Niagara Falls Park*, 14 A. R. 20.

A failure to reside and occupy as required by her will would be in the nature of a forfeiture for breach of a condition subsequent,

and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default; the vis major of a binding statute could not work a forfeiture. *Ib.*

Claimant's Acquiescence in Construction of Culverts.]—The suppliant sought to recover damages for the flooding of a portion of his farm, resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water, and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that, with respect to part of them, he was present when it was being constructed and actively interfered in such construction:—Held, that he was not entitled to compensation. *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Conversion into Personalty.] — When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia, 4th series, c. 36, s. 40 et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney* v. *Kean*, 3 S. C. R. 332.

Damages Claimed from Claimant.]—The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them:—Held, that as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract and could not maintain any claim against the Crown in that behalf. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Damage from Government Railway—*Parol Undertaking by Officer of the Crown.*]—Claimants are entitled to take such steps and to execute such works as are necessary to make their property injuriously affected by carrying out government improvements as good, safe and serviceable as it was before the interference therewith, and to recover from the Crown the expenses thereby incurred, and are entitled to be fully indemnified for any injury done, but in this case they were held not entitled to improve their water system and service at the Crown's expense. 2. Where the question of the government engineer's authority, under the circumstances of this case, to make a parol contract whereby the Crown's liability would be extended, was not raised:—Held, that the claimants were entitled, under the contract made with him, to recover the cost of the works executed under their engineer's direction. *St. John Water Commissioners* v. *The Queen*, 2 Ex. C. R. 78, 19 S. C. R. 125.

Dedication of Highway.]—In the construction of a government railway the Crown diverted a street as laid out on a registered plan, which, although it had not been declared a public way, was used as such, and public work had been done on it. The claimant asked for compensation on the ground that the street was her private property:—Held, 1. That the question was one of dedication rather than of prescription; that the evidence shewed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time. 2. That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England. Semble, that 18 Vict. c. 100, s. 41, s.-s. 9, is a temporary provision having reference to roads in existence on 1st July, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. Myrand v. Légaré, 6 Q. L. R. 120, and Guy v. City of Montreal, 25 L. C. J. 132, referred to. *Bourget* v. *The Queen*, 2 Ex. C. R. 1.

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

Filing Plans—*Contractor to Build Government Railway.*]—Section 109 of the Government Railway Act of 1881, 44 Vict. c. 25 (D.), provides that "no action shall be brought against any officer, employee or servant of the Department of Railways and Canals for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing:" —Held, that a contractor with the Minister of Railways and Canals, as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section. Held, also that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken when an order in council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Flooding Land.] — The Dominion Government constructed a collecting drain along a portion of the Lachine Canal. This drain discharged its contents into a stream and syphon-culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times, the suppliant's farm was flooded and the crops thereby injured. The flooding was not regular and inevitable, but depended upon certain

natural conditions which might or might not occur in any given time:—Held, that the Crown was liable in damages; that the case was one as to which the court had jurisdiction under clause (d) of s. 16 of the Exchequer Court Act; and that in assessing the damages in such a case the proper mode was to assess them once for all. *Davidson* v. *The Queen*, 6 Ex. C. R. 51.

Grantor (Auteur) — *Expropriation for Purposes of Lachine Canal—Easements and Servitudes Created by Claimants' Grantor (Auteur)—Claim for Present Damages Affected by — Compensation Paid to Grantor (Auteur)—Right of Action.*]—See *Jackson* v. *The Queen*, 1 Ex. C. R. 144.

Niagara Falls Park—*Closing Road.*]—The statute 48 Vict. c. 21 (O.) does not empower the commissioners appointed thereunder to expropriate the rights of a road company or to close up any part of the road for the purposes of the Niagara Falls Park. *Re Niagara Falls Park, Fuller's Case*, 14 A. R. 65.

Prince Edward Island Railway—*Effect of Non-Entry of Commissioners on Land Taken.*]—Held, on the facts of this case, that the railway commissioners had not complied with the statute, 34 Vict. c. 4, s. 13 (P.E.I.), and that the Crown had not acquired title to the lands in question. *The Queen* v. *Sigsworth*, 2 Ex. C. R. 194.

Railway—*Expropriation of a Railway by the Crown—Special Act—"Present Value of Work done"—Allowance for Capital Expended in Railway.*]—The plaintiff company had entered into an agreement with the Dominion Government to construct, in consideration of a certain subsidy per mile, a line of railway, but when they had partially completed it abandoned active work for lack of funds. The Government under Parliamentary authority to pay all claims standing against the company on account of their partial construction of the line, and to set the same off against the company's subsidy, was empowered by 50 & 51 Vict. c. 27, s. 1 (D.), to acquire "by purchase, surrender or expropriation the works constructed and property owned by the said company," paying therefor the amount adjudged by the Court "for the present value of the work done on the said line of railway by the said company:"—Held, that the statute contemplated the taking of all the works constructed by the company and not a portion thereof; and where a portion only was taken compensation should be assessed in respect of the total value of the works; 2. that the words "present value of the work done," in s. 1 of the said Act, should be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act; 3. that the word "value" in the Act meant the value of the property to the company and not to the Government; and that compensation for the taking should be assessed at the fair value of the property at the time contemplated by the Act; 4. the company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which certain county councils had, in aid of the company's undertaking, paid the proprietors whose lands were situated in such counties:—Held, that the company were entitled to compensation therefor; 5. held, also, that the company were entitled to an allowance for the use of capital expended in the enterprise. *Montreal and European Short Line R. W. Co.* v. *The Queen*, 2 Ex. C. R. 159.

Roads—*Expropriation for Public Work.*]—See *Re Trent Valley Canal*, 11 O. R. 687.

Unfinished Wharf — *Builder's Profit — Basis of Value.*]—Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of money advanced, and for the risks incurred by him during the construction thereof, in other words a sum to cover a fair profit to the builder on the work so far as completed. *Samson* v. *The Queen*, 2 Ex. C. R. 94.

Vesting Title in Crown — *Incumbrances.*]—An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession and, within a year, by a deed of surrender, is sufficient under the Expropriation Act, s. 6, R. S. C. c. 39, to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender; 2. under s. 11 of the said Act the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land and is not affected by any subsequent transfer or surrender of such land. Partridge v. Great Western R. W. Co., 8 C. P. 97, and Dixon v. Baltimore and Potomac R. W. Co., 1 Mackey 78, referred to. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Waiver—The defendant was the owner of a dwelling house and property fronting on a public highway. In the construction of a government railway, the Crown erected a bridge or overland crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed:—Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Act. Beckett v. Midland R. W. Co., L. R. 3 C. P. 82, referred to; 2. the defendant, and others interested in the manner in which the crossing was to be made, consulted the government engineer, who declined to authorize a level crossing with gates, and those present at the meeting decided on a certain grade which the defendant subsequently petitioned to have altered, which was refused:—Held, that by his presence at the meeting the defendant did not waive his right to compensation. The right of way for the line of railway had been previously acquired by another railway, and the defendant's predecessor in title had been paid the damages awarded to him. But it was clearly shewn that at the time when such damages were assessed there was no intention to construct an overhead bridge, and that they were assessed on the understanding that there was to be a crossing at rail level:—Held, that the defendant was not, by reason of such payment, precluded from recovering compensation

for injuries occasioned by the overhead bridge. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

II. LANDS.

1. *British Columbia Land Act.*

Right of Pre-emption—*Lands Reserved—Agricultural Settlers.*]—See *Hoggan* v. *Esquimault and Nanaimo R. W. Co.*, *Waddington* v. *Esquimault and Nanaimo R. W. Co.*, 20 S. C. R. 235; [1894] A. C. 429.

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2. *Dominion Land Act.*

Conflicting Claims—*Attacking Patents.*] See *Farmer* v. *Livingstone*, 5 S. C. R. 221; 8 S. C. R. 140.

Permits to Cut Wood and Ties.]—See *Sinnott* v. *Scoble*, 11 S. C. R. 571.

Reservation of Mines and Minerals.]—See *Canadian Agricultural Coal and Colonization Co.* v. *The Queen*, 3 Ex. C. R. 157; 24 S. C. R. 713.

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3. *Dominion and Provincial Rights.*

Foreshore of Harbour.]—See *Holman* v. *Green*, 6 S. C. R. 707; *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152; *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Intrusion.]—To an information of intrusion filed by Her Majesty's Attorney-General for the Dominion, prosecuting for Her Majesty, defendant pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada, but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situated. Issue being joined on this plea, the title at the trial was gone into, and a verdict entered for the Crown, with leave to defendant to move to enter it for him;—Held, that the Crown was clearly entitled to recover, for, among other reasons, the plea set up no title in defendant, and admitted the Crown title by stating the lands to belong to this Province; and the fact of the Attorney-General for Canada prosecuting for the Crown could not shew that a Dominion title was necessarily claimed. *Attorney-General* v. *Harris*, 33 U. C. R. 94.

Remarks upon the form of, and defects in, the nisi prius record. *Ib.*

Minerals.]—See *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295.

Railway Belt in British Columbia.]—Semble, that letters patent for public lands situated within the railway belt in British Columbia should issue under the great seal of Canada and not under the great seal of British Columbia. *The Queen* v. *Farwell*, 3 Ex. C. R. 271; 14 S. C. R. 392.

Railway Belt in British Columbia.]—Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled all lands held thereunder become the property of the Crown in the right of the Province and not in the right of the Dominion. (2.) Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of s. 11 of the terms of the union between the Province of British Columbia and the Dominion of Canada. See statutes of Canada, 1872, p. XCVII. *The Queen* v. *Demers*, 3 Ex. C. R. 283; 22 S. C. R. 482.

See CONSTITUTIONAL LAW.

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4. *Free Grants Act of Ontario.*

Deciding Claims to Land.]—Section 3 of 4 & 5 Vict. c. 100, giving authority to the Governor in Council to adjudge upon claims to free grants of land under any order in council then in force:—Held, to apply to located lands on which improvements have been made as well as other lands. *Simpson* v. *Grant*, 5 Gr. 267.

Exemption.]—The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. 1887 c. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money:—Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of s. 20, s.-s. 2. The exemption extends to the land or any part thereof or interest therein, so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him qua locatee. The word "interest" used in the sub-section does not extend to the chattel interest of a mortgagee. *Cann* v. *Knott*, 19 O. R. 422; 20 O. R. 294.

Grant to Men Only.]—By R. S. O. 1877 c. 24, free grants of lands for homesteads are authorized to be made only to men. *Rogers* v. *Lowthian*, 27 Gr. 559.

Sale of Land to Take Effect After Patent.]—Section 16 of the Free Grants and Homesteads Act, R. S. O. 1887 c. 25 (R. S. O. 1897 c. 29, s. 19), which provides that "neither the locatee, nor any one claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and where such agreement was entered into it was enforced after the issue of the patent, where all the requisites of s. 8 of the Act had been complied with by the locatee. Judgment below, 31 O. R. 54, reversed. *Meek* v. *Parsons*, 31 O. R. 529.

Sale of Trees by Locatee.]—A locatee of free lands under 38 Vict. c. 8 (O.), R. S. O.

1877 c. 24, who has, contrary to the provisions of s. 10 of the Act, sold the pine trees on the land before the issue of the patent, is not, nor is anyone claiming under him, after its issue, estopped from denying the validity of the sale. *Chapicwski* v. *Campbell*, 29 O. R. 343.

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5. *Ordnance Lands.*

Bytown Act—*Dower.*]—To an action of dower the tenant pleaded, that the husband in his life time, in 1823, granted certain land to the King; and from thence until the passing of 7 Vict. c. 11, the Crown continued seized of said land for purposes connected with the military defence of the Province, and the same was, during all the time aforesaid, duly set apart and occupied for the said purposes; that by the 7 Vict. c. 11, the said land was vested in the principal officers of ordnance, for the service of said department, &c.; that the lands in the declaration mentioned, formed part of the said land, and were part of the land on which a great part of Bytown had been built, as mentioned in the fifth clause of that statute, and at the passing of the Act was one of the building lots mentioned in said section, and was held under said officers by the tenant in this suit; and that under the powers contained in s. 6, the said officers in 1844, conveyed the land to the said tenant, to be held by him and his heirs for ever, clear of all charges and incumbrances of whatsoever kind or nature, as by the said statute they were empowered to do. By 7 Vict. c. 11, s. 1, the land in question was vested in the principal officers of ordnance, but it was provided that nothing in the Act should be taken to affect any right, title, or claim, vested in or possessed by any person at the passing of the Act, nor to give them a better title than was then vested in the Crown; and s. 6 enacted that the said officers might convey the land, which had for some time been held by the tenant under them, "to be held as freehold forever, and clear of all charges and incumbrances of whatsoever kind or nature:"—Held, on demurrer, that the plea shewed no defence, for the demandant's right was not extinguished by the conveyance to the Crown, nor by the provisions of the statute. *Begley* v. *Gibson*, 19 U. C. R. 458.

Confirmatory Act.]—Section 4 of 7 Vict. c. 11, only protects persons who, at the time of the Act passing, held an assurance derived under the officer in charge of the ordnance, of some certain or existing estate or interest in any portions of the lands about to be vested in the ordnance. *Doe d. Musgrove* v. *L'Esperance*, 7 U. C. R. 343.

Lease—*Power of Minister of Interior.*]—The Minister of the Interior cannot lease or authorize the use of ordnance lands without the authority of the Governor in Council. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

Niagara River Reserve.]—Held, that under the facts stated in this case defendant, being the lessee of the ordnance department, had no right to obstruct the road leading to the Niagara Falls ferry, and that he was guilty of a nuisance in so doing. *Regina* v. *Davis*, *Regina* v. *Fralick*, 11 U. C. R. 340.

In an action by the plaintiffs, claiming under a patent from the Ontario Government, and the defendant claiming under a lease from the Dominion Government, to try the right to a part of the chain reserved along the bank of the Niagara River and the slope between the top of the bank and the water's edge, which had been reserved out of the original survey of the township of Stamford, and was claimed by the defendants to have been reserved or set apart for "military" or "ordnance" purposes:—Held, that the "chain reserve" was part of the waste lands of the Crown held for public purposes. It was a "government reserve" originally made for public purposes:—Held, also, that as there was no evidence that this "chain reserve" was set apart for military purposes, or of any user, charge or control of it by the military authorities, it was not affected by the Ordnance Vesting Act of 1843, 7 Vict. c. 11, but remained a government reserve, held for public purposes generally, and that the portion in question vested in the Province of Ontario, as successor of the old Province of Canada, until vested in the plaintiffs, who were entitled to succeed:—Held, also, that assuming the "chain reserve" had been so set apart for military purposes, the "slope" formed no part of such reserve, but always remained part of the waste lands of the Province. History of the "chain reserve" along the west bank of the Niagara River from Niagara to Fort Erie traced. *Commissioners for Queen Victoria Niagara Falls Park* v. *Howard*, 23 O. R. 1; 23 A. R. 355.

Rideau Canal — *Improvident Grant.*]—Quære, whether any grant improvidently made by the Crown of lands set apart for the Rideau canal, before the passing of 7 Vict. c. 11, would not be void at common law if injurious to the canal, without the necessity of proceeding by sci. fa. to repeal it. *Doe d. Malloch* v. *Principal Officers of Her Majesty's Ordnance*, 3 U. C. R. 387.

Held, that lands which had been so granted before the passing of the Vesting Act, 7 Vict. c. 11, but afterwards marked out and reserved by the ordnance department as unnecessary for the canal, became again re-vested in the Crown. *Ib.*

Right of Province.] — The purchase money of ordnance land, comprised in the second schedule of 19 Vict. c. 45, but sold by the principal officers before that Act, is thereby transferred to the Provincial Government. *Her Majesty's Secretary of State for War Department* v. *Great Western R. W. Co.*, 13 Gr. 503.

Sale of Ordnance Lands in Quebec—*Cancellation.*]—Held, on the facts set out in the report that the sale of a lot of ordnance land to the suppliant was not duly cancelled, and that the suppliant had forfeited none of his rights under the sale, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof:—Quære, has the deputy minister of the interior the right to exercise the powers of cancellation vested in the commissioner of Crown lands by s. 20 of the Act of the Province of Canada, 23 Vict. c. 2. *Murphy* v. *The Queen*, 3 Ex. C. R. 75.

Trusts Affecting Ordnance Lands—*Power to Vary.*]—*Kennedy* v. *City of Toronto*, 12 O. R. 213.

6. Patents and Location Tickets.

(a) In General.

Absolute Grant—*Patentee Described as Free Grant Settler.*]—In a patent from the Crown of lots 16 and 17 in the 11th concession of Snowdon, the patentee was described as "a free grant settler;" but the patent on its face purported to grant the land absolutely and unconditionally, and did not contain the statements required by s. 16 of the Free Grants and Homesteads Act, R. S. O. 1877 c. 24; and there was no evidence that the patentee ever was a locatee of the land under said Act, or that the Crown intended issuing the patent thereunder:—Held, that the land must be deemed to have been granted absolutely and unconditionally. Semble, that the patent might have issued under s. 12 of the Public Lands Act, R. S. O. 1877 c. 23. *Canada Permanent Loan and Savings Co.* v. *Taylor*, 31 C. P. 41.

Access to Shore.]—The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons," gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore, could not successfully assert, when charged under R. S. O. 1897 *c.* 220, s. 1, and the Criminal Code, s. 511, that he had "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Davy*, 27 A. R. 508.

Claim for Obtaining Patent.]—A. having a claim upon the Government for certain wild lands, gave a bond to B. to procure the patent for the same in B.'s name, on condition that B. should pay him a certain stipulated sum on a fixed day. He did so obtain the patent, and informing B. of it, requested payment. B., without refusing, put it off, and afterwards an action of assumpsit was instituted to recover this money, in which the plaintiff declared, among other things, for the value of lands sold, and for services rendered in procuring letters patent to B., granting him certain lands in fee simple:—Held, that A. could recover. *Kilborn* v. *Forester*, Dra. 392.

Conclusive Effect of Patent.]—When the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot set up equities behind the patent. *Farmer* v. *Livingstone*, 8 S. C. R. 140.

Construction—*Evidence.*]—In construing a patent, reference may be had to papers in the Crown lands office connected with the application for the patent. *Brady* v. *Sadler*, 13 O. R. 462. See *S. C.*, 16 O. R. 49; 17 A. R. 365.

Construction—*Evidence—Other Grants.*]—In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises—as, for instance, what is to be considered the bank of a river—other grants from the Crown are admissible in evidence to assist the construction. *Clark* v. *Bonnycastle*, 3 O. S. 528.

Grants from the Crown, either for a valuable consideration or of special favour, are to be construed in the same manner as deeds from subject to subject. *Ib.*

Construction—*Usc.*]—The Crown granted lands by letters patent to J. S., in trust for his son, a lunatic, his heirs and assigns for ever, to have and to hold the same land to him, the said J. S., his heirs and assigns for ever:—Held, that this patent coming, as any other mode of assurance, under the operation of the Statute of Uses, 27 Hen. VIII. c. 10, if it did not, from particular considerations applying to the lunatic only, vest the real estate in him, yet that it nevertheless created a use which, on the death of the lunatic, was executed in his heir, and that therefore a deed, made by the heir after his death, would be valid as against a deed executed by the grantee of the Crown. *Doe d. Snyder* v. *Masters*, 8 U. C. R. 55.

Construction.]—The land in question was granted by letters patent to A. G., her heirs and assigns for ever, "to have and to hold the said parcel or tract of land thereby given and granted to her the said A. G., in trust for herself and her children, M. G. and F. G.:—Held, that A. took the fee, and that no legal estate passed to the children. *Goldie* v. *Taylor*, 13 U. C. R. 603.

Crown Grant—*Seal—Exemplification.*]—A grant from the Crown must be a matter of record and under the great seal. An exemplification under the great seal of a grant invalid in its inception, will not have the effect of making such grant valid by relation from its commencement. *Doe d. Jackson* v. *Wilkes*, 4 O. S. 142.

A grant of lands, in 1784, by the then Governor of the Province of Quebec, and under his seal at arms, to the Mohawk Indians and others, conveyed no legal estate; as not being by letters patent under the great seal, and for want of a grantee or grantees capable of holding. *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. 105.

Description — *Unsurveyed Township—Subsequent Survey.*]—Semble, the Crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions; and the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown makes it by name a different lot or places it in a different concession from that named in the patent, or the surveyor laying it out projects a road through it. *Horne* v. *Munro*, 7 C. P. 433.

Disclaimer.]—It is not essential to the validity of a disclaimer that it should be by deed or by record. Where therefore on the 19th June, 1818, a free grant or patent for 200 acres of Crown lands was issued in favour of W., as daughter of a U. E. loyalist, who shortly afterwards petitioned the Governor in Council, stating that the lands were granted to her by mistake and without her authority, whereupon an order in council was passed in 1820 allowing her to surrender them:—Held, affirming 8 O. R. 147, that the lands by reason of W. disagreeing to the grant never passed out of the Crown. *Moffatt* v. *Scratch*, 12 A. R. 157.

Ejectment — *Evidence of Invalidity of Patent.*]—Evidence will not be received to

shew that a grant from the Crown was improperly issued, so as to enable a subsequent grantee to recover in ejectment. *Doe d. McKay* v. *Rykert*, T. T. 3 & 4 Vict.

Improvements.]—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of such improvements, whereupon the commissioner of Crown lands directed that, before the patent issued, the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the master to inquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances made to them, after making all proper deductions:—Held, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements, &c., having regard to the object of the Crown lands department, the proper mode was to award such sum as in foro conscientiæ the defendant ought to receive. *Highland* v. *Sherry*, 32 O. R. 371.

Mandatory Remedy Sought by Petition of Right.]—A petition of right will not lie to compel the Crown to grant a patent of lands. *Clarke* v. *The Queen*, 1 Ex. C. R. 182.

Uncertainty of Description.]—A patent of land from the Crown is to be upheld rather than avoided and to be construed most favourably for the grantee. Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township shewed the lot with centre line running through the concession and shewed the part south of the line as one hundred acres, and the part north of the line as eighty acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so:—Held, in a contest between the plaintiff claiming under the patentee of the north part and the defendant claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him. Doe Devine v. Wilson, 10 Moo. P. C. 502; Nolan v. Fox, 15 C. P. 505; Regina v. Bishop of Huron, 8 C. P. 253, specially referred to. *Hyatt* v. *Mills*, 20 O. R. 351.

Reversed in appeal on another point, 19 A. R. 329.

(b) *Cancellation.*

Action Against Patentee and Purchaser—*Purchaser not Defending.*]—A bill was filed impeaching a patent as having been obtained wrongfully; the defendants were the patentee and his vendee, who had not paid all his purchase money. The patentee answered denying the equity claimed; his vendee allowed the bill to be noted pro confesso:—Held, that the plaintiff failing to establish his case against the patentee, the bill should be dismissed against both defendants. *McDermott* v. *McDermott*, 3 Ch. Ch. 38.

Adverse Claim.] — Where the Crown lands commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only a part of the purchase money, and the lands were afterwards sold for taxes:—Held, B. having assigned his interest, and the assignee having surrendered his interest to the Crown, before the issue of the patent to M., it could not be said that at the time of the issue of the patent to M., there was any "adverse claim" to the lands in question within 23 Vict. c. 2, s. 22, so as to debar the commissioner from cancelling the patent to B. under that section. *O'Grady* v. *McCaffray*, 2 O. R. 309.

Commissioner in Error as to Immaterial Fact.]—Where it appeared that the commissioner of Crown lands, in deciding between rival claimants to a lot to which neither had any right, was under a false impression as to a matter of fact, and the fact had not been untruly stated by the party in whose favour he decided, and was not shewn to be material, the court held, that the error was not a sufficient ground for setting aside the patent at the suit of the disappointed claimant. *McIntyre* v. *Attorney-General*, 14 Gr. 86.

Concealment of Facts.]—The lessee of the Crown conveyed his interest to others. The right to one portion, after going through several hands, became vested in one F., who died, leaving a widow and several children. The widow joined with her second husband in assigning the portion bought by F. to one C., who subsequently agreed to sell to S. A conveyancer employed to prepare the necessary writings recommended a transfer direct from the lessee of the Crown to S., to simplify the title, which was accordingly done, and thereupon S. applied to the Crown lands department to purchase, producing his transfer, a certificate of a surveyor, and an affidavit by himself that there was not any adverse claim, no mention being made of the previous transfers, or the possession of the intermediate transferees, or of the fact that the uncle of F.'s heir-at-law had intimated to S. that the heir did claim it. Upon this application S. was allowed to purchase, and a patent was issued to him in January, 1853. In 1863 a bill was filed by the heir-at-law of F., seeking to set aside this patent, as having been obtained through the fraudulent concealment of the facts by S. when applying for the grant. It appeared that the plaintiff before attaining his majority went to reside in California, and immediately on his return instituted proceedings. The court, under the circumstances, although acquitting defendant of all actual or intentional fraud, declared the patent void, in order that the Crown, with a full knowledge of all the facts, might deal with the case as should be deemed right, and ordered S. to pay the costs of the suit; the delay which had occurred in commencing the suit being accounted for by the inability of the plaintiff, arising from his poverty and his absence. *Fricht* v. *Scheck*, 10 Gr. 254.

Conditional Sale.]—Suppliant purchased from the Crown a parcel of land, forming part of an Indian reserve, subject to the condition that unless he erected certain manufacturing works thereon within a given time he would forfeit all rights under the sale. A portion of the purchase money was paid down. Some time after the expiry of the time wherein suppliant was bound to erect the works but had not done so, the Crown, through a duly authorized officer, accepted and received the balance of the purchase money from him,—such officer stating, however, that the sale would not be complete until the condition upon which it was made was complied with. On petition praying for a declaration by the court that suppliant was entitled to letters patent for said land:—Held, (1) that the acceptance of the balance of the purchase money, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself; and that inasmuch as the suppliant had not performed such a condition, he was not entitled to the relief prayed for. Clarke v. The Queen, 1 Ex. C. R. 182; Canada Central R. W. Co. v. The Queen, 20 Gr. 273, referred to. *Peterson* v. *The Queen*, 2 Ex C. R. 67.

Conflicting Claims Dealt with by the Crown.]—Where the executive government have considered the claims of opposing parties to lands leased from the Crown, with a claim of pre-emption, and have ultimately granted to one, the court cannot, where no fraud appears in obtaining the grant, afterwards declare the grantee a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein. *Boulton* v. *Jeffrey*, 1 E. & A. 111. Followed in *Barnes* v. *Boomer*, 10 Gr. 532.

Quære, even if there had been fraud, whether the court could interfere at the instance of the party who had opposed the grant. *Ib.*

Where the Crown lands department has considered opposing claims, and a patent is directed to issue to one claimant, the court cannot review the decision of the commissioner, although it might have taken a different view of the case in the first instance. *Kennedy* v. *Lawlor*, 14 Gr. 224.

Evidence of Cancellation.]—Held, that the evidence set out in this case was insufficient to prove that a sale of land to R. from the Crown had been effectually avoided. *Cochrane* v. *McDonald*, 11 C. P. 202.

Evidence Required.] — Although the Crown may shew mistake in law or fact in respect of its grant when the individual could not, still the evidence must be conclusive. *Attorney-General* v. *Garbutt*, 5 Gr. 181.

Facts not Made Known.] — Although parties dealing with the Crown will be held to the strictest good faith, yet where it is shewn that the patentee of land was ignorant of a fact which might have been material to bring under the notice of the officers of the Crown, and the plaintiff had the opportunity, but failed to do so, and subsequently filed a bill impeaching the patent, as issued in error and improvidence, the court refused the relief prayed, and dismissed the bill with costs. *Mahon* v. *McLean*, 13 Gr. 361.

Fraudulent Concealment — *Crown's Knowledge.*]—Patents issued under a right of pre-emption obtained by fraudulent concealment of other existing claims to such right, are void. *Attorney-General* v. *McNulty*, 8 Gr. 324.

If a party knowing that another claims an adverse right to pre-emption, or that there are circumstances which may give him such right, applies for the lands, and does not state these circumstances, such suppression will be considered fraudulent, even if the circumstances were already known to the Government; and a patent issued upon such application will be declared void. *Ib.*

Parties dealing with the Crown lands department must be fair and candid in all statements. Where, therefore, a bill was filed to set aside a patent, on the ground that the same had been so issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent misrepresentations of the patentee, and the concealment of the facts by him from the Crown lands department, the court, although unable to afford the relief sought, dismissed the bill without costs as against the defendant who had thus dealt with the department. *Lawrence* v. *Pomeroy*, 9 Gr. 474.

A patent was issued to A. in consideration of improvements on the land, but the benefit of these improvements had, on an arbitration between A. and B., been adjudged to B., and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the Crown to issue patents in such cases to those entitled to the improvements:—Held, that though the award was known to the officers of the Government, the patent should be set aside at the suit of the attorney-general, as having been issued through fraud, and in error and improvidence. *Attorney-General* v. *McNulty*, 11 Gr. 281, 581.

Fraudulent Misrepresentation by Applicant.]—It is the duty of the court to give as large and liberal an interpretation to the provisions of the Public Lands' Act as they will justly bear, otherwise many cases of flagrant wrong will go unredressed. A party, on applying to the Crown lands department for the grant of a lot of land belonging to the Crown, knowingly misrepresented that the same "was not valuable for its pine timber." At that time the lot was embraced in a timber license to B., but, in ignorance of that fact, the commissioner of Crown lands granted the application, and a patent for the lot was prepared on the 12th March, 1873, but, before its issue, the fact as to B.'s license comprising this lot was discovered, and thereupon the commissioner caused to be indorsed upon the patent a memorandum, that "These letters patent are subject to the renewal of the timber license for one year from the 30th April, 1873." In an action brought by a purchaser of the timber from the patentee it was decided that the reservation of the timber so made was unauthorized and invalid. See Contois v. Bonfield, 27 C. P. 84:—Held, under these circumstances, that the attorney-general was entitled to proceed in the court of chancery for a repeal of the patent, on the ground that the same had been issued improvidently. *Attorney-General* v. *Contois*, 25 Gr. 346.

Grant of Reserved Square — *Attorney-General.*]—In laying off the town plot of S., a reservation was made by the surveyor of a

block for a market square, and marked upon the plan returned by him to the office of the commissioner of crown lands, a copy of which was furnished to the local agent at S., by which he was to sell, and several sales were accordingly effected by him, some of them of lots fronting on this square. On the plans finally adopted by the Crown lands office, the market reservation was marked "Reserve" simply. Subsequently the government, under the impression that this block was at their disposal, granted part of it to the church society for a church:—Held, on a bill filed to set aside the patent on the ground of error or inadvertence, that it must be presumed that had the Crown lands department been aware of what had been done, the grant to the society would never have been made: that therefore, upon a bill properly framed, the letters patent should be repealed: and that the suit ought to have been instituted by the attorney-general on behalf of the public. *Township of Saugeen* v. *Church Society*, 6 Gr. 538.

Grant to Wrong Person.]—In 1797 an order in council was made in favour of M. P., as daughter of S. de F., a U. E. loyalist, under which a lot was located, and a description therefor regularly made out in her name; but in 1801 a patent for the lot so described issued to one M. F., the sister of the husband of the locatee, but during her life she never claimed any interest under such patent. No authority was shewn for the change of the name in the grant from M. P. to M. F. The court decreed the patent to be cancelled. *Attorney-General* v. *Garbutt*, 5 Gr. 383.

Heir and Devisee Commission—*Evidence.*]—The commissioners under the Heir and Devisee Act, in deciding upon claims, are not bound by the strict rules of courts at law. A purchaser from the Crown devised the land to his wife for life, with a power of appointment amongst his descendants in tail: and she devised the estate to one of such descendants in fee, on whose application the commission recommended a grant in tail to the person named as devisee. The Crown thereupon issued a patent in favour of such devisee. A bill was afterwards filed to set aside the patent, as having been issued in error; but a demurrer to the bill for want of equity was allowed. *Scane* v. *Hartrick*, 7 Gr. 161.

The heir and devisee commission having reported that the heirs-at-law of A. were entitled to a patent, the governor-in-council afterwards, upon a report of the solicitor-general in favour of B., a brother of A., issued a patent to B. The heirs of A. thereupon filed a bill to have the patent set aside as issued in error, and a new patent issued to themselves. The court having found there was no error of fact:—Held, that the patent was properly issued to B. notwithstanding the finding of the commissioners. *McDiarmid* v. *McDiarmid*, 9 Gr. 144.

Semble, this court may, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission. *Ib.*

Homestead Entry Issued Through Error and Improvidence.] — Where a homestead entry receipt for Dominion lands has been issued through error and improvidence, the holder thereof is not entitled to have a patent for such lands issued to him, and the court may order his entry receipt to be delivered up to be cancelled, as, outstanding, it might constitute a cloud upon the title. *The Queen* v. *Becher*, 4 Ex. C. R. 412.

Improvements by Locatee—*Fraudulent Purchase by Crown Agent.*]—A locatee of the waste lands of the Crown having settled thereon, in preparing it for cultivation cleared part of the adjoining land. According to the usage of the Crown lands department any person, even without settling upon lands of the Crown, effecting a clearing thereon, was allowed to purchase the lot at the price fixed by the agent of the government. Subsequently the government employed an agent to inspect the lands in the neighbourhood, who reported the property on which the clearing had been made as vacant and unimproved, and valued it at 12s. 6d. per acre. This agent afterwards applied for and obtained a patent for this lot at 8s. an acre, and almost immediately after sold it to a person who had full knowledge of the clearing. Upon a bill filed by the person who had made the improvement, the court ordered the patent to be revoked, as issued in error and mistake, without costs. But semble, that had the agent been joined as a party, he would have been ordered to pay costs. *Proctor* v. *Grant*, 9 Gr. 26.

On appeal, the court, while affirming the general doctrine on which the decree was pronounced, reversed the same, on the ground of want of notice of the improper conduct of the grantee of the Crown in obtaining the patent. *S. C., ib.* 224.

Improvements by Occupants—*False Representations.*]—A bill was filed alleging that by statute the Grand River Navigation Company could take such land as might be necessary for the purposes of the Act, subject to payment; and in case of dispute arbitrators were named to determine the amount; and the compensation was in the same manner to be made for any Indian lands required for the undertaking. The bill alleged that the company having claimed about ninety one acres, forming part of the village of Cayuga, which was then occupied and improved by several parties, an arbitration was had in respect thereof on the 30th October, 1847, when an award was made directing the payment of £159 7s. for the right of the Indians therein, but that no notice was given to the occupiers of the land, nor was anything further done in the matter until January, 1864, when the assignees of the company applied to the Government for the absolute purchase of the land, untruly representing, as the bill alleged, that the company had gone into possession under the award and were then in peaceable possession; that the only improvements made on the land were so made by squatters with knowledge of the company's right; and the applicants were thereupon allowed to purchase for the sum awarded, and interest, although in reality the land, by the improvements of the occupiers, was then worth ten times the amount. The bill prayed to set aside the patent as having been issued through fraud, error, improvidence, and mistake. A demurrer by the patentees for want of equity was overruled. *Westbrooke* v. *Attorney-General*, 11 Gr. 330.

Quære, whether, although a person may have been entitled to a grant, yet if on applying therefor, he knowingly makes grossly false representations to the government, the patent may not be set aside. *Ib.*

Information — *Scire Facias — Improvidence—Error.*] — Letters patent having been issued to F. of certain lands claimed by him under the Manitoba Act (35 Vict. c. 3, as amended by 35 Vict. c. 52), and an information having been filed under R. S. C. c. 54, s. 57, at the instance of a relator claiming part of said lands, to set aside said letters patent as issued in error or improvidence:—Held, that a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by scire facias. *Fonseca* v. *Attorney-General of Canada*, 17 S. C. R. 612.

The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and F.'s title having been recognized by the government as good and valid under the Manitoba Act, and the lands granted to him in recognition of the right, the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act. *Ib.*

Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no colour of right in law, has entered and was in possession without the knowledge of the government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent; or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made and rejected. *Ib.*

In the construction of the statute effect must be given to the term "improvidence" as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentée to the land, which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims. *Ib.*

Interest before Issue of Patent.]—A bill by a private individual impeaching a patent for fraud or error, must shew that the plaintiff's interest arose before the patent was issued. *Mutchmore* v. *Davis*, 14 Gr. 346.

This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract of purchase. *Ib.*

Jurisdiction of the Court.]—The court of chancery has jurisdiction, under 4 & 5 Vict. c. 100, s. 29, to rescind a patent though the grant may be voidable, or even void at law. *Martin* v. *Kennedy*, 2 Gr. 80.

But not to set aside a grant made upon a deliberate view of all the circumstances, and in the absence of fraud or mistake. *Simpson* v. *Grant*, 5 Gr. 267.

Limitations Act—*Fraud.*]—One through whom the plaintiff claimed obtained in 1855 from the commissioner of Crown lands a receipt on sale of a certain lot of land. In 1868, B., in whose possession this receipt was, handed it back to the Crown lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the commissioner till March 14th, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land:—Held, that the plaintiff's right of action was not barred by any statute of limitation. Per Ferguson, J.—Even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased. *McLure* v. *Black*, 20 O. R. 70.

Location Tickets — *Transfer of Purchaser's Rights—Registration.*] — A location ticket of certain lots was granted to G. C. H. in 1863. In 1872 G. C. H. put on record with the Crown lands department that by arrangement with the Crown lands agent, he had performed settlement duties on another lot known as the homestead lot. In 1874, G. C. H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 Vict. c. 11, s. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the commissioners cancelled the location ticket for default to perform settlement duties:—Held, that the registration by the commissioners in 1874 of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. *Holland* v. *Ross*, 19 S. C. R. 566.

Manitoba Act—*Half Breed—Indian Annuities.*]—See *The Queen* v. *Thomas*, 2 Ex. C. R. 246.

Onus of Proof.]—Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative. *McIntyre* v. *Attorney-General*, 14 Gr. 86.

Parties.]—Several persons being in possession of separate portions of Crown land, filed a bill, claiming to have, by the invariable usage of the government, a preëmptive right each to the portion he was in possession of, alleging that a patent had been obtained for all the lands by a defendant through fraud, and praying that the patent might be rescinded. A demurrer to the bill for misjoinder was allowed. *Westbrooke* v. *Attorney-General*, 11 Gr. 264.

Parties — *Plaintiff's Interest.*] — A bill which shews ground for repealing a patent is not demurrable for not shewing that the plain-

tiff was entitled to have a patent issued to him. *Rees* v. *Attorney-General*, 16 Gr. 467.

A bill alleged that the patentees obtained their patent by false representations to the government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:—Held, that to such a bill the attorney-general was not a necessary party. *Ib.*

Possession by Consent of Patentee.]—Possession of Crown lands by a person who entered under an agreement with another to clear and improve for the latter, on stipulated terms, is not such possession as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest. *Cosgrove* v. *Corbett*, 14 Gr. 617.

Previous Sale.] — Where a party had, according to the custom of the clergy corporation, paid the patent fee for a lease, gone into possession and made large improvements, the custom being that such party was considered as having a lease for twenty-one years, with a right of renewal and preëmption, (not materially varied by the subsequent orders in council regulating the sale of clergy reserves) and the Crown, in ignorance of the facts, granted the lands as a glebe of the rector of D., such patent was rescinded as issued in error and mistake. *Martyn* v. *Kennedy*, 4 Gr. 61.

Where the government had appropriated and patented as a glebe a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned to him by the government, the patent was set aside as issued in error and mistake. *Attorney-General v. Hill*, 8 Gr. 532.

Rideau Canal.] — Quære, whether any grant improvidently made of lands set apart for the Rideau canal, before 7 Vict. c. 11, would not be void at common law if injurious to the canal, without proceeding by sci. fa. to repeal it. *Doe d. Mallock* v. *Principal Officers of Her Majesty's Ordnance*, 3 U. C. R. 387.

Held, that lands granted before 7 Vict. c. 11, but afterwards marked out and reserved by the ordnance department as unnecessary for the canal, became again revested in the Crown. *Ib.*

Sale by Supposed Owner after Cancellation — *Recovery Back of Purchase Money.*]—See *Walker* v. *Douglass*, 23 U. C. R. 9.

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

Second Sale by Mistake.]—In March, 1862, S. purchased land from the Crown, and with his family went to reside on it, but by mistake settled on the adjoining land, and made improvements. In June following C. applied to the Crown lands department to know whether the land so purchased by S. was for sale: the patent had not issued to S., and through an error in the department C. was informed that the land was for sale, and immediately purchased and received a patent. He did not, however, take possession until December, 1863, when he brought ejectment against S., and engaged the defendant B. to take the timber off the lot. At the hearing the plaintiff failed to prove notice to C. of his claim and improvements, but the error on the part of the office being proved, and the attorney-general being a defendant, and submitting to the direction of the court, the patent to C. was rescinded, an injunction granted, and C. required to account for the timber cut. *Stevens* v. *Cook*, 10 Gr. 410.

Squatter.]—A bill by a squatter to set aside a patent for fraud or error, must allege the custom of the Crown in favour of squatters, and such other facts as may shew his interest. *Cosgrove* v. *Corbett*, 14 Gr. 617.

(c) *Rights before Issue of Patent.*

Advances.]—The plaintiff, having no title, assigned the land in question first to one C. and afterwards to one M., to secure certain advances. The Crown having issued the patent to C., the plaintiff sought to get in the legal estate outstanding in C., but without paying M.:—Held, under the maxim "He that comes into equity must do equity," that he was first bound to pay the advances made by M. *Wiggins* v. *Meldrum*, 15 Gr. 377.

Death Before Issue of Patent—*Heir's Status.*]—A patent was issued in favour of a person who had died six months previously:—Held, that her heir could not file a bill to set aside a conveyance executed under a power of attorney from her, alleged to have been forged. *Brouse* v. *Cram*, 14 Gr. 677.

It is no part of the functions of the court to take evidence or find facts, upon which the officers of the Crown may act in the disposition of the rights of claimants to grants of Crown lands. *Ib.*

Dedication—*Roads.*]—A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of Crown lands before pa-

tent issued dedicate any portion of the same; parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae* v. *Trim*, 27 Gr. 574.

Dispute between Vendor and Purchaser while Title in the Crown.]—A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand river, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands:—Held, that as the whole estate both legal and equitable was in the Crown, it was not a case in which the court would interfere even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs. *Bown* v. *West*, 1 O. S. 287.

Dower.]—A widow is entitled to dower in lands purchased from the Crown by her deceased husband, and whereof he died possessed, although no patent issued therefor, and the purchase money had not been all paid. *Craig* v. *Templeton*, 8 Gr. 483.

She is also entitled to one-third of the rents and profits for six years before the commencement of suit. *Ib.*

A widower was locatee of the Crown, and agreed with his son to assign his interest in the land on condition of his son making certain payments and performing certain services for the father, which were all duly made and performed, and afterwards the patent was issued in the name of the son, by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements, without any claim by the father, except for his support under the agreement made between the father and son. After the father's death, the widow filed a bill for dower in the premises, but the court held, that even admitting that the grant of the land was to, and was by the government meant only to be to, the father, he could be treated only as a trustee for the son, and dismissed the bill with costs. *Burns* v. *Burns*, 21 Gr. 7.

Ejectment.]—A person holding land under a license of occupation from the Crown is entitled to a demand of possession before ejectment brought by a grantee of the Crown in fee. *Doe d. Creen* v. *Friesman*, 5 O. S. 661.

Evidence of Title — *Receipts for Purchase Money.*]—The plaintiff in ejectment produced two receipts for certificates of deposits to the credit of the receiver-general, on a purchase of certain lands. In both the money was expressed to have been received from the plaintiff. In the first a blank was left for the name of the vendee, the words "sold to" being inserted. In the second no mention was made of the purchaser:—Held, that the receipts primâ facie imported a sale to the plaintiff. *Young* v. *Scobie*, 10 U. C. R. 372.

The plaintiff brings ejectment on a patent to himself for the south-west half of lot No. 12 in the 6th concession of Trafalgar, dated 22nd September, 1852; defendant puts in a receipt for the payment of the first instalment on the said lot from the commissioner of Crown lands, dated 19th July, 1852. Pending this suit 16 Vict. c. 159 was passed:—Held, that this statute, although passed while the suit was pending, had the effect of repealing all former Acts which gave any effect beyond the common law to the receipt. *Armstrong* v. *Campbell*, 4 C. P. 15.

In ejectment the plaintiffs produced and proved a receipt in the following form:—"Bank of Upper Canada, agency at Goderich, Feby. 20th, 1861. Original for the depositor. $60.20. Received from W. G. W. and A. M. the sum of sixty dollars twenty cents for account of the Crown land department, which amount will appear at the credit of the account with this bank on the mill reserve in the town plot of Fordwich, in the township of Howick. Signed in duplicate, &c.":—Held, that this receipt was not a sufficient authority under 23 Vict. c. 2, to maintain ejectment: that a license of occupation under the hand and seal of the commissioner of Crown lands or a patent was necessary; and that the 17th section of 23 Vict. c. 2, is only retrospective in its operation. *Walker* v. *Rogers*, 12 C. P. 327.

A receipt for the purchase money of land from the Crown under 4 & 5 Vict. c. 100, entitles the purchaser to maintain trespass, or replevy any property taken therefrom. *Deedes* v. *Wallace*, 8 C. P. 385.

A purchaser holding a receipt for an instalment, and having actual possession, may maintain trespass against all strangers, though not against the Crown. *Glover* v. *Walker*, 5 C. P. 478. Approved in *Alexander* v. *Bird*, 8 C. P. 539.

But actual possession is necessary, for the receipt confers no constructive possession. *Henderson* v. *McLean*, 8 C. P. 42.

The plaintiff in proof of his title put in at the trial a receipt from the Bank of Upper Canada at Kingston, which stated that the amount therein mentioned would appear at the credit of the Crown land department in the said bank on lots Nos. 24 and 25 in the 9th concession of Hinchinbrooke, being the premises in question. On this receipt was indorsed a certificate of the sale and terms thereof, signed by the Crown land agent:—Held, sufficient, under 23 Vict. c. 2, to entitle the plaintiff to maintain trespass for cutting trees after the date of the certificate, but before the statute. *Whiting* v. *Kernahan*, 12 C. P. 57.

Flooding Land—*Reservation.*]—A locatee before patent may maintain an action on the case against a stranger for an injury done by him to his land by flooding; but where an order in council had been made that no deeds should issue from government for lands in a particular part of the township, without a special reservation to the defendant of a right to flood certain portions of that land:—Held, that a locatee could not maintain an action for the flooding of a portion of those lands by the defendant, as he would in such a case be in a better position before grant from the Crown than afterwards. *Miller* v. *Purdy*, H. T. 6 Vict.

Fraudulent Assignment by Locatee.]—The court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the Crown, before the issuing of the letters patent, but a bill for the purpose must shew why it is necessary to come to the court. *Bull* v. *Frank*, 12 Gr. 89.

Indian Lands—*Mortgage before Patent.*]—A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage:—Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Reed* v. *Wilson*, 23 O. R. 552.

Mortgage—*Statute of Limitations.*]—R. S. O. 1877 c. 25, s. 26, declares that any mortgage or lien created by the nominees of the Crown in lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had before the execution of such instrument been issued in favour of the grantor:—Held, that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves, that they would have had, had the freehold been actually vested in the mortgagor; that the mortgagor was entitled to set up the statute of limitations against any one claiming under such mortgage; that the exercise of the power of sale by the mortgagee had not the effect of stopping the running of the statute; and that the fact that the commissioner of Crown lands before the issuing of the patent, had made a memorandum in his "ruling" upon the claims of the parties, that the sales made to them were "not intended to cut out the right, if any," of the mortgagee, had not the effect of estopping the mortgagor or those claiming under him, from claiming the benefit of the statute. *Watson* v. *Lindsay*, 27 Gr. 353; 6 A. R. 609.

Partition.]—The right which a squatter acquires by being in possession of lands of the Crown is not such an interest therein as this court will order a partition of amongst his heirs; in such a case the only remedy is by application to the executive government of this Province. *Jenkins* v. *Martin*, 20 Gr. 613.

The court will not decree the partition of lands, the title to which is vested in the Crown; neither will it decree the sale of such lands at the instance of the representatives of a deceased locatee. *Abell* v. *Weir*, 24 Gr. 464.

A locatee of Crown lands left the Province in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also, from time to time, till 1887. There were two other children who had not been in possession of the land for more than ten years before action, which was brought in 1895:—Held, that the locatee must be presumed to have been dead by 1884, and the defendant had acquired a title by possession as against the children other than the plaintiff, whose claim as to one-quarter was as good as his, and in making partition the Crown should recognize his right to the improvements. The Statute of Limitations, R. S. O. 1887 c. 111, applied because the rights involved upon the record were merely private rights not affecting the pleasure or the sovereignty of the Crown. Even in the case of unpatented lands, declaratory relief may in a suitable case be given, which will work practically the result of a partition of the property, subject to the Crown being willing to act upon the judgment of the court. *Pride* v. *Rodger*, 27 O. R. 320.

Patent Issued to Caretaker.]—The plaintiff having purchased at sheriff's sale all the interest of a bargainee of the Crown, placed defendant in possession. Afterwards the Crown land department advertised these lands, amongst others, for sale, at a stipulated price. The rule of the department in all such cases was, that the occupant of lands was entitled to a right of preëmption, and the defendant, concealing the nature of his holding, applied for and became the purchaser, and obtained a patent, after notice to the government of the plaintiff's claim. The court declared the defendant a trustee of the lands, and ordered him to pay the costs of the suit. *Dougall* v. *Lang*, 5 Gr. 292.

Persons in Occupation at Time of Sale—*Cancellation of Sale.*]—Plaintiff in 1846 purchased some clergy reserve land from a government agent, and obtained receipts for partial payment. Defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd of August, 1849, an order of council was made, that on the defendants making the required payments, the plaintiff's money should be returned to him, and the sale to him cancelled. When the present action was brought, an order of the executive council was made on the 6th August, 1850, recommending that the attorney-general be authorized to defend the suit:—Held, that when the plaintiff received his first receipt, defendants being mere intruders, he acquired a right to eject them under 12 Vict. c. 31, s. 2; and that the Crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee. *Doe* v. *Henderson* v. *Seymour*, 9 U. C. R. 47.

Priority of Purchasers.]—The purchaser from the government of a clergy reserve, upon which he had paid an instalment and obtained the usual receipt from the department, has a right to obtain possession against any one in occupation, even although the occupant may have subsequently obtained the receipt of the commissioner of Crown lands; the Crown, under such circumstances, being bound by the contract made by the department with the first purchaser. *Doe d. Henderson* v. *Westover*, 1 E. & A. 405.

Reservation of Timber—*Trespasser.*]—The patent to A. C. contained the clause then usual, (1796) saving and reserving to the Crown all white pine trees:—Held, that not-

withstanding this reservation the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine trees, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 U. C. R. 333.

Held, also, that on the evidence the possession being such as an owner could be expected to have of wild land, was sufficient to entitle the plaintiff to maintain the action. *Ib.*

Sale of Locatee's Interest.]—The court will, at the instance of a judgment creditor of a locatee, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold, and order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the Crown lands department for a patent, as vendee or assignee of the locatee. *Yale* v. *Tollerton*, 13 Gr. 302.

The interest of a debtor in land bought from the Crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Gr. 309.

Sale of Timber.]—Land within the free grant territory was located on the 12th August, 1870. On the 2nd April, 1872, the locatee sold to defendant all the pine and other timber thereon, stipulating that ten years should be allowed for taking it off, and the defendant paid the purchase money in full. The patents for the lands issued in 1876, and defendant afterwards cut timber, for which the patentees brought trespass:—Held, that under 31 Vict. c. 8, and the order in council of 4th October, 1871, confirmed by 37 Vict c. 23 (O.), the locatee had a right to make the sale; that no limitation as to the time within which the timber should be removed could be implied from these statutes; and that the plaintiff therefore could not recover. *Hutchinson* v. *Beatty*, 40 U. C. R. 135.

Transfer by Nominee of Crown.]—A., being the nominee of the Crown, transferred his certificate to B. in 1796, who soon after by writing, not under seal, contracted to sell to C. It was not shewn whether C. had made the payments specified by his agreement, but he went into possession, and he and his descendants had held uninterruptedly for more than fifty years. The defendant claimed under them. In 1837 a patent first issued to A., whose heir brought ejectment. It was left to the jury to presume a grant made by A. before the patent, but they found for the plaintiff, and the court refused to set aside the verdict. *McDonald* v. *Prentiss*, 14 U. C. R. 79.

Trespass.]—The plaintiff obtained a lease under the great seal for a lot of land, and finding defendant in possession as an intruder, gave him notice of the lease, and requested him to leave the lot. Defendant afterwards cut off some valuable timber, for which act plaintiff brought trespass:—Held, that plaintiff could recover without further proof of entry. *St. Leger* v. *Manahan*, 5 O. S. 89.

The plaintiff entered into an agreement for purchase of land from the Crown. He had the lots surveyed, and paid persons to look after them for him, who had frequently entered and examined them, but the plaintiff had not entered upon the land himself, nor cultivated any portion. Defendant went upon the land and cut trees, for which he offered to settle with the plaintiff's agent, but he afterwards went to the local Crown land agent, who was ignorant of the plaintiff's purchase, and got him to accept a sum of money and give a receipt for it, as for timber cut on the same land:—Held, that the plaintiff's possession was sufficient to maintain trespass against defendant, and that the payment to the Crown land agent formed no excuse. Quære, whether as vendee he could recover substantial damages for the trees cut. *Henderson* v. *McLean*, 16 U. C. R. 630.

Held, that 16 Vict. c. 159, by repealing the former Acts, does not confine the right of action against wrong-doers to those who have obtained the license of occupation mentioned in the sixth clause; but leaves to other purchasers whatever rights they may have at common law. Henderson v. McLean, 8 C. P. 42, in part dissented from. *Ib.*

The plaintiff held possession as purchaser under a receipt from the Crown land agent, and before defendant entered he had paid up in full, and was entitled to the patent, which however did not issue until some time after:—Held, that he was entitled to recover for trespass committed before as well as after the patent. *Nicholson* v. *Page*, 27 U. C. R. 505.

The patentee of the Crown of land may maintain trespass without entry against a person in actual possession before and at the time of the issuing of the patent, for the letters patent operate by way of feoffment with livery of seisin to the patentee, and defendant's possession must be regarded as an entry subsequent thereto. *Greenlaw* v. *Fraser*, 24 C. P. 230.

Where a person is in possession with the assent of the Crown, paying rent, or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer. *Brayea* v. *Rose*, 19 O. R. 433.

Where the owner of a lot of land encroached upon an adjoining lot belonging to the Crown, and took three successive crops off it without any permission from the Crown, and another person who had taken possession of the same land also without license about ten years before, and paid taxes and made clearings on it, warned off the owner of the other lot after he had taken the third crop, and then cropped the land himself:—Held, that the owner of the adjoining lot had no property or possession to maintain trespass against him for that crop. *Killichan* v. *Robertson*, 6 O. S. 468.

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7. *Miscellaneous Cases.*

Affidavits.]—The provision of 23 Vict. c. 2, s. 28, the Crown Lands Act, that all affidavits required thereunder may be taken before "any justice of the peace," only empowers a justice to administer the oath in a place where he can act as such justice. *Regina* v. *Atkinson*, 17 C. P. 295.

The same interpretation of this Act applies to commissioners for taking affidavits mentioned therein. *Ib.*

Clergy Reserves — *Revoking Order in Council.*]—An order in council was made after 7 Will. IV. c. 118, and before 4 & 5 Vict. c. 100, appropriating land to certain religious purposes:—Held, that under s. 27 of the latter statute, the Governor in Council had power to revoke such appropriation. *Simpson* v. *Grant*, 5 Gr. 267.

Crown Grant.]—See *Chisholm* v. *Robinson*, 24 S. C. R. 704.

Expired Crown Lease—*Restitution.*]—The lease of a Crown reserve having expired, the court refused a writ of restitution after a conviction of forcible entry and detainer. *Rex* v. *Jackson*, Dra. 50.

False Representation by Crown Lands Agent.]—A., a Crown lands agent, being asked by the plaintiff whether there were any lands for sale by Government in the township of M., told him that there were not, but that B. had certain lots there, to which he would sell his right, and the plaintiff being introduced by A. to B., paid the latter £50 for his good will, together with the first instalment required by Government, and received from him a receipt for the latter signed by A. as Crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the Government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence, or as money had and received. *McMaster* v. *Geddes*, 19 U. C. R. 216.

Foreshore.]—The property of the soil adjacent to the shore, and which is covered by the waters of the lakes or of navigable rivers, is in the Crown, subject to the right of the public to pass over the water in boats, and to fish and bathe therein:—Held, therefore ,where the defendant had encroached on a portion of lake Ontario not far from land belonging to himself, but not adjoining it, by the construction therein of certain crib work and piers, upon which he had built a warehouse, that these not being natural accretions to his land, but artificial improvements to the waters of the lake or harbour (the harbour being then vested in the Crown) must be considered to be upon the soil of the Crown, and that the defendant was liable to be removed therefrom on an information of intrusion at the suit of the Crown. *Attorney-General* v. *Perry*, 15 C. P. 329.

By 44 Vict. c. 1, s. 18, the Canadian Pacific Railway Company "have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vict. c. 56, s. 5, the location of the company's line of railway between Port Moody and the city of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver city, was ratified and confirmed. The Act of incorporation of the city of Vancouver, 49 Vict. c. 32, s. 213 (B.C.), vests in the city all streets, highways, &c., and in 1892 the city began the construction of works extending from the foot of Gore avenue, with the avowed object to cross the railway track at a level and obtain access to the harbour at deep water. On an application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:—Held, that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the jus publicum to get access to and from the water at the foot of Gore avenue is subordinate to the rights given to the railroad company by the statute 44 Vict. c. 1, s. 18*a*, on the said foreshore, and therefore the injunction was properly granted. *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Indian Lands Agent.]—See *Young* v. *Scobie*, 10 U. C. R. 372.

License of Occupation.]—Held, that s. 13, C. S. C. c. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease, or settle on any Crown land. *Street* v. *County of Kent*, 11 C. P. 255.

Navigable Waters.]—Right of commissioner of Crown lands to grant a right to construct a wharf over the navigable waters of the bay of Toronto. See *Clendinning* v. *Turner*, 9 O. R. 34.

Quære, whether the soil at the bottom of the Toronto bay at the place in question was vested in the Province or in the city of Toronto, under the patent from the Crown of the island. *Ib.*

A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. The Provincial Legislatures, since the union of the Provinces, cannot authorize such an interference. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

Possession as against the Crown or its Grantee.]—A. and B. having received grants from the Crown for adjoining lots, A. inadvertently occupied, fenced, and improved a portion of B.'s lot, according to the mode of running side lines prescribed by 58 Geo. III. c. 14, believing it to be a portion of his own lot. Some years after, B.'s lot was confiscated under the Alien Act, 54 Geo. III. c. 9, and sold under 58 Geo. III. c. 12. A. and those claiming under him, had held the disputed tract for upwards of twenty years at the time of action brought, but not at the time B.'s estate was confiscated, and the Crown became seized by inquest of office:—Held, that A.'s occupation did not work a disseisin of B., and that B. continued seized so as to entitle the Crown to that portion of his lot in A.'s possession, and that the bargainee of the Crown commissioners could maintain ejectment against the occupiers thereof. *Doe d. Howard* v. *McDonald*, Dra. 374.

The grantee of the Crown has the same right as the Crown has to treat the possessor without title as a trespasser: he is not disseised by the continuance of a possession that has been held wrongfully as against the Crown. *Doe d. Charles* v. *Cotton*, 8 U. C. R. 313.

The effect of the exception in 4 Will. IV. c. 1, s. 17, in favour of a grantee of the Crown who has never gone into possession, is, that while ignorant of the fact of his land being in the actual possession of some other person, he is not to be regarded as disseised, and consequently is in condition to devise. *Doe d. McGillis* v. *McGillivray*, 9 U. C. R. 9.

Right to Possession.]—So long as there is no other person in possession, claiming adversely to the grantee's title, the grant and title given under it carry the possession by construction of law to the owner of the fee. A visible actual possession by the owner, or by those claiming through him, need not be proved. *Doe d. Maclem* v. *Turnbull*, 5 U. C. R. 129.

Rival Applicants.] — See *Boulton* v. *Shea*, 22 S. C. R. 742.

Sale of Government Land.]—Government contracts for sale of lands. Time of the essence of the contract. *Ewing* v. *Good* 1 O. S. 65.

Tenancy by the Curtesy.]—Where a married woman claims under letters patent from the Crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent suo vigore constituting seisin in fact. *Weaver* v. *Burgess*, 22 C. P. 104.

Tolls.]—The patent in this case granted a certain public toll-bridge, with a planked and macadamized toll-road, together with all toll-gates on said road or bridge, "and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained," &c.:—Held, that the patent was not ultra vires, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof. *Regina* v. *Mills*, 17 C. P. 654.

III. Liability.

1. *Carriers.*

Regulations for Carriage of Freight—*Notice by Publication in Canada Gazette—Duty of Conductor of Train Carrying Live Stock in Box Cars.*]—Apart from statute the Crown is not liable for the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. By virtue of the several Acts of the Parliament of Canada relating to Government railways and other public works the Crown is in such a case liable, and, under the Act 50 & 51 Vict. c. 16 a petition of right will lie for the recovery of damages resulting from such loss or injury. The Queen v. McLeod, 8 S. C. R. 1, and The Queen v. McFarlane, 7 S. C. R. 216, distinguished. 2. The publication in the Canada Gazette, in accordance with provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is a notice thereof to all persons having occasion to ship goods or animals by such railway. 3. Under and by virtue of R. S. C. c. 38, certain regulations were made by the Governor in Council whereby it was provided that all live stock carried over the Intercolonial Railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading and transportation of the same. The regulations were, by s. 44, to be read as part of the Act, and by s. 50 it was enacted that the Crown should not be relieved from liability by any notice, condition or declaration where damage arose from the negligence, omission or default of any of its officers, employees or servants:—Held, that the regulation did not relieve the Crown from liability where such negligence was shewn. 4. The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started. *Lavoie* v. *The Queen*, 3 Ex. C. R. 96.

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed, and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed $50,000. The Attorney-General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants. The Judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded $36,000: — Held, that the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction, and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance or misfeasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways. *The Queen* v. *McLeod*, 8 S. C. R. 1.

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2. *Contract.*

Carriage of Mails—*Authority of Postmaster-General to Bind the Crown.*]—An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of $10,000 a year, made by parol by the postmaster-general and accepted by the contractor by letter notwithstanding it was partly performed, as, if a permanent con-

tract, being for a larger sum than $1,000, it could not be made without the authority of an order in council, and if temporary it was revocable at the will of the postmaster-general. *Humphrey* v. *The Queen*, 20 S. C. R. 591.

Construction of Public Work—*Material Change in Plans, &c.—Second Contract—Waiver.*]—Held, 1. that s. 7 of 31 Vict. c. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the department of Public Works, or shall be held to be acts of the minister of public works unless signed and sealed by him or his deputy, and countersigned by the secretary," only refers to executory contracts, and does not affect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him; 2. that the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants. *Starrs* v. *The Queen*, 1 Ex. C. R. 301. But, on appeal, reversing this judgment, held, that the chief engineer could not make a new contract binding on the Crown; that the claim came within the original contract and the provisions thereof which made the certificate of the chief engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed. *The Queen* v. *Starrs*, 17 S. C. R. 118.

The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed. *Ib.*

Construction of Public Work—*Delay in Exercising Crown's Right to Inspect Materials—Independent Promise by Crown's Servant.*]—Held, that the Crown was not bound under the contract in question to have the inspection of timber to be supplied made at any particular place; and that in view of s. 98 of the Government Railways Act, 1881, and the express terms of the contract, the officer whose duty it was to inspect had no power to vary or add to its terms, or to bind the Crown by any new promise; 2. the contract contained the following clause: "The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the minister:"—Held, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss. *Mayes* v. *The Queen*, 2 Ex. C. R. 403; 23 S. C. R. 454.

Executory Contract — *Goods Sold and Delivered—Interest.*] — Notwithstanding the provisions of s. 23 of the Railway and Canals Act, R. S. C. c. 37, where goods have been purchased on behalf of the Crown by its responsible officers or agents without a formal contract therefor, and such goods have been delivered and accepted by them, and the Crown has paid for part of them, a ratification of the informal contract so entered into will be implied on the part of the Crown, and, under such circumstances, the plaintiffs are entitled to recover so much of the value of the said goods as remains unpaid:—Held, also, following St. Louis v. The Queen, 22 S. C. R. 649, that interest was payable by the Crown on the balance due to the plaintiff in respect of such contract from the date of the filing of the reference of the claim in the exchequer court. *Henderson* v. *The Queen*, 6 Ex. C. R. 39. See the next case.

Executory Contract — *Goods Sold and Delivered—Interest.*] — The provisions of s. 23 of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37,) which require all contracts affecting that department to be signed by the minister, the deputy minister, or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that department. Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, s. 33 of "The Exchequer Court Act" does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that Province. *The Queen* v. *Henderson*, 28 S. C. R. 425.

See, also *Laine* v. *The Queen*, 5 Ex. C. R. 103.

Illegality of Contract—*Dominion Elections Act, 1874.*]—The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on bons in blank signed by one of the defendants only:—Held, on demurrer to the plea, to be no answer to the breach of contract alleged. *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Measure of Damages for Breach of Contract for Book-binding.]—See *Boyd* v. *The Queen*, 1 Ex. C. R. 186.

Measure of Damages for Breach of Contract for Carrying Rails.]—See *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Order in Council.]—The court of chancery cannot enforce against the Crown specific performance of an order in council. *Simpson* v. *Grant*, 5 Gr. 267.

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

Parliamentary Printing.]—On the 2nd July, 1869, the plaintiff contracted with one

H. as clerk of the joint committee of both houses of parliament, to do the printing, &c., for both houses at scheduled prices. On the 7th October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, to be specified in requisitions to be made upon him by the departments respectively, including the post-master-general's department, at scheduled prices; which were lower than under the first contract, and so tendered for, as alleged by plaintiff, because he expected in cases where similar matter was required under both contracts to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of and paid for by such departments, and the copies required for parliament were ordered and paid for separately through the clerk of the joint committee on printing; but afterwards, by resolution of the committee, concurred in by the house, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of departments, with which the departments should be charged. The reports of the postmaster-general having thus been ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department: —Held, that he had no such right. *Taylor* v. *Campbell*, 33 U. C. R. 264.

Quære, as to whether an action for parliamentary and departmental printing would lie against the postmaster-general, and as to the propriety of asking the court to express an opinion. *Ib.*

Parol Contract between Crown and Subject — *Quantum Meruit.*] — The provisions of s. 11 of 42 Vict. c. 7, and of s. 23 of R. S. C. c. 37, do not apply to the case of an executed contract; and where the Crown has received the benefit of work and labour done for it, or of goods or materials supplied to it or of services rendered to it by the subject at the instance and request of its officer acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same. *Hall* v. *The Queen*, 3 Ex. C. R. 373.

Public Work—*Formation of Contract—Ratification—Breach.*] — On 22nd November, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from the said date. The contract was executed under the authority of 32 & 33 Vict. c. 7, s. 6, and on 25th November, 1879, was assigned to W. who performed all the work sent to him up to 5th December, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's printer as follows: "I am directed by the honourable the secretary of state to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter and then brought an action for the profits he would have had on work given to other parties during the seven years:—Held, that the letter of the Queen's printer did not constitute a contract binding on the Crown; that the statute authorising such contract was not directory but limited the power of the Queen's printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's printer, and that he could not recover in respect of the work done after the original contract had expired. On 30th October, 1886, an order-in-council was passed, which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the secretary of state that a formal contract should be entered into extending the original to 1st December, 1887, and then authorized the secretary of state to enter into such formal contract with W. but subject to the condition that the Government should waive all claims to damages by reason of the non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties up to the date of said extension. W. refused to accept the extension of such terms:—Held, that W. could not rely on the order-in-council as a ratification of the contract formed by the letter of the Queen's printer; that the element of consensus enters as much into a ratification of a contract as into the contract itself; and that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it. After an appeal from the final judgment of the exchequer court was lodged in the supreme court the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages:—Held, that the Judge of the exchequer court had authority to allow the appeal and it was properly before the supreme court. *The Queen* v. *Woodburn*, 29 S. C. R. 112.

Statutory Requirements — *Informality—Ratification by Crown.*]—A contract entered into by an officer of the Crown empowered by statute to make the contract in a prescribed way, although defective in not conforming to such statutory requirements, may be ratified by the Crown. *Woodburn* v. *The Queen*, 6 Ex. C. R. 12.

Undertaking by Government to Promote Legislation — *Damages — Ordnance Lands—Power of Minister of Interior to Lease Same.*] — A minister or officer of the Crown cannot bind the Crown without the authority of law. 2. An order of the governor-general in council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown is liable in damages. R. S. C. c. 22, s. 4; R. S. C. c. 55, ss. 4 and 5, discussed. Wood v. The Queen, 7 S. C. R. 631; The Queen v. St. John Water Commissioners, 19 S. C. R. 125; and Hall v. The Queen, 3 Ex. C. R. 373, referred to. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

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3. *Intercolonial Railway.*

Boundary Ditches — *Non-Liability of Crown for Acts or Omissions of Grand Trunk R. W. Co.*]—The Crown is not bound to keep in repair the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec. 2. The Act 43 Vict. c. 8 (D.), does not make the Crown liable for the acts or omissions of the Grand Trunk R. W. Co. in respect of the construction or management by the company of such portion of its railway in the Province of Quebec as was

purchased by the Crown. *Simoneau* v. *The Queen*, 2 Ex. C. R. 391.

Boundary Ditches — *Damage to Farm from Overflow of Water—Negligence.*]—Under 43 Vict. c. 8, confirming the agreement of sale by the Grand Trunk Company to the Crown of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants. Judgment reported 2 Ex. C. R. 396, affirmed. *Morin* v. *The Queen*, 20 S. C. R. 515.

Petition of Right — *Tort—Demurrer—Acts Authorized by Statute—Official Arbitrators.*] — The suppliants filed a petition of right claiming redress against the Dominion Government for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial railway into the city of Halifax. The Crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vict. c. 13 (the Intercolonial Railway Act), and that the suppliants had not shewn good cause for relief against the Crown by petition of right:—Held, that under s. 14 of 31 Vict. c. 13, the only remedy suppliants had was by reference to the official arbitrators; and that, apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the Crown. *Halifax City R. W. Co.* v. *The Queen*, 2 Ex. C. R. 433.

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4. *Negligence of Officers and Servants.*

Goods Stolen while in Bond in Customs Warehouse—*Crown not a Bailee—Personal Remedy against Officer.*] — When goods are in the customs examining warehouse for examination and appraisal, the Crown is not a bailee. For the loss of any goods while so in the custody of the customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens. *Corse* v. *The Queen*, 3 Ex. C. R. 13.

Government Railway.]—The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow servant of the deceased. The right of action in such cases arises under 50 & 51 Vict. c. 16 (c) and Art. 1056 C. C. L. C., and is an independent one in behalf of the widow and children, which they may maintain in case the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries. *Grenier* v. *The Queen*, 6 Ex. C. R. 276. *See* the next case.

Government Railway.]—In s. 50 of the Government Railways Act (R. S. C. c. 38), providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612, disapproved. *The Queen* v. *Grenier*, 30 S. C. R. 42.

Government Railway.] — In an action against the Crown for an injury received in an accident upon a Government railway, the suppliant cannot succeed unless he establishes that the injury resulted from the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment upon such railway. The Crown's liability in such a case rests upon 50 & 51 Vict. c. 16, s. 16 (c). *Colpitts* v. *The Queen*, 6 Ex. C. R. 254.

Implied Liability.]—Laches cannot be imputed to the Crown, and, except where a liability has been created by statute, it is not answerable for the negligence of its officers employed in the public service. *Burroughs* v. *The Queen*, 2 Ex. C. R. 263.

Injury to Person by Accident on a Government Railway—*Burden of Proof—Latent Defect in Axle of Car—Undue Speed in Passing Sharp Curve.*]—On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must shew affirmatively that there was negligence. The fact of the accident is not sufficient to establish a primâ facie case of negligence. The immediate cause of the accident was the breaking of an axle that was defective. It was shewn, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was:—Held, that a case of negligence was not made out. *Dubé* v. *The Queen*, 3 Ex. C. R. 147.

Injury to Person on a Public Work—*Brakesman's Duty in Putting Children off Car when Trespassers—Damages.*]—The Crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment is guilty. City of Quebec v. The Queen, 2 Ex. C. R. 252, referred to. 2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence. *Martin* v. *The Queen*, 2 Ex. C. R. 328.

Reversed in the supreme court, on the ground that the Act 50 & 51 Vict. c. 16 was not retroactive and did not apply. *The Queen* v. *Martin*, 20 S. C. R. 240.

Injury to Property by Government Railway.]—A filly, belonging to the suppliant, was run over and killed by a train upon the Intercolonial Railway. It was shewn on

the trial that at the time of the accident the train was being run faster than usual in order to make up time, that it had just passed a station without being slowed and was approaching a crossing on the public highway at full speed. The engineer admitted that he saw something on the track, which he did not recognize as a horse. He, however, paid no attention to it, and made no attempt to stop his train until after it was struck:—Held, that the engineer, as a servant of the Crown, was guilty of negligence, for which the Crown was liable under R. S. C. c. 38, s. 23, and 50 & 51 Vict. c. 16, s. 16 (c). City of Quebec v. The Queen, 2 Ex. C. R. 252, referred to. *Gilchrist* v. *The Queen*, 2 Ex. C. R. 300.

Injury to Property from Negligence of Crown's Servants on Public Works.] —A large portion of rock fell from part of a cliff, alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city known as Champlain street, to such an extent that communication was rendered impossible between the two ends thereof. The suppliants charged that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, by the daily firing of guns from the citadel, and the fact that no precautions had been taken by the Crown to prevent the occurrence of such an accident. On demurrer to the petition:—Held, 1. There being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shewn by the suppliants in respect of which the court had jurisdiction under the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c). 2. Under section 16 (c) of the Act, the Crown is liable in damages for any death or injury to the person or to property on any public work resulting from the negligence of any officer, or servant of the Crown while acting within the scope of his duties or employment. 3. The Crown's immunity from liability for personal negligence is in no way altered by s. 16 (c) of the Act. *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252. See the next two cases.

The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in the Exchequer Court Act, s. 16 (c), but had its origin in the earlier statute 33 Vict. c. 23 (D.). 2. Prior to 1887, when the Exchequer Court Act was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the official arbitrators, with, in certain cases after 1879, an appeal to the exchequer court and thence to the supreme court of Canada. 3. It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shewn that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof. Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400, referred to. The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec, in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful inquiry was made. In the year 1880 an examination of the premises had been made by careful and capable men, one of whom was the city engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself:—Held, that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and of the defect in it. Quære, whether the place where the accident happened was part of the public work? Semble, the Crown may be liable although the injury complained of does not actually occur on, i.e., within the limits of, a public work. *City of Quebec* v. *The Queen*, 3 Ex. C. R. 164. See the next case.

50 & 51 Vict. c. 16, ss. 16 and 58 (D.), confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort. By 50 & 51 Vict. c. 16, s. 16 (D.), the exchequer court is given jurisdiction to hear and determine inter alia: (c) every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment: (d) every claim against the Crown arising under any law of Canada:—Held, on the facts stated in the previous case, affirming 3 Ex. C. R. 164, that as the injury to the property of the city did not occur upon a public work, s.-s. (c) did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. *City of Quebec* v. *The Queen*, 24 S. C. R. 420.

Misfeasance.] — For misfeasance of its servants. See *Regina* v. *McLeod*, 8 S. C. R. 1.

Negligence.] — As to liability of the Crown for the negligence of its servants. See *Regina* v. *McFarlane*, 7 S. C. R. 216.

Personal Injuries Received on Public Works.]—The suppliant alleged in his petition that on a certain date he was driving slowly along a road in the Rocky Mountain Park, N. W. T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from the buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public work of Canada under the control of the Minister of the Interior and the Governor in Council, who had appointed one S. superintendent thereof; that S. had notice of the obstruction to travel caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf; and that the Crown was liable in damages for the injuries so received by him. The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced:—Held, that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50 & 51 Vict. c. 16, s. 16 (*c*), (D.), which provides a remedy in such cases. *Brady* v. *The Queen*, 2 Ex. C. R. 273.

Under s. 16, clause (*c*), of The Exchequer Court Act, 50 & 51 Vict. c. 16 (D.), the Crown is liable for the death of any person on a public work resulting from the negligence of any of its officers or servants while acting within the scope of their duty or employment. (2) Within the limitation prescribed in s. 16 of The Exchequer Court Act, 50 & 51 Vict. c. 16 (D.), the Crown is liable for injuries resulting from the negligence of its officers and servants in any case in which a subject would, under like circumstances, be liable. (3) Held, in this case, that the superintendent and foreman in charge of work on a Government canal having failed to give notice to the men working beneath a derrick when they started to operate it, and an injury having resulted to some of these men, were guilty of negligence for which the Crown was liable. *Filion* v. *The Queen*, 4 Ex. C. R. 134.

Held, on appeal, affirming this judgment, that the Crown was liable under 50 & 51 Vict. c. 16, s. 16 (*c*); and that it was no answer to the petition to say that the injury was caused by a fellow servant of the deceased, the case being governed by the law of the Province of Quebec, in which the doctrine of common employment has no place. *The Queen* v. *Filion*, 24 S. C. R. 482.

Prescription under Law of Quebec.]—See *Martial* v. *The Queen*, 3 Ex. C. R. 118; *The Queen* v. *Martin*, 20 S. C. R. 240.

Public Work.]—A petition of right does not lie to recover compensation from the Crown for damages occasioned by the negligence of its servant to the property of an individual using a public work. *Regina* v. *McFarlane*, 7 S. C. R. 216.

Public Work—*Government Canal—Accident to Vessel.*]—Under the provisions of The Exchequer Court Act, s. 16 (*c*), the Crown is liable in damages for an accident to a steamer and cargo while in a Government canal, where such accident results from the negligence of the persons in charge of the said canal. *McKay's Sons* v. *The Queen*, 6 Ex. C. R. 1.

Public Work.]—A suppliant seeking relief under clause (*c*) of s. 16 of the Exchequer Court Act must establish that the injury complained of resulted from something negligently done or negligently omitted to be done on a public work by an officer or servant of the Crown while acting within the scope of his duties or employment. Quære, whether the words "on any public work" as used in clause (*d*) of s. 16 of The Exchequer Court Act may be taken to indicate the place where the act or omission that occasioned the injury occurred, and not in every case the place where the injury was actually sustained? City of Quebec v. The Queen, 24 S. C. R. 420, referred to. *Alliance Assurance Co.* v. *The Queen*, 6 Ex. C. R. 76.

The suppliants complained that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value:—Held, that the fish-way was not a public work within the meaning of 50 & 51 Vict. c. 16, s. 16 (*c*) (D.), and that the Crown was not liable. *Brown* v. *The Queen*, 3 Ex. C. R. 79.

Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the exchequer court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown. (2) The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (*c*) of the 16th section of the Exchequer Court Act, 50 & 51 Vict. c. 16, which gives the court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. *Archibald* v. *The Queen*, 3 Ex. C. R. 251, 23 S. C. R. 147.

Undue Rate of Speed of Train at Crossing.]—Where a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight. (2) Where such negligence occurs on a Government railway the Crown is liable therefor under 50 & 51 Vict. c. 16, s. 16 (*c*) (D.). *Connell* v. *The Queen*, 5 Ex. C. R. 74.

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5. *Miscellaneous Cases.*

Acts Authorized by Statute—*Proper Remedy for Damages Arising Therefrom.*]—The suppliants filed a petition of right claiming redress against the Dominion Government

for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial Railway into the city of Halifax. The Crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vict. c. 13, the Intercolonial Railway Act, and that the suppliants had not shewn good cause for relief against the Crown by petition of right:—Held, that under the 14th section of 31 Vict. c. 13 (D.), the only remedy suppliants had was by reference to the official arbitrators; and that, apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the Crown. *Halifax City R. W. Co.* v. *The Queen*, 2 Ex. C. R. 433.

Ditches.]—The Crown is not under any obligation to maintain drains or back-ditches constructed under 52 Vict. c. 13, s. 4 (D.). *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Grant of Ferry—*Subsequent Lease to Railway Companies.*]—Under the provisions of R. S. C. c. 97 and amendments, the Governor in Council duly issued to the suppliant a ferry license within certain limits over the Ottawa River between the cities of Ottawa and Hull. Subsequently the Crown leased certain property to two railway companies to be used for the construction of approaches to a bridge to be built across the said river between the said cities, and also granted permission to the Ottawa Electric Railway Company to extend its tracks over certain property belonging to the Dominion Government on the Hull side of the river, to enable the latter to make closer connection with the Hull Electric Company. The suppliant claimed that the construction of the said approaches interfered with the operation of his ferry, by enabling the said company to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable:—Held, that the granting of the said leases and permission did not constitute a breach of any contract arising out of the grant or license of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. Windsor and Annapolis R. W. Co. v. The Queen, 10 S. C. R. 335, 11 App. Cas. 607; and Hopkins v. Great Northern R. W. Co., 2 Q. B. D. 224, referred to. Semble, that if the said leases and permission prejudiced the rights acquired by the suppliant under his ferry license, he would be entitled to a writ of scire facias to repeal them. *Brigham* v. *The Queen*, 6 Ex. C. R. 414.

Improvements Under Mistake of Title—*Compensation — Occupation Rent.*]—The defendants, owners of land adjoining the bank of the Niagara river, built at great expense stairways and elevators and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators and paths were from time to time necessary, owing to their exposed position, and the defendants knew that they had no title to the bank, which was vested in the Crown:—Held, that works of this kind were not lasting improvements within the meaning of s. 30 of R. S. O. 1887 c. 100, and that both on this ground and on the ground that they knew they had no title the defendants could not recover compensation. Semble, the section would not affect the Crown and the title being in the Crown when the improvements were made the Crown's grantee would take the land free from any lien. In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed and the cost or value of the improvements is not the test. Held, also, that the defendants were not chargeable with the profits made by them but only with a fair occupation rent for the land. *Commissioners for Queen Victoria Niagara Falls Park* v. *Colt*, 22 A. R. 1.

Injury to Person Falling on Icy Steps of Government Post-office.]—The Crown is under no legal duty or obligation to any one who goes to a post-office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and step leading to such building. 2. A person who goes to a post-office to post or get his letter goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation. 3. A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of ice which had formed there and which the caretaker of the building employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes. 4. The expression "public work" occurring in the 16th section of The Exchequer Court Act includes not only railways and canals and such other public undertakings in Canada as in older countries are usually left to private enterprise, but also all public works mentioned in The Public Works Act, R. S. C. c. 36, and other Acts in which such expression is defined. *Leprohon* v. *The Queen*, 4 Ex. C. R. 100.

Public Work—*Negligence of Contractor.*]—In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before a contractor can be held liable the evidence must shew beyond reasonable doubt that the accident was the result of his negligence. *The Queen* v. *Poupore*, 6 Ex. C. R. 4.

Rifle Range.]—The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Côte St. Luc, in the District of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained:—Held, that the rifle range was not a "public work," within the meaning of clause (c) of s. 16 of The Exchequer Court Act, 50 & 51 Vict. c. 16 (D.), and that the Crown was not liable. City of Quebec v. The Queen, 24 S. C. R. 420, referred to. *Larose* v. *The Queen*, 6 Ex. C. R. 425.

Salaries of License Inspectors—*Approval by Governor-General in Council.*]—On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by order in council under s. 6 of the said Liquor License Act, 1883:—Held, affirming 2 Ex. C.

R. 263, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council. *Burroughs* v. *The Queen*, 20 S. C. R. 420.

Salvage.]—Right to claim salvage for services rendered to ship belonging to the Dominion Government. See *Couette* v. *The Queen*, 3 Ex. C. R. 82.

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

Wrongful Seizure of Ship by Crown's Servants.]—Damages cannot be recovered against the Crown for the wrongful act of a Customs officer in seizing a vessel for a supposed infraction of the customs law; but the claimant is entitled to the restitution of the vessel. *Julien* v. *The Queen*, 5 Ex. C. R. 238.

IV. Officers and Departments.

Civil Servant—*Extra Work.*]—The plaintiff was chief reporter of the debates staff of the House of Commons, and, as such, was paid an annual salary out of moneys voted by Parliament. He was employed by the chairman of a royal commission to report the evidence, and perform other work connected with the execution of the commission, at certain rates of remuneration fixed by agreement between him and the chairman—the same to be paid out of a sum voted by Parliament to meet the expenses of the commission:—Held, that he was entitled to recover such remuneration notwithstanding the provisions of s. 51 of The Civil Service Act that no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer, or employee in the Civil Service of Canada, or to any other person permanently employed in the public service. *Bradley* v. *The Queen*, 5 Ex. C. R. 409, 27 S. C. R. 657.

Civil Servant—*Superannuation.*]—Where under the provisions of The Civil Service Superannuation Act, R. S. C. c. 18, the Governor in Council exercises the discretion or authority conferred upon him by such Act to determine the allowance to be paid to a retired civil servant, his decision as to the amount of such allowance is final, and the exchequer court has no jurisdiction to review the same. *Balderson* v. *The Queen*, 6 Ex. C. R. 8, 28 S. C. R. 261.

Commissioners Under Statute.]—Commissioners, appointed under an Act of parliament, employing persons to make a macadamised road, are not personally responsible. *New* v. *Burn*, T. T. 3 & 4 Vict.

Assumpsit does not lie against the commissioners of the St. Lawrence canal, under 3 Will. IV. c. 17, for the work done on the canal on a contract made with them, unless it can be specially shewn that they made themselves personally liable, as they must be considered merely as the agents of the Government. *Tait* v. *Hamilton*, 6 O. S. 89.

Debt Due to the Crown—*Public Accountant.*]—The testator at or before his death was deputy superintendent general of Indian affairs, and trustee of the Six Nation Indians, and as such superintendent was an accountant to the Crown, and at the time of his death he was indebted as trustee:—Held, that the testator was not a public accountant within the meaning of 13 Eliz. c. 4, and that the Crown could have no authority to sell his land under that statute. *Doe d. Dickson* v. *Gross*, 9 U. C. R. 580.

Division Courts—*Examination of Government Official.*]—A county court Judge has jurisdiction under R. S. O. 1897 c. 60, s. 247, as amended by 61 Vict. c. 15, s. 4 (O.), in an action in a division court after the examination of, and an order for payment by, a judgment debtor who is a Government official, to commit him for default in payment, although he has no other source of income than his official salary. Prohibition refused. *Re Hyde and Cavan*, 31 O. R. 189.

Engineer in Charge of Works.] — Neither the engineer nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, has any power or authority, express or implied under the law, to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *O'Brien* v. *The Queen*, 4 S. C. R. 529.

Niagara Falls Park Commissioners—*Obligation to Maintain Fences.*]—There is no liability on the part of the commissioners for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them. Gibson v. Mayor of Preston, L. R. 5 Q. B. 218; Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400; Cowley v. Newmarket Local Board, [1892] A. C. 345; Municipality of Picton v. Geldert, [1893] A. C. 524; Municipal Council of Sydney v. Bourke, [1895] A. C. 433, followed. Nor are the commissioners liable for an accident happening under the above circumstances to a person while resorting to the park, who, paying nothing for the privilege, is in the position of a bare licensee, to whom no duty would be owing, unless the accident occurred by reason of some unusual danger known to the commissioners, and unknown to the person injured. Southcote v. Stanley, 1 H. & N. 247; Ivay v. Hedges, 9 Q. B. D. 80; Schmidt v. Town of Berlin, 26 O. R. 54; and Moore v. City of Toronto, ib. 59*n*, followed. The commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as "an emanation from the Crown" or as agents of the Crown, which is not liable for the acts of the subordinate servants of the commissioners. *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park*, 28 O. R. 1.

Notice of Action—*Government Railway Act.*]—Section 109 of the Government Railway Act of 1881, 44 Vict. c. 25 (D.), provides that "no action shall be brought against any officer, employee, or servant of the department [Railways and Canals] for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing:"—Held, that a contractor with the Minister of Railways and Canals, as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section. Held, also, that the compulsory powers given to the Government of Canada to expropriate lands required for any public work, can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds, and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken, when an order in council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon, is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Officer of the Crown.]—An officer of the House of Commons of the Dominion at Ottawa, paid out of moneys voted by the Parliament of Canada, is an officer of the Dominion Government. *Leprohon* v. *City of Ottawa*, 40 U. C. R. 478.

Ontario—*Public Department.*]—The maxim that the Crown can do no wrong applies to alleged tortious acts of the officers of a public department of Ontario. See *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563.

Ordnance Department.] — Held, that the contract set out in this case, for the construction of a lake wall on Lake Ontario, above the barracks at Toronto, was an agreement between the plaintiffs and the commissariat department, and that therefore the plaintiffs had no right of action under the statute against these defendants. Quære, suppose the contract had been clearly made between the plaintiffs and the ordnance department, could the plaintiffs have recovered against defendants under 7 Vict. c. 11, s. 30. Can the Provincial Parliament constitutionally give a right of action against the board of ordnance, a military department of the Imperial Government? Quære, also, does s. 30, assuming it to be constitutional, give a right of action against the ordnance department upon an implied, as well as upon an express contract. *Tully* v. *Principal Officers of Her Majesty's Ordnance*, 5 U. C. R. 6.

The officers of Her Majesty's ordnance, composing a department of the public service, existing in England, cannot at the common law be sued in our courts in this Province in their collective capacity, for an alleged culpable negligence; the remedy against them for any wrong done by the orders or omissions of the board as a board, can only be by application to the Crown. *Lane* v. *Officers of the Ordnance*, 10 U. C. R. 108.

Actions against the officers of Her Majesty's ordnance, as incorporated under 7 Vict. c. 11, are subject to the limitation provided for in 8 Geo. IV. c. 1. *Denaut* v. *Principal Officers of Her Majesty's Ordnance*, 10 U. C. R. 189.

7 Vict. c. 11, s. 30 (Ordnance Vesting Act), enables the principal officers of Her Majesty's ordnance to sue in their corporate capacity for the price of ordnance stores sold by them before the passing of that Act. *Principal Officers of Her Majesty's Ordnance* v. *Johnson*, 1 U. C. R. 198.

Personal Liability.]—A bill was filed against the attorney-general and A., the superintendent of certain slides belonging to the Crown, who was also the collector of the rates thereat, alleging that he had seized certain saw logs of the plaintiff, and was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction to restrain the sale. A. demurred to the bill on the ground that being the agent of the Crown he was exempt from personal liability. The demurrer was overruled with costs. *Baker* v. *Rauney*, 12 Gr. 228.

For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, an officer of the Crown is personally responsible to any one who sustains damage thereby. *Boyd & Co.* v. *The Queen*, 4 Ex. C. R. 116.

Postmaster-General.] — Power of, as minister of the Crown, to change his office in the Government without re-election under 20 Vict. c. 22. See *McDonell* v. *Smith*, 17 U. C. R. 310.

A declaration on the common money counts, by the postmaster-general, alleged that defendants were indebted to one M., who assigned such debt or chose in action to the plaintiff: —Held, sufficient, under 38 Vict. c. 7 (D.), without alleging that the debt was connected with plaintiff's office, that being a matter of evidence at the trial. *Postmaster-General* v. *Robertson*, 41 U. C. R. 375.

Receiver-General.] — The Receiver-General of this Province is not liable to actions at the suit of individuals, for money placed in his hands by the executive to be distributed among them. *Butler* v. *Dunn*, Tay. 415. See *Barclay* v. *Sutton*, 7 P. R. 14; *McKellar* v. *Henderson*, 27 Gr. 181.

Retiring Pension—*Surrender—Cancellation—Rights of Wife.*]—D., a retired employee of the Government of Quebec, in receipt of a pension under Arts. 676 and 677, R. S. Q., surrendered said pension for a lump sum to the Government, and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By Art. 690 of R. S. P. Q. the pension or half-pension is neither transferable nor subject to seizure, and by Art. 683 the wife of D. on his death would have been entitled to an allowance equal to one-half of his pension:—Held, that D. after his retirement was not a permanent official of the Government of Quebec, and the transaction was not, therefore, a resignation by him of office and a return by the Government, under Art. 688, of the amount contributed by him to the pension fund; that the policy of the legislation in Arts. 685 and 690 is to make the right of a retired official to his pension inalienable, even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension, and could maintain proceedings to conserve it; and therefore that the surrender of the pension

should be cancelled. *Dionne* v. *The Queen*, 24 S. C. R. 451.

Suretyship—*Lex Loci Contractus.*] — In an action by the Crown on the information of the attorney-general for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the Officers of Canada" (31 Vict. c. 37 (D.); 35 Vict. c. 19 (D.); and "The Post Office Act," 38 Vict. c. 7 (D.);—Held, that the right of action under the bond was governed by the law of the Province of Quebec. Held, further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada. Held, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. *Black* v. *The Queen*, 29 S. C. R. 693.

V. Practice and Procedure in Actions.

1. *In General.*

Absconding Debtor.] — Proceedings by attachment against absconding debtor for debt due to the Crown. See *Regina* v. *Stewart*, 8 P. R. 297.

Administration — *Will* — *Probate.*] — Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the attorney-general on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding. Such an action under the statute R. S. O. 1887 c. 59, is not for the purpose of escheating, but to protect the property for the benefit of those who may be entitled. *Regina* v. *Bonnar*, 24 A. R. 220.

Argument of Crown Cases.]—Semble, that the court may direct Crown cases to stand in the new trial paper for argument with ordinary suits between party and party, *Regina* v. *Sinnott*, 27 U. C. R. 539.

Attachment of Debts.]—The garnishee clauses of the C. L. P. Act do not extend to the Queen. The Crown cannot, therefore, proceed under them to attach a debt. *Regina* v. *Benson*, 2 P. R. 350.

Conflict of Laws—*Contract Made in One Province to be executed in Another.*] — The doctrine that where a contract is made in one Province in Canada, and is to be performed either wholly or in part in another, then the proper law governing the contract, especially as to the mode of its performance, is the law of the Province where the performance is to take place, may be invoked against the Crown as a party to a contract. *The Queen* v. *Ogilvie*, 6 Ex. C. R. 21.

Customs Export Bonds — *Penalties* — *Law of Quebec.*]—The provisions of 8 & 9 Wm. III. c. 11, affecting actions upon bonds, do not apply to proceedings by the Crown for the enforcement of a penalty for breach of a customs export bond. Two customs export bonds were entered into by warehousemen at the port of Montreal, Que. Upon breach of the conditions of the bonds the Crown took action to recover the amount of the penalties fixed by such bonds: — Held, that the case must be determined by the law of the Province of Quebec, and that under that law (Arts. 1036 and 1135, C. C. L. C.) judgment should be entered for the full amount of each bond. *The Queen* v. *Finlayson*, 6 Ex. C. R. 202.

Debts Due to the Crown.]—In case of debts due to the Crown, which would be cognizable in the court of exchequer in England, the court of Queen's bench may give relief when it appears that in law, reason, or good conscience, the debtor ought not to be charged. *Regina* v. *Bonter*, 6 O. S. 551.

Division Court Clerk's Sureties.] — The sureties of a clerk of the division court having entered into the bond authorized by the Acts 4 & 5 Vict. c. 3, and 8 Vict. c. 37, are liable upon such bond to the Crown for moneys collected by the clerk for suitors in the court not paid over. *Regina* v. *Patton*, *Regina* v. *McCullough*, *Regina* v. *Moran*, 7 U. C. R. 83.

Semble, that on the trial of any such action the Crown would be entitled to a verdict for the penalty of the bond, and not only for the sum received for the suitor and not paid over. *Ib.*

Enforcing Civil Remedy.] — The rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded does not apply where the Crown and not a private person is the plaintiff. *Regina* v. *Reiffenstein*, 5 P. R. 175.

Escheats.]—Held, on demurrer, 1 that the doctrine of escheats applies to lands held in Ontario; 2 that the attorney-general of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province; 3. that the court of chancery has jurisdiction in such cases; and, 4. that it was proper for the attorney-general, if he saw fit, to file a bill in that court to enforce the escheat. *Attorney-General* v. *O'Reilly*, 26 Gr. 126; 6 A. R. 576.

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

Execution to Enforce Fines.] — The Crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *Desjardins Canal Co.*, 29 U. C. R. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the Crown not being bound by 43 Geo. III. c. 1. *Ib.*

Foreclosure.] — Where the Crown holds the equity of redemption of mortgaged premises no absolute order of foreclosure can be

pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession. *Dunn* v. *Attorney-General*, 10 Gr. 482.

Forum.]—The court of chancery has no jurisdiction to grant relief to a subject where the rights of the Crown are in question. *Miller* v. *Attorney-General*, 9 Gr. 558.

Held, following the last case, that the equitable jurisdiction in matters of revenue in this Province, at the suit of a subject, is in the superior courts of common law, if at all, and not in the court of chancery. *Norwich* v. *Attorney-General*, 9 Gr. 563. But see *S. C.*, in appeal, 2 E. & A. 541.

Inland Revenue Dues.]—Mode of proceeding by the Crown to enforce a claim for dues under the Inland Revenue Act. See *Attorney-General* v. *Walker*, 25 Gr. 233.

Interpleader.]—The Crown cannot be a claimant within the meaning of the statute authorizing the settlement of claims of goods taken under execution by interpleader. *McGee* v. *Baines*, 3 L. J. 151.

Joint and Several Obligors.] — The Crown may have sci. fa. against one or against all of the joint and several obligors of a bond, but the proceedings must be against all or each one. *Regina* v. *McPherson*, 15 C. P. 17.

Jury.]—The Crown coming into the high court of justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendants. *Regina* v. *Grant*, 17 P. R. 165.

Lien—*Crown's Rights in Enforcing Maritime Lien—Writ of Extent*.] — Where the Crown invokes the aid of a court of admiralty to enforce a maritime lien, it is in no higher position than an ordinary suitor, and its rights must be determined in such court by the rules and principles applicable to all claims and suitors alike. 2. Where the Crown sued the owners of a steamship for damages to a Government canal occasioned by the ship colliding with the gates, but had obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages and disbursements accrued and made after the time of such collision, the latter judgment was accorded priority over that held by the Crown. Semble, where the Crown pursues its remedy by writ of extent against the owners of a ship, it can only take under the writ of extent the property of the debtor at the time of the issue of the writ. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect to the res. *The Queen* v. "*The City of Windsor*." *Symes* v. "*The City of Windsor*," 5 Ex. C. R. 223.

Petition of Right.]—A petition of right may be amended at the trial. *Smylie* v. *The Queen*, 27 A. R. 172.

Plea of Purchase for Value.]—A plea of purchase for value without notice cannot be set up against the Crown. *Attorney-General* v. *McNulty*, 11 Gr. 281.

Prosecution — *Statutory Procedure*.] — The Crown is not obliged, under 27 Vict. c. 32, s. 44 (O.), to prosecute before two magistrates for selling beer without a license as a private individual would be, but may proceed by information. *Regina* v. *Taylor*, 36 U. C. R. 183.

Provincial Government — *Style of Cause*.]—The action was instituted against the Government of the Province of Quebec, but when the case came up for hearing on the appeal to the supreme court, the court ordered that the name of Her Majesty the Queen be substituted for that of the Province of Quebec. *Grant* v. *The Queen*, 20 S. C. R. 297.

Set-off against the Crown — *Running Accounts—Pleading—Practice*.] — *The Queen* v. *Whitehead*, 1 Ex. C. R. 134.

Specific Performance.]—The court of chancery cannot enforce against the Crown specific performance of an order in council. *Simpson* v. *Grant*, 5 Gr. 267.

Venue.]—The Crown has the right in a civil action to lay the venue in any county. *Regina* v. *Shipman*, 6 L. J. 19.

Where a recognizance is removed into one of the superior courts at Toronto, the united counties of York and Peel are the proper counties in which to lay the venue, and in such a proceeding the venue cannot be changed without the consent of the attorney-general. *Ib.*

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2. *Information of Intrusion.*

Jus Tertii.] — Where defendant justifies under a third person, he must shew his own title and that of the person under whom he justifies, and also traverse the title in the Crown. *Regina* v. *Gould*, H. T. 3 Vict.

Plea of Not Guilty.]—The plea of not guilty puts in issue only the question of intrusion, and not the title of the Crown. *Regina* v. *Munro*, H. T. 6 Vict.

Information for intrusion. Plea, not guilty, with the words, "per stat." in the margin. The Crown gave evidence of their title, commencing within twenty years before the information brought, but gave no further proof of the trespass and intrusion, and defendants gave no evidence:—Held, that a general verdict could not be entered for the Crown. Semble, that the Crown was entitled to a writ of amoveas manus. *Attorney-General* v. *Stanley*, 9 U. C. R. 84.

On an information for intrusion: — Held, there being no proof that the Crown had been out of possession for twenty years, that under not guilty defendant could not give evidence of title under a Crown lease. Held, also, that the Crown on this plea was not entitled to judgment at once, but must go down to trial to shew the intrusion and damages, and because the defendants under the plea might shew the Crown out of possession for twenty years, and thus put the Crown to proof of title. *Regina* v. *Sinnott*, 27 U. C. R. 539.

Possession after Grant.]—A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, is not a disseisin of the grantee. *Doe d. West* v. *Howard*, 5 O. S. 462.

Procedure.]—In an information of intrusion the proper process to bring the defendant into court is a writ of subpœna ad respondendum, directed to the defendant. *Attorney-General* v. *McLachlin*, 5 P. R. 63.

This writ can be issued after the information is filed, and, in this country, without the information being entered; and a specific prayer for such process is not necessary. *Ib.*

A subpœna ad respondendum directed to the defendant, issued on information of intrusion, need not be served fifteen days before the return. *Ib.*

The affidavit of service of the subpœna, in an information of intrusion, is properly entitled in styling the attorney-general "informant," and may be tested as of term, though sued out in vacation. *Ib.*

Right of Entry.]—Under a Crown grant the grantee may maintain ejectment against a person who has been in adverse possession for upwards of twenty years, and it is not necessary that the Crown should proceed by information of intrusion in such a case before the grant, or that the grant should specially convey the Crown's right of entry on the land to the grantee. *Doe d. Fitzgerald* v. *Finn*, *Doe d. Fitzgerald* v. *Clench*, 1 U. C. R. 70.

Venue.]—In an information for an intrusion, the venue may be laid in any district. *Attorney-General* v. *Dockstader*, 5 O. S. 341.

VI. Prerogative.

Commission of Assize.]—As to the prerogative right of the Crown to issue commissions to hold a court of oyer and terminer. See *Regina* v. *Amer*, 42 U. C. R. 391.

Insolvency—*Priority.*]—Held, 1. that the Crown, claiming as a simple contract creditor in this case in respect of public moneys deposited by government departments in a bank which had become insolvent, to the credit of the receiver-general, has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vict. c. 23 (D.). 2. That the Crown in filing and receiving dividends on its first claim and not specially notifying the claim of privilege had not waived its right to be preferred. *Regina* v. *Bank of Nova Scotia*, 11 S. C. 1.

Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors, is not interfered with by the provision of the Bank Act (R. S. C. c. 120, s. 79), giving note holders a first lien on such assets, the Crown not being named in such enactment. *Liquidators of Maritime Bank* v. *The Queen*, 17 S. C. R. 657.

An insurance company, in order to deposit $50,000 with the minister of finance and receive a license to do business in Canada, according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the government claimed payment in full of this money as money deposited by the Crown:—Held, that it was not the money of the Crown but was held by the finance minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors. *Ib.*

Held, affirming 20 S. C. R. 635, that the Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada, in respect of public moneys of the Province deposited in the name of the receiver-general of the Province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches. *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437.

The Crown has no priority under an assignment for the general benefit of creditors. *Clarkson* v. *Attorney-General of Canada*, 15 O. R. 632, 16 A. R. 202.

Public Right of Navigation since the Union of the Provinces.]—A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. 2. The Provincial Legislatures, since the union of the Provinces, cannot authorize such an interference. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

See Constitutional Law.

VII. Timber and Timber Licenses.

Action After Expiration of License.]—Quære, whether, as was assumed in this case, the holder of a license which has expired may sue for trees cut during its currency. *White* v. *Dunlop*, 27 U. C. R. 237.

Application for License not Completed—*Laches.*]—McA. filed an application with the proper Government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the commissioner of Crown lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the Crown lands department. McA. and B., in 1884 joined in a petition of right for the issue of the license, and the attorney-general demurred to the same:—Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be under ordinary circumstances, a defence to a claim for specific

performance; but under the facts in this case a vendor would not be allowed to set up such a defence:—Held, also, that as the assignments were duly filed, and the Crown had the power of forfeiting the claim for nonpayment, and did not do so, even were the rule between subjects to apply, it would not be a bar in this case. Semble, it may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited. *McArthur* v. *The Queen*, 10 O. R. 191.

Crown Timber Agent.]—Held, that Crown timber agents have no legal right to dispose of the timber upon lands sold by the Crown lands agents, and that they can in no way affect the rights of purchasers as against trespassers: Glover v. Walker, 5 C. P. 478, approved. *Alexander* v. *Bird*, 8 C. P. 530.

C. S. C. c. 23, s. 1, enacts that the commissioner of Crown lands, or any agent under him authorized to that effect, may grant licenses to cut timber:—Held, that a person appointed the agent for Crown timber for the western division of Upper Canada had not, as such, any power to grant these licenses. *Farquharson* v. *Knight*, 25 U. C. R. 413.

Damages—*Loss of Profits in Cutting Logs.*]—Trees cut by the locatee in the actual process of cultivation were sold to the plaintiff, a mill owner, and were seized by the defendants, the timber licensees, who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year:—Held, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill. *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O. R. 343.

Death of Licensee.]—A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof:—Held, that the suit ought to be by the personal representative, such licenses being personal estate. *Bennet* v. *O'Meara*, 15 Gr. 396.

Disputed Territory—*Permit to Cut Timber—Implied Warranty of Title.*]—A permit issued under the authority of the minister of the interior, under which the purchaser has the right within a year to cut, from the Crown domain, a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty. (2) The government of Canada by order-in-council authorized the issue of the usual annual license to the plaintiff company to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the government of Ontario against the company under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the court of last resort:—Held, that there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the government's promise to issue such license. Quære.—Will an action by petition or on reference lie in the exchequer court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels? *St. Catharines Milling and Lumber Co.* v. *The Queen*, 2 Ex. C. R. 202.

By the 50th section of the Dominion Lands Act, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender. The orders in council in question in this case authorized the issue of leases subject to the terms of the regulations of March 8th, 1883, by which it was provided that under certain conditions (existing in this case) the minister of the interior might renew such licenses. From the orders in council and character of the several transactions it appeared to be the intention of the parties that the licenses should be renewable:—Held, that such renewals were provided for within the meaning of the statute. When the Crown agrees to issue a lease or license to cut timber on public lands it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement. Not only the word "demise" but the word "let," or any equivalent words which constitute a lease, create, it appears, an implied covenant for quiet enjoyment. Hart v. Windsor, 12 M. & W. 85; Mostyn v. West Mostyn Coal and Iron Co., 1 C. P. D. 152. Quære.—If this rule is applicable to a Crown lease? The Queen v. Robertson, 6 S. C. R. 52, referred to. An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely a sale of goods. The claimant applied to the government of Canada for license to cut timber on certain timber berths situated in the territory lately in dispute between that government and the government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute, which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the government of Canada, and consequently they could not carry out their promises:—Held, that the claimant was entitled to recover from the government the moneys paid for ground-rents and bonuses, but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business. *Bulmer* v. *The Queen*, 3 Ex. C. R. 184.

Held, on appeal:—(1) Orders-in-council issued pursuant to 46 Vict. c. 17, ss. 49 and 50, authorizing the minister of the interior to grant licenses to cut timber, did not constitute contracts between the Crown and proposed licensees, such orders in council being revocable by the Crown until acted upon by

the granting of licenses under them. (2) The right of renewal of the licenses was optional with the Crown and the claimant was entitled to recover from the government only the moneys paid for ground-rents and bonuses. *Bulmer* v. *The Queen*, 23 S. C. R. 488.

Free Grant Territory—*Patent.*]—Held, that a license to cut timber on lands comprised in the free grant territory, under the Free Grants and Homesteads Act of 1868, 31 Vict. c. 8 (O.), and located under that Act, does not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year. *Anderson* v. *Muskoka Mill and Lumber Co.*, 27 C. P. 180.

Hay on Lands under License.]—The entry of a party on timber limits to cut hay, and his cutting and stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown timber licenses then in force. *McDonald* v. *Bonfield*, 20 C. P. 73.

Hay on Land under License—*Intervals between Licenses.*]—Where the plaintiff entered on lands of the Crown in the summer months, without any right of occupation, and, no one hindering him, cut and cured hay, but was prevented from removing it by defendant, who subsequently took possession under colour of a timber license, which, however, was only in force during the winter months:—Held, that the plaintiff had no right of action against the defendant for the value of the hay so cut, the former shewing no better title than the latter. *Graham* v. *Heenan*, 20 C. P. 340.

Quære, as to the rights of licensees during the intervals between successive licenses. *Ib.*

Intervals between Licenses—*Replevin.*]—The plaintiffs were in possession of certain timber limits under a license from the Crown, which expired in April, 1872, but it was the practice of the Crown lands department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-3, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th April, 1873, but it was stated to cover the period from the 20th June previous. During this period certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit, for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam, and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiffs then went to where the logs were, and selected the logs in question, being of the same size and description as their own logs, and marked them:—Held, that the plaintiffs might maintain replevin: that there was sufficient evidence of identity: and that at all events, as the defendant's own wrongful act was the cause of any difficulty, he could not object on this ground. The plaintiffs being in possession, though they might have no title as against the Crown, could maintain replevin against a wrongdoer. *Gilmour* v. *Buck*, 24 C. P. 187.

Locatee—*Evidence of Cutting.*]—The locatee of Crown lands located under authority of the Act of 1868, has no power to sell or dispose of the pine timber growing thereon. *Hughson* v. *Cook*, 20 Gr. 238.

One S. was the locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The agent of the plaintiff swore that some pine timber had been taken off these lots in 1870-1 by some persons getting out square timber, and further, that the defendant was the only person getting out square timber that season. After two years the court considered this evidence too indefinite as to the locality of cutting and as to quantity cut; and the act too old in date to warrant the court in granting an injunction to restrain further cutting. *Ib.*

Locatee—*Right to Sell Pine.*]—A locatee of land whose rights are governed by R. S. O. 1887 c. 25, s. 10, or a patentee whose rights are governed by s. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything was done in the way of clearing it for cultivation, and sell to such purchaser the pine timber standing and growing upon such parcel. The right or liberty in such cases is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should, for the purposes of such clearing, be removed. *McArthur Bros. Co.* v. *Deans*, 21 O. R. 389.

Obstructing Creeks—*Evidence.*]—Plaintiff got out a quantity of timber, and placed it in a creek communicating with the intervening rivers for transport during the spring freshets to Quebec. Defendant, who was the lessee of the Crown of certain timber limits within which the creek was, obstructed the latter with fallen trees, &c., and thereby caused a large outlay to plaintiff in the removal of the obstructions, and prevented his getting his timber to the Quebec market. Defendant put in a sworn and examined copy of the original map from the Crown lands department of recent date, containing defendant's name as entitled to the timber limits, to prove that the creek was within such limits:—Held, that this coupled with the fact that he had been for many years in possession of the timber limits, cutting timber thereon, and improving the same, was some evidence to go to the jury that he was not a mere intruder on the rights of the Crown. *Whelan* v. *McLachlan*, 16 C. P. 102.

Manufacturing Condition—*Constitutional Law.*]—The Act, 61 Vict. c. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is intra vires, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage. The rights acquired under sales and licenses of timber limits under "The Crown Timber Act" considered. *Smylie* v. *The Queen*, 31 O. R. 202, 27 A. R. 172.

Patent—*Subsequent Renewal of License.*]—To an action for taking the plaintiff's timber defendant pleaded, on equitable grounds, that at the time of an application to the commissioner of Crown lands for patents to certain ungranted lands of the Crown, upon which the timber grew, it was agreed between the

applicants and the commissioner that the lands should be granted subject to a timber license to the defendant, then in force, and to a renewal of such license, if granted; that on the patents subsequently issuing, granting the lands absolutely to the patentees, the commissioner indorsed thereon and signed a memorandum of such agreement, and on the expiration of the license renewed it: that the timber was cut during such renewal; and that the plaintiff acquired his title from the patentees, with full knowledge of the premises:—Held, affirming 25 C. P. 39, that such indorsement and the renewal of the license were unauthorized and invalid, and that the plea shewed no defence. *Contois* v. *Bonfield*, 27 C. P. 84.

See Attorney-General v. *Contois*, 25 Gr. 346.

Patent without Reservation of Timber.]—The plaintiff was, in March, 1884, located as the purchaser of a lot in the township of Burleigh, and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the "Free Grants and Homesteads Act." The defendants, assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The township of Burleigh was within the geographical limits described in s. 4 of the Free Grants and Homesteads Act, R. S. O. 1887 c. 25, but had never been appropriated or set apart as free grant lands under the provisions of that Act:—Held, that the lot was not "land located or sold within the limits of the free grant territory," within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained. The expression "Free Grant Territory" in s. 10 does not refer to the whole territory or tract defined in s. 4, but only to such portion of that territory or tract as may be actually set apart and appropriated by the Lieutenant-Governor-in-council under the Act:—Held, further, that there being no actual reservation in the patent the defendants had no right to cut the timber after its issue, and were liable in damages. *Shairp* v. *Lakefield Lumber Co.*, 17 A. R. 322; 19 S. C. R. 657.

Proceedings after Expiration of License.]—The plaintiffs held timber limits under licenses granted from 30th December, 1865, to 30th April, 1866; from 15th October, 1866, to 30th April, 1867; from 30th December, 1867, to 30th April, 1868; and 16th November, 1870, to 30th April, 1871. The timber in question was taken in the winter of 1866-7; and this action was not brought until November, 1871, after the last license had expired. C. S. C. c. 23, s. 2, enacts that such licenses shall vest in the holders thereof all rights of property in all timber cut within the limits during the term thereof, and to prosecute all trespassers to punishment, and to recover damages, if any; "and all proceedings pending at the expiration of any such license may be continued to final termination as if the license had not expired:"—Held, that the concluding clause did not prohibit a licensee from suing after the expiration of his term, and that the action might be maintained. *McLaren* v. *Ryan*, 36 U. C. R. 307.

Proof of License.]—In trover for timber by a licensee:—Held, that the licenses were sufficiently proved by the evidence of the person who issued them that he was the Crown timber agent, and had acted as such, and issued these licenses in the discharge of his duty. *Boyd* v. *Link*, 29 U. C. R. 365.

Railway Through Timber Limits.]—Construction of railways through lands under timber license. See *Booth* v. *McIntyre*, 31 C. P. 183; *Foran* v. *McIntyre*, 45 U. C. R. 288; *McArthur* v. *Northern and Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86.

Right of Crown Land Agent to seize Lumber.]—Held, that under 12 Vict. c. 30, a Crown land agent is not authorized to seize boards made from Crown timber cut wrongfully. *Miller* v. *Clark*, 10 U. C. R. 9.

Rights of Way.]—Plaintiff was a locatee of a free grant and homestead lot, which, at the time he located it, in May, 1877, was subject to a regulation of an order in council of the 27th of May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, etc. The patent in favour of plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the order-in-council:—Held, affirming 13 O. R. 254, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the order-in-council. Semble, that such regulations apply only before the issue of the patent to lands located under the order-in-council, and then only so far as rights of way, etc., are expressly conferred upon the licensee by the terms of his license. *Dunkin* v. *Cockburn*, 15 A. R. 493.

Sale after License.]—A license to cut was granted to the plaintiffs on the 22nd November, 1865. On the 6th December defendant purchased the land, taking a receipt in full from the bank agent at Chatham. On the 14th he obtained a receipt from the commissioner of Crown lands, and on the 6th February, 1866, a patent issued to him:—Held, that if the license had been duly authorized, it would not have been revoked by the defendant's purchase, until the issuing of the patent. *Farquharson* v. *Knight*, 25 U. C. R. 413.

A license to cut timber under C. S. C. c. 23, has by the statute the effect of a grant of the timber cut, and though not under seal it is not revoked by the issuing of a patent for the land. *McMullen* v. *Macdonell*, 27 U. C. R. 36.

The plaintiff obtained from a county Crown lands agent a ticket stating the amount to be paid into the Bank of Montreal as the first instalment on a lot which he said he would probably buy. Nearly a month afterwards he paid this sum to the bank, taking their receipt, which stated that it would appear at the credit of the Crown lands department, from which he subsequently received a letter acknowledging the receipt of the money on this

lot, and saying that his communication would receive attention. The agent said this was not a sale, and this lot was not in the monthly return of lots sold sent to him from the department. Defendant held a timber license for this and other lots, but land previously sold was expressly excluded from it:—Held, that the plaintiff was not a purchaser from the Crown, so as to entitle him to recover against defendant for cutting timber on the lot. *Wells* v. *Cumming*, 27 U. C. R. 470.

Sale Subject to Licenses.]—Under the provisions of the Quebec Act, 41 Vict. c. 14, the respondents in November, 1881, alleging themselves to be proprietors and in possession of a number of lots in the township of Whitton, obtained an ex parte injunction, restraining the appellants from further prosecuting lumbering operations which they had begun on these lots. The appellants were cutting in virtue of a license from the government, dated 3rd May, 1881, which was a renewal of a former license. By a report of the executive council of the Province of Quebec, dated 1st April, 1881, and approved by the Lieutenant-Governor-in-council on the 7th of the same month, the commissioner of Crown lands was authorized to sell to the company the lands in question, and the company deposited $12,000 to the credit of the department, to be applied on account of the intended purchase. On the 9th May, the company gave out a contract for the clearing of a portion of the land, and on the 19th July, 1881, the commissioner executed a deed of sale in favour of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots:"—Held, that the respondents had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and the appellants having established their right to possess said lands for the purpose of carrying on their lumber operations, under a license from the Crown dated 3rd May, 1881, the injunction had been properly dissolved by the superior court. *Hall* v. *Dominion of Canada Land and Colonization Co.*, 8 S. C. R. 631.

Sale of Timber—*False Representation by Purchaser as to Payment of Dues.*]—Declaration, that defendant intending, &c., falsely and fraudulently represented to plaintiffs that the land and timber were defendant's, and that he had the right to grant to plaintiffs the privilege of cutting the timber thereon, and that all Crown dues in respect of such timber and the cutting thereof had been paid by him; whereas the land and timber were not defendant's property, nor had defendant any right to grant to plaintiffs the privilege of cutting the timber, nor had the said dues been paid by defendant, as defendant well knew; by reason whereof the plaintiffs were induced to contract with defendant to purchase said timber, and paid him $88 for the same and for the privilege of cutting it, and not to investigate the title to the land and timber; and relying on the same they cut and conveyed to Quebec the said timber to be sold on their behalf; and that by reason of the premises, and before sale, the timber was seized on behalf of the Crown for non-payment of the said dues, and plaintiffs had to pay the same and damages for the illegal cutting thereof, and were deprived thereof for a long time, and prevented during that time from selling same, and the same became greatly depreciated in value:—Held, on demurrer, declaration good; for it sufficiently disclosed a cause of action against defendant for assuming fraudulently to sell the privilege of cutting the timber discharged from Crown dues, when it was not discharged from them; and that it did not profess to set out a case of either defendant or plaintiffs being mere wrong-doers, without license of any kind from the Crown. Quære, as to an action on the case lying, where the cause of action arises from matter of contract. *Edscall* v. *Hamell*, 16 C. P. 93.

Sale of Timber — *Dues* — *Warranty.*]—The plaintiff agreed to sell to defendants certain timber which he was about to cut on a lot in the free grant district, of which lot he was in occupation on or before the 30th September, 1871. He cut it and delivered the logs at the place agreed upon, but the government made a claim of $111 upon them for timber dues, for which they would be liable in case the plaintiff had not, before cutting the trees, obtained his patent. There was no positive proof of this, but defendant swore that he told the plaintiff he had better not be in a hurry about cutting it, as he would soon have his patent, when there would be no dues, but that in the meantime there would be, to which the plaintiff replied that the local agent had informed him there would be no dues:—Held, that this, being unanswered, amounted to an admission on the plaintiff's part that the patent had not issued when the timber was cut, and sufficient affirmative evidence of the fact, which was one peculiarly within the plaintiff's knowledge. Defendants, without objection, put in a notice published by the Crown lands department, that pursuant to an order-in-council of the 4th October, 1871, the government would recognize the rights of all locatees of free grant lands before the 30th September, 1871, to sell the pine thereon subject to certain dues:—Held, that this was some evidence of the order-in-council, especially when taken in connection with the testimony that the Crown claimed only a lien for the dues. *Brown* v. *Cockburn*, 37 U. C. R. 592.

Held, although there was no express warranty of title, that this being an executory contract for purchase and sale of a subject unascertained and afterwards to be conveyed, the purchaser was entitled to a good title; and that in an action for not accepting he might deduct the amount of dues for which the Crown held a lien:—Semble, however, that in all cases of the sale of chattels, the vendor, by selling them as his own, impliedly warrants the title, unless the facts shew that he intended only to transfer his interest. *Ib.*

Sale of Timber by Locatee—*Subsequent Patent to Another Person.*]—In 1871, S., under the Free Grants and Homesteads Act, located certain land in the Crown lands department, but never entered into possession, or performed the settlement duties. The lot was located through B., the Crown lands agent for the district. In 1873 S. sold the timber on the lot to B. In 1875 B. wrote the department asking if a cancellation and relocation would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a bonâ fide one, and in accordance with the order-in-council, a relocation would not affect his claim. The order-in-council was that the department would recognize the right of all purchasers or locatees of free grant lands who

had purchased or located any lot on or before 30th September, 1871, and who on that day were in actual occupation of, or resident on the lots located, to sell and dispose of all pine trees on the said lots. On 10th September, 1875, S.'s location was cancelled for non-performance of the settlement duties; and on the 3rd July, 1876, the lot was relocated to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed, and acted on that belief. On the 9th November, 1886, the patent issued to the plaintiff, and contained no reservation of the pine trees. In 1883, B. sold the timber to the defendant, who in October, 1886, cut same notwithstanding he was notified by the plaintiff to desist. The timber was removed by defendant after the issue of the patent. In an action by plaintiff to recover the value of the timber:—Held, that as the patent contained no reservation of the pine trees standing or being on the land, and as the land was located prior to 43 Vict. c. 4 (O.), the trees "remaining on the land" at the time of the patent passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. 1877 c. 24, s. 10, had no right to cut timber except for building, fencing, and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 Vict. c. 23 (O.), for the locatee was not on or before 30th September, 1871, "in actual occupation or resident on the lots located;" and, semble, that the words, "remaining on the land," applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff being in possession with the assent of the Crown, he had title to the timber as against the defendant a wrong-doer:—Held, also, that the plaintiff having acted on B.'s misrepresentations, was not estopped from bringing the action. *Langmaid* v. *Mickle*, 16 O. R. 111.

Sale of Timber Limits—*Licenses—Plan—Description—Damages.*]—Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits, but was subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. The licensee's remedy would be by action to cancel the license under Article 992 C. C. with a claim for compensation for moneys expended. *Grant* v. *The Queen*, 20 S. C. R. 297.

Timber on Road Allowances.]—Licensees of the Crown of timber limits, covering allowances for roads, are not liable for cutting timber on such allowances, under the authority of the Crown, when no steps have been taken by the municipality to pass a by-law dealing with such timber. *Township of Burleigh* v. *Campbell*, 18 C. P. 457.

But after the passage of such by-laws the municipality may sue the licensees for cutting such timber, even though the licenses were granted before the by-laws, the licensees at the time of cutting having had notice of the by-law. *Township of Barrie* v. *Gillies*, 20 C. P. 369.

Quære, whether such licenses confer the right to cut timber on the road allowances. Semble, not. *Ib.*

The last case affirmed in appeal, and—Held, that the licenses did not authorize defendants to cut and carry away the timber from the road allowances. *S. C.*, 21 C. P. 213.

Timber Unlawfully Cut—*Trespasser—Crown's Paramount Right.*]—Where timber unlawfully taken from the Crown property was subsequently taken by force out of the possession of the first taker, who recovered a judgment against the trespassers, which included the value of the timber:—Held, that the Crown was entitled to claim so much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it. *Attorney-General* v. *Price*, 15 Gr. 304.

The defendant was ordered on argument to pay the costs of the relators. *S. C.*, 18 Gr. 7.

Transfer of License without Approval.]—The plaintiff herein, a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not approved, and by the regulations of the Crown lands department all transfers were to be in writing and subject to their approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's, who was entitled to maintain an action for damage done to the limits. *Booth* v. *McIntyre*, 31 C. P. 183.

Trees Cut in Clearing Land—*Building and Fencing.*]—Under s. 10 of R. S. O. 1877 c. 24, as amended by s. 2 of 43 Vict. c. 4 (O.), the locatee of land "may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees required to be removed in the actual clearing of such land for cultivation, but no pine trees (except for the necessary building aforesaid) shall be cut beyond the limit of such actual clearing:"—Held, there was nothing to prevent the locatee cutting, clearing, and cultivating the land in several parcels in various shapes and forms, so long as done in good faith for the purpose of clearing and cultivating, as was found to be the fact here; it not being necessary that the clearings should be together and contiguous; that the locatee may cut such pine trees necessary for building and fencing wherever he chooses on the land, but they can be only used for such purpose; but when the trees are cut in the actual process of clearing for cultivation they may be sold and disposed of. *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O. R. 343.

Trees Reserved in Clearing Land.]—Where a locatee of lands, in clearing a portion thereof, reserved twenty-six pine trees thereon, thinking that they would be useful for building, but had previously erected a permanent house and stable, and put up fences, and had enough timber left for building a barn without reserving these trees:—Held, that by thus reserving these trees, the locatee left them the property of the Crown, and a licensee of timber under the Crown had a right to cut and remove them. *Parker* v. *Maxwell*, 14 O. R. 239.

Where a locatee of lands left certain trees standing temporarily on a certain portion of the land which he was in process of clearing, intending first to burn the fallow and then to cut them down:—Held, that a licensee of timber under the Crown, had no right to interrupt the locatee in clearing the lands and to cut and remove such trees. *Ib.*

The meaning of 43 Vict. c. 4 (O.), is, that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee; otherwise, when cut, it still continues the property of the Crown. *Ib.*

Trespass.]—A party obtaining from the Crown agent a license to enter upon certain land, and to cut such a quantity of timber of particular dimensions as he might require, not having by such license the exclusive possession of the land, cannot maintain trespass. *McLaren* v. *Rice*, 5 U. C. R. 151.

The patent contained the clause then usual, (1796), saving and reserving to the Crown all white pine trees:—Held, that notwithstanding the reservation, the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 U. C. R. 333.

Held, also, that the evidence of possession, being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action. *Ib.*

The legal right of a licensee of timber limits under a license issued by the Ontario Crown lands department ceases (except as to the matters specially excepted by the Act) at the expiration of the license year, and there is no equitable right of renewal capable of being enforced against the Crown or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal. The insertion in a license, after its expiration, of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot. *Muskoka Mill and Lumber Co.* v. *McDermott*, 21 A. R. 129.

Trespass for Timber Cut in Quebec.]—Trespass or trover will lie here for timber cut in the Province of Quebec (the declaration not charging any trespass to the realty), although it may be necessary in such action to try the title to the land on which it was cut. *McLaren* v. *Ryan*, 36 U. C. R. 307.

See, also, *Stuart* v. *Baldwin*, 41 U. C. R. 446.

VIII. Miscellaneous Cases.

Bond — *Charge on Land.*]—The testator held certain lands as a trustee to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to J. M. (whom he also appointed one of his executors) and his heirs absolutely. The testator had joined in certain Crown bonds which remained undischarged:—Held, that they formed a charge upon the lands, which the purchaser was entitled to have removed. *Re Charles*, 4 Ch. Ch. 19.

Bond—*Co-sureties.*]—A. and B. enter as co-sureties into separate bonds to the Crown for C.; C. becomes a defaulter; the Crown proceeds by sci. fa. on each bond, and obtains a separate judgment against each surety. A. satisfies to the Crown the judgment against himself. B. moves the court to be allowed, on paying the judgment against himself in full, to stand in the place of the Crown, and to have the benefit of the Crown process against his co-surety for a moiety of the judgment:—Held, that the court could not thus relieve B. from the effect of the judgment against himself; all that they could have done would have been to allow him to proceed in the name of the Crown to enforce the judgment which had been obtained on a sci. fa. against A., and this they could not now do, as it appeared the Crown had already enforced that judgment. *Regina v. Land*, 3 U. C. R. 277.

Chattel Mortgage.] — The Queen may take a chattel mortgage from any of her subjects (under our Acts) through and in the name of the head of the department to which the debt is due, to secure such debt. *McGee* v. *Smith*, 9 C. P. 89.

Chose in Action.]—Where a chose in action was assigned, inter alia, for the general benefit of creditors, all the parties interested being before the court, and the Crown making no objection, the court gave effect to such assignment:—Quære, in the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Customs Duties — *Drawback.*]—By the Customs Act, 1877 (40 Vict. c. 10), s. 125, clause 11, it was enacted, inter alia, that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, s. 11, the Governor in Council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also the Customs Act, 1883, s. 230, clause 12, and R. S. C. c. 32, s. 245*m*.) By an order of the Governor-General in Council, dated the 15th May, 1880, it was provided as follows: "A drawback might be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country since the first day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for 9 years, and at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1893:"—Held, that a petition of right would not lie upon a refusal by the controller of customs to grant a drawback in any particular case. Semble, that the pro-

vision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority. *Matton* v. *The Queen*, 5 Ex. C. R. 401.

Crown Bonds.]—The testator had joined in certain Crown bonds, which remained undischarged:—Held, that they formed a charge upon lands, which the purchaser was entitled to have removed. *Re Charles*, 4 Ch. Ch. 19.

Enrolment of Surrender.]—Enrolment of a surrender to the Crown is unnecessary in this country to perfect the title of the Crown. *Regina* v. *Guthrie*, 41 U. C. R. 148; *Regina* v. *McDonell*, *ib.* 157.

Estoppel.]—The doctrine of estoppel cannot be invoked against the Crown. *Humphrey* v. *The Queen*, 2 Ex. C. R. 386; 20 S. C. R. 591.

The doctrine of res judicata may be invoked against the Crown. *The Queen* v. *St. Louis*, 5 Ex. C. R. 330.

Semble:—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the attorney-general, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca* v. *Attorney-General of Canada*, 17 S. C. R. 612.

Exemptions.]—The statute 23 Vict. c. 25 (c), exempting certain articles from seizure, does not bind the Crown. *Regina* v. *Davidson*, 21 U. C. R. 41.

Highways.]—See *Rae* v. *Trim*, 27 Gr. 374; *Re Trent Valley Canal*, 11 O. R. 687.

Injunction — *Breach of Charter.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O.1887 c. 171, which authorized them to construct and operate (on all days except Sundays) a street railway:—Held, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public, or any interference with proprietary rights, being shewn. Judgment below, 19 O. R. 624, affirmed. *Attorney-General* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 18 A. R. 453.

Interest.]—Held, following St. Louis v. The Queen, 25 S. C. R. 649, that interest may be allowed against the Crown upon a judgment on a petition of right arising ex contractu in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance. But such interest should only be computed from the date when the petition of right is filed in the office of the Secretary of State. *Lainé* v. *The Queen*, 5 Ex. C. R. 103.

Interpretation Act—*Controverted Elections Act.*]—The Crown is not bound by ss. 100 and 122 of the Dominion Elections Act, 1874. The 46th clause of s. 7 of the Interpretation Act, R. S. C. c. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in the Magdalen College Case, 11 Rep. 70*b*, "that the King is impliedly bound by statutes passed for the general good * * * or to prevent fraud, injury, or wrong." *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Laches and Estoppel—*Waiver by Acts of Minister of Crown.*]—While the law is that the Crown is not bound by estoppel, and that no laches can be imputed to it, and that there is no reason why it should suffer by the negligence of its officers, yet it appears to be well settled that forfeitures of certain kinds may be waived by the acts of ministers and officers of the Crown. Attorney-General of Victoria v. Ettershank, L. R. 6 P. C. 354, and Davenport v. The Queen, 3 App. Cas. 115, referred to. *Peterson* v. *The Queen*, 2 Ex. C. R. 67.

Lease of Canal—*Action by Users of Canal to Cancel.*]—Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the Attorney-General was a defendant) to have the lease declared void. *Hinckley* v. *Gilderslceve*, 19 Gr. 212.

Lord's Day Act.]—R. S. O. 1877 c. 189, which forbide the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a government locktender on the Welland Canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was quashed. *Regina* v. *Berriman*, 4 O. R. 282.

Moneys in Court—*Payment Out by Mistake—Lapse of Time—Restitution.*]—Statutes of Limitation have relation only between subject and subject—the Crown cannot be bound by them. The supreme court of judicature for Ontario is a public trustee as to all moneys and securities in its hands. Moneys in court are in custodiâ legis, in this case tantamount to custodiâ regis, and to such a fund and such a custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the court to which they have no just claim. Restitution was ordered after a period of fourteen years, without interest, as the mistake was that of an officer of the court. Where moneys in court have been improperly paid out in an action, a motion to refund the amount is the proper procedure. *Allstadt* v. *Gortner*, 31 O. R. 495.

Mortmain — *Forfeiture.*] — Forfeiture by the Crown of lands held by corporations contrary to the statutes of mortmain. See *McDiarmid* v. *Hughes*, 16 O. R. 570.

Navigable Waters—*Title to Soil—Presumption of Dedication—Obstruction to Navigation.*]—The user of a bridge over a navigable river for 35 years is sufficient to raise a presumption of dedication.—If a Province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge. An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. *The Queen* v. *Moss*, 26 S. C. R. 322.

Parol Agreement.] — Under the provisions of the 7th section of the Petition of Right Act of 1876, the Dominion Government, in enforcing a parol agreement, is entitled to whatever rights any subject of the Crown would have in respect of such an agreement in an action between subject and subject. *Merchants' Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

Railway Subsidy—*Discretionary Power of Lieutenant-Governor in Council — Petition of Right — Misappropriation of Subsidy Moneys by Order-in-Council.*]—Where money is granted by the Legislature, and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right:—Held, that the statute 51 & 52 Vict. c. 97 and documents relied on did not create a liability on the part of the Crown to pay the money arising from a converted land grant voted to the appellant railway company enforceable by petition of right; but assuming it did, the letter and receipt signed by the president of the company set out in this case did not discharge the Crown from such obligation to pay the subsidy; and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

Receiver — *Claim against Crown.*] — The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was voted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant:—Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right. Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant. Willcock v. Terrell, 3 Ex. D. 323, and Manning v. Mullins, [1898] 2 I. R. 34, followed. The fact that the Crown is the debtor does not stand in the way of the court going as far as it can go, without directing or assuming to direct, what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor. Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment. *Stewart* v. *Jones*, 19 P. R. 227.

Rideau Canal.] — See *Magee* v. *The Queen*, 3 Ex. C. R. 304.

Sale of Liquor near Public Works.]—Having liquor for sale near public works. See *Bond* v. *Conmee*, 15 O. R. 716, 16 A. R. 398.

Taxes.]—See *City of Quebec* v. *The Queen*, 2 Ex. C. R. 450; *Quirt* v. *The Queen*, 19 S. C. R. 510; and *Rural Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702.

Taxes Paid by Mistake.]—Held, that the Crown could not be prejudiced in its right to recover back taxes on land leased to a commissariat officer by mistake of the officer in charge in paying them. *Principal Secretary of State for War* v. *City of London*, 23 U. C. R. 476.

Yukon — *Tolls.*]—The Executive Government of the Yukon territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O'Brien* v. *Allen*, 30 S. C. R. 340.

See CONSTITUTIONAL LAW — DEED — LACHES, IV.—LIMITATION OF ACTIONS, I., II. 10—MINES AND MINERALS, II.—PETITION OF RIGHT—STATUTES, III.

CROWN BONDS.

See SCIRE FACIAS AND REVIVOR, I.

CROWN LANDS.

See CONSTITUTIONAL LAW, II. 17—CROWN, II.—PLANS AND SURVEYS, II.

CROWN OFFICE.

See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, V.

CURRENCY.

See MONEY, I.—PAYMENT, III. 5.

CURTESY, ESTATE BY.

See HUSBAND AND WIFE, VI.

CUSTOM AND USAGE.

Animals Running at Large — *Wire Fences.*]—Held, that the colt in question in this case, five weeks old, following its dam, could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam. *Hillyard* v. *Grand Trunk R. W. Co.*, 8 O. R. 583.

Held, that evidence of the common use of barbed wire fences in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance. *Ib*.

Bill of Lading—*Acceptance of Draft.* — The plaintiffs, a bank at Milwaukee, sent to defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date, together with a bill of lading indorsed by A. for certain wheat consigned by A. to B.:—Held, that in the absence of any instructions to the contrary defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. Evidence having been given as to the custom of merchants in such cases, both in the United States and in Canada:—Held, that the latter only could be material. *Wisconsin Marine and Fire Ins. Co.* v. *Bank of British North America*, 21 U. C. R. 284.

Brokers.]—Custom of brokers in dealing with customers' stock. See *Mara* v. *Cox*, 6 O. R. 359; *Sutherland* v. *Cox*, 6 O. R. 505; 15 A. R. 541.

Carriers — *Payment to Wharfingers.*] — Action for money earned by plaintiffs as forwarders and carriers. Plea, that according to the custom and usage of forwarders and carriers existing at Toronto, consignees are authorized to pay wharfingers the amount due from them to such forwarders and carriers for the forwarding or carrying of their goods, and that defendant so paid this money:—Held, that assuming the alleged custom to be valid, notice thereof to the plaintiff, if not acquiescence therein, should be alleged. *Torrance* v. *Hayes*, 2 C. P. 338.

Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, according to the custom and usage of forwarders and carriers at T., paid the plaintiffs' claim:—Held, plea bad, for not averring notice of the custom to the plaintiffs. *S. C.*, 3 C. P. 274.

Commission Merchants — *Reimbursement of Advances.*]—At the trial of an action for advances made by a commission merchant on goods consigned to him for sale, defendant tendered evidence to shew the meaning of cash advances so made, and the usual practice as to commission merchants reimbursing themselves for such advances:—Held, that such evidence was properly rejected. *Cowie* v. *Apps*, 22 C. P. 589.

Commission Merchants — *Interest on Advances.*]—A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, the plaintiff, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:—Held, that interest could not be charged. *De Hertel* v. *Supple*, 13 Gr. 648, 14 Gr. 421.

Contract for Sinking Well.] — Defendant agreed with the plaintiffs to sink an artesian well in B. for seventy-five cents a foot. After sinking a distance of 160 feet he met with an impediment, and refused to proceed further:—Held, that he was entitled to be paid for the work done. Quære, whether evidence as to how contracts for artesian wells were usually made in B. should have been received. *Barrie Gas Co.* v. *Sullivan*, 5 A. R. 110.

Custom of Paris.]—See *Pilon* v. *Brunet*, 5 S. C. R. 318.

Customary Right.] — Held, following Shuttleworth v. Le Fleming, 19 C. B. N. S. 687, that pleas setting up a custom for inhabitants of the surrounding country as of right to drink the water of certain mineral springs for forty years were bad, for such right could not be claimed in gross under the Prescription Act, R. S. O. 1877 c. 108, s. 38. Semble, that, apart from the statute, the alleged custom was bad, as being too large, and not confined, either in the pleas or in the evidence, to any particular class of persons. *Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

Quære, whether a custom could be proved in this Province, there being no time immemorial on which to found it, especially where, as here, the land sought to be burdened therewith was only granted by the Crown within fifty years. *Ib*.

Deck Cargo.]—Where it is the usage of the trade to carry a deck cargo in inland navigation, and such usage is known to the shipper, he cannot hold the master or owner responsible for a part of the deck cargo swept off in a storm, the bill of lading excepting the dangers of navigation. *Stephens* v. *McDonell*, M. T. 6 Vict.

Whether in case of loss of cargo loaded on deck the ship-owner will be liable, depends on the usage which prevails in respect to deck loading in the particular navigation. *Paterson* v. *Black*, 5 U. C. R. 481.

Case against defendant as a common carrier for loss of goods. Plea, not guilty; 2. That it is a custom in navigating Lake Ontario to carry cargo on deck; that the plaintiff's goods were laden and stowed on deck; and that a storm arising they were of necessity thrown overboard for the preservation of the vessel and cargo. Replication de injuriâ generally, not expressly admitting nor expressly traversing the custom:—Held, per curiam that under these pleadings, the custom of trade, as well

as all questions tending to shew negligence, either in the method of loading or in the management of the vessel, or in the throwing overboard the goods without adequate reason, were put in issue. *Ib.*

As to the usage of vessels to carry deck loads, with reference to marine insurance. See *Spooner* v. *Western Assurance Co.*, 38 U. C. R. 622.

Evidence of Usage — *Knowledge.*]—To incorporate mercantile usages with the terms of a contract, or to prove that they form the basis of it, they must be such as attach universally to the subject matter of the contract in the neighbourhood or place where it was made. If a local custom or usage of a particular place, or class of persons, be relied on, it must be shewn that the parties knew the custom, as it is not binding on those who are ignorant of it. The evidence of the usage must be "clear, cogent and irresistible." *Burke* v. *Blake*, 6 P. R. 260.

At the trial the bank manager to whom the draft was returned, was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the Judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, and (following Daines v. Hartley, 3 Ex. 200), a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the Judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber* v. *Crookall*, 10 O. R. 475.

Foreign Usage.]—Evidence of custom in foreign country rejected where the contract was made in Ontario. See *Williams* v. *Corby*, 5 A. R. 626.

Import Duties.]—Plaintiffs bought from defendant certain coal, shipped to defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland Canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel:—Held, that defendant was not obliged to pay the import duties. Held, also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances. *Brown* v. *Browne*, 9 U. C. R. 312.

Inspection of Timber.]—Action for non-delivery of timber at a place named. Plea, setting up a custom requiring the plaintiff to inspect the timber where it was being cut before delivery, and neglect to do so:—Held bad, as insufficient and inconsistent with the defendant's express contract. *Hayes* v. *Nesbitt*, 25 C. P. 101.

See, also, *Aitcheson* v. *Cock*, 37 U. C. R. 490.

Insurance—*Credit for Premiums.*]—The plaintiffs alleged that it was the custom of agents to give each other credit for premiums on reassurance and to settle at the end of the month, when the balance, if any, was handed over, but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved:—Held, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it. *Western Assurance Co.* v. *Provincial Ins. Co.*, 5 A. R. 390.

Insurance—*Deviation in Voyage.*] — The plaintiff effected an insurance with defendants on certain wheat to be carried in a schooner from Port Darlington to Kingston, and from thence to Montreal by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, about three miles below Kingston; the wheat was there transferred to a barge, which returned to Kingston to complete her cargo, and while so returning the barge was stranded and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only shewed that certain forwarders having storehouses at Port Sidney had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised:—Held, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage. *Fisher* v. *Western Assurance Co.*, 11 U. C. R. 255.

Plaintiff shipped 90 barrels of flour at Port Credit, in a vessel of defendant's, to be carried to Quebec, such vessel being capable of carrying 4,500. She proceeded to Toronto, where she took in 400 barrels more, and thence to Oswego, where 2,450 were shipped for Quebec also. She was wrecked near Oswego. Defendant was held liable therefor, such deviation being beyond the established usages of trade. *Wright* v. *Holcombe*, 6 C. P. 531.

Interest on Note.]—A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice:—Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible. *Re McDougall*, 12 A. R. 265.

Lease—*Away-going Crops.*]—Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right of the away-going crop is excluded: and semble, that there is no custom of the country as to the away-going crops in Upper Canada. *Burrowes* v. *Cairns*, 2 U. C. R. 288.

Marking Timber.]—B. had agreed to deliver certain timber to the plaintiff at a price named, and in trover for such timber defendant claimed under a purchase from B. The fact that the timber was marked with B.'s mark was relied upon by defendant to shew that it was not the plaintiff's:—Held, that the plaintiff might shew, in answer, that it was not uncommon for persons in charge of

but not owning timber thus to mark it. *Little* v. *Foley*, 24 U. C. R. 177.

Sale of Wheat—*Providing Cars.*]—Held, that under a contract to sell wheat f. o. b. the railway cars, it was the duty of the buyer to provide the cars; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received to vary the contract. Semble, that the explanation of the alleged usage was that the sellers, in providing cars at Clinton under such contracts, were acting as agents for the buyers. *Marshall* v. *Jamieson*, 42 U. C. R. 115.

Sheep Left with Vendor—*Bills of Sale Act.*]—Plaintiff bought from R. a number of sheep, paying him part of the purchase money at the time, and the balance within a few days. Upon the first payment being made plaintiff marked the sheep with red paint as his property, and they were then placed apart from the rest of R.'s sheep in a separate field on the latter's farm, where they were to remain until required by plaintiff. Plaintiff was a butcher, and it appeared to be the custom among butchers to leave with farmers stock purchased from them until convenient to remove it. This had also been the course of dealing between plaintiff and R. on previous occasions. The sheep thus remained on R.'s premises until seized under an attachment against R., as an absconding debtor:—Held, that the mere marking of the sheep, or the removal of them from one field of the seller to another, did not constitute a sufficient delivery or change of possession under C. S. U. C. c. 45, s. 4:—Held, also, that there was no evidence of a sufficiently established custom or mode of dealing among farmers of treating as their own property really belonging to others, to put third parties upon inquiry as to the actual ownership. Quære, whether such inquiry would be admissible in a case arising under the statute in question. *Doyle* v. *Lasher*, 16 C. P. 263.

Trade Terms.]—The construction of a mercantile contract is for the court, unless it contains words of a technical or conventional use in the trade to which the contract relates. *Nordheimer* v. *Robinson*, 2 A. R. 305.

CUSTOMS DUTIES.

See REVENUE, II.

CUSTOMS OFFICER.

See REVENUE, II. 4.

DAMAGE FEASANT.

See DISTRESS, I.

DAMAGES.

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I. GENERALLY.

Assignment of Damages.]—See *Sutherland* v. *Webster*, 21 A. R. 228; *Laidlaw* v. *O'Connor*, 23 O. R. 696; *Ball* v. *Tennant*, 21 A. R. 602.

Attachment of Damages.]—See *Davidson* v. *Taylor*, 14 P. R. 78.

Crown's Liability for Damages.]—See CROWN, III.

Expropriation.]—See CROWN, I.—MUNICIPAL CORPORATIONS, XIII. — SCHOOLS, COLLEGES, AND UNIVERSITIES — RAILWAY, XV.

Injury to Right.]—An action will lie for injury to a right, though no appreciable damage has been sustained. *Mitchell* v. *Barry*, 26 U. C. R. 416; *Plumb* v. *McGannon*, 32 U. C. R. 8; *Warren* v. *Deslippes*, 33 U. C. R. 59.

II. APPORTIONMENT.

Joint Act—*Severance of Damages.*]—In an action against two justices for one act of imprisonment, charged in one count as a trespass, and in another as done maliciously, the jury

found $800 against one defendant, and $400 against the other:—Semble, that the damages could not be thus severed; but, held, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. Quære, as to the proper mode of entering the judgment. *Clissold* v. *Mitchell*, 25 U. C. R. 80. Affirmed in appeal, 26 U. C. R. 422.

Liquor Supplied by Two Tavern-Keepers.] — Where a person comes to his death while intoxicated, and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. 1887 c. 194, s. 122, they cannot be sued jointly. The jury having in such an action in which tavern-keepers had been jointly sued assessed the damages at the trial at different sums against the two defendants, upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a nolle prosequi against the other. *Crane* v. *Hunt*, 26 O. R. 641.

Pollution of Stream.] — In an action against several mill owners for obstructing a navigable river by throwing saw-dust and refuse into it from their mills, a reference was made to the master to ascertain the amount of damages: — Held, that the master rightly treated the defendants as joint tort-feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant: and he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Booth* v. *Ratté*, 21 S. C. R. 637.

Sheep Act.]—The right of action given by R. S. O. 1887 c. 214, s. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the county court it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages if an apportionment be required. *Fox* v. *Williamson*, 20 A. R. 610.

See Edmonds v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

III. Assessment.

1. *By Jury or Judge.*

After Interlocutory Judgment.]—The plaintiff must assess his damages after interlocutory judgment, in debt on a bond to the limits. *Callagher* v. *Strobridge*, Dra. 158.

Where an interlocutory judgment was set aside by a Judge's order, but the plaintiff proceeded and assessed damages, the court set the proceedings aside. *Staats* v. *Reynolds*, 4 O. S. 5.

Where, in a country cause, a short time before the assizes, an interlocutory judgment was set aside by a Judge's order on terms of payment of costs and that the defendant should plead issuably and take twenty-four hours' notice of trial, and defendant tendered the costs and pleas the evening before the first day of the assizes, at the same time serving a written demand of replication, and offering to take one hour's notice of trial, notwithstanding which the plaintiff, having previously given notice of assessment, went on and assessed damages, the court held the assessment regular, the defendant filing no affidavit of merits, nor shewing that his pleas were issuable, and the delay in his proceeding after the order was granted being too great. *Jessup* v. *Frazer*, 1 U. C. R. 390.

A plaintiff is not at liberty to go on and assess his damages, pending a summons to set aside his interlocutory judgment, and after it is returnable. *Pace* v. *Meyers*, 8 U. C. R. 70.

See Star Life Assurance Society v. *Southgate*, 18 P. R. 151; *Stuart* v. *McVicar*, *ib.* 250; *Stanley* v. *Litt*, 19 P. R. 101; *Appleby* v. *Turner*, *ib.* 145, 175.

After Judgment on Demurrer.] — Semble, that in making up a record for assessment after judgment on demurrer, before the record is made up a judgment paper should be filed in the office; but the omission of it must be taken advantage of before damages assessed. The fact that a nisi prius record contains a blank for the date of the judgment on the demurrer, is no ground for setting aside the assessment of damages. *Gamble* v. *Rees*, 7 U. C. R. 406.

Contingent Damages.] — Where there was an issue of fact and an issue in law, on which contingent damages were to be assessed, a notice of trial was held sufficient to enable the plaintiff to try the issue and assess damages. *Davis* v. *Davis*, 4 O. S. 322.

In trespass qu. cl. fr., defendant's attorney, seeking the advice of counsel upon some difficult points of pleading that were likely to arise in the defence, undertook to allow the plaintiff's attorney to enter his record at any time during the assizes. Defendant's attorney pleaded a special plea, to which the plaintiff new assigned, and defendant then pleaded specially to the new assignment, and the plaintiff demurred specially. Defendant thereupon gave the plaintiff notice that if he proceeded to assess contingent damages, he should move to set aside the proceedings for irregularity: the plaintiff proceeded to assess his damages, and the court set the assessment aside without costs. *Hodgkinson* v. *Donaldson*, 2 U. C. R. 274.

A plaintiff cannot, under rule 23 of H. T. 12 Vict., assess contingent damages where there is nothing on the record but a demurrer to the whole declaration. *Elliott* v. *Wilson*, 7 U. C. R. 331.

Evidence on Assessment — *Admissibility.*]—Upon an assessment of damages for goods sold, defendant tried to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by defendant in consequence of their arriving with charges on them, and the jury found nominal damages only:—Held, that such matter should have been pleaded in bar, and was not available to defendant on an assessment of damages. *Comstock* v. *Thistle*, 7 C. P. 27.

Evidence—*Necessity for—Payment into Court.*]—Where in indebitatus assumpsit the defendant, as to all the moneys in the declaration except as to £33 14s., pleaded the general issue, and as to that sum pleaded payment of £1 1s. 8d. into court, and no damages ultra;

and the plaintiff replied that he had sustained greater damages, but at the trial obtained a verdict for the difference between the sum of £33 14s. and £1 1s. 8d. paid into court, as a sum admitted on the record, without giving any evidence—the court set the verdict aside, as it was incumbent on the plaintiff to prove damages, no specific sum being admitted on the record in this form of action. *Ross* v. *Garrison*, 6 O. S. 626.

General Damages.]—Where one count is good and another bad, and the damages general, the court will not arrest judgment, but award a venire de novo. *Owens* v. *Purcell*, 11 U. C. R. 390; *Decow* v. *Tait*, 25 U. C. R. 188.

Issues—*Sufficiency of.*]—In debt by executor on an annuity bond made by defendant to the testator, and payable during the lifetime of the testator:—Held, that the issues tendered by the replications were sufficient, and that the allegations in the pleadings, set out in the case, were sufficient to warrant the assessment of damages. *Smith* v. *Muirhead*, 13 U. C. R. 9.

Several Damages.]—Held, that, upon the evidence given in this case, a jury might assess several damages on each of the three counts; the first two being for assault and imprisonment on different days, and the third for malicious prosecution. *Appleton* v. *Lepper*, 20 C. P. 138.

Several Damages.]—Agreement to get out logs and to make road therefor. Plaintiff overpaid for the logs got out, but damages to $10 sustained by defendant's neglect to make the road:—Held, plaintiff entitled to a verdict for $10, notwithstanding the overpayment. *Stubbs* v. *Johnston*, 38 U. C. R. 466.

Several Damages.]—After a count by husband and wife for injury done to the wife during coverture, a second count, by the husband alone—after setting out the facts that the horse and cutter, in which both plaintiffs at the time were, having been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering—proceeded to allege that the husband was put to great trouble and expense by reason of the loss of the wife's society and her services, and was compelled to pay and did pay large sums of money on account of her illness to nurses and medical men, &c., and also lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for the plaintiffs, and assessed damages generally on both counts:—Held, that after verdict the second count must be treated as a count only for the damages of the husband, for, which he alone could sue; and that, treating it as such, it was well joined with the first count, under the C. L. P. Act, though damages were sought by him for the injury to the horse and cutter, as well as for that resulting to the husband from his injury to the wife:—Held, also, that defendants were not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count. *Campbell* v. *Great Western R. W. Co.*, 29 C. P. 345, 563.

Special Venire.]—When the writ of trial is only to try the issue, and contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested. *Hunter* v. *Vernon*, 7 U. C. R. 552.

Verdict for Defendant.]—There can be no assessment of damages where a verdict is found for defendant on an issue going to the whole cause of action. *Prynne* v. *Carroll*, 10 U. C. R. 519.

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2. *Reference to Assess.*

Court of Appeal — *Reference back to Court below.*]—The court of appeal directed a verdict to be entered for the plaintiff against a tavern keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the county court Judge to assess the damages, declining to follow the course adopted in Denny v. Montreal Telegraph Co., 3 A. R. 628. *Austin* v. *Davis*, 7 A. R. 478.

Trial Judge—*Discretion—Appeal.*]—The right of the trial Judge to refer the question of damages, as a question arising in the action, under s. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised. And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river and to his business as a boatman, by the acts of the three several defendants, who owned saw mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a primâ facie case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Ratté* v. *Booth*, 16 P. R. 185.

IV. Continuing Damage.

Criminal Conversation — *Statute of Limitations.*]—Criminal conversation is a continuing wrong, and where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the statute of limitations. *Bailey* v. *King*, 27 A. R. 703.

Personal Injuries—*Future Sufferings.*]—When in an action for bodily injuries there is but one cause of action, damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury. *City of Montreal* v. *McGee*, 30 S. C. R. 582.

Severance of Land—*Railway.*]—Under 14 & 15 Vict. c. 51, where a railway com-

pany's line severs a farm, it is primâ facie their duty to construct a farm crossing, and the fact of their having commenced the construction of such a crossing at a particular place, and afterwards desisted at the request of the owner, does not prevent the owner from recovering damages as for a continuing breach. *Reist* v. *Grand Trunk R. W. Co.*, 6 C. P. 421.

Water —*Flooding Land—Public Work.*]—The Dominion Government constructed a collecting drain along a portion of the Lachine canal. This drain discharged its contents into a stream and syphon-culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times, the suppliant's farm was flooded and the crops thereby injured. The flooding was not regular and inevitable, but depended upon certain natural conditions which might or might not occur in any given time:—Held, that the Crown was liable in damages; that the case was one in which the court had jurisdiction under s. 10 (*a*) of the Exchequer Court Act; and that in assessing the damages in such a case the proper mode was to assess them once for all. *Davidson* v. *The Queen*, 6 Ex. C. R. 51.

Water—*Obstruction.*]—An action is maintainable by the reversioner of a mill demised to a tenant for diversion or obstruction by a stranger of water from the mill head, the obstruction being of such a character as to render the sale of the reversion less valuable:—Quære, whether damages must be recovered once for all. *Rogers* v. *Dickson*, 10 C. P. 481.

V. Double or Treble Damages.

Distress — *Construction of Lease.*] — Remarks as to the hardship of the statute allowing double damages for distraining when no rent due, where the landlord has acted on an erroneous construction of a doubtful lease. *Brown* v. *Blackwell*, 35 U. C. R. 239.

Distress—*Reference to Arbitration.*]—A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under 2 Wm. & M. c. 5, s. 4; the word "recover" used in the statute means "recover by the verdict of a jury." *Clark* v. *Irwin*, 8 L. J. 21.

Registrar—*Conviction.*]—An action cannot be brought against a registrar for treble damages under s. 10 of 35 Geo. III. c. 5, until he has been convicted under that section of some offence for which he shall forfeit his office. *Hamilton* v. *Lyons*, 5 O. S. 503.

VI. Equity— Damages in.

Discontinuance of Wrongful Act.]—Where a plaintiff filed a bill for an injunction and payment of damages; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced:—Held, that the court had not jurisdiction to make a decree for the damages. *Brockington* v. *Palmer*, 18 Gr. 488.

Reference—*A. J. Act.*]—Under 28 Vict. c. 17, s. 3, and the A. J. Act, 1873, the court of chancery is bound, where damages are shewn to have been sustained by a plaintiff, to give him full relief in any suit brought before it, by directing an inquiry as to the damages sustained; and the court is not at liberty to send the plaintiff to law for the purpose of obtaining such damages. *Standly* v. *Perry*, 23 Gr. 507.

VII. Exemplary Damages.

Justice of the Peace.]—In an action against two justices, one of the defendants having used insulting expressions to the plaintiff during the examination before them:—Held, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages. *Clissold* v. *Machell*, 25 U. C. R. 80, 26 U. C. R. 422.

VIII. Increasing or Reducing.

1. *Excessive Damages.*

Bodily Injuries.]—In an action by Y. against a steamboat company to recover damages occasioned by the death of his wife, by a fall from a wharf, it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? replied "very doubtful." A verdict was found for the plaintiff, with $1,500 damages, which the supreme court of Nova Scotia set aside, and ordered a new trial. On appeal from that decision:—Held, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York* v. *Canada Atlantic Steamship Co.*, 22 S. C. R. 167.

Bodily Injuries.]—The bodily injuries received by the plaintiffs having been severe and caused much suffering, a verdict of $6,500 was not one that should be disturbed as excessive. *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

Bodily Injuries—*Appeal—Further Evidence.*]—See *Fraser* v. *London Street R. W. Co.*, 18 P. R. 370.

Breach of Contract—*Manufacture and Sale of Chattels.*]—See *Ontario Lantern Co.* v. *Hamilton Brass Mfg. Co.*, 27 A. R. 346, post X. 1 (*b*).

Conversion — *Interpleader.*]—Defendant caused plaintiff's goods to be seized under an execution against his father, believing them to belong to the latter. The goods in question consisted of some articles of machinery, metal, &c., in the upper portion of a shop where plaintiff carried on his business. The sheriff did not take possession before the 20th, and

an interpleader order was made on 29th January, and during part of this interval plaintiff was allowed to continue his business. The jury having given the plaintiff $1,000 damages:—Held, excessive, as no damages were recoverable after the date of the interpleader order; and a new trial was ordered. *Lister* v. *Northern R. W. Co.*, 19 C. P. 408.

Death of Son—*Expectation of Pecuniary Benefit.*]—Damages of $3,000 for the death of the plaintiff's son by the negligence of the defendants held excessive, having regard to the plaintiff's expectation of pecuniary benefit, and a new trial ordered unless the plaintiff should consent to accept $1,500. *Collier* v. *Michigan Central R. W. Co.*, 27 A. R. 630.

Defamation.]—See *Dominion Telegraph Co.* v. *Silver*, 10 S. C. R. 238.

Ejection from Train.]—The amount of damages allowed by the jury to the plaintiff because of his removal from a train while taking a longer route than that authorized by his ticket was reduced by the court of appeal as unwarrantably large. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

Illegal Distress.]—Where in an action for illegal distress damages were assessed by the trial Judge generally in favour of several plaintiffs, whose rights and interests were distinct, and were apportioned equally between them by the divisional court, the court of appeal, while holding that one plaintiff only was entitled to recover, reduced the damages apportioned to him, being of opinion that such damages were excessive; it appearing, moreover, that in the general assessment matters had been taken into consideration of which he was not entitled to complain. Corham v. Kingston, 17 O. R. 432, considered. Judgment in 19 O. R. 677 varied. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Loss of Goods by Carriers—*New Trial.*]—See *Robertson* v. *Grand Trunk R. W. Co.*, 21 A. R. 204.

Reversion — *Injury to.*] — The plaintiffs, lessors, proved that the damage to the reversion by reason of the defendant's omission to repair was $651, the estimate covering all injury up to the time of trial; the jury gave a verdict for $400. There was no misdirection complained of, nor was the Judge asked to direct the jury to find in express terms the actual damage sustained by the reversion; nor were any affidavits filed to shew that the damages were excessive. The court refused to grant a new trial, on the ground of excessive damages. Marriot v. Cotton, 2 C. & K. 553, referred to, distinguished, and doubted. Review of English authorities as to injuries to the reversion, the time of bringing the action therefor, and the measure of damages. *Perry* v. *Bank of Upper Canada*, 16 C. P. 404.

Trespass — *Mutilation of Corpse.*] — See *Davidson* v. *Garrett*, 30 O. R. 653.

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2. *Inadequate Damages.*

Bodily Injuries—*Loss of Business.*]—Although it is unusual to interfere with a verdict of a jury in an action of tort on the ground of inadequacy of the damages found, still such verdicts are subject to the supervision of the court, and if the amount awarded be so small that it is evident the jury must have overlooked some material element of damage in the plaintiff's case, a new trial will be granted. A practising physician having been badly, if not permanently, injured through the negligence of the defendants, it appearing also that his professional business had suffered to a considerable extent, was awarded $700 by the jury:—Held, that there must be a new trial on the ground of inadequacy of the damages. *Church* v. *City of Ottawa*, 25 O. R. 208, 22 A. R. 348.

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3. *Practice of Appellate Courts.*

Discretion of Court of First Instance.]—In an action for damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the Judge (the exercise of a discretion on his part being, in the nature of the case, required), an appellate court will not interfere with the discretion such Judge has exercised in determining the amount of damages. *Levi* v. *Reed*, 6 S. C. R. 482.

A court of appeal should not interfere with damages awarded by a judgment under consideration in appeal unless they appear to have been calculated upon a wrong principle, or arrived at without regard to considerations which ought to govern a tribunal in awarding damages. It is not sufficient if the Judges in the appeal sitting as Judges in the first instance might have given, as some of the Judges in the court below in this case were disposed to give, larger damages. *Mayor of City of Montreal* v. *Hall*, 12 S. C. R. 74.

The amount of damages awarded by the Judge who tries the case, in his discretion, in the court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the Judge. Levi v. Reed, 6 S. C. R. 482, and Gingras v. Desilets, *Cassels's Dig.* 117, followed. *Cossette* v. *Dun*, 18 S. C. R. 222.

The supreme court will not interfere with the amount of damages assessed by a judgment appealed from, if there is evidence to support it. *Montreal Gas Co.* v. *St. Laurent, City of St. Henri* v. *St. Laurent*, 26 S. C. R. 176.

Where evidence offered at a trial and rejected affects only the amount of damages, and the amount assessed is small, the court, in the exercise of the discretion vested in it by the Error and Appeal Act (C. S. U. C. c. 13, s. 24), will refuse leave to appeal. *Myers* v. *Currie*, 9 L. J. 152.

Increasing Damages without Cross-appeal.]—Under the Ontario Judicature Act, R. S. O. 1887 c. 44, ss. 47 and 48, the court of appeal has power to increase damages awarded to a respondent without a cross-appeal, and the supreme court has the like power under its rule No. 61. Though the court will not usually increase such damages without a cross-appeal, yet where the original

proceedings were by arbitration under a statute providing that the court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the court may do, and a cross-appeal is not necessary. *Town of Toronto Junction* v. *Christie*, 25 S. C. R. 551.

4. *Miscellaneous Cases.*

Inflammatory Address to Jury.] — Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the court will not interfere upon appeal. The injuries having been severe and caused much suffering, a verdict of $6,500 was not one that should be disturbed as excessive. *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

Nuisance — *Abatement — Release.*] — Where in an action on the case for a nuisance, by landlords as reversioners, they recovered £250 damages, the court granted a rule nisi to reduce the verdict to 1s. on the nuisance being abated within a certain time, unless the landlords obtained a release from their tenants to the defendant of any cause of action accruing to them from the nuisance. The rule was afterwards discharged on a release being produced, although the release was not exactly in accordance with the terms of the rule. *Drew* v. *Baby*, 6 O. S. 241.

IX. Liquidated Damages or Penalty.

Bonus—*Breach of Condition.*]—In 1874 the county of Halton gave to the Hamilton and North-Western Railway Company a bonus of $65,000 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company, and ceased to be an independent line:—Held, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252. Affirmed, 21 S. C. R. 716.

Building Contract—*Delay.*] — Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, &c., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike. The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract. Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for, and he did not grant, any extension of time:—Held, that the contract must govern, and that the defendants were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages. If a claim to liquidated damages by a defendant is pleaded by way of counterclaim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought. Aliter, if pleaded by way of set-off. Toke v. Andrews, 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

Building Contract—*Delay.*] — Where a contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" $10 a day until completion:—Held, that this authorized a deduction as liquidated damages of the amount so "allowed," from the contract price, even as against lien-holders claiming adversely to the contractor, other than those having liens for wages where such wages liens were less in the aggregate than ten per cent. of the contract price. *McBean* v. *Kinnear*, 23 O. R. 313.

Contract—*Delay Caused by Contractor.*] —Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if, owing to the purchaser's fault, the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to actual damages. Holme v. Guppy, 3 M. & W. 387, followed. *Kerr Engine Co.* v. *French River Tug Co.*, 21 A. R. 160. Affirmed, 24 S. C. R. 703.

Covenant — *Delay — Equitable Relief.*]—Under a covenant contained in a lease granting a right of way over certain lands to a railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor $5 a day as liquidated damages, and not as a penalty, for each day after the said time that the lands and premises should remain in any way obstructed:—Held, that such damages were liquidated. Held, however, that, under the circumstances set out in the judgment, this was a proper case in which to grant relief under s. 52, s.s. 3, of the Ontario Judicature Act, 1895, by awarding actual damages estimated on a liberal scale. *Townsend* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 28 O. R. 195.

Insurance — *Life — Non-acceptance of Policy—Premium.*]—See *Royal Victoria Life Ins. Co.* v. *Richards*, 31 O. R. 483.

X. Measure of Damages.

1. *Breach of Contract.*

(a) *Covenants.*

Against Incumbrances.] — Where the vendee of lands, who had himself after pur-

chasing mortgaged the property, brought action for breach of covenant against incumbrances; and the mortgage constituting the breach covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into court, to insure its reaching its proper destination. *McGillivray* v. *Mimico Real Estate Security Co.*, 28 O. R. 265.

Against Incumbrances—*Taxes.*]—Upon a breach of covenant, a party is liable only for such damages as are the natural consequences of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes which had accrued during his vendor's time, and neglected to redeem it within the year afterwards:—Held, that he could not as of right recover damages to the value of the land so allowed to be sold. *McCollum* v. *Davis*, 8 U. C. R. 150.

For Quiet Enjoyment — *Deducting Amount of Former Award.*] — During the plaintiff's ownership of a mill site the Government constructed a breakwater at the mouth of the river, and the plaintiff had been awarded damages "on account of the penning or damming up of the waters by the constructing of the breakwater, and forcing them back on his property," and on another account not material to this action:—Held, that, as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected the plaintiff to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and this action on the covenant for quiet enjoyment were not the same, the defendants were not entitled to deduct the money recovered from the Government from the amount recovered for damages for their breach of contract. *Platt* v. *Grand Trunk R. W. Co.*, 12 O. R. 119.

For Title.]—W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., and an action of ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances W. executed to his vendee a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R. respecting his claim:—Held, that W.'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise. *Hart* v. *Bown*, 7 Gr. 97.

Not to Assign Lease.]—Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health. Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500. Williams v. Earle, L. R. 3 Q. B. 739, followed. *Munro* v. *Waller* (No. 2), 28 O. R. 574.

Not to Carry on Business — *Loss of Custom.*] — In an action for damages for breach of a covenant not to carry on a certain business, it was held that general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business. Ratcliffe v. Evans, [1892] 2 Q. B. 524, applied and followed. 2. That damages were properly assessed up to the date of the judgment. Stalker v. Dunwich, 15 O. R. 342, followed. *Turner* v. *Burns*, 24 O. R. 28.

To Insure against Fire.]—In an action on a covenant by lessee to insure the premises in the name of the lessor, the insurance money to be expended in the erection of new buildings:—Held, that the measure of damages was the value of the premises lost to the plaintiff by defendant's neglect to insure, such value not exceeding the sum in which defendant was to have insured by his covenant; and that it could make no difference that, on failure of the lessee to insure, the lessor was allowed by the lease to do so, and charge the premiums as rent. *Douglass* v. *Murphy*, 16 U. C. R. 113.

To Repair.] — In an action on a lease (having many years to run) for rent and non-repair of the premises:—Held, that the reversioner, by reason of the length of the lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion is injured by the premises being out of repair. *Atkinson* v. *Beard*, 11 C. P. 245.

(b) *Other Contracts.*

Advance of Money.]—Assumpsit on an agreement, whereby defendant agreed to supply plaintiff with whatever funds he should require for carrying on his business (a miller, &c.) not exceeding, &c., to be secured by the promissory notes of plaintiff, and warehouse receipts for the flour, which was to be sold by defendants as agents and commission merchants in any market the plaintiff might think proper, and that plaintiff should give a mortgage to defendants on his mill as collateral security. Breach (first count), that, although defendants advanced a small sum, yet they would not make any further advances, by means whereof the plaintiff has been unable to do such an extensive business and gain such profits as he might have done. Defendants traversed the several averments in the declaration, and pleaded a substituted special agreement. After verdict for plaintiff on the first count for £3,039 and on the second for £2,237 12 s. 6d.:—Held, that there should be a new trial: that as to the first count, the damages were not warranted by the evidence, there being no request of any specific sum proved, and that general evidence of plaintiff asking for and failing to obtain advances was not sufficient. Quære, as to the measure of damages for breach of the contract set out in the first count. *Hyde* v. *Gooderham*, 6 C. P. 21.

Advance of Money.]—Defendant agreed to furnish plaintiff with money to construct a

drain in the township of Dunwich known as the Mennie drain, the amount to be furnished "not to exceed the sum of $1,500 at any time," and to pay the same to plaintiff as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at twelve per cent. per annum for the use of said moneys. Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished money from time to time to the plaintiff, exceeding in all $1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at less than twelve per cent. interest, but claimed damages for breach of his agreement, contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made: —Held, that whether the agreement was to furnish money to the extent of $1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding $1,500 at any one time, the only damages for which defendant was liable would be the difference between the rate of interest payable to the defendant under the agreement and the market rate of interest at the time of the breach. *Mennie* v. *Leitch*, 8 O. R. 397.

Bonus.]—Damages to a municipal corporation upon failure of defendant in performance of contract to carry on manufactures according to the terms of a by-law granting him aid. See *Village of Brussels* v. *Ronald*, 4 O. R. 1, 11 A. R. 905.

Bonus—*Failure to Comply with Conditions.*] — See *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252, 21 S. C. R. 716; *Village of Brighton* v. *Auston*, 19 A. R. 305.

Building Contract — *Non-completion of Houses by Stipulated Time.*]—The defendant agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated 24th March, the houses were to be completed by 30th May, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, i.e., by 24th May, but as a matter of fact they were executed and exchanged about 9th May. The plaintiff subsequently in the present action claimed damages for non-completion of and defects in the finishing of the houses. The deed from the defendant contained no covenants covering the matters complained of:—Held, nevertheless, that the plaintiff was entitled to recover on the original contract. A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance:—Held, also, that the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

Building Contract—*Reduction of Price for Bad Work.*]—In an action to enforce a mechanics' lien, brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract:—Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the court. The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship:—Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work:—Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad material and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled. *Wood* v. *Stringer*, 20 O. R. 148.

Carriers.] — The measure of damages against carriers for non-delivery of trees considered. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Carriers—*Knowledge of Special Purpose —Non-delivery of Animals.*] — Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits. *Kennedy* v. *American Express Co.*, 22 A. R. 278.

Carrying Rails—*Employment of Persons other than Contractor to do Work Covered by Contract.*]—On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbour of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Some time in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract:—Held, that suppliant was entitled to damages, the measure thereof being the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Crown.]—Petition of right for damages for failure on the part of the Crown to perform agreement. See *Windsor and Annapolis R. W. Co.* v. *The Queen*, 11 App. Cas. 335.

Employment of Workmen.]—The defendant, who was a contractor for certain work in this Province, entered into an agreement with the plaintiffs that if they would go to New York, at their own expense, and pro-

cure about 200 labourers, he would give them work at $1.25 a day. The plaintiffs brought the labourers, but the defendant refused to employ them. The plaintiffs were allowed as damages for the breach of the agreement $25, their expenses in going to and returning from New York, and $700, the amount of advances made by them in paying the fares of certain of the labourers from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished. *Mandia* v. *McMahon*, 17 A. R. 34.

Indemnity.] — Held, that the value of goods sold under a judgment recovered upon a mortgage made by the plaintiffs, against which they held a bond of indemnity from defendants, did not form the measure of damages, but they were entitled to recover the amount of such judgment. *Raymond* v. *Cooper*, 8 C. P. 388.

Insurance — *Fire—Estimate of Loss.*]—Where a policy of insurance against fire on a steamboat, provided that in the event of loss the damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen;" —Held, that in estimating the loss the defendants were not entitled to have taken into account a depression in the value of steamers generally, caused by circumstances which might be temporary only. *McCuaig* v. *Quaker City Insurance Co.*, 18 U. C. R. 130.

Insurance—*Fire—Tenant for Life.*]—The measure of damages recoverable by tenant for life of insured premises is the full value of such premises to the extent of the sum insured. *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, 11 S. C. R. 212.

Insurance — *Life — Non-acceptance of Policy.*]—By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept it:—Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy. *Royal Victoria Life Ins. Co.* v. *Richards*, 31 O. R. 483.

Land Scrip — *Assignment of Worthless Right.*]—The plaintiff had agreed with the defendant to purchase the claim of a half-breed to land scrip in Manitoba, and defendant procured to be assigned to plaintiff the claim of one alleged to be a child of a half-breed. This proved to be erroneous, and the scrip which had been issued to him was worthless; —Held, that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff for the purchase of the so-called right; the plaintiff to assign to the defendant, quantum valeat, the land scrip he had received. *Burns* v. *Young*, 10 A. R. 215.

Manufacture and Sale of Chattels—*Contingencies.*]—Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense with reference to it:—Held, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment. The court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by the trial Judge. *Ontario Lantern Co.* v. *Hamilton Brass Manufacturing Co.*, 27 A. R. 346.

Mortgage — *Distress — Request of Mortgagor — Judgment against Mortgagee.*] — Action on a mortgage and for damages and expenses of a fruitless distress on F., the tenant of the mortgaged premises, made at the request of the defendant. On the reference to ascertain what damage the plaintiffs had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the plaintiffs was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by defendant to the plaintiffs to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co.* v. *Ireton*, 5 O. R. 47.

Sale of Goods — *Defect in Quality.*]—Assumpsit on a contract to make and deliver two pair of burr mill-stones. Breach, their insufficiency and bad quality. The jury, in addition to the cost of new stones, allowed certain separate sums for money expended in attempting to repair the broken stones, for dressing them, and for injury caused by their breaking the machinery of the mill; damages being specially claimed in the declaration on these accounts:—Held, that the verdict was sustainable as to the last two items, but not as to the first. *Colton* v. *Good*, 11 U. C. R. 153.

Sale of Goods—*Non-delivery.*]—In an action by plaintiffs against defendants for damages occasioned by the non-delivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to:—Held, on the authority of Cory v. Thames Iron Works Co., L. R. 3 Q. B. 181, and Hadley v. Baxendale, 9 Ex. 341, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from this non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used. *Ruthven Woollen Manufacturing Co.* v. *Great Western R. W. Co.*, 18 C. P. 316.

Plaintiff had sold certain goods to M., which were at the time lying at the defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping

bill accordingly. In an action by plaintiff against defendants for non-delivery:—Held, that the plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time when defendants refused to deliver it, and when they tendered it back again. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

In an action for non-delivery of 2,000 bushels of wheat sold by defendant to plaintiff:—Held, that the plaintiff was entitled to recover as damages the amount paid by him for additional carriage on wheat which he was forced to purchase in a more distant market. *Bruce* v. *Tolton*, 4 A. R. 144.

In an action for non-delivery of goods purchased by plaintiff:—Held, that the fact of plaintiff having contracted to re-sell to a third person would not limit his damages to the price agreed upon on such re-sale, though less than the market price. *Ballantyne* v. *Watson*, 30 C. P. 529.

Sale of Goods—*Warranty of Title—Contemplated Profits.*]—The defendant company in 1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under s. 6 of 51 Vict. c. 19 (s. 3 of R. S. O. 1897 c. 149). A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. The defendant company seized it in the plaintiff's possession under the terms of their contract:—Held, that the plaintiff was entitled to recover from his vendor, upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale. *Sheard* v. *Horan*, 30 O. R. 618.

Sale of Land—*Loss of Bargain Previously Made.*]—Loss of profit sustained by, and the expenses which a purchaser of lands has been put to, on a resale by him, unknown to his vendor, before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered by him against his vendor. In such a case, if recoverable at all, the true measure of damages would be the increased value of the land at the time of the breach, over the purchase money. *Loney* v. *Oliver*, 21 O. R. 89.

Work and Labour.]—Defendant agreed to saw for plaintiff a certain quantity of logs, which the plaintiff was to deliver at his mill, at specified rates. In an action for not sawing logs so delivered:—Quære, as to the measure of damages to be recovered. *Buchanan* v. *Anderson*, 16 U. C. R. 331.

Work and Labour—*Loss of Profits.*]—M. entered into a contract with the Dominion Government to do parliamentary and departmental binding for a period of five years. During the continuance of the contract the Government employed other persons to do certain portions of the work which M. was entitled to do, and in consequence of this M. (through his trustee in insolvency) brought an action by petition of right to recover damages against the Government for breach of contract. The breach was admitted by the Crown, and the case was referred by the court to two referees to ascertain the amount due M. for loss of profits in respect to the work that was withheld from him and given to other persons. The referees found that the work done by persons other than M. amounted to $25,357.79, and that the cost of performing such work amounted to $10,094.74, leaving a balance for contractor's profit of $15,263.05. From this balance the referees made deductions for "superintendence generally, wear and tear of plant, building, &c., rent, insurance, fuel, and taxes," amounting in the whole to $3,637.71, and recommended that M. be paid a sum of $11,625.34 as representing the contractor's profit lost to M. by the breach of contract. On appeal from the referees' report:—Held, that the referees were wrong in making such deductions, and that M. was entitled to be paid the difference between the value of the work done by persons other than himself during the continuance of his contract, and the amount it would have actually cost him, as such contractor, to perform that work. *Boyd* v. *The Queen*, 1 Ex. C. R. 186.

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2. *Torts.*

Bodily Injuries—*Mental Shock.*]—In an action for bodily injuries damages for "mental shock" are not recoverable. Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, followed. *Henderson* v. *Canada Atlantic R. W. Co.*, 25 A. R. 437.

Chattel Mortgage—*Possession Taken by Mortgagee—Seizure by Sheriff under Attachment in Insolvency—Handing Goods over to Assignee.*]—See *Paterson* v. *Maughan*, 39 U. C. R. 371.

Chattel Mortgage—*Seizure before Default.*]—Held, following Porter v. Flintoft, 6 C. P. 335, and Ruttan v. Beamish, 10 C. P. 90, that an action will not lie at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession until default; and that even if an action would lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer. *McAulay* v. *Allen*, 20 C. P. 417.

Company—*Transfer of Stock—Refusal to Register.*]—In an action against a harbour company for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *McMurrich* v. *Bond Head Harbour Co.*, 9 U. C. R. 333.

Conversion—*Distress—Measure of Damages.*]—See *Williams* v. *Thomas*, 25 O. R. 536.

Crown—*Lands Taken—Lands Injuriously Affected.*]—See CROWN, I.

Diversion of Watercourse.]—The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm:—Held, that the diversion, not the damage sustained therefrom, gave him his cause of action; and the proper mode of estimating the damages was to treat the diversion as permanent and to consider its effect upon the value of the farm. McGillivray v. Great Western R. W. Co., 25 U. C. R. 69, distinguished. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37. Affirmed in appeal, 22 A. R. 89.

Diversion of Watercourse.] — The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and, instead of granting a mandatory injunction to compel the restoration of the watercourse, the court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. c. 29, s. 90, s.-s. *h* (D.) *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Easement.] — The defendants granted to the predecessors in title of the plaintiff, with covenants for title under the Short Forms Act, certain lands with the right and easement of erecting a dam at a certain spot. It was afterwards held that they had no power to grant such a right, but it was shewn that it was not, in any event, practicable to maintain a dam at the spot in question:—Held, that the defendants were not liable to repay the full purchase money less the actual value of the land without the supposed right, but only the actual practical value of the supposed right, which was nothing. *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

Execution—*Seizure of Stranger's Goods.*]—The defendant G. and two others, having executions against W. & K., directed the seizure of certain goods. The plaintiff, to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did not appear that he told the plaintiff of this, or ordered the goods to be returned to him. The plaintiff then brought trover against the bailiff and G., and the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.:—Held, that G. was liable for the full value of the goods, for the plaintiff's right of action accrued on the demand and refusal, and was not defeated by what took place afterwards. *Macklem* v. *Durrant*, 32 U. C. R. 98.

Fraudulent Removal of Goods Liable under Execution.] — A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution. In estimating the damages against the defendant for such fraudulent removal, it was held that the return of the sheriff as to the amount made on the writ should be presumed to be correct, and if the defendant contended that the sheriff should have applied the proceeds of the sale of other goods to satisfy the plaintiff's execution, or that the sheriff should have seized and sold goods, and so applied the proceeds, he must prove such a case. *Turner* v. *Patterson*, 13 C. P. 412.

Nuisance—*Injury to Reversion.*]—In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance. *Drew* v. *Baby*, 1 U. C. R. 438.

Principal and Agent—*Mis-investment.*]—An agent who invests money for his principal, without taking proper precautions as to the sufficiency of the security, is guilty of negligence, and, if the value of the security proves less than the amount invested, he is liable to his principal for the loss occasioned thereby. The measure of damages in such a case is not the amount lent, with interest, but the difference between that amount and the actual value of the land. *Lowenburg* v. *Wolley*, 25 S. C. R. 51.

Registrar of Deeds—*Omission in Certificate.*]—A registrar, being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first incumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than what would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages:—Held, that the damages were moderate, the plaintiff having in fact sustained loss by defendant's mistake to the full amount of the first mortgage. *Harrison* v. *Brega*, 20 U. C. R. 324.

Right of Way—*Loss of Business.*]—The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do:—Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the court for a declaration of right. Gooderham v. City of Toronto, 21 O. R. 129, 19 A. R. 641, and City of Toronto v. Lorsch, 24 O. R. 229, followed. Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a bonâ fide mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Cullerton* v. *Miller*, 26 O. R. 36.

Shares—*Pledge—Sale.*]—See BROKER.

Sheriff.]—Damages in action against sheriff for taking insufficient bond in action of replevin. *Norman* v. *Hope*, 43 O. R. 556, 14 O. R. 287.

Ship—*Injury by Collision.*]—In an action for injury to plaintiff's vessel, caused by collision with defendant's steamboat:—Held, that the plaintiff was entitled to recover the cost of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment. Semble, that in an action of trover for a vessel, the loss of profit may be recovered. *Brown* v. *Beatty*, 35 U. C. R. 328.

Timber—*Injunction.*]—On an application for an injunction, where timber is cut and there is no evidence of mala fides or intentional wrong, the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land. *McLean* v. *Burton*, 24 Gr. 134.

Timber—*Trespass.*]—In trespass for taking timber, the court refused to disturb the verdict, on the ground that the damages were beyond the value of the logs taken. *Flint* v. *Bird*, 11 U. C. R. 444.

Timber License—*Failure to make Title.*]—*See St. Catharines Milling and Lumber Co.* v. *The Queen*, 2 Ex. C. R. 202, and *Bulmer* v. *The Queen*, 3 Ex. C. R. 184, 23 S. C. R. 488.

Trespass to Land—*Crops.*]—In trespass to land, where the action was brought on the 7th May:—Held, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest. *Throop* v. *Fowler*, 15 U. C. R. 365.

Trespass to the Person — *Arrest before Indorsement of Warrant—Detention after.*] — A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed, and the detention of the plaintiff was continued until payment of the fine:—Held, that the only damages recoverable by the plaintiff were for the trespass up to the time of the backing of the warrant. *Southwick* v. *Hare*, 24 O. R. 528.

Trover — *Pamphlets — Literary Value — Worth of Paper.*] — Trover for pamphlets. Plea, not guilty. On the production, at the trial, of one of the pamphlets sued for, the Judge in the county court directed that the plaintiff was not entitled to maintain the action because the pamphlet was a scoffing and indecent attack on christianity, and ordered a nonsuit. On appeal:—Held, that the plaintiff had property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefor; that the Judge should have directed the jury as to the nature of works which the law protects and what it prohibits; that if the pamphlets were not illegal, they should give damages for their value as a literary production; and if illegal, they should give damages to the value of the paper, &c., irrespective of the words upon it. *Boucher* v. *Shewan*, 14 C. P. 419.

Trustee — *Bad Investment.*] — Where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. Two years before the passing of the Act relaxing the usury laws (22 Vict. c. 85), a trustee, who was authorized to invest on mortgage or government securities, made an investment in Upper Canada Bank stock, under the impression that such an investment was within his authority. The stock ultimately turned out worthless; and the trustee submitted to account for the principal with compound interest at six per cent.:—Held, that this was the extent of his liability, though eight per cent. might have been obtained on mortgages. *Paterson* v. *Lailey*, 18 Gr. 13.

XI. Mitigation of Damages.

Breach of Promise of Marriage.]—In assumpsit for breach of promise of marriage, the defendant is entitled, in mitigation of damages, to cross-examine the plaintiff's own witness respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 403.

Carriers—*Not Carrying Goods Safely.*]—In an action for not carrying goods safely, whereby they were lost, issues in fact were left to the jury, reserving the question of nominal or substantial damages for the opinion of the court:—Held, that the only question for the court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods; and that the question of mitigating the damages upon the facts proved could not be considered. *Robson* v. *Buffalo and Lake Huron R. W. Co.*, 10 C. P. 279.

Sale of Goods—*Redelivery.*] — Semble, if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recover damages equal to the value of the wheat delivered to defendant, he cannot bring an action for goods sold, for part of the wheat which had, in point of fact, been redelivered to the plaintiff; and that such redelivery should have been given in evidence in mitigation of damages. *Andrus* v. *Burwell*, Tay. 382.

Trespass to Goods—*Justice of the Peace.*]—Trespass against a magistrate for seizing and selling plaintiff's goods. At the trial evidence was given to shew that the plaintiff had been guilty of the offence charged, but such evidence was offered and received only in mitigation of damages; the provisions of 16 Vict. c. 180, s. 12, which in such a case limits the damage to 2d., and deprives the plaintiff of costs, were overlooked; and the plaintiff obtained a verdict for full damages:—Held, that there must be a new trial without costs. *Bross* v. *Huber*, 15 U. C. R. 625.

See Pleading.

XII. Nominal Damages.

Assumpsit—*Admission of Cause of Action —Failure to Prove Damages.*]—In assumpsit on the common counts, defendant was duly notified to attend the trial of the cause as a witness on behalf of the plaintiff, which he neglected to do. The plaintiff proceeded with the trial of the cause, expecting to prove by defendant's attorney that he had offered £20 to compromise the action, which he failed to prove. A verdict was taken for the plaintiff, under the statute 14 & 15 Vict. c. 66, pro confesso, and damages were assessed at 1s.:—Held, on an application to increase the verdict to £50, the amount claimed by the plaintiff in his particulars, that the admission was only to be taken as to the cause of action, and not the amount of damages, and that a misunderstanding having arisen as to the offer of £20, the plaintiff was entitled to a new trial on the ground of surprise, on payment of costs. *Robertson* v. *Ross*, 2 C. P. 193.

Attorney.]—Where an attorney was retained to apply to relieve a sheriff from an attachment, and the jury found him in fault in conducting the application:—Held, that he was liable to nominal damages, although the special damage laid was not proved. *McLeod* v. *Boulton*, 3 U. C. R. 84.

Bailiff Not Executing Writ of Execution.]—See *Nerlich* v. *Malloy*, 4 A. R. 430.

Carriers.] — See *Robson* v. *Buffalo and Lake Huron R. W. Co.*, 10 C. P. 279, ante, XI.

Contract—*Breach of—Formation of Company.*]—The plaintiffs and defendant entered into a joint venture to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the mineral right in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under s. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. Defendant obtained an Act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued defendant for not forming the joint stock company, or carrying on mining operations, and having obtained a verdict for $400:—Held, that the verdict must be reduced to nominal damages. *Johns* v. *Beck*, 24 C. P. 219.

Contract — *Breach of — Presentment of Note.*]—Plaintiff sued defendant, an agent of an express company, on an alleged undertaking to take and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the indorsers. Breach, that defendant did not present or notify, in consequence of which the indorsers refused to pay the note. The evidence shewed no demand by the plaintiff upon the indorsers for the payment, nor refusal by them to pay:—Held, that without such evidence the plaintiff could at most recover only nominal damages. *McQuarrie* v. *Fargo*, 21 C. P. 478.

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

Contract—*Breach of—Sale of Goods.*]—Upon an assessment of damages for goods sold, defendant tried to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by defendant in consequence of their arriving with charges on them, and the jury found nominal damages only:—Held, that such matter should have been pleaded in bar, and was not available to defendant on an assessment of damages. *Comstock* v. *Thistle*, 7 C. P. 27.

Defamation—*Omission of Jury to Find.*]—Per Hagarty, C.J.O., and Galt, J.—No court has or ought to have the right ex proprio motu to direct judgment for nominal damages where a jury has refused to award them. Per Osler, J.A.—Nominal damages should not be added, unless it clearly appear that such damages are a mere matter of form, or that the omission to find them was accidental, or unintentional, or an oversight following a distinct intention to find the plaintiff's cause of action proved. Per Patterson, J.A.—The jury having left no fact undetermined, the plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs. *Wills* v. *Carman*, 14 A. R. 656.

Ejectment.]—When the term in a declaration in ejectment has expired, the plaintiff is entitled to recover nominal damages and his costs, although he cannot recover possession. *Doe d. Lick* v. *Ausman*, H. T. 6 Vict.

Ferry Rights — *Infringement of.*] — See *Galarneau* v. *Guilbault*, 16 S. C. R. 579.

Money Demand—*Payment after Action.*]—*Sherwood* v. *Campbell*, 5 O. S. 2.

Prohibition.]—In proceeding in prohibition, the plaintiff can only recover nominal damages. If he wish to recover substantial damages, he must proceed by action on the case after the entry of judgment quod stet prohibitio. *Mittleberger* v. *Merritt*, 2 U. C. R. 413.

Sheriff.] — Where a jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there had been neglect on the part of the sheriff from which the plaintiff had suffered some damage, returned a nominal verdict in favour of the plaintiff, the court refused to set it aside under the facts stated in the case, on the ground that, even to sustain such a verdict for not arresting a defendant upon mesne process, some clear proof of an injury received from the neglect should have been given, and that none was offered. *O'Connor* v. *Hamilton*, 4 U. C. R. 243.

Sheriff—*Direction of Appellate Court.*]—The jury having assessed the damages against a sheriff's officer at a nominal sum, the court of appeal, instead of a new trial, directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

Trespass.]—In trespass, defendant justified cutting the ditch complained of under an award of fence viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage:—Held, that, as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages. *Warren* v. *Desjippes*, 33 U. C. R. 59.

See Taylor v. *Massey*, 20 O. R. 429; *Coffey* v. *Scane*, 25 O. R. 22, 22 A. R. 269.

XIII. Particular Actions and Proceedings.

(See also under the Titles of the Particular Actions.)

Bailment—*Hire of Goods—Agreement to Return—Contract—Damage Occasioned by Unforeseen Accident.*]—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible. The defendant hired the plaintiff's scow and pile driver, at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile driver were driven from their moorings and damaged:—Held, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair. Taylor v. Caldwell, 3 B. & S. 826, followed. Harvey v. Murray, 136 Mass. 377, approved. *Grant* v. *Armour*, 25 O. R. 7.

Bailment — *Inability to Deliver Specific Property—Claim for Unliquidated Damages—Interpleader Order.*]—See *Re Canadian Pacific R. W. Co. and Carruthers*, 17 P. R. 277.

Banks and Banking—*Special Deposit—Wrongful Refusal to Pay Out.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money. Marzetti v. Williams, 1 B. & Ad. 415, and Rolin v. Steward, 14 C. B. 594, distinguished. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641.

Benefit Insurance.]—The plaintiff, in an action to recover damages from a railway company for the death of her husband, was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were not parties to the receipt:—Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. Hicks v. Newport, &c., R. W. Co., 4 B. & S. 403 (*n.*), distinguished. *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 269.

Bond—*Administration Bond.*]—In an action on an administration bond, the want of a decree is a good plea to a breach for not distributing, but it is no ground for staying proceedings, nor is the want of a citation for an account, nor the omission to shew the receipt and misappropriation of funds. On such breach full damages may be recovered. *Neill* v. *McLaughlin*, 4 P. R. 312.

Bond—*Appeal Bond.*]—In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the court of appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes:—Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property. *Re Alger and Sarnia Oil Co.*, 23 O. R. 583.

Bond—*Damages in Lieu of Interest.*]—See *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132, *post*, Interest, II.

Bond—*Fidelity of Clerk.*]—An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal—(and this, although the bond might be considered as still subsisting and sufficient to sustain an action of debt)—and damage may be recovered against the obligor to the amount of the penalty. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Copyright — *Infringement — Consent Judgment — Costs—Reference—Offer—Payment into Court.*]—Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered $25

for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—Held, that the plaintiffs were entitled to the costs of the action; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into court.. *Anglo-Canadian Music Publishing Association* v. *Somerville*, 19 P. R. 113.

Covenant for Title — *Heir.*]—In this Province (though not in England) the heir is only liable, on descent of lands, for the debts of his ancestor. He is not liable for unliquidated damages, as, for instance, upon the ancestor's covenant for good title. *Vankoughnet* v. *Ross*, 7 U. C. R. 248.

Erection of Dam.]—Semble, that though an inquiry as to daamges, or to assess damto the defendant not under seal, is insufficient to create an easement, yet that it may be sufficient, as a license, to prevent the plaintiff from recovering damages for the erection as a wrongful act. *Robinson* v. *Fetterly*, 8 U. C. R. 340.

Injunction.]—The jurisdiction to award an inquiry as to damages, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously. Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved to have been occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, a divisional court, under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal inquiry, refused to award a reference as to damages. *Gault* v. *Murray*, 21 O. R. 458.

Injunction—*Damages in Lieu of.*]—See *Arthur* v. *Grand Trunk R. W. Co.*, 22 A. R. 89.

Injury to Land—*Abating Nuisance.*]—A person who takes upon himself to abate a nuisance—for instance, a mill dam—may be called upon to pay damage for any injury done to the plaintiff's property beyond what is necessary for removing the public inconvenience. *Truesdale* v. *McDonald*, Tay. 121.

Injury to Person.]—The inability properly to calculate the damages to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, was held a sufficient ground for postponing the trial on terms. *Speers* v. *Great Western R. W. Co.*, 6 P. R. 170.

Interest—*Damages in Lieu of—Interest post Diem.*]—See *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132, *post*, INTEREST, II.; *McCullough* v. *Clemow*, 26 O. R. 467, *post*, INTEREST, I.

Lessor—*Term.*]—A lessor, who had the title to the premises at the time of action brought, but not at the time of trial, is entitled to damages, although he cannot recover his term. *Doe d. Meyers* v. *Blaker*, E. T. 2 Vict.

Libel—*Damages in the Way of Trade.*]—See *Blachford* v. *Green*, 14 P. R. 424; *Acme Silver Co.* v. *Stacey Hardware Co.*, 21 O. R. 261.

Libel—*Mitigation of Damages.*]—The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business. *Beaton* v. *Intelligencer Printing and Publishing Co.*, 22 A. R. 97.

Libel — *Special Damages—Loss of Custom.*]—By s. 11 of the Libel Act of Manitoba, 50 Vict. c. 22, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed:—Held, that a general allegation of damages by loss of custom is not a claim for special damages under this section. Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable per se, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmissible. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.
See Blachford v. *Green*, 14 P. R. 424.

Replevin.] — The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the division court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers, which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond to recover the amount of the note as damages he had sustained by the replevin:—Held, that, even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs. Under the Division Courts Act, R. S. O. 1887 c. 51, s. 266, the whole matter could have been litigated in the division court.—Quere, as to the amount of damages recoverable. The fact of the conditions of the bond being in the alternative instead of the conjunctive remarked on. *Kennin* v. *Macdonald*, 22 O. R. 484.

Sewers—*Act of God.*]—Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rain-fall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes. An extraordinary rain-

fall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence. *Garfield* v. *City of Toronto*. 22 A. R. 128.

Slander—*Finding of No Damage.*]—See *Bush* v. *McCormack*, 20 O. R. 497.

Tavern-keeper — *Penalty.*] — Whether under 27 & 28 Vict. c. 18, s. 40, which makes a tavern-keeper liable in case any person while in a state of intoxication from excessive drinking in his tavern has come to his death "by shooting or drowning, or perishing from cold or other accident caused by such intoxication," proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the Act at not less than $100, was a question raised but not decided. *Bobier* v. *Clay*, 27 U. C. R. 438.

Trespass to Land—*Mortgagee.*]—An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Wages—*Agreement to Remunerate by Legacy—Damages for Failure to Do so.*]—See *Smith* v. *McGugan*, 21 A. R. 542, 21 S. C. R. 263; *Murdoch* v. *West*, 24 S. C. R. 305.

XIV. Pleading in Actions for Damages.

Action on the Case—*Manner of Pleading.*]—In a special action on the case for obstructing an inquiry into the financial affairs of a township:—Held, that upon the declaration, which is fully set out in the report, the damage was sufficiently stated, and was a legal damage, being directly occasioned by the Act complained of. *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 556.

Carriers — *Delay — Loss.*] —In an action for delay in carrying goods:—Held, that under the averment in the declaration of the loss of market caused thereby, the evidence of loss caused by the corn sprouting, and thus deteriorating in quality, was improperly received. *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

Contract—*Denial—Estoppel.*]—The plaintiff and defendants entered into an agreement, the former to perform certain work for the latter upon certain conditions. The plaintiff executed the contract, and the defendants' engineer signed it on their behalf, without attaching the seal of the company. Upon an action brought by plaintiff for work and labour performed and executed, the defendants put on the record a plea denying the contract:—Held, that by their pleadings having denied the contract, they could not invoke its aid to prevent the recovery of damages by the plaintiff. *Stock* v. *Great Western R. W. Co.*, 9 C. P. 334.

Injury Continued after Action.]—In an action on the case, a declaration would be open to special demurrer in claiming damages for an injury stated to have been committed, or at least continued, after action. *Watson* v. *City of Toronto Gaslight and Water Co.*, 4 U. C. R. 158.

Particular Damages — *Notice of.*] — Where a party, upon an alleged breach of an agreement, seeks to recover compensation not in the nature of general damages, to be left to the discretion of the jury, but in the shape of particular damages specially contracted for by the agreement itself, should he not aver in his declaration notice to defendant before action brought of such particular damages and the amount? *Henderson* v. *Nichols*, 5 U. C. R. 398.

Special Damage — *Necessity for Pleading.*]—In an action for breach of covenant by delaying the completion of a railway crossing, which afforded the best road to the plaintiff's saw mill:—Held, that evidence of special damage was not admissible, none being alleged in the declaration, and the plaintiff not having notified the defendants at the time of the fact of his suffering the loss of profit, which constituted the alleged damages. *Shaver* v. *Great Western R. W. Co.*, 6 C. P. 321.

Unrecoverable Damages.] — An allegation of damages on a ground on which the plaintiff is not entitled to recover, does not form ground for demurrer to a declaration. *Duffield* v. *Great Western R. W. Co.*, 4 L. J. 47.

XV. Recovery of Costs as Damages.

Application for Assignment of Probate Bond.]—The costs of an application under s. 82 of the Surrogate Courts Act, C. S. U. C. c. 16, for an assignment of a probate bond, in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on default. *Closson* v. *Post*, 6 L. J. 141.

Criminal Prosecution.]—Right of person robbed to recover expenses incurred in criminal prosecution of the robber—Pleading. See *Pettit* v. *Mills*, 12 C. L. J. 224.

Postponement of Trial.]—In an action by the sheriff on an indemnity bond, the sheriff is entitled to recover from the obligors in the indemnity bond the costs for putting off the trial of the cause against himself on account of the absence of a material witness. *Corbett* v. *Wilson*, 8 U. C. R. 22.

Previous Action—*Defence.*]—Action by the assignee of a replevin bond for costs incurred in setting aside the writ, and for damages for detention of the vessel replevied. Plea, non damnificatus. At the trial it appeared that the plaintiff had caused the vessel for which the writ of replevin had issued, to be seized on certain fi. fas. placed in the sheriff's hands prior to her being replevied:—Held, that the plaintiff's property being seized under the writ of replevin, he had to take steps to defend the same, and was entitled to his costs of defence. *Burn* v. *Blecher*, 14 C. P. 415.

Previous Action—*Indemnity.*]—Defendant took an assignment of a lease from the plaintiff, a lessee, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence:—Held, that under defendant's covenant to indemnify him, the plaintiff was entitled to recover the damages and costs in that suit, but not interest. *Spence* v. *Hector*, 24 U. C. R. 277.

Previous Action—*Landlord and Tenant.*]—The plaintiff leased a house from defendant, and a dispute arose as to some repairs, for which defendant refused to pay. The plaintiff, being sued for the work done, defended on the ground that defendant only was liable to the contractor; but a verdict was rendered against him, which he paid, with costs. The plaintiff thereupon sued defendant:—Held, that he could recover the amount of such verdict only, not the costs. *Taylor* v. *Strachan*, 16 U. C. R. 76.

Previous Action—*Principal and Agent—Representation of Authority.*]—Held, that a person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent, is answerable to the person who so contracts, for any damages which he may sustain, by reason of the assertion of authority being untrue; and further, that costs incurred by such third person in an action for the recovery of damages against the supposed principal, may be recovered as damages in an action against such unqualified agent. *Eckstein* v. *Whitehead*, 10 C. P. 65.

Previous Action—*Unsuccessful Action.*] Defendants sold to the plaintiff and received the purchase money for some wheat, which they represented to be their own, but which belonged to one B., who obtained it from the railway company in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. The plaintiff then sued the defendants for the deceit, claiming as special damages the costs of this unsuccessful action:—Held, that such costs could not be recovered. *Merritt* v. *Nevin*, 20 U. C. R. 540.

Quashing Conviction.]—Action against justices of the peace for issuing distress warrant under conviction. Right to recover costs of quashing conviction. *Hallett* v. *Wilmot*, 40 U. C. R. 263.

XVI. Recovery of Interest as Damages.

By Verdict of Jury.]—Interest is in practice much more frequently allowed by our juries, than English authority would seem to warrant. *Spence* v. *Hector*, 24 U. C. R. 277.

Rate of Interest.]—Held, following Howland v. Jennings, 11 C. P. 272, and Montgomery v. Boucher, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. *Young* v. *Fluke*, 15 C. P. 360.

XVII. Remoteness.

Bodily Injuries—*Mental Shock.*]—See *Henderson* v. *Canada Atlantic R. W. Co.*, 25 A. R. 437.

Detinue—*Deed.*]—In detinue for a deed:—Quære, whether plaintiff can recover damages for having been prevented by the want of it from obtaining horses to cultivate his farm. *Wood* v. *Bowden*, 23 U. C. R. 466.

Fire—*Loss of Goods by.*]—The plaintiffs, living at Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were so sent in one of the mail steamers, but the captain of the "Regina," being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and then by the railway to Sarnia, where he would take them up on his way to Southampton. Defendants, however, shipped them from Kingston by a propeller, which was burned, with the goods on board, in the river St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was cancelled. It was held in the Queen's bench that on the contract for not sending as directed, defendants were liable only for nominal damages, the loss by fire being too remote; and that they were not liable in trover. On appeal:—Held, reversing the judgment, that the defendants were liable on the contract for the value of the goods. *Wallace* v. *Swift*, 31 U. C. R. 523, 28 U. C. R. 563.

Highway — *Obstruction.*] — The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence:—Held, that the damages were not too remote. Page v. Bucksport, 64 Maine 51, and Stickney v. Maidstone, 30 Vermont 738, applied and followed. *McKelvin* v. *City of London*, 22 O. R. 70.

Impurity of Seed.]—Plaintiff bought seed barley from defendant guaranteed to be clean. The seed was sown, and it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root and grew up with the barley. In an action to recover damages for depreciation in the value of the farm, the evidence shewed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to shew depreciation in the value of the farm, which the trial Judge refused to receive. On motion for a new trial:—Held, that the plaintiff should have been allowed to substantiate, if he could, that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm. *McMullen* v. *Free*, 13 O. R. 57.

Impurity of Seed.]—Where seed is delivered, without any warranty, by one person, honestly believing it to be clean, to another, to be grown on the land of the latter, the produce thereof to be returned and paid for at a fixed price per bushel, the transaction is a bailment and not a sale; and damages arising from other innocuous seed having been mixed

therewith, and on harvesting having become scattered on the ground and coming up the following year on the land, are too remote, and not within the rule laid down in Hadley v. Baxendale, 9 Ex. 341, and Cory v. Thames Ironworks Co., L. R. 3 Q. B. 181. McMullen v. Free, 13 O. R. 57, and Smith v. Green, 1 C. P. D. 92, distinguished. The plaintiff, having received seed from the defendant to be grown under the circumstances and conditions above mentioned, became aware while it was growing that vetches were coming up with it, but did not inform the defendant of the fact, and permitted them to grow, and delivered the produce mixed to the defendant, and was paid for it:—Held, that he could not recover damages for an injury which his own conduct was responsible for. McCollum v. Davis, 8 U. C. R. 150, specially referred to. *Stewart* v. *Scullthorp*, 25 O. R. 544.

Injury to Land — *Deposit of Filth in Lane—Raising Level.*]—See *Lewis* v. *City of Toronto*, 39 U. C. R. 343.

Injury to Land—*Ditches and Watercourses Act.*] — After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work with the object of having it completed according to the award, but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, &c.: —Held, that the provision of s. 13 of the above Act as to the inspection by the engineer is imperative, and an action will lie for breach of his duty; but, even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of s. 13 are merely permissive, and no action will lie for non-compliance therewith; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-compliance. Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne* v. *Campbell*, 15 O. R. 339.

Injury to Land — *Lowering Highway.*] —The defendants having built a subway in front of the plaintiffs' property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, under the circumstances set out in 7 O. R. 270, 8 O. R. 59, 12 A. R. 393, 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an official referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference the referee ruled: (1) that the measure of damages was the difference in value of the property before and after the construction, with interest added; (2) that the prospective capabilities or value of the land could not be taken into account except so far as such element entered into the computation of the then market value, or had regard to what would have been the present value of the property had the subway not been constructed; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling it was:—Held, that the corporation were liable as wrongdoers, who were not protected from the consequences of their tort by any statutory provision, to make good all damages sustained, for which an action would lie for their unauthorized act, such damages being of a twofold character, involving injury to the plaintiffs' land and to their business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads. Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value; such evidence to be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and potential value of the property. *West* v. *Town of Parkdale*, 15 O. R. 319.

Injury to Person—*Neglect of Duty to Fence.*]—The plaintiff and his wife sued defendants for injury alleged to have been caused to the wife by their neglect to have a railing or guard along an embankment leading down to a bridge, on one of their leading highways in a populous township. It appeared that the wife and her son, about eight years old, were crossing the bridge in a buggy, when the horse shied at some new planks on the bridge, and backed to the end of it, where the hind wheel went over the bank, throwing her out and into the water, about fourteen feet below. The jury found, upon the evidence set out in the case, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse;—Held, that it was the duty of defendants to fence or guard the place in question; that the injury was caused by the want of such protection as the proximate cause, not by the horse becoming frightened or unmanageable; and that defendants therefore were liable. The authorities as to remote and proximate causes of damage reviewed. *Toms* v. *Township of Whitby*, 35 U. C. R. 195. Affirmed on appeal, 37 U. C. R. 100.

Railway Company — *Abandonment of Station.*] — Where a railway company, in breach of a contract entered into by them to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains:—Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the inquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued. Constat, that the personal loss or inconvenience suffered by travellers or citizens from

the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighbourhood, could not be reckoned as constituents per se of the damages suffered by the corporation. Held, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. *City of St. Thomas* v. *Credit Valley R. W. Co.*, 15 O. R. 679.

Sale of Land—*Breach of Contract for.*]—Defendant, on 14th March, 1872, agreed to buy from the plaintiff two acres of land in a village for $325, and to complete upon it within eighteen months a brick factory of specified dimensions, and at or before its completion to commence and prosecute therein the manufacture of plated ware on a scale commensurate with its size; and that in case he should not perform his agreement in this respect he would at the end of the eighteen months reconvey the land to the plaintiff, receiving back the purchase money, $325, and compensating the plaintiff for damages, if any. The defendant did not pay the purchase money, and at the end of sixteen months elected not to go on with the agreement, whereupon the plaintiff sued, alleging in his declaration that the plaintiff's adjoining land would have been much enhanced in value by the sale to defendant, and the erection of the factory, and claiming as damages profits which he would have derived therefrom:—Held, that such damages were not recoverable, being altogether too remote. Quære, whether he could recover interest, though he had demanded the $325, for he had not offered at the time to make a conveyance. *Dullea* v. *Taylor*, 35 U. C. R. 395.

Street Railways—*Expulsion from Car—Cold.*]—In an action for damages for being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment, is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Judgments in 24 O. R. 683, 21 A. R. 578, affirmed. *Toronto R. W. Co.* v. *Grinsted*, 24 S. C. R. 570.

See ATTACHMENT OF DEBTS, I.—BILLS OF EXCHANGE, I. 1 — BOND, III. — COVENANT, III. 2—CROWN, I. 1—DEFAMATION, VI.—DISTRESS, III. 3 (*b*)—DOWER, I. 2—EJECTMENT, II.—INJUNCTION, II.—LANDLORD AND TENANT, II. 1 (*b*)—MALICIOUS PROCEDURE, II. 2 — MONEY, IV. — NEGLIGENCE, IV. — NEW TRIAL, II.—NUISANCE, II.—PATENT FOR INVENTION, IV. 2—PROHIBITION, III.—RAILWAY, V., XIII. 4—REPLEVIN, II. 2, III. 1 (*c*) —SALE OF GOODS, III. 2 (*a*), 3 (*a*)—SEDUCTION, I. 2—SHERIFF, VII. 1 (*b*)—SHIP, II. 5 (*c*), V. 2—SPECIFIC PERFORMANCE, V. 1, 3—TRESPASS, I. 1, II. 2, III. 2 (*c*)—TROVER AND DETINUE, III. — VENDOR AND PURCHASER, VII. 1 — WARRANTY, I. 2 — WATER AND WATERCOURSES, XII. 2.

DAY.

See TIME, I.

DEATH.

Of Guarantor.]—Held, following Bradbury v. Morgan, 1 H. & C. 249, that the death of one of two guarantors for the payment of goods, did not extinguish the guarantee, it not appearing that any notice had been given to plaintiff on behalf of the estate of deceased, or that the survivor supposed he was released by the death of the other, but, on the contrary, acknowledged his liability as still subsisting, and promised to settle. *Fennell* v. *McGuire*, 21 C. P. 134.

Of Insolvent.]—Death of insolvent during the pendency of his appeal to county Judge. *Lawrie* v. *McMahon*, 6 P. R. 9.

Of Intoxicated Person — "*Accident Caused by Intoxication*"—*Meaning of.*]—See *Bobier* v. *Clay*, 27 U. C. R. 438.

Of Judge.]—A rule to enter a nonsuit having been granted in the county court in April term, was duly enlarged until the following term. The Judge died before that term began, and no successor was appointed until after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new Judge, who treated it as still pending, and gave judgment:—Held, that he was right. *Leslie* v. *Emmons*, 25 U. C. R. 243.

Of Judge.] — Order for judgment when after a verdict the Judge who presided at the trial died before giving judgment thereon. *Wellbanks* v. *Conger*, 12 P. R. 354.

Of Judge—*Death of Division Court Judge pending Application for New Trial—Right of Successor to Order New Trial.*]—See *Appelbe* v. *Baker*, 27 U. C. R. 486.

Of Municipal Clerk — *List of Voters under 37 Vict. c. 4 (O.), Prepared and Certified by Clerk — Transmission by Successor after Death.*]—See *In re Voters' List of Goderich*, 6 P. R. 213.

Of Murdered Person — *Dying Declaration.*]—See *Regina* v. *McMahon*, 18 O. R. 502.

Of Party to Action—*Account—Party to Pay.*]—There is no authority to take an account in the master's office after the death of the party who is bound to pay. *Galbraith* v. *Armstrong*, 1 Ch. Ch. 34.

Of Party to Action—*Between Verdict and Judgment.*]—See *Sibbald* v. *Grand Trunk R. W. Co.*, 19 O. R. 164; *Muirhead* v. *Shirreff*, 14 S. C. R. 735; *White* v. *Parker*, 16 S. C. R. 699.

Of Party to Action—*Defendant.*]—The court gave leave to enter judgment on cognovit against one defendant, the other being dead. *Nichall* v. *Cartwright*, Tay. 464.

Of Party to Action—*Plaintiff.*]—Leave to enter a suggestion of death of plaintiff, and proceed under s. 210 of C. L. P. Act, 1856,

will be granted upon an ex parte application, upon affidavit shewing the nature and state of the action, and that the party applying is plaintiff's legal representative. *Reischmuller* v. *Uberhorst*, 3 L. J. 48.

Of Party to Action—*Sole Defendant—Adding Parties.*]—See *McCarthy* v. *Arbuckle*, 31 C. P. 48.

Of Person Appointed to Sell Lands.]—A sale of lands having been ordered under s. 17 of the Partition Act, C. S. U. C. c. 86, to be made by certain persons agreed upon by the parties, one of the persons named refused to act, and the petitioners then applied on this ground to rescind the order for sale, and for partition to be made by the real representative:—Quære, whether the order might not have been properly varied or rescinded by consent of all those who consented to its being made; or if one of those appointed to make the sale were to die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining. *In re Knowles* v. *Post*, 24 U. C. R. 311.

Of Principal—*Effect on Agent.*]—By the death of the principal the authority of an agent is determined. Where, therefore, an agent obtained on credit from persons with whom his principal had been in negotiation previously, a supply of furniture for the house of the principal, in which he had intended carrying on business, but before any binding agreement was concluded or the furniture delivered, the principal had died abroad, the court refused to decree a specific performance of the contract to purchase, and ordered the administrators, who had taken possession of the goods, to deliver them to the vendors, and pay the costs of the suit instituted for the purpose of obtaining possession of the furniture, or security for the price of it. *Jacques* v. *Worthington*, 7 Gr. 192.

Of Prosecutor—*Rule Nisi to Quash Conviction.*]—The death of the prosecutor, who is also informant, after a summary conviction, before the service on him of a rule nisi to quash, does not prevent the court from dealing with the matter and from quashing the conviction. *Regina* v. *Fitzgerald*, 29 O. R. 203.

Of Sheriff—*Death of Sheriff Appointed Assignee under R. S. O. 1887 c. 124.*]—See *Brown* v. *Grove*, 18 O. R. 311.

Of Surety.]—Where the surety of a receiver dies pending the suit, the receiver may obtain ex parte an order referring it to the master to approve of a new one. *Baldwin* v. *Crawford*, 1 Ch. Ch. 264.

Of Testator.]—Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's death as well as of the will. *Davis* v. *Van Norman*, 30 U. C. R. 437.

Of Vendor of Land.]—The vendor of real estate had died before the execution of the conveyances, and his infant heirs filed a bill praying for specific performance of the contract, which the defendants (the vendees) admitted and expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The court under the circumstances made a decree for specific performance of the agreement, but without costs to either party; the costs of the infants to be defrayed out of the balance of purchase money payable by the defendants. *Weihe* v. *Ferrie*, 10 Gr. 98.

See EJECTMENT, VI. 5—EVIDENCE, XI. 3—NEGLIGENCE, V.—PARTNERSHIP, IV.—PRINCIPAL AND SURETY, II. 3—SCIRE FACIAS AND REVIVOR, IV. 1, V. 2—SEDUCTION, I. 5 (*d*).

DEBENTURES.

Loan Company—*Mortgage Debentures—Preferred Charge on Assets.*]—See *Re Farmers' L. & S. Co., Debenture Holders' Case*, 30 O. R. 337.

See COMPANY, V. 2—MUNICIPAL CORPORATIONS, X.—RAILWAY, IV.—STREET RAILWAYS, III.

DEBT.

As to when the action for debt lay, see the following cases:—*Jones q. t.* v. *Chase*, Dra. 322; *Forsyth* v. *Johnston*, 6 O. S. 97; *City of Toronto and Lake Huron R. R. Co.* v. *Crookshank*, 4 U. C. R. 309; *McLean* v. *Tinsley*, 7 U. C. R. 40; *De Tuyl* v. *McDonald*, 8 U. C. R. 171; *Hall* v. *Morley*, 8 U. C. R. 584; *Dougall* v. *Turnbull*, 10 U. C. R. 121; *McLaughlin* v. *Brouse*, 11 U. C. R. 609; *McLean* v. *Young*, 1 C. P. 62; *Lyall* v. *Mayor, &c., of City of London*, 8 C. P. 365; *Montgomery* v. *Spence*, 23 U. C. R. 39; *Hope* v. *White*, 17 C. P. 52.

As to pleading in that form of action, see *McDougall* v. *Young*, Dra. 111; *Adams* v. *Ham*, 5 U. C. R. 292; *Ketchum* v. *Rapelje*, 1 Ch. Ch. 152.

As to what constitutes a debt, see *Cockburn* v. *Sylvester*, 1 A. R. 471.

DECEIT.

See COMPANY, VI.—FRAUD AND MISREPRESENTATION.

DECISIONS.

CONFLICTING DECISIONS — ENGLISH DECISIONS—FOLLOWING DECISIONS.

See COURTS.

DECLARATION.

See PLEADING—PLEADING BEFORE THE JUDICATURE ACT, IV.

DECLARATION OF OFFICE.

See MUNICIPAL CORPORATIONS, XVIII. 1.

DECLARATORY JUDGMENT.

See JUDGMENT, V.

DECREE.

See JUDGMENT, I. 1 (*b*)—MORTGAGE, IV. 4, XIII.—PRACTICE—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, VI., VII.

DEDICATION.

See MUNICIPAL CORPORATIONS, XI.—WAY, III. 4.

DEDIMUS POTESTATEM.

See JUSTICE OF THE PEACE.

DEED.

I. ALTERATION.
1. *After Confirmation*, 1830.
2. *After Execution*, 1830.
3. *Presumption as to Whether after Execution*, 1832.

II. CANCELLATION AND MUTILATION, 1832.

III. CONSTRUCTION AND OPERATION.
1. *Bargain and Sale*, 1834.
2. *Conditions, Reservations, and Exceptions*, 1835.
3. *Consideration*, 1840.
4. *Description of Land.*
(a) *Crown Patents*, 1841.
(b) *Evidence to Explain*, 1850.
(c) *Inconsistent Descriptions*, 1852.
(d) *Uncertainty*, 1856.
(e) *Other Cases*, 1860.
5. *Description of Parties*, 1868.
6. *Estate Created*, 1868.
7. *Habendum*, 1869.
8. *Option to Purchase*, 1871.
9. *Recitals*, 1871.
10. *Short Forms Act*, 1873.
11. *Other Cases*, 1874.

IV. ESCROW, 1875.

V. EXECUTION AND DELIVERY,
1. *Delivery*, 1878.
2. *Execution by Illiterate Persons*, 1880.
3. *Parties*, 1880.
4. *Seal*, 1882.
5. *Other Cases*, 1883.

VI. LOST DEEDS, 1886.

VII. REFORMATION OF DEEDS,
1. *Generally*, 1888.
2. *Agreements under Seal*, 1889.
3. *Conveyances of Land*, 1890.
4. *Leases*, 1893.
5. *Mortgages*, 1894.
6. *Other Instruments*, 1899.

VIII. MISCELLANEOUS, 1900.

I. ALTERATION.

1. *After Confirmation.*

Composition and Discharge—*Execution by Insolvents.*]—G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county Judge on the 2nd December, 1868, but the confirmation was reversed in the Queen's bench in March following, on the ground that the insolvents had not executed it. Afterwards, in the same month, the insolvents executed the deed, without previous leave from the Judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note:—Held, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts. Per Richards, C.J.—The deed was invalid also, because not properly executed by the insolvents. Per Wilson, J.—Such execution was not an alteration of the deed, for the insolvents, being named in and parties to the deed, were only perfecting, not altering it, by executing. *Allan* v. *Garratt*, 30 U. C. R. 165.

2. *After Execution.*

Bail Bond.]—See *Woodworth* v. *Dickie*, 14 S. C. R. 734.

Bond — *Filling up Blank — Consent — Absence of Obligor.*]—A blank having been left in the bond, which was afterwards filled up with the consent of the debtor, although not in his presence, was held no variance on non est factum. *Leonard* v. *Merritt*, Dra. 281.

Bond — *Verbal Direction — Absence of Obligor.*]—A person who has executed a deed cannot be bound by an alteration made in his absence by his verbal direction. Quære, whether upon the evidence, more fully stated in the case, defendant could be held estopped by his acts from disputing the bond so altered. To bind a person to a deed altered out of his presence, and by his verbal directions only, the acts done should be unequivocal and consistent only with his positive assent. *Martin* v. *Hanning*, 26 U. C. R. 80.

Conveyance of Land — *Alteration of Description — Absence of Authority — Ratification.*]—H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shewn that the deed, after its execution, had

been altered by the grantee so as to convey the correct lot (22 instead of 122), the only lot owned by the grantor, but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from H. of the correct lot, which he afterwards surrendered to H.:—Held, that as the grantor, according to the ruling in Sayles v. Brown, 28 Gr. 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff. *Sommerville* v. *Rae*, 28 Gr. 618.

Conveyance of Land — *Alteration in Name of Grantee—Authority of Grantor.*]—In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession:—Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff if necessary. *Thorne* v. *Williams*, 13 O. R. 577.

Conveyance of Land — *Alteration in Name of Grantee—Authority of Grantor—Effect of.*]—See *Wilson* v. *Owens*, 26 Gr. 27.

Conveyance of Land — *Insertion of Words—Authority of Grantor—Absence.*]—The Crown, in 1798, granted 5,000 acres, including the land in question, to J. H. and E. H. and three others. In 1800 E. H. became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838. In 1804 J. H. conveyed "all his *fourth* part or share" of the lands mentioned in the above patent, "containing in all five thousand acres," to his brother-in-law, M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection and of $1 paid. When executed, the words "fourth" and "five thousand" were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks, and told M. to fill them up according to the fact; adding in a postscript, that if any errors should be found in the deed, he authorized M. to rectify them, and that such corrections should be valid as if he had made them himself. The words "fourth" and "five thousand" were inserted after M. received the deed in Lower Canada:—Held, that by the deed of 1804 J. H.'s share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstances. *Stuart* v. *Prentiss*, 20 U. C. R. 513.

Covenant by Sureties — *Alteration in Name—Ratification—Laches.*]—To an action against V. & G. on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and was delivered by him as an escrow until C. should execute, which C. afterwards refused to do; and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied that, after both defendants had executed, V. ratified the agreement and accepted the other defendant as his co-surety. There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition, C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent:—Held, that this was evidence from which a ratification might be inferred; and as the defendant had lain by for years, leaving the plaintiff to believe, and telling others, that he was bound, a verdict for the plaintiff was upheld. *Henderson* v. *Vermilyea*, 27 U. C. R. 544.

Discharge of Mortgage — *Mortgagee's Agent.*]—See *Sayles* v. *Brown*, 28 Gr. 10.

Lease—*Name of Lessee—Action on Covenant.*]—A lease having been granted by plaintiff to one T., the defendant, before the expiration of the term, without the plaintiff's knowledge, struck out T.'s name and put his own opposite to the seal, and entered and paid rent:—Held, that the plaintiff could not maintain covenant against defendant on such lease. *Lapp* v. *May*, 14 U. C. R. 47.

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3. *Presumption as to whether after Execution.*

Date—*Erasure—Delivery.*] — The erasure of the date is not to be presumed to have been made after execution; but, even if it were, the deed takes effect from its delivery. *Fraser* v. *Fraser*, 14 C. P. 70.

Material Alteration—*Offence.*] — The production of the registered duplicate original of an instrument, with the registrar's certificate indorsed thereon, is, by virtue of s. 63 of the Registry Act, R. S. O. 1897 c. 136, primâ facie evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open. Whenever it would be an offence to alter a deed which has been completed, the legal presumption is, that material alterations appearing on the face of the deed were made at such a time and under such circumstances as not to constitute an offence. *Graystock* v. *Barnhart*, 26 A. R. 545.

See Northwood v. *Keating*, 18 Gr. 643; *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

II. Cancellation and Mutilation.

Cancellation of Bond—*Tearing off Seal—Attorney.*]—An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal (and this although the bond might be considered as still subsisting and sufficient to sustain an action of debt); and damages may be recovered against the obligor to the amount of the penalty. A several obligor is a competent witness in an action against a co-obligor to prove the cancelling of the obligation by tearing off the seal of the co-obligor. A bond may be given up to be cancelled by the president and directors of a banking corporation, without the appointment of an attorney. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Cancellation of Contract—*By Order of Court—Cancellation of Signature.*]—An injunction restraining a corporation from permitting certain buildings to be completed under a contract, was dissolved, it appearing that the contract which had been entered into between the corporation and a contractor had been cancelled. On production of the contract in court, it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. *Edinburgh Life Assurance Co.* v. *Town of St. Catharines*, 10 Gr. 379.

Cancellation of Deed—*By Order of Court.*]—The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled, and that although his title may be such that he would succeed in defending any action against him at law. *Harkin* v. *Rabidon*, 7 Gr. 243.

Cancellation of Deed—*By Order of Court—Effect of.*]—A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, but failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the civil code of Lower Canada:—Held, that upon the nullification of the deed no allegation contained in it could subsist even as an admission. *Durocher* v. *Durocher*, 27 S. C. R. 363.

Cancellation of Deed—*Divesting of Estate.*]—The cancellation of a deed does not divest the estate which has passed by it. *Fraser* v. *Fraser*, 14 C. P. 70; *Laur* v. *White*, 18 C. P. 99; *Fraser* v. *Fralick*, 21 U. C. R. 343; *Doe d. Burr* v. *Denison*, 8 U. C. R. 185.

Cancellation of Lease—*By Agreement.*]—By an indorsement under seal upon a lease of premises, it was agreed between landlord and tenant that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased; but that, if the agreement became void by reason of the non-fulfilment of its terms before or at the time of payment of the second instalment, the lease was to remain in full force; and in case of the lease being cancelled, no rent was to be paid after 3rd February, 1863, the date of the agreement to purchase. Under the lease, the rent was payable in advance, and at the date of the agreement to purchase, a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid under the agreement, and the interest also, according to the tenant's evidence, but according to the landlord's it was not paid at the time, though he admitted that he had agreed to allow it to stand for some months afterwards:—Held, that by the memorandum under seal, indorsed on the lease, the rent under it, payable in advance, was not to be paid in case the lease was cancelled; and that the deed was cancelled, in accordance with the agreement, by the payment of the second instalment of purchase money, even supposing the interest not to have been paid, for the landlord admitted he had waived its payment at the day, by suspending it to a future time. *Forge* v. *Reynolds*, 18 C. P. 110.

Cancellation of Lease—*By Deed—Re-execution of Lease—Construction.*]—*Bell* v. *McKindsey*, 23 U. C. R. 162, 3 E. & A. 9.

Cancellation of Lease — *Effect of — Merger.*]—See *Laur* v. *White*, 18 C. P. 99.

Mutilation—*Deed or Patent—Accident—Validity.*]—If it be clear that a deed or patent, once perfect, has afterwards had its seal and signature torn off, or has become otherwise mutilated by accident, or the effect of time, such mutilation does not render it invalid. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224; *Todd* v. *Cain*, 16 U. C. R. 516.

Mutilation—*Deed Torn up by Grantor—Subsequent Stitching Together by Grantee—Delivery—Effect of Affidavit of Execution.*]—*McDonald* v. *McDonald*, 44 U. C. R. 291 (but see 23 C. L. J. 102).

Mutilation—*Patent from Crown—Exemplification.*]—See *Goodtitle ex dem. Snyder* v. *Barker*, 5 O. S. 335.

III. Construction and Operation.

1. *Bargain and Sale.*

Consideration—*Purchaser for Value.*]—A deed purporting to be a deed of bargain and sale, but containing no statement of consideration, pecuniary or otherwise, and no sufficient proof of consideration being given aliunde, was held void in law against a bonâ fide purchaser for value at sheriff's sale, under judgment and execution, although the jury had negatived any fraud in fact in the deed expressing no consideration. *Doe Proudfoot* v. *McCrae*, 6 O. S. 502.

Registry—*Deed Poll — Statutes — Retroactivity.*]—A deed poll will operate as a bargain and sale; and 4 Will. IV. c. 1, s. 47, has a retrospective operation so as to make deeds of bargain and sale executed before the Act valid, without registry. *Rogers* v. *Barnum*, 5 O. S. 252. See, also, *Doe d. Rogers* v. *Barnum*, 2 U. C. R. 470.

Registry—*Time.*]—The registry of a deed of bargain and sale relates back to the time the conveyance was made. *Doe d. Spafford* v. *Brown*, 3 O. S. 92.

"Remise, Release, and Quit Claim."]—By indenture of bargain and sale made in 1856 between L. and K., L. in consideration of $4,000 (the receipt whereof was thereby acknowledged) did remise, release, and quit claim unto K., his heirs and assigns, the south half, &c., to have and to hold, &c.:—Held, that since 14 & 15 Vict. c. 7, s. 2, the words "remise, release, and quit claim" may operate as a grant; and either before or since that enactment they would operate as a bargain and sale. Acre v. Livingstone, 26 U. C. R. 282, not followed. *Pearson* v. *Mulholland*, 17 O. R. 502.

Use.]—It is superfluous in any deed of bargain and sale to express that the land is to be held "to the use of" the bargainee. *Gamble* v. *Rees*, 6 U. C. R. 396.

Use—*Trust*—"*Grant.*"]—In an indenture the granting words were, "grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto

the parties of the second part, their heirs and assigns, all and singular, &c.: To have and to hold unto the said parties of the second part, their heirs and assigns forever, to the use and upon the trust following, that is to say, to and for the use of, &c., infant children of, &c., their heirs and assigns forever." It appeared that upon the execution by the grantor of this deed, which was executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged this mortgage and then mortgaged the estate back to the grantor to secure the purchase money of his equity. In ejectment, brought by the infant children against the lessee of the grantees:—Held, that the use was not executed in them (the children), but that, notwithstanding the use of the word "grant" in the deed, and C. S. U. C. c. 90, s. 2, the old rule that deeds "shall operate according to the intention of the parties, if by law they may," must govern, and that the intention to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust. *Mitchell* v. *Smellie*, 20 C. P. 389.

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2. *Conditions, Reservations, and Exceptions.*

Crown Grant—*Reservation of Trees—Trover against Stranger.*]—The patent to A. C., in 1796, contained the clause then usual, saving and reserving to the Crown all white pine trees:—Held, that, notwithstanding this reservation, the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 U. C. R. 333.

Crown Grant—*Use of Land for Park.*]—Certain ordnance land vested in the Crown was, in 1858, patented to a city corporation, with the following clause in the patent: "Provided always, and this grant is subject to the following conditions, viz., that (the land) * * shall be dedicated by the said corporation and by them maintained for the purpose of a public park for the use * * of the inhabitants of the said city of T., for all time to come * * *." The corporation in 1876 obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor, which they applied to a park fund, as provided by the Act giving the power to sell, &c.:—Held, that the words in the patent "Provided always, and this grant is subject to the following conditions," did not create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest. Held, also, that the words "otherwise dispose of," when read with the rest of the Act, covered the mode of using the property adopted, viz., as a cattle market. *Kennedy* v. *City of Toronto*, 12 O. R. 211.

Erection of School House—*Condition of Re-entry.*]—On 26th September, 1844, a man by deed bargained and sold, &c., to a district municipal council, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house. Habendum, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school-house for the use of the district, or if the council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the grantor and his heirs to re-enter and avoid the estate of the said municipal council. The grantor by his will, dated in July, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered it. The municipal council complied with the condition by building a school-house, and at the time of the making of the will the condition had not been broken, but the successors of the council dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold:—Held, that the word "possibility" in R. S. O. 1877 c. 106, s. 2, includes a "right of entry for condition broken," mentioned in s. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after-acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession. Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid. The devisees and not the heirs were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626.

Life Interest—*Reservation of — Conveyance of Fee—Covenant to Stand Seized.*]—H., by deed poll, in consideration of natural love and affection and of 5s., conveyed land to her daughter, R., in fee, adding after the habendum, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues, and profits of the said above granted premises for and during the term of my natural life:"—Held, a conveyance of the fee simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. Quære, whether the reservation was void, or whether only the reversion passed subject to the life estate. *Simpson* v. *Hartman*, 27 U. C. R. 469.

Held, that the reservation in the above deed was not void, but that the deed might be construed as a covenant to stand seized of the reversion to the use of R., the life estate remaining in H. *Hartman* v. *Fleming*, 30 U. C. R. 209.

Preliminary Contract—*Inconsistent Reservation.*]—C., by agreement of 6th April, 1891, agreed to sell to the Erie County Gas Company all his gas grants, leases, and franchises, the company agreeing, among other

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

Restraint on Alienation — *Sale under Execution.*]—Where lands were held by A., upon express condition to alienate only to his children, and under an execution against him the sheriff sold and conveyed his interest by a deed sufficient to pass the fee:—Held, not a breach of the condition. *Reaume* v. *Guichard*, 13 U. C. R. 275.

Restraint on Alienation — *Repugnancy.*]—The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared "nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have only the use during his lifetime, after which his children will have full right to the said property above mentioned:" —Held, on demurrer, that such proviso was repugnant to the grant and habendum, in fee, and therefore void. *Lario* v. *Walker*, 28 Gr. 216.

Restraint on Alienation — *Rights of Judgment Creditor—Quebec Law.*]—See *Fraser* v. *Pouliot*, 4 S. C. R. 515.

Reverter—*Proviso for, Inconsistent with Grant.*]—Defendant claimed under a deed in fee, in which, after the habendum, was contained a proviso that the conveyance should be void, and the estate revert to the grantor, if the grantee should make default in performing the covenant thereinafter contained. This covenant was, that the grantee should cultivate the land during the life of the grantor for his benefit:—Held, that the proviso was void, as being inconsistent with the grant. *Brown* v. *Stuart*, 12 U. C. R. 510.

Revocation by Grantor.]—By deed between B., grantor, of the first part, certain named persons, trustees, of the second part, and P., grantee, of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside:—Held, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed; and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a reconveyance of the property. *Poirier* v. *Brulé*, 20 S. C. R. 97.

Right of Redemption — *Effect as to Third Parties—Quebec Law.*]—See *Salvas* v. *Vassal*, 27 S. C. R. 68.

Right of Way.]—In an action of trespass q. c. f. the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of the property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot:"—Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright* v. *Jackson*, 10 O. R. 470.

Right of Way—*Construction of Grant.*] —A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and for that required the land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, &c., along a certain road, &c.; habendum to the defendants, their successors and assigns, for the purposes aforesaid to and for their sole and only use for ever, subject, nevertheless, to the following conditions. The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed, for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they might require the same. The second condition was, that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claim upon the land save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant:—Held, that under the terms of the conveyance, the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it; and that under s. 29 of the Municipal Waterworks Act, R. S. O. 1887 c. 192, they had the right to dispose of the land when no longer required for

waterworks purposes. 2. That the grant of the right of way gave to the defendants and their employees footway, carriageway, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land. *McLean* v. *City of St. Thomas*, 23 O. R. 114.

Right to Occupy House and Three Acres.]—R. G., being seized in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard and dwelling-house, after the decease of his beloved wife, J. G.," to hold to his daughters for and during their lives, or the life of the survivor of them, at the yearly rent of twenty cents, if demanded. Ten days afterwards he conveyed in fee to his son W. G. the land of which the three acres formed part, the son having actual notice of the agreement between his sisters and R. G. Subsequently W. G. conveyed to the plaintiff, "subject to the right of R. G.'s wife and daughters to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to a mortgage, which the plaintiff agreed to pay off. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres:—Held, that the agreement by which R. G. intended to demise the three acres created a term at once, the wife of R. G. retaining the right to occupy during her life:—Held, also, that the words "subject to," &c., in the conveyance to the plaintiff, either operated as an exception, or, by reason of the execution of the deed by the plaintiff, as a regrant of the three acres to her vendor. Quære, also, if the deed operated as a regrant to W. G., whether if the lease were void, as contended, as creating a freehold interest to commence in futuro, W. G., having notice of his sisters' claim under it, would not be restrained from disturbing them. *Wilson* v. *Gilmer*, 46 U. C. R. 545.

Right to Select One Acre.]—Defendant conveyed to his son J. L., jun., the east half of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death in 1876. Several years before his death, J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., (the defendant) to J. L. jun.":—Held, that the reservation in the deed from the defendant to his son was more properly an exception than a reservation: that an estate for the joint lives of the defendant and his wife, and for the life of the survivor, remained in the defendant; and he therefore was entitled to select the acre at any time, and was not bound to do so in the lifetime of his son. Burnham v. Ramsey, 32 U. C. R. 49, distinguished. The estate in question had been conveyed to G. D. and L. P., between whom a partition had been made, not under seal, giving to L. P. the east half. Afterwards G. D. conveyed to the defendant his interest in the east half, and after the execution of the deed by the defendant to his son, L. P., by deed reciting that by oversight there was no release from him of the east half, and that he was desirous of completing the son's title, released the east half to the son. It was contended that the defendant owned only an undivided moiety of the lot when he conveyed to his son, and that the plaintiff, claiming through the son, could recover an undivided moiety of the acre selected by the defendant; but:—Held, otherwise, for the plaintiff took his deed subject to the reservation in the defendant's deed to his son, and the deed from L. P. to the son would enure only to the benefit of the title conveyed to him by his father. *Lapointe* v. *Lafleur*, 46 U. C. R. 16.

Right to Terminate Lease—*Habendum—Repugnancy.*]—*See Weller* v. *Carnew*, 29 O. R. 400 (*post*, 7.)

Undertaking—*Partition Deed—Charge on Land.*]—*See Green* v. *Ward*, 29 S. C. R. 572 (*post*, PARTITION.)

Way—*Dedication—Trespass.*]—E., owning land through which Victoria street ran part of the way, from N. to S., conveyed to the plaintiff four acres S. of that street, "with the exception of continuing Victoria street across said lot." Afterwards E. conveyed to W. by a statutory deed 65 acres adjoining plaintiff's land on the south, and W. conveyed to defendant:—Held, that by the deed to the plaintiff the continuation of Victoria street was excepted out of the land conveyed: that upon the evidence, set out in the report, this continuation was, when E. conveyed to W., a way actually used across the plaintiff's land to W.'s land, and so passed by the deed to W. and from him to defendant, who was therefore not liable in trespass for entering to repair the way. *Hebner* v. *Williamson*, 44 U. C. R. 583.

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3. *Consideration.*

Absence of Consideration—*Purchaser for Value without Notice.*]—The defendant, being the owner of the equity of redemption in certain lands, executed a deed on the 18th October, 1884, purporting to convey them directly to his wife for a consideration of $100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff, who claimed by conveyance from the wife, brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore, void. The plaintiff purchased bonâ fide without notice of there having been no consideration:—Held, that under 49 Vict. c. 20, s. 10 (O.), the acknowledgment of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration. That section of the Act is not to be restricted to claims upon alleged vendors' liens and the like. Semble,

that, even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient. *Jones* v. *McGrath* (2), 16 O. R. 617.

Erroneous Statement as to — *Quebec Law—Obligation to Pay.*]—See *Fulton* v. *McNamee*, 2 S. C. R. 470.

False Consideration—*Actual Good Consideration—Quebec Law.*]—See *Valade* v. *Lalonde*, 27 S. C. R. 551.

Partition Deed — *Undertaking — Charge on Land.*]—See *Green* v. *Ward*, 29 S. C. R. 572 (*post*, PARTITION.)

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4. *Description of Land.*

(a) *Crown Patents.*

Boundaries — *Certain Points.*] — Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown lands department, the proper course is to run a straight line between the two certain points, R. S. Q. Article 4155. *Bell's Asbestos Co.* v. *Johnson's Co.*, 23 S. C. R. 225.

Boundaries—*Departure from—Estoppel.*] —Quære, whether a boundary intended by a grant from the Crown might be varied or departed from by subsequent acts and acquiescence of parties interested in the position of such boundary, who would be accordingly bound. *Hart* v. *Bown*, 10 Gr. 266.

Boundaries—*Evidence.*]—The description of a lot prepared for and used by the Crown lands department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot. *Kenny* v. *Caldwell*, 21 A. R. 110. Affirmed, 24 S. C. R. 699.

Boundaries—*Falsa Demonstratio.*] — In 1792 lot 17 in the 2nd concession of Harwich was appropriated by the land board for the district of Hesse to O'B. He had made no improvements, however, up to 1794, and in 1853 the location made to him by the board was formally cancelled. In 1801 a patent issued to F. for lot 17 in the front concession of Harwich, which had been appropriated to him by the land board about a year after their grant to O'B., described as commencing in front of the concession at the N. E. angle of the lot, on the river; then S. 45 degrees E. 80 chains, more or less, to the lands of O'B.; then S. 45 degrees W. 30 chains, more or less, to lot 16; then N. 45 degrees W. 68 chains to the river; then along the water's edge north-easterly to the place of beginning, containing 200 acres, more or less. Up to this time there had been no second concession line run. In 1863 the Crown granted to defendant the rear part of the lot, 188½ acres, and the plaintiff, claiming it under the patent to F., brought trespass:—Held, that, as O'B. never got a patent or became entitled to claim one, the reference to his land was falsa demonstratio, and that the plaintiff was confined to the distance of 80 chains mentioned in the patent to F. *Fields* v. *Miller*, 27 U. C. R. 416.

The Crown in 1808 granted the continuation of lots 12 and 13 in the 1st concession of Gosfield, by two separate patents, describing each as containing 100 acres, more or less, and giving metes and bounds, beginning at a certain distance from the S. E. angle of each lot on lake Erie, and extending a fixed distance north, not saying more or less. The front portion had been granted, it was said, in 1790, and it was not shewn whether the line between the 1st and 2nd concessions had been run in 1808, or at what time. The distance given would carry the land into the 2nd concession, and the defendant claimed the land there covered by the metes and bounds as against the plaintiff, who claimed the lots in the 2nd concession under a later patent:—Held, that only land in the 1st concession would pass by the patents of 1808; for this, in the absence of any proof as to the concession line, was evidently the intention of the Crown, and the description by metes and bounds must be rejected as erroneous. *Wigle* v. *Stewart*, 28 U. C. R. 427.

Boundaries—*Point of Commencement.*]— The point of commencement "in front on lake Erie, at the south-east angle of the lot," means the south-east angle as it stood at the time the grant issued, and not a point shifting with the encroachment of the lake. *Iler* v. *Nolan*, 21 U. C. R. 309.

Boundaries—*Point of Commencement.*]— The question was as to the true boundary line between lots 26 and 27 in the 6th concession of Wainfleet, which the plaintiff contended should be 10 chains further east than where the defendant asserted it should be. The patent under which the defendant claimed described his land as commencing at the S. W. angle of his lot, 26, and then running north "56 chains, more or less, to the lands granted to B." It was shewn that taking the defendant's point of commencement this course would not reach B.'s land, and that commencing at the point contended for by the plaintiff it would reach B.'s land:—Held, that upon the evidence stated in the case—the original instructions to the surveyors, the field notes, character of the land, &c.—the defendant was right in his contention. 2. That the description in the patent under which defendant derived title was not sufficient alone to outweigh all the other facts in his favour; and that under the circumstances the words, "to the lands granted to B.," should rather be rejected. *Hoover* v. *Sabourin*, 21 Gr. 333.

Boundaries—*Water's Edge.*]—In 1804 a patent issued to J. McG., for lot 20 in the 1st concession of the township of Chatham, containing 200 acres, more or less, and described as "commencing in front on the river Thames, at the north-east angle of the said lot, then N. 45° W. 58 chains, more or less, to within one chain of the lands granted to Hugh Holmes," &c. In 1809 a survey of the lands was made, the plan of which shewed a road between the 1st and 2nd concessions 58 chains from the river, which had never been opened however, and the lands remained in the same position as in 1792, when a description had been issued for this lot in the name of one W. as running north 67½

chains, more or less, to a post, containing 200 acres, more or less, but no patent had ever been completed on such description. McG.'s interest in this land was subsequently sold by the sheriff in 1811 under execution, and the conveyance was of lot 20 in the 1st concession, containing 200 acres, more or less; not expressing any metes or bounds. The deed to the plaintiff was made in 1843, and purported to convey the lot (20) as containing 200 acres, "bounded in front by the river Thames; in the rear by the allowance for road between the 1st and 2nd concessions," &c.:—Held, that the plaintiff was restricted in his claim to a space of 58 chains from the river Thames, and that he had no title upon which to found an action for trespass to lands to the north thereof, although the same were situate at a distance greater than one chain from the lands granted to Holmes. *Crow* v. *Martin*, 2 E. & A. 425, 22 U. C. R. 485.

Boundaries—*Water's Edge—Accretions.*]—Where land granted by the Crown bordered on lake Ontario, and was described in the grant thereof as extending to the water's edge, it was held that under this description the water's edge must be the boundary, wherever it might be, and therefore that land which was gradually and imperceptibly formed by the receding of the water would belong to the grantee, the boundary of the lake being fluctuating, and the grantee not being restricted to the land extending to where the water's edge was at the time of the issuing of the grant. Land gradually and imperceptibly formed by the washing of sand and shingle from the lake, is the property of the owner of the adjoining land, even although the formation is caused by the artificial erections of a harbour company who are entitled to particular privileges by Act of Parliament. *Doe d. McDonald* v. *Cobourg Harbour Co.*, M. T. 7 Vict.

Boundaries—*Water's Edge—Bank.*]—A grant conveying land to within one chain of a river, means to within one chain of the edge of the river, and not of the top of the bank. *Stanton* v. *Windeat*, 1 U. C. R. 30.

Boundaries—*Water's Edge—Bank—Subsequent Patent.*]—On the 9th February, 1852, a patent issued to F., under which the plaintiff claimed, for a mill site in Owen Sound, described by metes and bounds, by which, after going "1 chain 70 links, more or less, to the top of the bank of the river," it proceeded, "then south-easterly along the top of the bank, to the limit between park lots 5 and 4; then southerly to the southerly limit of the town plot, or park lot 1, keeping in all places at such a distance inland from the river as will allow of 13 feet head of water being raised at the mill," &c. It then crossed the river "to a point to which the water will be backed by being raised 13 feet, as before mentioned, at the mill," and then ran northwardly, eastwardly, and northwestwardly (being the general directions of the river) "keeping always, as on the other side of the river, at such a distance inland therefrom as ensures to the mill owner the privilege of raising 13 feet head water as aforesaid, to the place of beginning." A well-defined bank of the river about 30 feet above the water extended from where the line first mentioned struck the top of the bank to the limit between lots 4 and 5, and then the bank died away into a flat:—Held, that under this patent the limit of the land granted was the top of the bank as far as the limit between park lots 4 and 5, not the line formed by the 13 feet head of water. On the 14th February, 1852, a patent issued to F. (presumably the same person as the patentee of the mill site for park lots 4 and 5). The description of these lots by metes and bounds was in part "commencing where a post has been planted in the N. W. angle of park lot 5; then N. 82° 45′ E., 9 chains 30 links, more or less, to the water's edge of the mill dam in the mill-site block, in the said town aforesaid, by 13 feet head of water being raised at the mill; then southerly following the water's edge thus formed," &c.:—Held, that the first patent could not be controlled by the second; and the latter being to the first patentee, he thus acquired the whole land in dispute, and there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second. *Harrison* v. *Frost*, 34 U. C. R. 110.

Lands Covered by Water.]—A patent from the Crown purported to grant the W. half of a certain lot of land, through which flowed the F. river, issuing out of the C. lake in the N. W. corner of the half lot, and running in a diagonal direction. In the metes and bounds given in the patent occurred the following courses: "Then S. 73 degrees 15 minutes W. 24 chains, more or less, to C. lake; thence southerly, along the water's edge, to the allowance for road between the 9th and 10th concessions; thence S. 16 degrees 45 minutes E. 21 chains, more or less, to the place of beginning, containing 76 acres, more or less, together with the waters thereon lying and being." From the point thus indicated on the margin of the C. lake, which was about the place of issuance of the F. river from it, a shoal, a good part of which was exposed, extended across in a southerly direction to the road between the 9th and 10th concessions. It was contended that the said metes and bounds indicated that a course was to be taken from the said point on the margin of the C. lake along the east bank of the river to the imaginary eastern boundary line of the half lot, then across the river, and up the other side to the said road, and that this interpretation coincided with the acreage mentioned in the patent, and that none of the land covered by the F. river passed to the grantee:—Held, however, that the plan and description of the lot, together with the other circumstances of the case, shewed that by the "water's edge" was meant the edge of the lake, i.e., the shoal above mentioned, which was to be taken as the margin of the lake, and the course indicated was across the lake on the line of the said shoal, so that the bed of the river crossing the half lot passed to the grantee, notwithstanding that by this interpretation about 14 acres above the quantity mentioned in the patent passed thereby. There being a reasonably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description. The fair presumption was that such a course was meant as would give the most direct points of connection between the termini thereof. Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party:—Held, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing

upon the instrument. *Re Trent Valley Canal*, 12 O. R. 253.

Lands Covered by Water.]—A Crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only 60 acres. At and before the issue of the patent, there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about 4 acres, by the use of bracket boards upon the dam, which raised the water about a foot. The two Judges composing a divisional court agreed in reversing the judgment in 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards, but disagreed as to the construction of the patent:—Held, by the court of appeal, that the words "the waters of the S. river" did not mean the waters of that river flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the river, at their natural height at any time during the ordinary changes of the seasons. *Brady* v. *Sadler*, 16 O. R. 49, 17 A. R. 365.

"North-Westerly Quarter" — *Evidence—Subsequent Patent.*]—In 1857 a patent issued for "the north-westerly quarter" of a 200-acre lot, the side lines of which ran N. 45° W., and S. 45° E. (or north-west and south-east); and in 1859 another patent was issued for "the S. E. ½ of the N. W. ½" of the same lot:—Held, that the first patent covered 50 acres, extending half the depth and half the width of the whole lot, not 50 acres extending one-fourth of the depth and the whole width. Held, also, that the subsequent patent could not affect the construction of the first, for the question must be, what did the patent cover when it was issued. Held, also, that the assignments to the respective patentees by the original purchaser from the Crown of the N. W. ½ of the lot, could not be resorted to to aid in interpreting the patent. *Davis* v. *McPherson*, 33 U. C. R. 376.

Plan — *Reference to.*] — Held, under the facts and evidence set out in this case, that the plaintiff, claiming under a patent for part of lot 29 in concession A, "according to a plan of survey by provincial land surveyor O'H., dated on the 9th January, 1860, of record in the Crown lands department," was confined to and governed by the plan mentioned, and could not claim according to the legal limits of the lot by the original survey. *O'Donnell* v. *Tiernan*, 35 U. C. R. 181.

Presumption as to Correctness.]—The description in a grant will be taken as correct unless proved wrong by the clearest testimony. *Doe d. Smith* v. *Meyers*, 2 O. S. 301.

Quantity of Land — *Additional Lot.*]—Held, that a grant from the Crown of "all that certain parcel or tract of land in the township of York, containing 200 acres, more or less (including lot 21 in the 7th concession), being the clergy reserve lot 21 in the 6th concession west of Yonge street, in the said township," the land not being set out by metes and bounds, conveyed to the grantee lot 21 in the 7th concession as well as lot 21 in the 6th concession. *Doe d. Keating* v. *Wyant*, 6 O. S. 314.

Quantity of Land — *Alteration of Plan.*]—Ejectment, to recover a piece of land claimed by plaintiff as part of lot 3 and by defendant as part of lot 4, both claiming under the letters patent for the respective lots. The plaintiff's patent, issued on the 2nd January, 1874, granted lot 3, containing 85 acres, without any description by metes and bounds. The defendant's patent, issued on the 8th December, 1875, granted lot 4, containing 23 acres, without any specific description. It appeared that the piece in question, though not so laid out on the ground, would, according to the field notes and plan made on the original survey, have formed part of lot 4; but that the Crown lands department had subsequently erased a portion of the division line between the lots, and that the grants were evidently made according to the plan so altered; and that, including the land in question, lot 3 would consist of 85 acres, while lot 4, exclusive of the piece, would consist of 23 acres:—Held, that the piece in dispute was granted as part of lot 3. *Stevens* v. *Buck*, 43 U. C. R. 1.

Quantity of Land—"*More or Less.*"]—In 1851 J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and being described in the Crown lands department books as containing 175 acres, more or less. On 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot, described as 75 acres, "neither more or less." In 1863 R. sold to B. his interest in this parcel, described as containing "75 acres, more or less," and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent of his portion, the land being described as "75 acres, more or less," being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres, without the words "more or less," these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed as heir of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions to his two sons, the defendants. About the time J. took out his patent, by instructions from the plaintiff's father, a surveyor ran a line dividing the 75 acres from the 100 acres; and in 1874 he procured another line to be run, under instructions to lay off the 75 acres, which was done, and the plaintiff's father and J. jointly erected a fence on such line. In 1883 the plaintiff discovered that the actual acreage exceeded 175 acres by some 11 acres. The actual occupation under R.'s patent was confined to the 75 acres:—Held, that B.'s patent would of itself include the 11 acres; and there was nothing to shew that the patent was

issued by fraud or mistake so as to entitle defendants to have it reformed; and that defendants on the evidence, except as to a small portion thereof, failed to shew any possessory title to the land in question. *Cain* v. *Junkin*, 6 O. R. 532. Affirmed, 13 A. R. 525.

Quantity of Land—*Municipality.*]—In a patent the land was described as "certain parcel of land in the township of Niagara, containing by admeasurement 35 acres, more or less, which said 35 acres of land are butted and bounded as follows," &c. The boundaries given would embrace about seventy acres, including several lots in the town of Niagara, which it was clear was not the intention of the government:—Held, that the description as in the township, coming first, must govern, and therefore that no land could pass which was then in the town. 2. It being shewn that in the patents dated both before and after this the lots claimed by defendant were declared to be set apart as clergy reserves, that such declaration was conclusive as against the Crown, and would prevent the land so appropriated from passing to the defendant, independently of the first objection. *Doe d. Campbell* v. *Crooks*, 9 U. C. R. 639.

Quantity of Land—*Numbered Lots—Inclusive or Exclusive.*]—A license to cut timber "from lots 1 to 13;"—Held, to exclude both 1 and 13. *Haggart* v. *Kernahan*, 17 U. C. R. 341.

Quantity of Land — *Particular Description—Falsa Demonstratio.*]—Ejectment, to recover a piece of land claimed by the plaintiff as part of the south half of lot 23 in the 10th concession of the township of Clinton, as being included in the patent thereof from the Crown, and by the defendant as ungranted land lying between the western boundary of the lot and the township line. No original field notes could be found, but according to the official plans lot 23 appeared to extend to the township line, and there was no evidence of any work on the ground inconsistent therewith; and it also appeared that the government had never made any claim to this piece as ungranted land, but, on the contrary, had always assumed it to have been included in the patent of lot 23. In the patent there was a general description of the lot as lot 23 in the 10th concession, &c., and also a particular description by metes and bounds, which would exclude the part in question from the limits of lot 23:—Held, that the plaintiff was entitled to recover, for that the piece in question passed under the general description in the patent, and that the particular description, which was inconsistent therewith, must be rejected as falsa demonstratio. *Huntsman* v. *Lynd*, 30 C. P. 100.

Quantity of Land — *Plan — Evidence — Township—Concession.*]—The question in dispute was, what quantity of land was granted by the patent, which described it as "beginning about 18 chains below a small creek which empties itself into the river Thames, in lot number 17," thence, &c., — there being two creeks. An old map from the surveyor-general's office was put in evidence, under which the lot had evidently been granted; and a surveyor called for the defence stated that the ground contended for by the plaintiff corresponded best with the old map:—Held, that, as the description contended for by the plaintiff corresponded best with this plan, and with a survey since made for the purpose of tracing out or completing parts not fully surveyed before, he was entitled to recover. Semble, that the Crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions, and the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown makes it by name a different lot, or places it in a different concession from that named in the patent, or the surveyor laying it out projects a road through it. *Horne* v. *Munro*, 7 C. P. 433.

Quantity of Land—"*North Part*"—*Tax Sale.*]—A patent of land from the Crown is to be upheld rather than avoided, and to be construed most favourably for the grantee. Where land was granted by a Crown patent describing it as the north part of lot 13, containing 60 acres, and the original plan of the township shewed the lot with centre line running through the concession, and shewed the part south of the line as 100 acres, and the part north of the line as 80 acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing 100 acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so:—Held, in a contest between the plaintiff, claiming under the patentee of the north part, and the defendant, claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him. Doe Devine v. Wilson, 10 Moo. P. C. 502, Nolan v. Fox, 15 C. P. 585, Regina v. Bishop of Huron, 8 C. P. 253, specially referred to. *Hyatt* v. *Mills*, 20 O. R. 351.

See the next case.

A parcel of land was described in the patent and in the books of the county treasurer as "the north part of lot number 13 * * * containing 60 acres of land, be the same more or less." The parcel contained in fact 82 acres. In 1868 there were sold for taxes 50 acres described thus: "Commencing at the north-east angle of said north part at the limit between said north part of lot number 13 and lot number 14, thence along said limit, taking a proportion of the width corresponding in quantity with the proportion of the said north part of lot number 13, in regard to its length and breadth sufficient to make 50 acres of land." Then in 1871 there was sold for taxes a parcel described thus:—"The whole of said southerly part of the north half of said lot number 13 * * * containing 10 acres, and being part not sold for taxes in 1868:"—Held, that the sale of 1871 could not be limited to 10 acres to be located by the court "in such manner as is best for the owner," but was, the taxes being properly chargeable against the whole of the unsold portion, a sale of the whole of that unsold portion, and could not in consequence of the provisions of R. S. O. 1887 c. 193, s. 191, be attacked by the plaintiff, a purchaser from the owner after the time of the tax sale, who then had a mere right of entry. Application and effect of this section considered. Decision

in 20 O. R. 351 reversed. *Hyatt* v. *Mills*, 19 A. R. 329.

Quantity of Land — *Possession — Evidence.*]—In 1796 a patent issued to R. for 528 acres, more or less, "being composed of lots 16 and 17, front concession, 16 and 17, 2nd concession, and 17, 3rd concession, with the broken fronts of 16 and 17 on Burlington Bay, in the township of Barton, butted and bounded as follows: beginning at the N. W. angle of lot 15 on Burlington Bay; thence S. 18° W. 115 chains; then N. 72° W. 21 chains; then S. 18° W. 51 chains; then N. 72° W. 20 chains; then N. 18° E. to Burlington Bay; then easterly along the bay to the place of beginning. Barton is on the south shore of Burlington Bay, and the lots number from the east. At the west side of lot 15 the shore turns suddenly to the south, for some distance, so that the broken front of lots 16 and 17 are on a line with what to the eastward is the 1st concession, and these broken fronts contain together only 28 acres. In the description for this patent in the department the lots were called 16 and 17, "front or 1st concession." The question was, whether lot 16 in the 3rd concession proper, passed by this grant. It was shewn that the government had never asserted any right to it; and the entries in books and plans in the Crown lands department shewed that it had always been assumed to have been granted to R. The descriptions for patent, and the patents of the surrounding lots, agreed with this view; the number of acres mentioned, 528, would not otherwise be covered by the grant; and R., and those claiming under him, had held possession for more than forty years. It was shewn, also, that the N. W. angle of lot 15, on the bay, was about 14 chains N. of the concession road in front of the second concession proper. The defendant in ejectment, R.'s heir-at-law, contended that the description excluded this lot, so that the title was still in the Crown, and relied, among other things, upon certain old plans from the department, which the plaintiffs asserted to be incorrect: — Held, that the lot passed by the patent. Remarks as to the nature of the evidence admissible.—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent. Quære, whether the defendant, a mere stranger, could set up the title in the Crown as against the plaintiffs' possession for forty years, with the privity of the Crown. Semble, that at all events the plaintiffs could have maintained trespass against him. *Jason* v. *Reynolds*, 34 U. C. R. 174.

Road Allowance—*Government Survey—Deficiency in Lots — Evidence.*]—One R., in 1829, first surveyed part of the township of Plymouth fronting on lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown land office, from surveys of three separate portions of it, made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the deeds were according to the scale on which the plan was compiled. This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan:—Held, that it was competent for the government to make such allowance for road, not being inconsistent with any work on the ground. Held, also, that in order to give effect to the change made by such allowance—to avoid an irregular rear boundary for such front lots—and to reconcile the plans, and the grants for one of the front lots and two gore lots in rear of it, which could not all three be carried out, owing to a deficiency in the land—a proportionate reduction should be made in each of such lots. The description of a lot by metes and bounds, from the Crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession. *Hagarty* v. *Britton*, 30 U. C. R. 321.

Road Allowance—*Government Survey — Possession.*] — On the 8th January, 1836, a surveyor, in compliance with instructions from the government agent, laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then and had for some time been in the actual possession of the Episcopal church, to which body a patent subsequently and on the 18th January, 1836, was issued, granting to them all that parcel or tract of land "on which the Episcopal church now stands, and containing four acres and two-tenths of an acre or thereabouts." Upon an indictment for a nuisance in stopping up the highway:—Held, that this survey, although made after the grantees had gone into possession, must prevail against such possession. *Mountjoy* v. *The Queen*, 1 E. & A. 429.

(b) *Evidence to Explain.*

Exceptions.]—Where land was described in a deed as consisting of certain lots, excepting thereout certain portions, and it was objected that the deed was void for uncertainty, the excepted portions not being sufficiently described:—Held, that evidence was properly admitted to shew what these portions were. *Lloyd* v. *Henderson*, 25 C. P. 253.

Latent Ambiguity—*Intention of Parties.*] —Defendant leased to plaintiff a lot of land, "known as the park, in front of Denison terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas street on the south, to be bounded on the east by the garden fence of my old cottage, and on the west by McGregor's garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by my carpenter, and which cottage is to go into the bargain with the land." It appeared that the garden fence extended only part of the way to the drive from Dundas street, and the dispute was as to the eastern boundary beyond it:—Held, that the plaintiff was not therefore entitled to claim to the eastern boundary of all the land known as the park, but that, this being a latent ambiguity, parol evidence was admissible to ascertain what was intended by the parties. *Burgess* v. *Denison*, 16 U. C. R. 457.

Latent Ambiguity — *Mistake.*] — Defendant, owning a block of land which had been laid out in village lots, conveyed it to S., the plaintiffs' grantor, reserving thereout several village lots, and among them lots 1, 2, and

3 on the south side of Queen street, in tier 2. There was in fact no such lot 1 laid out, either on the plan of the village or on the ground, the first lot on the south side of Queen street being No. 2. S., in 1870, conveyed to the plaintiffs part of village lot 4 on the south side of Queen street, in tier 2. The adjoining lot, 5, was then pointed out to the plaintiffs as being 4, and they built upon it, defendant occupying 2, 3, and 4, and having a blacksmith's shop on 4, which lot he had occupied ever since his sale to S., as one of the reserved lots. The plaintiffs having brought ejectment for lot 4:—Held, that, as the extrinsic evidence shewing that there was no lot 1 disclosed a mistake in the description of the lots reserved, and a latent ambiguity, parol evidence might be received to explain it; and that the reservation might be construed as meaning lots 2, 3, and 4, or the first, second, and third lots on that side of the street. *Kean* v. *Drope*, 35 U. C. R. 415.

Name of Place.]—D. sold to the predecessor in title of the plaintiff certain lands, and the deed contained the following (which was held to amount to a covenant, the benefit of which passed to the plaintiff):—"Bellevue square is private property, but it is always to remain unbuilt upon except one residence with the necessary outbuildings, including porter's lodge." The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that parol evidence was admissible to shew what was meant by "Bellevue square," no plan or description being incorporated in the deed. *VanKoughnet* v. *Denison*, 11 A. R. 699.

Point of Commencement — *Erroneous Understanding.*]—A deed of part of lot 5 in the 1st concession of Uxbridge, described it as commencing at a point 46 chains 33⅓ links from the north-west angle of the lot:—Held, that the deed must be read as meaning the true north-west angle, from which the admeasurement must be made, and not from a point which when the deed was executed was erroneously supposed to be such angle, and which, for the purpose of construing the deed, it was understood should be so taken; and that evidence of such understanding was inadmissible. *Forsyth* v. *Boyle*, 28 C. P. 26.

Preliminary Contract — *High Water Mark.*]—Trespass to try title to lands lying adjacent to the river Humber, and occasionally overflowed during freshets. The defendant's deed gave him the bed of the river, and two rods beyond "high water mark" on both sides of it. The evidence was conflicting as to the position of posts mentioned in the deed, and defendant contended that he was entitled to two rods beyond the highest point to which the water of the river ever rose, including the lands in question. A bond containing the agreement between the parties, in pursuance of which the conveyance appeared to have been made, defined "high water mark" to be "where the water has already or may hereafter be flowed for mill conveniences or other machinery:"—Held, that the language of the deed was explained by the bond, and that high water mark was the line to which the water was flowed for the purposes therein mentioned. *Grahame* v. *Brown*, 12 C. P. 418.

Vagueness—*Road Allowance.*] — Where, in trespass for cutting timber, the question was, in which of two townships there was an allowance for road, and the grants from the Crown not being very explicit, the plaintiff endeavoured to support his construction of the grant by parol evidence, which was rebutted by the defendant by parol testimony also, and the jury found for the defendant—the court held such finding right, and that parol evidence was admissible. *Miller* v. *Palmer*, 3 O. S. 425.

(c) *Inconsistent Descriptions.*

General and Particular Descriptions.]—Where land is described generally as part of lot 4, and the specific description afterwards clearly given embraces a part of lot 3, the specific will govern. *Doe d. Murray* v. *Smith*, 5 U. C. R. 225.

The Crown in 1838 granted a parcel of land as containing 70 acres, being the E. ½ of lot 30 in the 7th concession of Albion, giving the metes and bounds as commencing at the S. E. angle of the rear or E. ½ of the lot (such point being known and undisputed, and the Crown at the time owning all the land in that concession beyond that lot); then on a course N. 45° 45′ W. 10 chains, more or less, to the allowance for road on the northern boundary of the township (which was also well known and ascertained); then S. 74° W. 35 chains, 50 links, more or less, to the allowance for road between lots 30 and 31; then S. 39° 30′ W. 1 chain 50 links, more or less, to the centre of the concession, &c.; and in 1850 another grant was made of lot 31 in the 7th concession, as containing 34 acres, without any description. In the original survey the allowance for road between lots 30 and 31 had never been run through, or any posts planted on the rear of the lots, although posts had been planted at the front angles, and by producing the line as run between lots 30 and 31 in the 6th concession, the distance of 35 chains and 50 links, as given by the patent, along the allowance for road on the northerly side of the township, would be materially lessened. The owner of lot 31, treating the person in possession of lot 30 as a trespasser, in respect of all the land not included within such limits, brought trespass against him:—Held, that the grantee, under the patent of 1838, in the absence of any post to mark the allowance for road, was entitled to the full distance of 35 chains and 50 links, as specified in the grant, without any reference to the posts planted at the front angles of the lot. *Dixon* v. *McLaughlin*, 1 E. & A. 370.

The Crown in 1804 granted lots 18 and 19 in the 6th concession of F., containing 247 acres, more or less, and bounded as follows:—"commencing in front of the said concession at the S. E. angle of the said lot 19; then N. 31° W. 65 chains; then S. 59° W. 38 chains, more or less, to the allowance for road between lots 18 and 17; then S. 31° E. 65 chains, more or less, to the allowance for road in front of the said 6th concession; then N. 59° E. 38 chains, more or less, to the place of beginning:—Held, to include all of lots 18 and 19, not merely that part extending 65 chains back from the front or south end. *Cartwright* v. *Detlor*, 19 U. C. R. 210.

The Crown in 1836 granted to S., under whom defendants claimed, "200 acres, more or less, in the township of Colchester, being

lot 41 in front on lake Erie, in the said township," describing it as "commencing in front on lake Erie, at the S. E. angle of the said lot; thence N. 175 chains," &c. In 1839 a grant issued to B. for the rear parts of lots 41, 42, and 43 in the front or 1st concession of Colchester," described as commencing in the limit between lots 40 and 41, at a distance of 175 chains from the S. E. angle of the said lot 41; and then going north:—Held, that the first grant must be taken to include the whole of lot 41, notwithstanding the particular description, and therefore that nothing could pass by the second patent. *Her* v. *Nolan*, 21 U. C. R. 369.

J. A. by deed dated 22nd January, 1840, conveyed to the plaintiff lots 134, 135, and 136 in the 3rd concession of Sandwich, adding this description, "which said lots were patented to the said J. A., bearing date the 15th March, 1836, and which was surveyed and laid off by J. A. Wilkinson, D.P.S., on 21st January, 1840:"—Held, that the plaintiff was not bound by such survey, but could claim the whole of lot 136, as laid out by government. *Mahony* v. *Campbell*, 15 U. C. R. 396.

Ejectment for part of the E. half of lot 95. The mortgage under which the defendants claimed described the land as "part of broken lot No. 94, and Nos. 95 and 96," butted and bounded as follows: "lot 94, commencing at the eastern angle of said lot," &c. The metes and bounds given would cover the whole of the lot, or part of 93 and part of 94, but it did not appear from them which was intended, except that the last course was "to the place of beginning in lot 94." "Also lot 96, commencing 9 chains and 40 links on a course S. 45° W. from the northerly angle of said lot," and running westerly to the distance of 6 chains 50 links beyond the limit between lots 95 and 96, being a description in fact of parts of lots 95 and 96. "Also lot 96," commencing &c., giving boundaries to include only that part of 96 not covered by the previous description. The patent to A., under whom defendant claimed, was put in, covering lots 95, 96, and the west half of 94; and it was admitted that he had conveyed to the mortgagor. By commencing at the eastern angle of the W. ½ of 94, instead of at that angle of the whole lot, the descriptions given would cover this land, and the distances given for the courses from north to south would then agree very closely with the measurement on the ground, but would be incorrect otherwise. There was no evidence that the mortgagor owned any part of 94 but the west half:—Held, that by the general description the whole of lot 95 passed; and (reversing the judgment below) that the particular description, being clearly inaccurate in many respects, could not control the previous grant, so as to exclude the part of that lot not described. Semble, however, that had the description by metes and bounds been consistent with itself, and excluded clearly a part of 95, the whole would still have passed by the previous words. *Jamieson* v. *McCallum*, 18 U. C. R. 445; *McCallum* v. *Wilson*, 17 U. C. R. 572.

In ejectment brought to recover possession of certain land, called part of 22 in the 8th concession of Hamilton, and described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township (called the 9th), between the 8th, to the north thereof, and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as extending to the bank of Rice Lake, but the deed to himself only stated the lot without giving metes and bounds:—Held, that, although the specific description in the patent, and not the general description, would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, defendant was entitled to a verdict. *Henderson* v. *Harris*, 10 C. P. 374.

A mortgage described the land as all those certain parcels of land situate in the township of N., containing 2½ acres, more or less, being composed of part of lot 23 in the 5th concession of the said township of N., particularly described in the deed of conveyance thereof made between, &c. This deed referred to was for 2½ acres, part of lot 23 in the 4th concession, and of lot 23 in the 5th concession, describing the part in each concession separately by metes and bounds, that in the 5th containing less than half an acre:—Held, that the mortgage included only the land in the 5th concession. *Ferrie* v. *Wright*, 20 U. C. R. 644.

Plaintiff claimed under a deed from one C. of "all that parcel of land being composed of lot 26, as laid down upon a plan of lots laid out by G. T. and W. T., being on the west side of G. street in the town of Belleville, described as follows," adding a description by metes and bounds, which left a small strip at the south end of the lot uncovered:—Held, that the whole lot passed, and that the description curtailing its size should be rejected as falsa demonstratio. Held, also, that evidence of what took place between the parties when C. afterwards conveyed the small strip to defendant, and as to defendant's possession thereunder, and the acquiescence therein of the person through whom plaintiff claimed, &c., was properly rejected. *Gillen* v. *Haynes*, 33 U. C. R. 516. See *Haynes* v. *Gillen*, 21 Gr. 15.

Held, the general description being wholly insufficient, that the particular description by metes and bounds which followed, not being a falsa demonstratio added to a complete description, but an entire description in itself, governed. *Hart* v. *Rowe*, 10 Gr. 266.

Other Cases.]—Where the number of acres mentioned in a patent does not correspond with the quantity of land according to the description in the grant, the description will control. *Manning* v. *Doe d. Fergusson*, H. T. 2 Vict.

Where in a deed a certain quantity of land, and half of a saw-mill thereon erected, were conveyed, and the description of the premises covered the whole site of the mill:—Held, that the vendee was entitled to only one-half of the mill. *Doe d. Miller* v. *Dixon*, 4 O. S. 101.

A. surrendered to the Crown in consideration of £636 5s., "all that parcel of land overflowed and covered with water, being and composed of lots 37, 38 39 in the 1st concession of the township of Kingston, containing by admeasurement 462 acres, more or less, and more particularly described in the plan thereof hereunto annexed, to the intent that the said land and premises covered with water should for ever be vested in His Majesty," &c. There

was attached to the deed a plan verified by one Burke, the surveyor who made it, and certified by him thus: "I do hereby certify that the above diagram is drawn from actual survey, and in actual accordance with the deed held by the proprietor, and that there are 462 acres 36 roods, permanently covered with the waters of the Rideau canal." Across the land from one side to the other was drawn an irregular line, exhibiting on the one side (which was the front end of the lots) the 462 acres surrendered to the government, as being covered by the overflowing of the canal, and on the other side, or in rear of this line, 123½ acres, which was marked "land." Afterwards A. conveyed to B. "all those certain parcels of land in the township of Kingston, and being the rear parts of lots 37, 38, and 39, (as laid down on a certain plan drawn by Mr. Burke the surveyor), in the fifth concession of the township of Kingston, and by the said B. stated to contain 123½ acres." The land surrendered to the Crown had been paid for to A. at a price per acre, assuming it to contain 462 acres, according to Burke's survey; but it afterwards turned out that the plan did not correspond with the fact, the survey being extremely inaccurate, for that there was not as much land covered with water as the plans represented, by 141 acres:—Held, that the deed made to B. carried only such land (123½ acres) as, upon the scale of measurement upon which the plan was framed, formed the area in rear of the irregular line drawn across the lots, without regard to the fact of what portion of the lots was actually covered with water, and that the whole 462 acres had, under the deed of surrender, vested in the Crown. *Doe d. Gildersleeve*, v. *Kennedy*, 5 U. C. R. 402.

The defendant agreed, under seal, with the plaintiffs to pay them £275 by a certain day, for "the south 100 acres of lot 15 in the 7th concession of Norwich, beginning at the S. E. corner, and run by the surveyor 100 acres exactly:"—Held, upon the facts stated in the case, that under these words defendant was entitled to the tract as "run by the surveyor," that being in accordance with the substance of the agreement, and the latter words being the principal feature of the description, not the words, "the south 100 acres." *Joiner* v. *Colborne*, 11 U. C. R. 631.

A. conveyed to B. all and singular those lands and premises, with the appurtenances, situate at Point Iroquois canal, in the township of Matilda, being composed of the wharf, store-houses, and appurtenances built on part of the east half of lot 24 in the 1st concession of the said township, south of said Point Iroquois Canal, commonly known as Carman's wharf:—Held, that by such deed all the premises known as Carman's wharf would pass to B., although part of said wharf was in fact built in front of lot 23. *Carman* v. *Molson*, 5 C. P. 124.

When the description in a deed which was supposed to contain half a lot, in giving metes and bounds, stated as a measurement 40 chains "being half the length of the lot," as the length conveyed:—Held, that it was necessary for the grantee to prove that the whole lot contained more than 80 chains from front to rear, to entitle him to any greater quantity, for the production of the deed alone would entitle him to 40 chains only. *VanEvery* v. *Drake*, 9 C. P. 478.

One S. B., by deed dated January, 1851, conveyed to W. T. 120 acres of the south part of lot 6 in the 2nd concession of Canborough, describing it by metes and bounds. In March, 1855, W. T. and wife conveyed to the defendant J. T. the southerly part of lot No. 2 in the 2nd concession of Canborough, "which said southerly part was sold by S. B. to W. T." The defendant J. T. and wife conveyed to T. H. the north 65 acres of the southerly part of No. 2 in the 2nd concession of Canborough, described as follows, "which said southerly part was sold to W. T. by S. B., and by the said W. T. conveyed to J. T. by deed," &c. T. H. and wife conveyed to one M. in fee 65 acres of the southerly part of lot No. 6 in the 2nd concession of Canborough, by metes and bounds, and concluding, "the same being the lands originally sold by W. T. to J. T. and by J. T. to H." M. entered into possession and demised for one year to the plaintiff D., who entered, and being disturbed by defendants, brought this action to recover possession. It was admitted that there was no lot No. 2 in the 2nd concession of Canborough:—Held, the description of lot No. 2 being falsa demonstratio, and it appearing in evidence that S. B. did convey the south part of lot No. 6 in the 2nd concession of Canborough to W. T., that by rejecting the words "No. 2" sufficient remained to shew that 65 acres of No. 6 were conveyed, and the plaintiff was entitled to recover. *Bohn* v. *Tice*, 11 C. P. 289.

Held, that upon the lease and assignment, as set out in the declaration in this case, there was nothing to sustain the defence relied on, that the lease was intended to include land on Front street, in the city of Toronto, for Front street was not mentioned in either, except in defendants' covenant, where it must be treated as merely a falsa demonstratio of what had been already clearly described. *Talbot* v. *Rossin*, 23 U. C. R. 170.

Where land was described as commencing at a post planted 4 chains and 50 links from the N. E. angle of a lot:—Held, that the post (the existence and position of which were satisfactorily established) was the point of commencement, though its distance from the true N. E. angle was inaccurately given. *Marrs* v. *Davidson*, 26 U. C. R. 641.

A description of land in a deed, after running to a point two chains from a line with the east side of the Port Colborne guard lock on the Welland canal, proceeded: "thence S. half a degree E. 25 chains, more or less, always at a distance of two chains from a line with the east side of said guard lock, to the northern limit of said lot 27," thence, &c. The course should have been north instead of south, and the effect of it as written was to go away from the northern limit of the lot, and exclude the land in question:—Held, that the course might be rejected, and a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot. *County of Welland* v. *Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147.

(d) *Uncertainty.*

Boundaries — *Ambiguous Description — Evidence to Explain.*]—By a deed made in August, 1882, the appellant ceded to the

Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot No. 1937 in St. Peter's ward in the city of Quebec, situated between the streets St. Paul, St. Roch, Henderson, and the river St. Charles, with the wharves and buildings thereon erected. Of the lands which the respondents entered into possession of by virtue of said deeds, they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882:—Held, that the words "Henderson street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shewn to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed, which should be read as containing the matured conclusions at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. *City of Quebec* v. *North Shore R. W. Co.*, 27 S. C. R. 102.

Boundaries—*Water's Edge — Evidence of Intention.*]—The deed to the plaintiff, in an ejectment action, purported to convey "part of lot 43,"described as "commencing in the southerly limit of said lot 43, at a distance of 20 feet from the water's edge of the Detroit river, thence northerly, parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet, more or less, to the channel bank of the Detroit river, thence southerly, following the channel bank 208 feet, thence easterly 600 feet, more or less, to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed:"—Held, that the patent of lot 43 might be looked at to ascertain the point of commencement; that, as that lot was described as running to the water's edge of a navigable river, the point of commencement must be taken to be 20 feet landwards; and that the plaintiff was entitled to claim the strip of 20 feet along the water's edge. *Scotten* v. *Barthel*, 21 A. R. 569. See the next case.

A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend ad medium filæ as in the case of a non-navigable river. If, in a conveyance of land, the description is not certain enough to identify the locus, it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted. The intention of the parties to a deed is paramount, and must govern regardless of consequences. Res magis valeat quam pereat is only a rule to aid in arriving at the intention, and does not authorize the court to override it. A general description of land as being part of a specified lot, must give way to a particular description by boundaries, and, if necessary, the general description will be rejected as falsa demonstratio. Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence, the maxim verba fortius accipiuntur contra proferentem cannot be applied in favour of either party. Where a description is such that the point of commencement cannot be ascertained, it cannot be determined at the election of the grantee. Judgment in 21 A. R. 569 reversed. *Barthel* v. *Scotten*, 24 S. C. R. 367.

Exception.] — The mortgage under which the plaintiffs claimed, executed in 1861, described the land as lot 5 in the 4th concession of Flos, containing 200 acres, "save and except 35 acres sold off the east side of said lot 5 to L. for taxes." L. had bought 35 acres in 1858. The certificate of purchase then given to him by the sheriff had a diagram sketched on it, shewing this to be the east 35 acres, and the said diagram was on the certificate and deed given in 1865 and 1866 to one J., who purchased the remaining 165 acres for taxes, and under whom the plaintiffs claimed:—Held, that the description in the mortgage was sufficient, the exception being thus clearly defined. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

Highway.] — A surveyor's deed to plaintiff granted land as being "the public highway or road leading from Wellington to the carrying place," and described it thus, "commencing at the base line in front of lot No. 7, then on a north-westerly course along the north-easterly edge till it intersects the limits between lot No. 8 and 9; thence south 20° east to the southern limits of said road; thence along the south-westerly edge of said old road, till it intersects the base line in front of lot No. 7; thence along said line to the place of beginning," with the exception of what is occupied by the main road, meaning, by the new quarter sessions road, which traversed the old road on defendant's lot No. 8. Semble, that the description was too uncertain to convey anything. *Clapp* v. *Haight*, 19 U. C. R. 94.

Illegibility—*Insufficiency.*] — Where, in ejectment, the deed under which the lessor of the plaintiff claimed, was in several parts illegible, and contained no description by which the part of the lot intended to be conveyed could be certainly ascertained, and there was strong evidence that the deed was made to defeat creditors, the court set aside a verdict for the plaintiff. *Doe d. McDonald* v. *McDonald*, 2 U. C. R. 267.

Insufficiency.]—In advertising lands for sale for taxes they were described as "Race lands, Paris Hydraulic Co.," no further specification of the locality or quantity to be sold being given:—Held, that the description was insufficient, and the sale void. *Greenstreet* v. *Paris*, 21 Gr. 229.

Insufficiency.]—The property in an agreement for exchange was described as "135 feet on G. avenue, the same being 337 feet west from R. avenue, Parkdale, on the north side of

said avenue. It was shewn that R. avenue was the west boundary of Parkdale, and G. avenue a street in it, which, as such street, would have its termination at R. avenue, but it extended across R. avenue as a road or way outside of Parkdale, and no further description was given, such as the depth or by reference to a plan or otherwise:—Held, that the property was not sufficiently described. *Stevenson* v. *McHenry*, 16 O. R. 139.

Insufficiency — *Exception.*] — L. in conveying land to S. described it as being composed of the southerly half of lot 17 in the 4th concession of King, giving it the metes and bounds of the east half, but excepting out of the same 45 acres sold for taxes. The only part of lot 17 which L. had before the tax sale was that conveyed to him by B. as part of lot 17, giving it the metes and bounds of the east half, the same as in the deed to S.; and the same quantity was conveyed in both deeds. The sheriff's deed described a portion of the lot sold by him for taxes as "45 acres of the south half of said lot number 17 in the 4th concession of the said township of King:"—Held, that the sheriff's deed was void for uncertainty. Held, also, that the exception in the deed to S. was likewise void for uncertainty. Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them. *Mulholland* v. *Mulholland*, 17 O. R. 502.

Land Occupied by Buildings.]—Defendant agreed to sell to plaintiff certain buildings specified, "with the land which they occupy, with the whole of the dam and water privilege:"—Quære, as to the effect of the uncertainty in the agreement with regard to the description of the premises. *Snyder* v. *Proudfoot*, 15 U. C. R. 532.

Omission of Concession and Township — *Surrounding Circumstances.*] — The modern doctrine in interpreting the meaning of a grant or other instrument, is to ascertain the surrounding facts at the time the same was made. In ejectment for part of lot 41 in the 1st concession of the township of Colchester, it appeared that the patentee of the whole lot granted to the plaintiff "all that parcel of land commonly known by part of lot 14 (not giving the township or concession) containing 50 acres," describing it by boundaries which corresponded with the 50 acres off the rear part of the lot on which it was proved he lived at the date of the deed, being also himself described in the deed as of the same place. The grantee with her husband thereupon went into possession of that land, and there was no evidence that the grantor owned any other lot 41:—Held, that the words in the deed, with the surrounding facts, together with what followed immediately after its execution, were sufficient to shew with reasonable certainty what land passed by the deed; and that evidence of such facts was properly received at the trial. *Nolan* v. *Fox*, 15 C. P. 565.

Quantity of Land — *Ascertainment.*] — Where a contract was for the sale of lot 16, "and as much of lot 17 as should require to be flooded for the purpose of working a mill on lot 16:"—Held, that, as the quantity of land in lot 17 could be ascertained by a jury or the master, there was not such an uncertainty as to make the contract void. *Hook* v. *McQueen*, 2 Gr. 490.

Unspecified Part of Lot—*Election.*]—An agreement to sell and convey, or a deed of, "one acre of land, being part of the north-east quarter of lot 19 in the 7th concession of Darlington," is not void for uncertainty, but the purchaser may elect what acre he will have. *Cummings* v. *McLachlin*, 16 U. C. R. 626.

Unspecified Part of Lot—*Election.*]—See *Burnham* v. *Ramsay*, 32 U. C. R. 491.

Wrong Lot.]—Where land is so described by its local abutments as to enable any one to find it with certainty, it is unnecessary to state further in what lot in the township the land lies. If, therefore, the land so described is stated to be part of lot 42, when it is in reality part of lot 45, the deed is nevertheless certain and good. *Doe d. Notman* v. *McDonald*, 5 U. C. R. 321.

(c) Other Cases.

Boundaries—*Astronomical Line.*]—Defendant claimed under a timber license, which described his limits as bounded on the south by "the continuation of a line from the head of Mud Lake on the course N. 54° E., formerly the boundary between T. C. and A. R. M." The plaintiff claimed under a license which gave his northerly limit as the same line, describing it also as running N. 54° E. Both licenses were renewals of previous licenses from about 1839:—Held, that the boundary between them was the true astronomical line N. 54° E.; and that the plaintiff could not claim according to a line run in 1874 N. 54° E. magnetically, making no allowance for the variations of the compass. *Thibaudeau* v. *Skead*, 39 U. C. R. 387.

Boundaries—*Estopped.*]—In trespass q. c. f. it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the N. E. angle of the lot. This starting point upon the ground was undisputed; and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to the boundary between lots 1 and 2. *Crosswaite* v. *Gage*, 32 U. C. R. 196.

Boundaries — *Intersection of Stream.*]—Where land is described as commencing at the intersection of a road allowance by a stream, and the boundary lines at once diverge from the stream on either course:—Quære, where is the point of commencement, in the middle of the stream or on the bank, and what are the owner's rights as regards the water? This question was discussed, but not decided, as the plaintiff failed to shew that any part of his land came to the stream. *Hamilton* v. *Gould*, 24 U. C. R. 58.

Boundaries—*Lands Fronting on Streets.*]—The owners of a block of land in Toronto, bounded on the north by Wellesley street and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block, which was vacant wild land not divided into lots, and containing

neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced. A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant:—"And the grantors * * * covenant with the grantees * * * that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street, now owned by them, that they will convey the same subject to the same building agreements or conditions" (as in the agreement). The vendors afterwards sold a portion of the remaining land fronting on Amelia street, and one hundred feet east of Sumach street, and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against the vendors for breach of said covenant, claiming that it extended to the whole block:—Held, that the covenant included all the property south of Wellesley street; that, the land not being divided into lots, any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets, and so within the purview of the deed; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed. *Dumoulin* v. *Burfoot*, 22 S. C. R. 120.

Boundaries—*Lines between Lots—Plan.*]—Where a conveyance describes the property by reference to a plan, the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance, and to determine what passes by the conveyance, the description and plan alone are to be looked at, their construction being a question of law. *Smith* v. *Millions*, 16 A. R. 140, 15 O. R. 455.

Where, therefore, lots were sold by reference to a plan, and in the plan the lots were laid out in rectangular and not in rhomboidal shape, the dividing lines between the lots were held to run at right angles to the admitted line of frontage, and the ownership of the land in dispute was determined by this test. S. C., 16 A. R. 140, reversing the decision in 15 O. R. 453.

Boundaries—*Mistake as to Line between Lots—Title by Possession.*]—In 1847, by a fence intended as a division fence between lots 26 and 25 in the township of Southwold, the land claimed in this action as part of 25 was included with 26, and was occupied by M., the owner of 26, as part of his lot, until 1854, when the error was discovered by a survey. M. assented to the line as then run, and was to have moved his fence, but he continued to occupy until 1856, when he conveyed to the defendant, who entered into possession and occupied up to the fence as M. had done. The deed purported to convey the south half of lot 26, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining, or therewith demised, held and occupied or enjoyed, or taken or known as part and parcel thereof. By deeds made in 1865 and 1874, M. conveyed all his estate and interest in lot 25. In 1875 the plaintiffs, claiming under these conveyances, brought ejectment against the defendant for the part of lot 25 which had been enclosed with 26, as above stated, contending that M., notwithstanding the deed of 1856 and the delivering up of possession to the defendant, still retained a right of entry, either because the defendant was his tenant at will and so estopped from denying his title, or by virtue of his prior possession:—Held, in the common pleas, that whatever interest M. had in the land in question, whether it was part of 26 or 25, passed to the defendant under the deed to him of lot 26, together with the appurtenances, &c., therewith occupied, &c. Held, on appeal, that no part of 25 passed by M.'s deed to defendant; but that the plaintiff could not recover, for the defendant, when he took possession, did not enter as acknowledging any remaining right in M., and therefore not being tenant at will to M. of this piece, or estopped from denying M.'s title, he had acquired title as against the plaintiffs under the statute of limitations. *McNish* v. *Munro*, 25 C. P. 290.

Boundaries — *Point of Commencement—Ascertainment.*]—In an action of ejectment the question to be decided was whether the locus was situate within the plaintiff's lot, No. 5 in concession 18, or within defendant's lot adjoining, No. 24 in concession 17. The grant through which the plaintiff's title was originally derived, gave the southern boundary of lot 5 as a starting point, the course being thence 84 chains, more or less, to the river. The original surveys were lost, and this starting point could not be ascertained:—Held, affirming the judgment in 11 A. R. 788, which reversed that in 2 O. R. 614, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river. *Plumb* v. *Steinhoff*, 14 S. C. R. 739.

Boundaries — *Point of Commencement—Plan—Evidence.*]—In 1861 W. D. P., who owned a piece of land bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan shewed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out in lots, so depicted on another plan, and a street was shewn between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face shewed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street on the north of the first plan were actual limits of the plan:—Held, per Strong, J., that the true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Dummer street, as measured on the ground at the time when the plan was made; but in the absence of evidence shewing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question. 2. Inasmuch as the conveyances to the parties were made according to the first

plan, the second plan could not be invoked to aid in ascertaining the limits of the lot so conveyed. 3. Where lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description. 4. In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed. *Grascett* v. *Carter*, 10 S. C. R. 105.

Boundaries—*Water's Edge.*]—P., owning land on both sides of a stream, conveyed a piece on the south side, described as extending "to the water's edge of the creek, then keeping along the water's edge of said creek with the stream until," &c.; reserving a road 15 feet wide along the bank:—Held, to pass the land to the centre of the stream. *Kains* v. *Turville*, 32 U. C. R. 17. See *Robertson* v. *Watson*, 27 C. P. 579.

Boundaries — *Way—Staking out.*]—An oblong tract of land, 20 by 100 chains, containing 200 acres, was sub-divided into smaller lots, with a lane laid out and staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries. Part of the tract lying to the east of the lane was sold and conveyed; and, in the deed of that part reference was made to a plan, which shewed the lane as laid out through the centre of the whole tract, and the lane was therein declared to be the western boundary of such piece. In the same deed a right of way was granted to the purchaser in and over the said lane or way, being 83 links in width, "and which said way is already staked and laid out for the benefit of the occupiers of the said lot." Afterwards it was discovered that the eastern and western boundaries of the whole 200 acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed; and if those boundaries were shifted to their proper places, as had been done by the owners of adjoining lots, the lane as originally laid out could not remain in the centre of the lot when shifted:—Held, in ejectment by the purchaser of the piece to the east of the lane, that his western limit could not extend beyond the east side of the lane as staked out before the execution of the deed. *Dunn* v. *Turner*, 3 C. P. 104.

Exception.]—When two deeds were given to different parties of a lot containing 150 acres, the first covering fifty acres by metes and bounds, the last containing the whole lot, and commencing at the same point as the first, "except fifty acres already sold:"—Held, that the last deed covered only the remaining 100 acres of the lot. *Arner* v. *McKenney*, 8 C. P. 373.

Exception.]—The plaintiff owned part of lot 7, and agreed verbally, in 1859, to buy from one M. 2 acres more adjoining on the north, of which he went into possession. In 1860 M. gave to defendant a bond to convey to him 30 acres of the lot, more or less, describing it as "all that part of the said lot 7 lying north of the land owned by D.," the plaintiff, "and south of the road through the said lot to Cramahe Hill." He afterwards conveyed the 2 acres to the plaintiff, who then brought ejectment. M. swore upon the trial that these 2 acres were not intended to be included in the bond to the defendant, but were looked upon as a part of the plaintiff's land referred to in it, and that defendant had without them his full 30 acres:—Held, that the plaintiff must recover, for, 1. the bond, under the circumstances, should be construed as referring to all the land in the plaintiff's visible possession as owner, thus excluding the two acres; and, 2. the deed at all events vested the legal title in the plaintiff, and defendant's equitable right under the bond could afford no defence. *Duscnbury* v. *Palmatier*, 21 U. C. R. 462.

General and Particular Descriptions—*Plan.*]—When a close or parcel of land is granted by a specific name, and it can be shewn what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not shew the whole contents of the land as included in the designation by which it is known. In 1859 the then owners of part of the lands in question had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as block F.:—Held, that it must be presumed they intended to convey the same parcel of land shewn on said plan as block F. with the same natural boundaries as those indicated thereon. *Attrill* v. *Platt*, 10 S. C. R. 425.

Land Abutting on Lane—*Obstruction of Lane by Buildings—Obligation of Vendors to Remove.*]—See *O'Sullivan* v. *Clarton*, 26 Gr. 612.

Mistake—"*Northwards*" — *Rejection of.*]—The premises intended to be conveyed by a tax deed from the warden and treasurer to the plaintiff, were described therein as 180 acres of the east halves of two lots "commencing at the front east halves of said lots, taking the full breadth of each half respectively, and running northwards so far as required, to make 90 acres of each east half:"—Held, that "northwards" might be rejected, being evidently a mistake for westward. *Ferguson* v. *Freeman*, 27 Gr. 211.

Portion of Lot—*Inadequate Description.*]—In a deed under which defendant claimed in ejectment the description was "the east side of the southerly part of lot 24, containing 90 acres:"—Held, that this was a good description of the east 90 acres of the southerly part of the lot, and that it sufficiently appeared what the southerly part was, for the patent from the Crown was for the rear or southerly part of lots 23 and 24 described by metes and bounds, and the deed of defendant's grantor referred to the patent. *McCracken* v. *Warnock*, 43 U. C. R. 214.

Quantity of Land—*Deficiency—Compensation.*]—The plaintiff sold to defendant a lot of land; the contract did not mention the number of acres it contained; the conveyance stated the quantity to be 200 acres, more or less, and the covenants did not warrant the quantity. Part of the purchase money remained as a lien on the land, and many years afterwards, but before the purchase money was

fully paid, the vendee discovered that there was a deficiency of 24 acres in the supposed contents of the lot:—Held, that the vendee was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money. *Follis* v. *Porter*, 11 Gr. 442.

Quantity of Land — *Drowned Land.*]—Defendant gave a bond to the plaintiff in $1,000, reciting that he had that day purchased certain land known as "the mill property," in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over 2½ acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed by J. included over 4 acres, part of which at the eastern end was covered with water:—Held, that defendant clearly was not entitled to retain 2½ acres of dry land in addition to that covered with water, but only 2½ acres of the whole. *Greer* v. *Johnston*, 32 U. C. R. 77.

Quantity of Land—"*Half Lot.*"]—The front half of a lot supposed to contain in all 200 acres, but in reality consisting of more, was construed to mean half the real quantity. *Ellis* v. *Waddel*, 5 O. S. 639.

Quantity of Land — *Mistake—Registry Laws.*]—The owner of two town lots, 25 and 26, sold a portion of 26 to one P., but by mistake the description in the deed was such as at law to pass the whole lot. He subsequently sold lot 25 and all that part of lot 26 not before sold to P. to the plaintiff, and the deed thereof was duly registered. Subsequently to the registration of this deed, defendant obtained a conveyance from P., the description of the land being the same as that in the deed to P.:—Held, that the registration of the plaintiff's deed was notice to the defendant of the plaintiff's claim to that part of lot 26 not sold to P., and that the plaintiff was entitled to a reconveyance thereof. Gillen v. Haynes, 33 U. C. R. 516, followed but not concurred in. *Haynes* v. *Gillen*, 21 Gr. 15.

Quantity of Land — *Mutual Mistake—Notice.*]—W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only. A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that, before the sale to the plaintiff, W. had sold all he purchased to A.:—Held, that this was sufficient proof of that actual notice which is requisite in this class of cases. *Wigle* v. *Setterington*, 19 Gr. 512.

Quantity of Land—"*More or Less.*"]—Held, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in a sheriff's deed, might be rejected as surplusage. *Nelles* v. *White*, 29 Gr. 338.

Quantity of Land—*Right of Way.*]—A right of way ten feet wide, described as running north from a certain street equally upon, along, and between two lots to the depth of 60 feet, and then at right angles:—Held, to extend only 60 feet between the lots, so that the crossway would lie within that distance, not 10 feet beyond it, which would make the depth 70 feet. *McCammon v. Beaupré*, 25 U. C. R. 419.

Quantity of Land—*Road Allowance.*]—The north half of lot 24 in the 2nd concession of Darlington, according to the original survey, contained 108 acres. B. conveyed to defendant "the south 100 acres of the north half," and afterwards to the plaintiff, "8 acres, more or less, being the north 8 acres of lot 24," &c., "and being all the north half of said lot contains over 100 acres." The Kingston road, not being an original allowance, but substituted for it owing to natural obstructions, ran through the south part of the north half, taking up two acres, and had been established as a highway by user for forty years. Whether it existed before the deed to defendant, or whether the soil had become vested in the Crown under our statutes, did not appear:—Held, that the deed to defendant could cover only 100 acres in all, not exclusive of the road, and that the plaintiff was entitled to the remaining eight acres. *Ash* v. *Somers*, 22 U. C. R. 191.

Quantity of Land — *Shifting of Street Line.*]—J. L. conveyed to G. L. a piece of land extending 103 feet 6 inches along the south side of Wellington street, easterly, from its intersection with Elgin street, covenanting that, should the line of Wellington street be shifted to the north, he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 feet to the north, and, as Elgin street intersected it at an acute angle, the intersection was about 11 feet further west than before. G. L. having obtained a conveyance in accordance with the covenant:—Held, that he was entitled to have his eastern boundary produced on its original course, at right angles to Wellington street, though he would thus have more than 103 feet 6 inches on that street; for the intention was to give him all the land in front of that first conveyed to him, and between it and the street as altered. *Lang* v. *Matthewman*, 32 U. C. R. 126

Quantity of Land — *Terminal Point—Number of Rods.*]—A specific lot of land was conveyed by deed and also: "A strip of land 25 links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about 12 rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less:"—Held, that the strip conveyed was not limited to 12 rods in length, but extended to the western end of the station, which was more than 12 rods from the starting point. *Doyle* v. *McPhee*, 24 S. C. R. 65.

Reference to Former Deeds.]—A description of land in a deed by reference to other conveyances for a fuller description is sufficient. *In re Treleven and Horner*, 28 Gr. 624.

Schedule—*Plan—Reference to.*]—In ejectment for 20 acres the plaintiff claimed under a patent. Defendant put in a mortgage from the plaintiff to one P. of 1,300 acres, described as "being comprised in the schedule and map attached." The land in the patent was not mentioned in the schedule, though it was laid down on the map, but it was proved that the

map contained other lands belonging to other parties, and was not made with reference to the mortgage, and that the schedule embraced lands not appearing on the map:—Held, clearly insufficient to disprove the plaintiff's claim. *Cotton* v. *McCully*, 21 U. C. R. 559.

Specific Description—*Other Lands—Appurtenances—Short Forms Act.*]—See *Hill* v. *Broadbent*, 25 A. R. 159, *post*, 10.

Uncertified Plan—*Reference to—Registry Laws.*]—Held, that, though a plan not certified as required by the registry law, R. S. O. 1877 c. 111, s. 82, s.s. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson* v. *Winsor*, 10 O. R. 13. See *S. C.*, 11 O. R. 88.

Wrong Concession — *Surveyor's Mistake.*]—A mistake of a surveyor in marking the number of the concessions wrong on some of the posts of an original survey will not make it proper to describe the lots so marked as being in the concession numbered on the posts. *Jarvis* v. *Morton*, 11 U. C. R. 431.

Wrong Part of Lot.]—Trespass q. c. f. The plaintiff claimed under deeds from A. M. to S. M. in 1834, and from S. M. to the plaintiff in 1843. In 1829 A. M. had made a deed to his step-mother, intended to be in lieu of her dower in his father's lands. It was clear by evidence at the trial, and by the mention made in this deed of the lands adjoining, that the grantor's intention was to convey the west part of lot 5; but the deed described the land as "being composed of the easterly part of lot 5 in the 1st concession of the said township of S.," adding a description by metes and bounds, beginning at the S. E. angle of the said lot, which could be well carried out. It was proved, however, that S. M. had been in possession of the land in 1829, and that he and the plaintiff had held it ever since:—Held, that the deed could pass no land which was not part of the easterly part of lot 5. *White* v. *Myers*, 10 U. C. R. 574.

Wrong Part of Lot—*Conveyancer's Mistake—Parties.*]—Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective descriptions the conveyance to A. comprised B.'s land, and did not comprise A.'s own, nor did the conveyance to B. comprise A.'s land; but each took and kept the land actually intended for him:—Held, that to a bill filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party. *Rowsell* v. *Hayden*, 2 Gr. 557.

Wrong Part of Lot—*Mistake of Fact.*]—The owner of the west half of a lot of land, supposing himself to be the owner of the east half, and not the west half, contracted with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them, by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west." It appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but, as the contract was for the east half, and the mistake was that of the plaintiff alone:—Held, that the west half could not be substituted for the east half; and the relief asked was refused. *Cottingham* v. *Boulton*, 6 Gr. 186.

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5. *Description of Parties.*

Company—*Change of Name.*]—The deed of the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptio personæ to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co.* v. *Midland R. W. Co.*, 7 A. R. 681.

Mistake — *Name of Mortgagee.*]—In a mortgage which was intended to be taken in the name of the mortgagee, she, by mistake, was described by a name which was not her real name, and which was one she had never assumed or been known by;—Held, that the legal estate did not pass to her by the mortgage, whatever its operation in equity; and that she could not make a good legal title to a purchaser under the power of sale contained in the mortgage. *Burton* v. *Dougall*, 30 O. R. 543.

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6. *Estate Created.*

Fee Simple — *Limitations.*] — Under a grant to A. and his heirs for ever, habendum to A. and his wife "for and during their natural life and the life of the survivor of them;" and "from and after the death of both, to have and to hold unto their lawful heirs and assigns for ever," or from and after the death of both, to have and to hold unto their lawful heirs, their heirs and assigns for ever," A. takes a fee simple absolute. *Langlois* v. *Lesperance*, 22 O. R. 682.

Fee Simple — *Rule in Shelley's Case.*] — Under a conveyance of land to M., to hold "during her natural life, then to go to her heirs, equally alike, and their heirs and assigns for ever:"—Held, that the rule in Shelley's case applied, and that M. took a fee. *Brown* v. *O'Dwyer*, 35 U. C. R. 354.

Future Estate—*Deed of Appointment.*]—On the 25th October, 1870, the plaintiffs' testator purchased certain lands and procured a deed to be made to the grantees named therein to hold to such uses as he should by deed or will appoint, and, in default of such appointment, and so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she so continued up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, residing with her, and after her death continuing to reside on the land, and remaining in possession until action brought. On 1st November, 1892, the plaintiffs' testator, in the alleged exercise of the power of appointment, executed a deed appointing and conveying the lands to another person, who then re-

conveyed to him. He subsequently died, having devised the property to the plaintiffs, and on the 19th March, 1897, an action to recover possession was brought by them:—Held, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses, subject to be divested on the exercise of the power of appointment, and that the deed of the 1st November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of s. 5, s.-s. 11, of the Real Property Limitation Act, R. S. O. 1897 c. 133, which came into possession on the execution of the deed of the 1st November, 1892, and that the plaintiffs, not being barred by effluxion of time, were entitled to recover. *Thuresson* v. *Thuresson*, 30 O. R. 504.

Life Estate—*Trustees — Temperance Society.*]—A grantor, by deed, conveyed certain land to three trustees in trust for certain societies at a named place and their successors, representatives of the aforesaid societies, or the representatives of the said societies (sic) of any temperance society by whatever name it or they might be known or designated. Together with all * * * the estate, right, title * * * of the grantor, his heirs or assigns, habendum, unto the said trustees and their successors in trust for said societies, or such of them as may continue to exist * *. The three temperance societies mentioned in the deed had all ceased to exist for many years:—Held, that the trustees took only a life estate for their joint lives and the life of the survivor of them, leaving the reversion in fee in the grantor:—Held, also, looking at the situation of the premises and the uses for which they were intended, and that the temperance societies originally named were all formed in a certain place, that, although the trust was intended to be confined to temperance societies having the same local habitation, the words in the habendum were large enough to include any temperance society founded at that place while any of the original grantees were living:—Held, also, that the plaintiff, having been appointed a trustee for such a society, although no such appointment could extend or prolong the life estate granted, was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises, which he had commenced to do. *Armstrong* v. *Harrison*, 29 O. R. 174.

Maintenance—*Gift of Board and Lodging—Right of Occupation.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use of another son, the plaintiff, of a bed, bedroom, and bedding, in the dwelling house on the farm, and to his board so long as the plaintiff should remain a resident on the farm:—Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bedroom and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 O. R. 213.

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7. *Habendum.*

Assignment — *Indenture — Estate.*]—Where the granting part of a deed of assignment transfers the indenture simply, and the habendum the estate in the indenture, the estate passes. *Doe d. Wood* v. *Fox*, 3 U. C. R. 134.

Bargain and Sale—*Use.*]—It is superfluous in any deed of bargain and sale to express that the land is to be held "to the use of" the bargainee. *Gamble* v. *Rees*, 6 U. C. R. 397.

Estate in Fee—*Habendum for Years.*]—See *McDonald* v. *McGillis*, 26 U. C. R. 458.

Estate in Fee—*Limitation—Repugnancy.*]—By deed of bargain and sale, A. M. conveyed to H. M., her heirs and assigns, certain freehold premises, to hold the same to the said H. M., her heirs and assigns, "so long as she remains the widow of M. M., but should she marry or decease, the above described land will become the property of the two sons of the said H. M., C. M. and J. M., for ever." Covenants for title were added to the said H. M., her heirs and assigns:—Held, that the habendum constituted a limitation and not a condition; that such limitation was void, as being repugnant to the grant in the premises; and that the grantee took a fee simple. *Doe d. Meyers* v. *Marsh*, 9 U. C. R. 242.

Estate in Fee—*Limitation—Repugnancy.*]—Under a conveyance to A., her heirs and assigns, habendum to A., her heirs and assigns, and in case of her decease leaving issue, then in trust to O. (her husband), his heirs or assigns, to and for the benefit of the said children, their heirs or assigns, to be sold for their benefit, if the said O., his heirs or assigns, should think fit; and if the said A. should not survive the said O., leaving no issue, then to the said O., his heirs and assigns for ever:—Held, that the habendum being inconsistent with the premises, the former must govern, and that A. took a fee. *Gweston* v. *Williams*, 16 U. C. R. 405.

Estate in Fee—*Statute of Uses—Crown Patent.*]—By a patent from the Crown, after a recital of one J. L. having contracted for the purchase of certain land from the Crown lands department at a price specified, the land, in consideration of the payment of said sum by J. L., was granted "to the said J. L. upon the conditions below stated," &c.: "To have and to hold to the said J. L., for the use and benefit of herself and children, Margaret, Robert, and Mary, their heirs and assigns for ever. And also to have and to hold the said parcel or tract of land hereby granted," &c., "unto the said J. L., upon the conditions above stated, her heirs and assigns for ever:"—Held, that in order to carry out the intent of the Crown the second habendum must be transposed, and read as the first, and thereby a fee simple under the Statute of Uses was created in J. L., and her three children named, as the grantees of the first use declared. *Long* v. *Anderson*, 30 C. P. 516.

Estate in Futuro—*Limitation of Use.*]—T. and his son D. desired to effect a certain settlement of landed property, but employed a non-professional conveyancer to draw the deed of settlement, who failed to insert many of the essential provisions of the agreement, and as to the land, made T., in consideration of natural love and affection, grant the same to D., his heirs and assigns, habendum "after the decease of T. unto and to the only proper

use and behoof of D., his heirs and assigns for ever;" and D. now brought this action for waste against T.:—Held, that the deed was not void as passing only a freehold to commence in futuro, for the habendum is not essential to a deed, and the granting part was sufficient of itself to pass the immediate freehold to D., the expressed consideration of natural love and affection sufficing to carry the use to D., in whom the deed, viewed as a covenant to stand seized, would vest the entire estate. But quære, whether the express limitation of the use in the habendum after T.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in D., so that the use of so much of the estate as was not expressly limited, viz., for the life of T., resulted to and vested in T. *Dunlap* v. *Dunlap*, 6 O. R. 141. The decree which directed the deed to be reformed was reversed. See *S. C., sub nom. Dunlop* v. *Dunlop*, 10 A. R. 670 (*post* VII. 3).

Repugnant Subseqent Clause.]—A lease with habendum for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months' written notice prior thereto:—Held, that the clause was repugnant to the habendum and must be rejected, and that the lease terminated at the end of the year without any notice. *Weller* v. *Carnew*, 29 O. R. 400.

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8. *Option to Purchase.*

Sale of Phosphate Mining Rights— *Option to Purchase other Minerals.*]—M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mine for five years and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals, and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B., the original vendor, M. granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages:—Held, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica as to which B. claimed the option *Baker* v. *McLelland*, 24 S. C. R. 416.

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9. *Recitals.*

Deed Poll — *Recitals in — Effect on Grantee.*]—The recitals in a deed poll are not binding on the grantee, being entirely the language of the grantor, and the grantee is not estopped from setting up the contrary in an action not founded on the instrument, and wholly collateral to it. *Minaker* v. *Ash*, 10 C. P. 363.

Erroneous Recital—*Effect of.*]—A testator devised property to his wife, who conveyed to D. in fee. Afterwards D., and S., his wife, joined in a deed for valuable consideration, to M. and his wife, reciting that she was entitled to the property as co-heiress of the testator. Subsequently M. and his wife conveyed to a trustee for S. The plaintiff claimer under S., and, notwithstanding the erroneous recital, the court held her entitled to a conveyance. *Lawlor* v. *Murchison*, 4 Gr. 284.

Evidence—*Recital of Facts.*]—The recitals in a deed put in as evidence:—Held, not conclusive as to the facts therein stated. *Neale* v. *Winter*, 9 C. P. 394.

Evidence—*Recital of Mortgage.*]—Semble, that the recital in a deed proved is sufficient evidence of the contents of a mortgage, so far as therein recited. *Nesbitt* v. *Rice*, 14 C. P. 409.

Guaranty—*Recital of Previous Contract —Error in Date.*]—K. having agreed with the plaintiffs for the purchase of some lumber, the defendants consented to guarantee his punctual payment for the same; but inadvertently the first agreement in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties, as bearing date the 22nd December, 1851, whereas it was dated on the 8th January, 1852:—Semble, that on such an issue, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiff might recover. *Wadsworth* v. *Townley*, 10 U. C. R. 579.

Presumption—*Identity of Grantor—Recitals as to Death.*]—Lands were conveyed, in 1804, by deed to W. R. By a deed poll indorsed upon the deed of 1804, and dated in 1823, W. R., described as "the within named W. R." granted the same lands to trustees of a marriage settlement executed in 1820, under which plaintiffs claimed:—Held, that the W. R. who executed the deed poll would be presumed to have been the grantee of the deed of 1804, notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee of the deed of 1804 was dead before 1820. *Thompson* v. *Bennett*, 22 C. P. 393.

See Melocke v. *Simpson*, 29 S. C. R. 375.

Sheriff's Deed—*Error in Reciting Writ.*]—Ejectment on a sheriff's deed, which recited that by a ven. ex. he had seized the lands, and since the seizure made by virtue of the said writ, had exposed then to public sale, &c., and then granted to the purchaser. It appeared that the lands had been seized under a fi. fa. previously issued, and that the ven. ex. ordered him to sell the lands so seized:—Held, that the misrecitals did not invalidate the deed, and that the plaintiffs might shew what the facts were. *Roe* v. *McNeill*, 14 C. P. 424.

Tax Deed — *Advertisement.*]—Held, that the recital in the tax deed and the advertisement in the Gazette were sufficient evidence of the amount of taxes due, but not of the warrant to sell. *Hutchinson* v. *Collier*, 27 C. P. 249

Unregistered Agreement — *Effect of Recital in—Title to Land.*]—The plaintiff proved a deed to himself from D., dated 3rd July, 1851, registered on the 7th of the same month. The defendant put in an instrument under seal, dated 3rd June, 1847, between one M. and D., reciting that differences had arisen between them, and that M. had brought ejectment to recover possession of this lot, "belonging to the said M.," and, in consideration of M. withdrawing the record, D. agreed that the lot should be valued by certain persons, and covenanted to pay to M., or secure by mortgage on the land, whatever that value might be. No valuation was made:—Held, this agreement being unregistered, that the recital in it could not affect the plaintiff's title. *Rutledge* v. *McLean*, 12 U. C. R. 205.

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10. *Short Forms Act.*

(*See*, also, under LANDLORD AND TENANT—MORTGAGE.)

Appurtenances.] — Where in a conveyance made in pursuance of the Short Forms of Conveyances Act, R. S. O. 1877 c. 102, a parcel of land is accurately described by metes and bounds, the general words of s. 4 will not pass lands with buildings thereon not embraced in the specific description, merely because the buildings were previously used, occupied, and enjoyed with the property specifically described by metes and bounds. Willis v. Watney, 51 L. J. Ch. 181, 30 W. R. 424, 45 L. T. N. S. 739, distinguished. *Hill* v. *Broadbent*, 25 A. R. 159.

Conveyance to Trustees.] — The operation of an ordinary deed of bargain and sale under the Short Forms Act, R. S. O. 1877 c. 102, conveying lands to trustees, considered and acted on. *Seaton* v. *Lunney*, 27 Gr. 169.

Covenant—*Right to Convey—Omission of Words.*—A covenant in a deed, purporting to be made in pursuance of the Act respecting Short Forms of Conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words "notwithstanding any act of the covenantor," contained in column 1 of schedule 2 of the Act:—Held, not a covenant within the statute; but to mean that the covenantor had the right to convey as he had conveyed, i. e., in fee simple. Held, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that defendant had done no act to incumber, by making them absolute covenants; these covenants being in accordance with the form in column 1. *Brown* v. *O'Dwyer*, 35 U. C. R. 354.

Covenant—*Right to Convey.*]—In a deed purporting to be under the Short Forms Act, the covenant was that the grantor had the right to convey, omitting the words "notwithstanding any act of the said covenantor:"—Held, following Brown v. O'Dwyer, 35 U. C. R. 354, that although not in accordance with the statute it bound the covenantor as an absolute covenant that he was seized and had a right to convey in fee simple. *McKay* v. *McKay*, 31 C. P. 1.

Easement—*Implied Grant.*] — One J. S., being owner of the east half of one and the west half of an adjoining lot, by deed, under the Act respecting Short Forms, conveyed to G. S. in fee, the west half, without express mention of any easements, &c. There were then on the west half a saw mill and factory, which then, and for some years during unity of title to both lots, were driven by a river, which was dammed back to form a pond on both lots, by a dam and embankment extending on to both. There was on the west half a grist mill, ready for the reception of machinery, and the embankment was partly cut through to carry the water therefrom to another pond partly begun, from which the grist mill was to be supplied. After the conveyance, G. S. finished the cut through the embankment, carried the water required from one pond to the other by a flume, and thus worked the grist mill, which could not otherwise have been worked. By this he diverted the water from the first pond and from the east half, more than before the conveyance. Such diversion and working of the mill were with the parol license of J. S. The cutting, flume, and grist mill pond were all on the west half, and the water was returned from the mill to the river below the east half:—Held, that, as by the statute the deed included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purposes of the saw mill and factory, to the same extent as before the conveyance. Held, however, that no right or easement passed in respect of the grist mill; and also, that the parol license was revocable; but that the plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S. and those claiming under him from interfering with the right claimed respecting the grist mill. *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63.

Quit Claim—*Form of.*]—S., being owner in fee, by deed expressed to be made in pursuance of the Act to facilitate the conveyance of real property, in consideration of £75, did quit claim to one G., his heirs and assigns for ever, all his right and title to the land in question. It was added that G. might take possession, that S. would execute such further assurances as might be requisite, that he had done no act to incumber, and he released and quitted claim to G. all his claim upon said lands:—Held, sufficient to pass the title in fee. *Nicholson* v. *Dillabough*, 21 U. C. R. 591.

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11. *Other Cases.*

Gravel — *Subsequent Deposit.*] — In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed. Subsequently the company removed all the gravel which was on the land at the date of the deed:—Held, that gravel deposited on the land after the date of the deed, owing to the action of the waters of the lake, did not pass by the conveyance. *Mann* v. *Grand Trunk R. W. Co.*, 32 O. R. 240.

Notarial Deed — *Ratification of Title — Validity — Dower.*] — See *Chevrier* v. *The Queen*, 4 S. C. R. 1.

Notarial Deed—*Warranty — Interest.*]—*See Windsor Hotel Co. v. Cross*, 12 S. C. R. 624.

Trust Deed—*Good in Part.*]—A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trust in respect thereof, as follows: first, to lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor to pay the same, or in the discretion of the trustees a portion thereof, to A. M. during his life; and the trustees sold a portion of the estate, and after the death of the settlor a bill was filed impeaching the settlement as void under the statute of mortmain, which it admittedly was as respected the trusts declared of the corpus of the estate:—Held, that the trusts declared in favour of the settlor and A. M. were sufficient, however, to support the sale which had been effected; and the bill as against the trustees, the purchaser from them, and A. M., was dismissed with costs. *McIsaac v. Heneberry*, 20 Gr. 348.

Servitude—*Creation of — Way — Quebec Law.*]—*See Rioux v. Rioux*, 28 S. C. R. 53 (*post* WAY).

IV. Escrow.

Agreement—*Release — Delivery—Condition.*]—To an action for work and labour, the defendants pleaded a release by agreement under seal, making profert. The plaintiff replied that the agreement was delivered to a third party as an escrow, on condition that it should be void on default made by the defendants in payment of £200 by a certain day; that the defendants did not pay, whereby the agreement became void, and so was not the plaintiff's deed:—Held, that the defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery as part of his case. *Light v. Woodstock and Lake Erie R. W. and H. Co.*, 13 U. C. R. 216.

Assignment for Creditors — *Release — Condition Precedent.*]—R., being indebted to B. and V., the plaintiffs, in $979.76, gives his note in September, 1859, at six months, payable at the Bank of Montreal, in Guelph, with current rate of exchange on New York. In June, 1860, R. made an assignment, to which the plaintiffs were executing parties, which —after reciting an agreement by R.'s creditors to accept 5s. in the £, payable in six and twelve months, to be secured by notes satisfactorily indorsed, and a covenant by R. to pay that sum—contained an absolute release of R. from all those executing it. The plaintiffs before executing this instrument claimed the promised indorsed notes, or to hold the original note till the compromise was paid. On the 6th August, 1860, another assignment was made by R., in trust, till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted—"the party that promised to become a partner drew back." This assignment the plaintiffs did not sign, because when the first offer fell through they sold the original note, and claimed to have nothing more to do with the matter:—Held, that the giving of the notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt. *Benedict v. Rutherford*, 11 C. P. 213.

Bargain and Sale — *Delivery — Condition.*]—Detinue for an indenture of bargain and sale. Pleas, 1. Non-detinet; 2. That the deed was not the plaintiff's. The jury found that the indenture was delivered by one A. to the defendant, to be delivered to the plaintiff after A.'s death, on condition that he (the plaintiff) should keep A. until his death, and should pay his debts; and that the plaintiff had not maintained A., but after his death was ready to pay his debts. Defendant, who was one of A.'s creditors, had refused to accept his debt from the plaintiff, and had destroyed the deed:—Held, that on these facts and pleadings the plaintiff could not recover; for, as to the first plea, the writing, being delivered to the defendant merely as an escrow, was not in fact a deed as described in the declaration; and, as to the second plea, the plaintiff had forfeited his right by a breach of one of the conditions. *Reynolds v. Waddell*, 12 U. C. R. 9.

Conveyance of Land—*Bar of Dower.*]—No form of words is necessary to constitute the delivery of a deed as an escrow, but the facts and surrounding circumstances may be looked at to see whether such was the intention of the parties. On a sale of land the deed and mortgage back for the unpaid purchase money were executed respectively by the vendor and purchaser at one S.'s, and left with him until their respective wives should come in and bar their dower; but there was nothing to shew that the instruments were to have no operation until the dower should be barred, nor until a good title was shewn, nothing having been said at the time as to title, whilst it appeared that the defendant, the purchaser, had been for years in possession of the land, had made a payment on the mortgage, which was indorsed thereon, and used the deed in endeavouring to raise money on the land; and it also appeared that the covenants in the deed were sufficient to protect the purchaser against any claim for dower or against certain incumbrances afterwards discovered:—Held, that there was nothing to justify the inference that the instruments were delivered as escrows until the dower should be barred or a good title shewn. *O'Connor v. Beaty*, 27 C. P. 203.

Conveyance of Land — *Contradictory Evidence.*]—The jury having found that a deed by father to son had been absolutely delivered, although the father asserted the delivery to have been as an escrow only:—Held, that the evidence, set out in the case, supported their verdict. *Young v. Hubbs*, 15 U. C. R. 250.

Conveyance of Land—*When Operative.*]—Plaintiff was defendant's tenant of premises in Toronto, for which rent was in arrear to the amount of $145.83. Defendant sold the premises to the Crown. The deed, dated 23rd October, 1872, was delivered by F., the agent at Toronto of the minister of justice, to M., the agent of the defendant, on the 15th November, for execution. On the 16th it was executed, and was by M. handed to F. as an

escrow, to become a deed when the money was paid. The deed was returned to F. on the 26th November, and he registered it on the 29th, but the money was not paid till the 7th December. Defendant having distrained on the plaintiff for rent on the 29th November:—Held, that the deed did not become operative from its original delivery by relation back, in which case defendant would have had no reversionary interest at the time of the distress, but from the payment of the purchase money only. *Oliver* v. *Mowat*, 34 U. C. R. 479.

Covenant—*Surety—Execution on Condition.*]—Declaration on a covenant by defendant as surety for the payment of rent by one B. Plea, on equitable grounds, that the defendant executed on the understanding and representation, that Y. K. & E. should also execute, and that he should be responsible with them and not solely; and that it was represented to him by B. and by the said K., that immediately after defendant's execution, the other three would execute. It was then alleged that they never did execute, and before any breach and with all due diligence, he gave notice to the plaintiffs of the premises; and that he claimed to have been released by such non-execution. There was also a plea of non est factum:—Held, that the defence was admissible under this plea, as shewing in substance that defendant executed the deed conditionally only, and as an escrow. *County of Huron* v. *Armstrong*, 27 U. C. R. 533.

Covenant—*Surety—Execution on Condition—Ratification.*]—To an action against V. & G. on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and delivered by him as an escrow, until C. should execute, which C. afterwards refused to do, and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied that after both the defendants had executed, V. ratified the agreement and accepted the other defendant as his co-surety. There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition; C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent:—Held, that this was evidence from which a ratification might be inferred, and as the defendant had lain by for years, leaving the plaintiff to believe and telling others that he was bound, a verdict for the plaintiff was upheld. *Henderson* v. *Vermilyea*, 27 U. C. R. 544.

Insurance Policy.]—See *Confederation Life Association* v. *O'Donnell*, 10 S. C. R. 92, 13 S. C. R. 218.

Mortgage—*Discharge of Prior Mortgages.*]—To a declaration on a covenant for quiet enjoyment in a mortgage to the plaintiffs (appellants), executed by T., the defendants' grantee, R., one of the defendants (the respondent), pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, 1855—the deed first. It appeared there were two mortgages from T. to the plaintiffs on another lot when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th October, 1865:—Held, on appeal—affirming the judgment in 32 U. C. R. 222, and reversing the judgment of the court of appeal, 1 A. R. 26—that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover. Held, also, per Strong, J., (the chief justice concurring), that, assuming the deed of the 10th April to have been a completed instrument from its date, the usual covenant contained in it, that the grantor was seized in fee at the date of the deed, created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of the 22nd June, 1855,—Henry J., dissenting. *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 564.

Mortgage—*Registration—Death of Mortgagor.*]—See *Mackechnie* v. *Mackechnie*, 7 Gr. 25.

V. Execution and Delivery.

1. *Delivery.*

Authority to Deliver—*Repudiation.*]—Under an agreement for the sale of land, defendant, on the execution to him of the deed thereof and removal of certain prior incumbrances, was to give back a mortgage for the balance of the purchase money. The defendant by agreement went into possession, and afterwards executed a mortgage and left it with his solicitors, with, as he stated, express instructions not to deliver it over until he was satisfied that all was right and assented to their doing so, and he alleged that without such approval or consent they had filled in the date and delivered it over. In consequence of delay in removal of the incumbrances defendant claimed that the agreement was at an end and quitted possession, repudiating the delivery of the mortgage as being without his consent. In an action by the plaintiff, assignee of the mortgage, on the covenant to pay the mortgage money:—Held, that the evidence, set out in the report, shewed that defendant was fully cognizant of his solicitors' dealings in the matter, and had authorized their delivering the mortgage whenever they should deem it advisable to do so in defendant's interests, which it appeared they had fully protected; and that on the faith of the solicitors' acts the position of the parties was changed, namely, a conveyance executed vesting the title in defendant and incumbrances removed, all of which took place before defendant quitted possession. The plaintiff was therefore held entitled to recover. *Leys* v. *Hollingshead*, 29 C. P. 66.

Date of Delivery.]—A deed will be assumed to have been delivered on the day it bears date. *Hayward* v. *Thacker*, 31 U. C. R. 427.

Date of Delivery—*Re-execution.*]—The plaintiff, by lease, consisting of seven sheets,

and bearing date the 15th March, 1862, demised certain premises to W. On the 21st July following, this lease was cancelled by an instrument under seal; the second and fourth sheets were taken out and replaced by others, and it was re-executed and re-delivered without any other alteration. As it then stood it was dated as before, to hold "from the 1st day of April now next," for nine years "from thence next ensuing," at a yearly rent, payable "in advance, that is to say, on 1st April, 1862, and on the 1st April in each year during the term:" the conclusion being that the parties had thereunto set their hands and seals, "the day and year first above written:"—Held, that the lease took effect from the delivery, on the 21st July, 1862, not the date; that the term began on the 1st April, 1863; that the first year's rent, payable "in advance," was not due until that day, the words, "that is to say, on the 1st April, 1862," being merely falsa demonstratio. *Bell* v. *McKindsey*, 23 U. C. R. 162.

Held, affirming the judgment in the last case, that the lease spoke from the day of re-execution, not from its date; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction. *Bell* v. *McKindsey*, 3 E. & A. 9.

Promise to Deliver.]—A promise to deliver a conveyance includes a promise to execute it. *Whittier* v. *McLennan*, 13 U. C. R. 638.

What Constitutes—*Affidavit of Execution.*]—One M. prepared a deed of land which purported to be executed in plaintiff's favour and delivered by him, and requested one C. to witness his execution of it, which C. did. He procured C. to swear to the affidavit of execution for registry. Subsequently, in a moment of anger against plaintiff, he tore up the deed, the pieces of which plaintiff collected and stitched together:—Held, that the deed was executed and delivered, so as to vest the land in plaintiff. *McDonald* v. *McDonald*, 44 U. C. R. 291. See, however, *S. C.*, 23 C. L. J. 102.

What Constitutes—*Insurance Policy.*]—A suit was brought in this court against an insurance company to recover for loss sustained, on the ground that the policy was not a perfected one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were that the policy had been duly signed by the president and secretary, and countersigned by the agent at L. (the place where the insurance was effected) and was ready to be delivered to the plaintiff:—Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed. *McFarlane* v. *Andes Insurance Co.*, 20 Gr. 486.

What Constitutes—*Registration—Death of Mortgagor.*]—A mortgage in favour of persons in Europe was executed in this country, and left in the hands of the attorney who prepared the security, with directions from the mortgagor not to register it until further orders. After the death of the mortgagor, the mortgage was delivered up to the agent of the mortgagees, who had the same registered:—Held, that there had been a sufficient delivery during the lifetime of the mortgagor, and that a person who entered into partnership with the mortgagor, and thereby acquired an interest in the mortgage estate, with a knowledge of the circumstances attending the execution of the mortgage, did so subject to the claim of the mortgagees. *Mackechnie* v. *Mackechnie*, 7 Gr. 23.

What Constitutes—*Registration—Ignorance of Grantee.*]—See *Muir* v. *Dunnet*, 11 Gr. 85.

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

What Constitutes—*Time.*]—In a bond for a deed, where the condition required that a deed should be "executed and delivered" before a certain day:—Held, that the due execution of the deed before the day and forwarding it to a third party for the obligee, though it was not received until after the day, was a sufficient delivery under the terms of the bond. *Muirhead* v. *McDougall*, 5 O. S. 642.

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2. *Execution by Illiterate Persons.*

Misreading.]—Where the subscribing witness swore that the agreement was not read as it stood upon the record:—Held, no execution. *Hutton* v. *Fish*, 8 U. C. R. 177.

Omission to Read.]—A deed executed by a person making his mark is not invalidated by the mere omission to read it over to him. *Doe d. Biggard* v. *Millard*, E. T. 3 Vict.

Where a blind and illiterate person, an Indian, had been induced to put his mark to a chattel mortgage without its being read over to him, although he desired such reading:—Held, not a sufficient execution. *Owens* v. *Thomas*, 6 C. P. 383.

See *Powell* v. *Watters*, 28 S. C. R. 133.

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3. *Parties.*

Agreement — *Executing Parties not Named.*]—The agreement sued on was headed "specification of school-house in school section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded: "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of $708, one-half on the 15th May, and the other half when the said school-house is completed." Then followed the signatures of the three trustees, with their corporate seal, and the signature of the plaintiff. It bore no date,

but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him $400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed, but the learned Queen's counsel who tried the case without a jury, found for the plaintiff for the balance of the $708:—Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld. *Coghlan* v. *Tilbury East School Trustees*, 35 U. C. R. 575.

Bar of Dower — *Executing Party not Named.*]—A husband by deed aliens land, and the wife, though not named in the commencement as a formal party, in the body of it releases her dower, and both execute it:—Held, a sufficient bar of dower. *Bonter* v. *Northcote*, 20 C. P. 76.

Conveyance by Wife — *Non-joinder of Husband.*]—See *Hartley* v. *Maycock*, 28 O. R. 508.

Conveyance of Land — *Execution by Agent of Grantee — Surplusage.*] — In ejectment a deed under which the plaintiff claimed was stated to be an indenture made at Quebec, in Lower Canada, between G., of the one part, and "H. accepting hereof for and on behalf of" T., of the other part. The consideration was declared to have been paid by T., and the grant of the land was to him, as was also the habendum. The covenants, including one for further assurance, were also made with T. The deed, however, was signed by G. and H.:—Held, that in order to give effect to the deed in every particular according to the plain intent of the parties, the words, "H. accepting hereof for and on behalf of," must be struck out as surplusage and repugnant to the rest of the deed, and thereby the whole conveyance was made operative as a conveyance to T., the signature of H. to the deed being of no consequence, not being necessary in the conveyance. Held, also, that in any event the plaintiff must recover, for, even if the deed could not be sustained in law as conveying a perfect title to T., it would be deemed to be a license to T. to enter upon the land, and he claiming it as his own had sold to a purchaser from whom a good possessory title was shewn. *Elliott* v. *Douglas*, 30 C. P. 398.

Indenture of Apprenticeship—*Execution by Father of Apprentice.*]—By deed between A. B. and C. D., father and son, of the one part, and E. F. and G. H., partners, coach builders, of the other part, the son, with the consent of his father, bound himself apprentice to the coach builders. The instrument contained this clause: "And lastly, for true and faithful performance, &c., the said A. B., C. D., and E. F. and G. H., do bind themselves unto each other in the sum of," &c.:—Held, in debt by the father alone, against E. F., the surviving partner, that all defendant's covenants were with the son and not the plaintiff; that the words "unto each other" did not mean separately and individually, but that each party respectively, *i.e.*, E. F. and G. H. jointly to A. B. and C. D. jointly, became jointly bound to the other; and that there was therefore a non-joinder of plaintiffs. Quære, the sufficiency of the declaration as given in the report. *Connell* v. *Owen*, 3 C. P. 249.

Mortgage—*Executing Party Not Named.*] —See *Foster* v. *Beall*, 15 Gr. 244.

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4. *Seal.*

Omission of Seal—*Bond.*]—Defence to an action on a bond against sureties that the bond when executed had no seals. See *Marshall* v. *Municipality of Shelburne*, 14 S. C. R. 737.

Omission of Seal—*Insurance Policy.*]—The defendants' Act of incorporation provided that "all policies shall * * be signed * * and being so signed and countersigned and under the seal of the company, shall be deemed valid and binding upon them." The policy sued on was issued by the company without the corporate seal being affixed, although the attestation clause stated that the company had thereunto affixed its seal:—Held, affirming the judgment in 29 C. P. 221, that the policy was a valid contract to grant an insurance. *Wright* v. *Sun Mutual Life Ins. Co.*, 5 A. R. 218. Affirmed, *London Life Ins. Co.* v. *Wright*, 5 S. C. R. 466.

Pleading—*Setting out Deed—Oyer—"L. S." Need Not be Inserted.*]—See *Moffat* v. *Loucks*, Tay. 305.

What Constitutes "Sealing."]—A circular flourish with the word "seal" inscribed, is not a legal seal. *Nagle* v. *Kilts*, Tay. 269.

Semble, there is no absolute necessity to put the hand on a seal in executing, or make any declaration of delivery. *Hatton* v. *Fish*, 8 U. C. R. 177.

Defendant had signed the deed, and afterwards merely marked the paper with the end of a poker, opposite to his name, not even acknowledging the mark as his seal:—Held, not a sealed instrument. *Clement* v. *Donaldson*, 9 U. C. R. 299.

Where a seal is set opposite to the name of the party signing, the document must be treated as under seal, although the testatum is, "I hereby subscribe myself." *Whittier* v. *McLennan*, 13 U. C. R. 638.

Semble, that an impression upon the paper, without wax or any extraneous substance, is a sufficient seal. *Foster* v. *Geddes*, 14 U. C. R. 239.

Defendants, having signed a bond, left in a hurry, without having it properly sealed, which was afterwards done, but it was clear they knew it to be a bond, and it was stated on the face of it to be under seal. The jury having found against the defence that the bond was not sealed, the court refused to interfere, holding it not one to be favoured. *Mutual Fire Insurance Co. of Prescott* v. *Palmer*, 20 U. C. R. 441.

A deed had been duly signed by the parties; but, instead of any wax or wafer being affixed thereto for seals, slits had been cut in the parchment, and a ribbon woven through, so

as to appear on the face of the document at intervals, opposite one of which each of the parties to the deed signed:—Held, a seal. *Hamilton* v. *Dennis*, 12 Gr. 325. Affirmed by the court of error and appeal, 14th March, 1867.

The covenant on the back of a mortgage had no seal on it when produced at the trial, but there was a mark of where the seal had been, and the witness to its execution swore he had put a seal on it before execution. It was contended on defendant's part that the covenant was invalid, not being proved to be under seal. The point being left to the jury, and they having found for the plaintiff, the court considered the evidence sufficient to support the finding. *Stewart* v. *Clark*, 13 C. P. 203.

Held, that where one of two partners signed in the name of both in the presence of the other, and for him, with his assent, though there was but one seal, it was the deed of both. *Moore* v. *Boyd*, 15 C. P. 513, 23 U. C. R. 459.

The testimonium clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal was a visible impression made by the pen in the form of a scroll, in which was inscribed the word "seal:"—Held, a sufficient sealing of the document. *Re Bell and Black*, 1 O. R. 125.

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5. *Other Cases.*

Blanks—*Evidence of Bond of Suretyship to Crown Being Executed in Blank—Estoppel of Defendant from Denying Execution.*]—See *Regina* v. *Chesley*, 16 S. C. R. 306.

Blanks—*Filling in after Execution—Authority—Attorney.*]—The Crown, in 1798, granted 5,000 acres, including the land in question to J. H. and E. H. and three others. In 1800 E. H. became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1858. In 1804 J. H. conveyed "all his fourth part or share" of the lands mentioned in the above patent," "containing in all five thousand acres," to his brother-in-law, M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection, and of $1 paid. When executed, the words "fourth" and "five thousand" were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks, and told M. to fill them up according to the fact; adding in a postscript, that if any errors should be found in the deed, he authorized M. to rectify them, and that such corrections should be valid as if he had made them himself. The words "fourth" and "five thousand" were inserted after M. received the deed in Lower Canada. On the 9th January, 1805, M. and his wife, A., and J. H., by deed reciting the patent, conveyed to R. and D. 2,000 acres, parcel of the 5,000 granted, "being the undivided part and portion of the said 5,000 acres belonging under and by virtue of the said letters patent to J. H. and A. M." This deed was executed by M. and his wife, and by J. H., by his attorney M., but there was no evidence of any power of attorney to M. The plaintiff claimed under these conveyances; defendant under a deed from the heir-at-law of J. H.—Held, that by the deed of 1804 J. H.'s share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstances. 2. That the conveyance of 1805 passed his share as belonging to M., though the execution by M., as his attorney, could have no effect for want of authority. *Stuart* v. *Prentiss*, 20 U. C. R. 513.

Blanks—*Filling in after Execution—Authority.*]—A debtor, on going away to raise funds to pay his debts, signed and sealed a printed form of mortgage upon certain lands, without inserting either the name of himself or the mortgagee therein; his wife also executed it, and he locked it up in his desk. From Halifax he wrote to his agent in Upper Canada instructing him to fill up the blanks as he should find necessary, which was accordingly done, and handed over to the mortgagee:—Held, that this was a sufficient execution of the mortgage; and that it was valid. *Bank of Montreal* v. *Baker*, 9 Gr. 97.

Held, affirming this decision, that whether the deed there mentioned as having been executed in blank operated as a deed, or as a mere parol agreement, it created a charge upon the equitable estate of the debtor; and that a registered judgment creditor, having notice thereof before the registration of his judgment, would be bound thereby. *Bank of Montreal* v. *Baker*, 9 Gr. 298.

Compelling Execution.]—An application for an order to compel a party to execute a deed directed to be executed, should be on notice, and will not be granted ex parte. *Westmacot* v. *Cockerline*, 2 Ch. Ch. 442.

Compelling Execution—*Volunteer.*]—The court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value. *Ross* v. *Fox*, 13 Gr. 683.

Compelling Proof of Execution.]—A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry. *Regina* v. *O'Meara*, 15 U. C. R. 201.

Composition and Discharge—*Execution by Insolvent after Filing—Alteration—Perfecting.*]—G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county Judge on the 2nd December, 1868, but the confirmation was reversed in this court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the Judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note:—Held, per Richards, C.J., that the deed was invalid, because not properly executed by the insolvents. Per Wilson, J., that such execution was not an alteration of the deed, for the insolvents, being named in

and parties to the deed, were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under s. 9, s.-s. 2, of the Act of 1864, were necessary after the execution by the insolvents, and for want of this, it was ineffectual:—Held, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it. *Allan* v. *Garratt*, 30 U. C. R. 165.

Date of Execution — *Operation — Presumption.*]—A conveyance of land, dated 27th March, 1824, was to hold to the grantee from the 30th day of the same month until the day of her decease:—Held, that though it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; and that, under the facts stated in the case, the jury might properly have been asked to presume one or both of these propositions in favour of the grantee. *Nolan* v. *Fox*, 15 C. P. 565.

Defect in Form — *Quebec Law.*] — See *Powell* v. *Watters*, 28 S. C. R. 133.

Evidence of Execution—*Production of Registered Duplicate — Alterations in.*]—See *Graystock* v. *Barnhart*,, 26 A. R. 545.

Executors—*Signature.*] — Executors empowered under a will to sell lands, are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

Partnership — *Execution by one Partner.*]—Upon an application under 29 & 30 Vict. c. 45 for the discharge of a prisoner committed under the Apprentices and Minors' Act for disobedience to his masters, on the ground, inter alia, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm:—Held, that it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to show that his co-partners had not been present and assented to the execution. *Regina* v. *Mahoney*, 5 P. R. 438.

Pleading—*Non est Factum.*]—In order to except to the execution of a deed, the defendant should plead non est factum; he should not demur. *Burns* v. *Robertson*, 8 U. C. R. 280.

Power of Attorney.] — A prior deed, through which the title comes to the vendor, having been executed by the attorney of the grantor, does not render the title invalid, or such as a purchaser will not be bound to accept. *Farrell* v. *Moore*, 1 Ch. Ch. 139.

Power of Attorney — *Attorney Made Grantor.*]—A. received from B. a power of attorney to sell lands. Under the power A. delivered to C. a deed professing to be made as follows:—"Between A., by and under power of attorney, bearing date, &c., by and from one B., &c., yeoman, of the first part, and C., of the other part." Throughout the deed, A., the party of the first part, was made the grantor, and the deed was thus executed: Signed A. [L.S.], signed C. [L.S.]:—Held, that B.'s interest did not pass by the deed. Semble, that, even if B. had been made the granting party, the deed would have been inoperative from the informal mode of execution. *Dacksteder* v. *Baird*, 5 U. C. R. 591.

Ratification of Execution — *Presumption from Presence at — Acquiescence.*] — See *Powell* v. *Watters*, 28 S. C. R. 133.

Sheriff's Sale—*Inoperative Deed—Power to Execute Another.*]—The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it in such terms that on the face of the deed no parcel could be distinguished from the rest, and allowed to pass alone:—Held, that he must be considered in the same light with any other person having a power to execute: that he could not be regarded as functus officio by the execution of the first deed, which was wholly inoperative and void: and that he might therefore, in 1849, make a deed of the part actually sold. Quære, whether, in this case, the debtor having a title to all the land conveyed, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone under such circumstances, though the case might be otherwise if the mistake had arisen from including land not owned by the debtor. Quære, also, whether the proper course would not have been to apply to the court to set aside what had been done under the execution. *Doe d. Tiffany* v. *Miller*, 10 U. C. R. 65.

Signature.]—Signing is not essential to a deed, but should never be dispensed with. *Judge* v. *Thomson*, 20 U. C. R. 523.

Signature — *Partnership.*]—Defendants, B. and A., being in partnership, agreed under seal to buy a quantity of tobacco, B. signing the name of defendants' firm opposite to one seal. Quære, whether one or both defendants could be held liable upon the deed. *Moor* v. *Boyd*, 23 U. C. R. 459.

Signature — "*Signed*" — *Copy.*] — The word "signed" before the lessor's name to a lease, raises no presumption that the instrument is a copy, not the original. *Becher* v. *Woods*, 16 C. P. 29.

Stamps.] — Deeds executed in England, conveying land in this Province, do not require to be stamped under the provisions of the English Stamp Acts, but are valid in this Province though unstamped. *Murray* v. *Van-Brocklin*, 1 Ch. Ch. 300.

Unincorporated Body.] — Where four persons, described not by their own names and personal descriptions, but as a collective body, not shewn to be corporate, signed and sealed a deed with their own names and seals, they were held to be individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

VI. Lost Deeds.

Articles of Clerkship.]—Where an attorney's clerk had lost his articles of clerkship, he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *In re Loring*, M. T. 2 Vict.

Bond—*Nonsuit.*]—Where the plaintiff was nonsuited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, the nonsuit was set aside and a new trial granted on payment of costs, the bond having been afterwards found. *Muirhead* v. *McDougall*, H. T. 2 Vict.

Conveyance of Land—*Subsequent Conveyance after Loss.*]—G., in consideration of his support and maintenance, conveyed to McR. certain land. The arrangement fell through, and the land, it was alleged, was reconveyed by a deed, which was supposed to have been lost, and which contained a covenant for further assurance. Before such reconveyance, however, G. made a similar arrangement with R., and McR., at the instance of G., conveyed the land to R. This arrangement was also abandoned, and a new one similar in its object was entered into between G. and N., which lasted for upwards of six years, and the conveyance executed pursuant thereto was considered effectual. With full notice of this, K. also entered into an arrangement with G., and with his assent took a conveyance from R., which gave him the legal estate. N. having died, his son filed a bill, alleging the loss of the conveyance to McR., and seeking to compel the execution of another deed by him to G. in place of the last one, or a conveyance to himself as claiming under G., praying, also, that K. might be ordered to join in such conveyance. At the examination of witnesses the supposed lost deed came to light in the hands of an attorney with whom it had been deposited, but its genuineness was denied by McR. K. had supported G. for some time, and in his answer sought to avoid the conveyance to N., by alleging insufficient support of G. Under these circumstances the bill, as against McR., was dismissed with costs, but it being considered that under the pleadings relief might properly be given as against K., although the bill was not filed principally with that object, K. was ordered to convey to the plaintiff, on receiving compensation in respect of his support of G., not exceeding the amount which N. had agreed to pay in the event of his failure to provide G. with support, the plaintiff as against K. being allowed only such costs as he would have been entitled to if the suit had been instituted against him alone upon the equity existing between himself and K. *Nickles* v. *McRoberts*, 10 Gr. 473.

Mortgage—*Evidence of Loss—Indemnity—Interest—Costs.*]—Where a mortgagee loses the mortgage deed, he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand third persons may have acquired, by deposit of the deed or otherwise, to the money or any part thereof. After the loss of a mortgage deed, the mortgagor offered to pay the overdue interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults:—Held, that the plaintiffs must bear the expense of proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. *McDonald* v. *Hime*, 15 Gr. 72.

Mortgage—*Loss of—When a Defence.*]—See *Macaulay* v. *Boyle*, 25 C. P. 239.

VII. Reformation of Deeds.

1. *Generally.*

Absolute Conveyance—*Cutting Down.*]—To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only, the evidence of such intention must be of the clearest, most conclusive, and unquestionable character. *McMicken* v. *Ontario Bank*, 20 S. C. R. 548.

Evidence—*Requisites.*]—In order to secure the rectification of an instrument, the clearest evidence is required to be adduced. If the court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of witnesses, paying due regard to their interest in the subject-matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it. *Clarke* v. *Joselin*, 16 O. R. 68.

Evidence — *Requisites—Agreement—Mistake.*]—In order that a deed may be reformed by the court, there must be at least two things established, namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed. *McNeill* v. *Haines*, 17 O. R. 479.

Evidence—*Requisites—Mistake.*]—To induce the court to vary a written instrument, on the ground of alleged mistake, the evidence must be of the strongest character. *Williams* v. *Felker*, 7 Gr. 345.

Evidence—*Sworn Answer.*]—In suits for the rectification of deeds the court of chancery allowed great weight to the statements made by the answer. *Cotton* v. *Corby*, 7 Gr. 50, 8 Gr. 98.

Misunderstanding.]—A court of equity will not give relief by way of rectification of a written agreement, merely on the ground that one of the parties misunderstood its true construction and legal effect at the time of execution. Every party to a contract has a right to assume that the other parties intended it to operate according to the proper sense of the words in which it is expressed. *Campbell* v. *Edwards*, 24 Gr. 152.

Voluntary Deed.]—The court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value. *Ross* v. *Fox*, 13 Gr. 683.

Voluntary Deed.]—A voluntary deed will not be reformed against the grantor. *Bellamy* v. *Badgerow*, 24 O. R. 278.

2. *Agreements under Seal.*

Conflict of Verbal Evidence.]—Reformation of agreement for renewal lease by inserting a provision for reference to arbitration as to the terms. The evidence as to mistake in omitting such provision being chiefly the verbal testimony of defendant, which the plaintiff denied:—Held, that the agreement clearly could not be reformed. *Dawson* v. *Graham*, 41 U. C. R. 532.

Meaning of Words—"*Contract Price.*"] E. contracted with the plaintiffs for the manufacture by him into logs of all the pine timber on a certain timber limit owned by the plaintiffs, during a period of six years from 1st October, 1867, for an aggregate sum of money equal to the sum of $1.29 for every standard log delivered and accepted, the plaintiffs advancing to E. "three-fourths thereof as the work progressed, and the balance on delivery of the logs, namely, for each and every log accepted and delivered as above mentioned, and cut on any lots numbered * * the sum of $1.12½; for similar logs cut on any of the lots numbered * * the sum of $1; for similar logs cut on any of the lots numbered * * the sum of $1.50; for similar logs cut on the remaining lots of the said limit the sum of $1.29; and the balance, if any, on the completion of this contract. And should it be found that the aggregate of the said advances will amount to more than $1.29 for each standard log, then the parties of the second part (the plaintiffs) shall be at liberty to reduce their advances by such excess, so that on completion of the contract they shall not have advanced and paid * * more than the said sum of $1.29 for each such standard saw log." E. entered upon the task of carrying out the contract, and worked for two years thereunder, when he died intestate, and letters of administration were, by his father, obtained to his estate; an arrangement having in the meantime been entered into between the plaintiffs and the father, whereby the plaintiffs were to assume all the debts and liabilities of E. incurred in connection with the contract, and account for the value of the logs got out by the deceased "at the contract price." In a suit brought by the administrator against the present plaintiffs, he claimed and recovered judgment for $1,880.54, being the balance remaining due to the intestate's estate, computing the price of the saw logs at $1.29 each, which the court of common pleas determined was the sum properly chargeable under the agreement. The plaintiffs, insisting that the words "contract price" meant the sum of $1, $1.12½, and $1.50, according to the section from which the logs were obtained, filed a bill in chancery, seeking to have their agreement with the administrator varied in this respect, and obtained a decree for that purpose, although the administrator swore that he had never entered into such an agreement. On appeal to the court of appeal, that decree was reversed with costs; and the bill ordered to be dismissed with costs. *Campbell* v. *Edwards*, 24 Gr. 152.

Mistake—*Omission of Proviso.*] — Defendant applied to the plaintiffs to purchase from them 10,000 barrels of crude petroleum oil, for exportation; and the plaintiffs, at a meeting of their board at which defendant was present, passed a resolution accepting defendant's application for the purchase of said oil for exportation, and that he was not to offer any refined oil for sale up to 15th July, 1877, provided the London Oil Refining Company should make an arrangement with the plaintiffs and continue their monopoly till that date: this proviso being added at defendant's instance. An agreement under seal was then drawn up and executed by the parties, containing a stated sum as liquidated damages for a breach thereof, but omitting the above proviso. The president of the plaintiff company said, but the defendant denied, that he told the defendant at the meeting that the contract must be absolute, and that he, the president, would not have signed it otherwise. He instructed the plaintiffs' solicitor to draw it without the proviso, and the defendant so executed it, believing, as he swore, that it contained the proviso, his attention not having been specially called to the omission. Afterwards the arrangement which had been made with the London Oil Refining Company was put an end to, and the monopoly ceased to exist. In an action by the plaintiffs to recover the said damages for breach of the agreement, in selling crude and refined oil in the Dominion:—Held, upon the above facts, and upon the evidence set out in the report, that they could not recover; that the resolution, which had not been rescinded by any corporate act of the plaintiffs, must govern; that the defendant should have been informed of the omission; and that the defendant was entitled to have the instrument reformed by inserting the condition. *Petrolia Crude Oil and Tanking Co.* v. *Englehart*, 29 C. P. 157.

Non-existence of Part of Subject-matter.]—On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain non-resident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available; and its supposed existence had been an element in determining the amount to be paid:—Held, on rehearing, that the corporation was not entitled to have the agreement altered so as to make the money payable by the other absolutely. *Township of Arran* v. *Townships of Amabel and Albemarle*, 17 Gr. 163.

See S. C., 15 Gr. 701.

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3. *Conveyances of Land.*

Confirmation Deed—*Material Error.*]—Where there was a material error in a confirmation deed of land sold with the sanction of the court under C. S. U. C. c. 69, an application made after the repeal of that Act for an order authorizing the execution of a new deed was refused. *Re United Presbyterian Congregation of London*, 6 P. R. 129.

Cutting down to Mortgage — *Contre Lettre—Evidence.*]—See *Hunt* v. *Taplin*, 24 S. C. R. 36.

Cutting down to Mortgage—*Deed Executed to Protect Property from Creditor.*]—See *Mundell* v. *Tinkis*, 6 O. R. 625.

Cutting down to Mortgage — *Evidence.*]—See *McMicken* v. *Ontario Bank*, 20 S. C. R. 548.

Grant to Non-existent Party.]—In one of the conveyances in the chain of title, the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it:—Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty. *Re Clarke and Chamberlain*, 18 O. R. 270.

Limitation of Covenant.]—Held, that the evidence set out in the report of this case shewed that the agreement of the parties was that the plaintiff should have a deed with covenants as distinguished from a quit claim deed, and that it was through the mistake of all the parties that the covenant, as framed, was entered into, and that the deed should be accordingly reformed by limiting the covenant to the grantor's own acts in the usual form. *McKay* v. *McKay*, 31 C. P. 1.

Omission of Covenant.] — In an action against the defendant for unpaid purchase money on the sale of land, the deed thereof, as well as the receipt indorsed thereon, acknowledged the payment; but in an equitable defence, as also at the trial, the defendant admitted the non-payment thereof, but claimed that he was not liable to pay it because the plaintiff had agreed at the time of the sale, on the faith of which agreement the defendant purchased, to pay off a prior incumbrance, and that a covenant to that effect had been omitted by mistake; that the same had not been paid off by the plaintiff, but had been paid by the defendant; and the defendant prayed that the deed might be reformed by the insertion in the deed of such covenant:—Held, that, notwithstanding the receipt under seal, the court could entertain the plaintiff's claim as an equitable demand under s. 2 of the A. J. Act of 1873; but that the evidence, set out in the report, failed to establish the agreement relied on. *Parkinson* v. *Clendinning*, 29 C. P. 13.

Omission of Part of Land — *Relief of Grantor.*] — The plaintiff was entitled to a conveyance from defendant of half a lot of 160 acres; defendant wished to give 50 acres only. A friend of both, aware of their mutual rights, was requested by the plaintiff to obtain the deed as claimed by him; he procured the defendant to execute a deed which conveyed 50 acres only, and which the defendant executed in that belief, as this person knew; but he thought that it really conveyed the half lot or the 80 acres, to which the plaintiff was entitled. He took the deed to the plaintiff, telling him that it conveyed the 80 acres, on which the plaintiff accepted the deed. The plaintiff was not then aware of the different belief which the defendant had in signing it:—Held, that the plaintiff was entitled to have the deed corrected, and made to embrace the 80 acres. *McDonald* v. *Ferguson*, 17 Gr. 652.

Omission of Part of Land — *Trust Deed.*]—A deed of trust was executed by a debtor, and by a mistake in setting out the metes and bounds a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained and registered a judgment against the debtor:—Held, that the assignees in trust were entitled to have the mistake rectified, and that the lien of the judgment creditor did not attach upon the land. *McMaster* v. *Phipps*, 5 Gr. 253.

Omission of Provisions.]—In an action to restrain waste it was shewn that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making; the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The court reversed the decree of the court below (6 O. R. 141), directing the deed to be reformed; and ordered the bill to be dismissed with costs and the deed to be delivered up to be cancelled. *Dunlop* v. *Dunlop*, 10 A. R. 670.

Omission of Words of Inheritance.]—Held, in this case, that, although equity has ample powers to supply words of inheritance in a deed, no case was established for the reformation of the deed in question. *Trust and Loan Co.* v. *Clarke*, 3 A. R. 429.

Omission of Words of Transfer.]—Where there was a contract for the sale of a reversion, and the deed purported to relinquish and quit claim the property, with no other words of transfer, the court held that, in order to remove any doubt, the vendee was entitled to have proper technical words introduced. *Collver* v. *Shaw*, 19 Gr. 599.

Quit Claim Deed — *No Consideration — Purchaser for Value—Equities.*]—The defendant, a man of weak intellect, was fraudulently induced to execute a quit claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed to plaintiffs in these suits, for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in the court of chancery to reform the deed executed by defendant, or, treating it as a contract only, for a specific performance thereof:—Held, that, though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his favour, the court could not interfere to give the plaintiffs relief. 2. That though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief, were he a plaintiff, still they were no ground for granting the plaintiffs the relief sought; and the court dismissed the bill with costs. *Livingstone* v. *Acre*, 15 Gr. 610.

Substitution of Proper Words of Inheritance.]—A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties "and their successors," which words it was proved would convey the fee simple according to the law of Lower Canada, and it was shewn that the grantor's intention was to convey the lands absolutely. The court ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada. *Allan* v. *Thorne*, 3 Gr. 645.

Voluntary Deed — *Estate in Fee instead of Life Estate.*]—By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder, to her issue, but, through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in the writ. The purchaser afterwards claimed the fee in the lands under the terms of the deed of gift and the conveyance from the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred on the ground that the plaintiffs had not shewn any interest in the land:—Held, that the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified; and that their delay in filing the bill was not such as should deprive them of their right to relief. To such a bill it was considered that the grantor in the deed of gift was not a necessary party, but that the grantee must be made a party, as she had a right to insist that the deed had been correctly drawn, and the defendant had a right to have her before the court in order to protect him from another suit. *Calvert* v. *Linley*, 21 Gr. 470.

Whole of Lot instead of Part—*Purchaser for Value — Representation — Estoppel.*]—The trial Judge found that in a conveyance by a deceased person to one S., and in all the subsequent transactions and conveyances, there had been, without deceit or fraud on either side, but from accident and ignorance, mutual mistake in designating the land as the whole of lot 7 instead of a part thereof, and he gave judgment declaring that the defendant was entitled only to such portion as was intended to be conveyed:—Held, reversing the judgment, that the evidence was not satisfactory or conclusive. Dominion Loan Society v. Darling, 5 A. R. 577, followed. Held, also, that the defendant was entitled to the benefit of his grantor's position as purchaser and registered owner for value, and was not estopped by a representation made by him to the plaintiff. *Ferguson* v. *Winsor*, 10 O. R. 13, 11 O. R. 88.

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4. *Leases.*

Omission of Proviso—*Evidence.*] — The lessee set up an agreement between himself and the lessor that the lease should expire at her death, in case she should not live for the full term of ten years, and asked that the lease should be reformed accordingly. The only evidence in support of this was that of the lessee and his wife, and of a relation of theirs, whose memory was shewn to be untrustworthy:—Held, that this evidence was not sufficient, after so many years of acquiescence, and after the death of the lessor, to justify the reformation of the lease. *Thatcher* v. *Bowman*, 18 O. R. 265.

Proviso as to Manure — *Purchaser for Value.*]—M., being possessed of certain lands subject to a mortgage, made a lease thereof for a term of years to the plaintiff, which provided, amongst other things, that $15 should be expended in the first year of the term in procuring manure for the purposes of the farm. Afterwards he created a mortgage in favour of the defendant, and assigned to him this lease as collateral security. The defendant distrained for rent, and plaintiff replevied the goods seized, asserting that there was no rent due, and proved the payment of certain moneys to the first mortgagee, and claimed also credit for $15 a year in respect of manure furnished and expended in each year on the premises, which, at the trial, was proved to have been the true agreement between the landlord and tenant, though not so expressed in the lease; and the lease was ordered to be reformed accordingly:—Held, that the lease should not have been reformed as against defendant, he being a bonâ fide purchaser for value, without notice of the facts on which the plaintiff's equity rested. *Forse* v. *Sorercen*, 14 A. R. 482.

Rent — *When Payable — Uncertainty.*] — Defendant on the 2nd September, 1872, leased land to the plaintiff for five years from the 1st October, 1872, at the yearly rent of $230, payable "on the 1st day of October of each year in each and every year" during the continuance of the term, "the first payment of $200 to be made on the 31st December, 1872, in advance, the balance of said year's rent, amounting to $30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th October, 1873, for the second year's rent, defendant pleaded the general issue by statute:—Held, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease in accordance with the agreement of the parties; and a verdict for the plaintiff was set aside on payment of costs to enable him to do so. *Brown* v. *Blackwell*, 35 U. C. R. 239.

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5. *Mortgages.*

Amount—*Increase of—Evidence.*]—To induce the court to vary a written instrument, on the ground of alleged mistake, the evidence must be of the strongest character. Where, therefore, a bill was filed to rectify an alleged error in a mortgage, by inserting "£225" instead of "£125," and defendants denied any mistake, and the conveyancer who drew the deed swore that he had read over distinctly the written portion of the conveyance, that the mortgagee had corrected him as to the time of payment, and that he thought he could not have been understood as reading "two" when he read "one," and it also appeared that the instructions for the mortgage had been given to another person in the absence of the conveyancer, and were read over to the parties at the time, the court dismissed the bill with costs. *Williams* v. *Felker*, 7 Gr. 345.

Amount — *Proviso for Payment — Wrong Amount—Omission of Redemise Clause—Rescission.*]—Defendant applied to the plaintiffs, a money lending company, after being shewn their loan tables, on a form of application provided by the plaintiffs, for a loan of $2,000, payable in twenty years, by quarterly payments, according to the plaintiffs' scale of repayments. This scale shewed the quarterly payment required to repay $1,000 in twenty years to be $26.85, or $53.70 for $2,000, the

sum required by defendant. The loan tables had this notice printed on them:—"The loan table is for the inspection of all, rendering borrowers free from the possibility of extortion, deception, or fraud, the loan being made at a fixed uniform rate." The application was submitted to the loan committee of the plaintiffs' board of directors and passed, it not being shewn or appearing that the committee was aware of any change from the loan table. A mortgage was afterwards prepared under the directions of the plaintiffs' manager, and signed by the defendant, wherein the quarterly payment was stated to be $57.60 instead of $53.70, and the plaintiffs' manager swore that he told defendant the quarterly payment would be $57.60 when he applied for the loan. This the defendant denied. The mortgage contained no redemise clause. Defendant paid the first quarterly instalment, stating that he thought the amount too much. The second he got a member of the plaintiffs' company to pay for him, telling him, as he said, of the mistake. This person, being indebted to defendant, paid the full amount. When the third payment matured, defendant tendered to plaintiffs the correct amount, after crediting himself with the overpayments on the first two instalments. This the plaintiffs refused to accept, and brought ejectment, claiming a right to possession of the land mortgaged, both by reason of the default in payment of the third instalment, and because there was no redemise clause:—Held, that the loan table and defendant's written application referring thereto, accepted by plaintiffs' loan committee, constituted the agreement between the parties, and that the mortgage, notwithstanding the manager's statement that he had told the defendant the amount of the quarterly payment as stated in the mortgage, did not correctly set forth the true agreement, and therefore the defendant was entitled to have it reformed; and that rectification, and not rescission, was the proper remedy. Held, also, that, notwithstanding the omission of the redemise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiff company, that it was the intention of the parties that the defendant should retain possession until default, and the plaintiffs should, therefore, be enjoined from disturbing defendant's possession until such default. *Superior Savings and Loan Society* v. *Lucas*, 44 U. C. R. 106.

An appeal was allowed on the grounds mentioned in the dissenting judgment of Hagarty, C.J., in the court below, viz., that the defendant was entitled to a decree for rescission only, and that a decree for rectification of the mortgage was improper, the parties never having been ad idem. *S. C.*, sub nom. *Superior Loan and Savings Co.* v. *Lucas*, 15 A. R. 748.

Amount—*Reduction of.*]—Before the face of a mortgage is altered by reducing the amount secured, there must be clear evidence by which to act. *Fraser* v. *Locie*, 10 Gr. 207.

Dower—*Omission to Bar.*]—A voluntary deed will not be reformed against the grantor. And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death, paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower. *Bellamy* v. *Badgerow*, 24 O. R. 278.

Exchange of Mortgages—*Personal Liability.*]—The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant, guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment, that the mortgage assigned was a good and valid security, alleging that it was not so:—Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged. *Clarke* v. *Joscelin*, 16 O. R. 68.

Inclusion of Land not Intended—*Action Against Assignees of Mortgage.*]—See *Bridges* v. *Real Estate L. & D. Co.*, 8 O. R. 493.

Omission of Part of Land—*Buildings.*] The owner of a lot of land mortgaged the west half thereof when it was supposed that the east and west halves were divided by a highway. Subsequently it was discovered, upon a survey made, that a small portion of the east half was embraced in what was always taken to be the west half only. At the time of the mortgage there was a grist and saw mill under one roof, about one-third of which was on the strip; there were also a tavern, storehouse, barn, and piggery, all on the strip, and the west half and strip had always been occupied as one property by the mortgagor, who delivered up possession of the whole to the agent of the mortgagee. Afterwards the mortgagor sold the east half up to the road; and subsequently, having become bankrupt in the meantime, took a lease of the west half, "with a grist mill, saw mill, tavern, sheds, store," &c., and no mention was made in the bankrupt's schedule of assets of any claim upon this property. On a bill filed by the holder of the mortgage against the mortgagor's assignee in bankruptcy:—Held, that the plaintiff was entitled to have the mortgage rectified, and to a decree of foreclosure for the whole of the property, including this strip; but, under the circumstances, without costs. *Russel* v. *Darcy*, 6 Gr. 165.

Omission of Part of Land—*Evidence.*]—A mortgage may be reformed by inserting additional parcels, on clear parol evidence that the omission was by mutual mistake. *Forrester* v. *Campbell*, 17 Gr. 379.

Omission of Part of Land—*Evidence.*]—The plaintiffs sought a rectification of the description of the premises covered by a mortgage to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied on parol testimony, while the documentary evidence was all in favour of the defendant:—Held, affirming the judgment reported in 27 Gr. 68, that no case was made for a reformation of the mortgage. *Dominion Loan Society* v. *Darling*, 5 A. R. 576.

Omission of Part of Land—*Insolvency Proceedings.*]—In proceedings in insolvency mortgagees claimed to rank upon the insolvent

estate for the excess of their claim over the value placed by them upon the mortgaged premises, after which they discovered that certain property intended to be included in the security had, by mutual mistake, been omitted therefrom, whereupon they filed a bill in chancery to have the mortgage rectified and the security realized:—Held, that the fact of the mortgagees having so proceeded in insolvency formed no objection to the relief asked, and the court ordered a rectification of the instrument as prayed, as this was a matter dehors the administration of the assets, in which the Judge in insolvency could not give adequate relief; remitted the parties back to the insolvency proceedings with a view of the same or a new value being placed by the mortgagees on their security, in order that the assignee and creditors might proceed under the statute; and in the event of those proceedings resulting in the security being retained by the mortgagees, the court directed the bill to be retained to enable them to resume proceedings here to realize the security, for which purpose it would be necessary simply to file a petition stating shortly the proceedings taken and their result. *Cameron* v. *Kerr*, 23 Gr. 374.

Omission of Part of Land — *Land Shown by Mortgagor to Mortgagee.*]—See *Merchants' Bank of Canada* v. *Morrison*, 19 Gr. 1.

Omission of Part of Land—*Municipal Corporation.*]—Where a mortgage on land was executed to a municipal corporation, for the purpose of securing a debt due to the corporation by its treasurer, and by a mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage, it was held that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled. *Brown* v. *McNab*, 20 Gr. 179.

Omission of Part of Land—*Notice.*]—B., having a mortgage over 23 acres, filed his bill to foreclose. A., B., and C., having liens, were made parties, and their position settled by the master. A. held a mortgage as executor of a deceased mortgagee. B. redeemed and applied by petition to rectify an alleged mistake in C.'s mortgage, so as to make it a lien over an additional 25 acres prior to A.'s, over the same land. B. failing to prove that A.'s testator had notice of the error at the time of taking his mortgage, the relief sought was refused. *Ogilvie* v. *Squair*, 10 Gr. 444.

Omission of Part of Land—*Subsequent Purchase.*]—M. & B., owners of certain village lots of land, were in possession of an adjoining water lot in a lake, the title to which was in the Crown, and to which, according to the practice of the Crown lands department, they had a right of preëmption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to R. of the village lots and certain other lands was intended to comprise the water lot and mill, but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons. M. & B. having become insolvent assigned all their property for the benefit of their creditors, and the assignee sold at auction all their property, including the mill. The sale was made subject to certain printed conditions, one of which was that, as all the information relating to the titles of the property was set out in the schedules, stock list, and inventory, the vendor would not warrant the correctness of the same, and that no other claims existed, "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers, to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money, and he took an assignment to himself after the sale, paying the amount out of the purchase money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages. R., the mortgagee of the village lots, brought an action to have his mortgage rectified, so as to include the water lot and mill property, omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice:—Held, that there being ample evidence to establish, and the trial Judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R.'s equity before paying the purchase money and taking a conveyance, these facts must be taken to be established, and the findings deemed final on this appeal, and they established R.'s right to have his mortgage reformed. *Utterson Lumber Co.* v. *Rennie*, 21 S. C. R. 218.

Substitution of Land—*Wrong Half of Lot.*]—A., being in possession of the east half of a lot, claiming title thereto, mortgaged the west half. On a bill against his heir to reform the mortgage by substituting the east half, it was shewn that A. had no claim to the west half, which was an improved farm, of which others had, for many years, been in possession. The defendant neither admitted nor denied the mistake:—Held, that the plaintiff was entitled to a decree for reforming the mortgage. *White* v. *Haight*, 11 Gr. 420.

Substitution of Lot — *Collateral Security.*]—A mortgage which had been executed by the defendant L., reciting that it had been agreed to be given to secure notes held by the plaintiffs, and containing covenants for title, was reformed, on parol evidence, by substituting for one of the parcels inserted by mistake, which did not belong to L., another lot proved to be his at the time of creating the mortgage; and being the only other lot owned by him. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Bank of Toronto* v. *Irwin*, 28 Gr. 397.

Time for Payment.]—Rectification of the mortgage deed as to the time of the first payment of principal, was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements. *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677.

6. Other Instruments.

Bond — *Stipulations.*]— In suits for the rectification of deeds, the court allows great weight to the statements made by the answer. On the sale of a steamboat, the vendors gave a bond binding themselves unconditionally to procure a conveyance of the vessel to the purchasers within three months, and delivered possession to them; but the conveyance was not made, and two years afterwards the vessel was taken from the purchasers, upon process against the owner, and under a mortgage previously existing upon the vessel. A bill was filed by the vendors to rectify the bond, by introducing certain stipulations set forth in a memorandum made by the holder of the incumbrance at the foot of the vender's bond, and which the incumbrancer swore he had made in order that the purchaser might have notice of his claim, and also a receipt given by him when paid part of the claim he held against the vessel. The purchasers in their answer asserted that they never had intended to abridge their rights under the bond, and never would have consented to any stipulation therein to that effect; and, as the alteration proposed would have materially affected the rights of the purchasers to their prejudice, and there was nothing inconsistent in the facts being as the purchasers alleged them to be, the court refused the relief prayed, and dismissed the bill with costs. *Cotton* v. *Corby*, 7 Gr. 50. Affirmed in appeal, 8 Gr. 98.

Insurance Policy.]—As to reformation of a policy of insurance, when not in accordance with the intention of the parties. See *Wyld* v. *London and Liverpool and Globe Ins. Co.*, 33 U. C. R. 284.

Insurance Policy—*Omission to Affix Seal—Right to Reform by Adding Seal.*]—See *Wright* v. *Sun Mutual Life Insurance Co.*, 29 C. P. 221, 5 A. R. 218.

Notarial Transfer—*Evidence to Contradict.*]—Verbal evidence is inadmissible to contradict an absolute notarial transfer, even where there is a commencement of proof by writing: Article 1234, C. C. *Bury* v. *Murray*, 24 S. C. R. 77.

Partnership Articles.]—See *Macdonald* v. *Worthington*, 7 A. R. 531, 9 S. C. R. 327.

Partnership — *Registered Declaration.*]— An action was brought by W. McL. and F. W. R. to recover the amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death:—Held, that such evidence was inadmissible: Article 1835, C. C., and c. 65, C. S. L. C. *Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263.

Release of Debt—*Trust.*]—A widow, by writing duly signed, sealed, and attested, released to her son W. a sum of $14,477.95, "standing to my account in my son W.'s books at this date, and which I intended to give him; I hereby give it to him and release him from all claim in respect thereof." W. subsequently went into a somewhat hazardous business, and afterwards, becoming insolvent, made an assignment under the Insolvent Acts. In a suit instituted by the official assignee claiming this money for W.'s creditors, the court allowed parol evidence to be given, shewing that such release, though absolute in form, was, as to one-half of the amount transferred, intended to create a trust in favour of another son, A., his wife and children; and the court being satisfied of the truthfulness of such evidence, refused the relief asked, and dismissed the bill with costs. *Kerr* v. *Read*, 23 Gr. 525.

VIII. Miscellaneous.

Disclaimer of Grant.]—It is not essential to the validity of a disclaimer of a grant of land that it should be by deed or by record. *Moffatt* v. *Scratch*, 12 A. R. 157.

Revival of Deed.]—Semble, where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so after reconciliation and subsequent separation at the husband's instance, the deed is thereby revived. *McArthur* v. *Webb*, 21 C. P. 358.

Setting Aside or Varying Deed for Misrepresentation — *Evidence.*] — See *Coates* v. *Bacon*, 21 Gr. 21.

Unexecuted Deed—*Acceptance of Benefit under.*]—An action of covenant cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises, but which has not been executed by the grantee, although she has accepted the benefit of the deed. *Credit Foncier Franco-Canadien* v. *Lawrie*, 27 O. R. 498.

See Covenant — Estate—Estoppel—Infant, V. 2—Mistake, I.—Partnership, VI. 2 — Principal and Agent, VI. 4 — Trover and Detinue, I. 2 (*a*)—Trusts and Trustees, II. 1.

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2. *Slander of Women*, 1966.

XIV. SLANDER OF TITLE, 1967.

XV. MISCELLANEOUS CASES, 1969.

I. BUSINESS, OFFICE, OR CALLING.

Clergyman — *Drunkenness.*] — Declaration, that the plaintiff was and is a clergyman of the Church of England, and that the defendant falsely and maliciously spoke and published of him, in relation to his said profession, "He will get drunk, I have seen him drunk," meaning thereby that the plaintiff was an unfit and improper person to exercise his said calling, whereby the plaintiff was injured in his good name, &c., and shunned by divers persons; without any averment of special damage:—Held, on demurrer, declaration bad. *Tighe* v. *Wicks*, 33 U. C. R. 479.

Medical Practitioner, Unregistered.]—A medical practitioner registered in Great Britain but not in this Province, cannot maintain an action against a person slandering him in his profession. *Skirving* v. *Ross*, 31 C. P. 423.

Methodist Preacher — *Crime.*]—Held, that words imputing the crime of incest to a paid preacher or lay exhorter of the Methodist Church, are of themselves actionable, without special damage, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office, even though it was not spoken with reference to the office. *Starr* v. *Gardner*, 6 O. S. 512.

Methodist Preacher — *Immorality.*]—Saying of a Methodist preacher that he kept company with a prostitute, and defendant could prove it:—Held, not actionable, at all events without special damage. *Breeze* v. *Sails*, 23 U. C. R. 94.

Postmaster Violating Public Trust.]—Where a paper contains matter that is grossly libellous per se, and without reference to any particular situation or office to make it so, it is no objection to a verdict upon such libel that the plaintiff filled no such office as mentioned in the declaration. Nor is such libel excused on pretence of its being a formal application to the head of the department for redress of grievances, the plaintiff being a postmaster. And words charging a person with violating a public trust, are words libellous per se, and do not require connexion with any particular office; an office may be introduced as an explanatory circumstance. *Jones* v. *Stewart*, Tay. 453.

Registrar of Deeds—*Misconduct in Office.*]—The statement of claim alleged that from 1874 to 1883 the plaintiff was registrar of deeds of the county of Bruce; that in 1880, on a petition of the defendants to the Lieutenant-Governor, a commissioner was appointed to inquire into the conduct of the plaintiff as registrar, and an inquiry held, when charges of a defamatory character were made against the plaintiff, setting them out; that the charges were not sustained in law or by the evidence, and were shewn to be, and were, untrue in fact, and to have been made maliciously and with the design of injuring the plaintiff; that, before the commissioner had made any report on the charges, the defendants maliciously, and without any reasonable or probable cause, and with design and intention of injuring the plaintiff in his reputation, character, and business, caused the accusations, charges, and defamatory statements thereinbefore specially mentioned, and portions of the evidence adduced before the said commissioners, together with certain statements made by one R., who, during the investigation, acted as defendants' solicitor, to be printed and published in pamphlets and in the minutes of the county council, and circulated throughout the county and elsewhere in the Province, greatly to the prejudice, detriment, damage, and injury of the plaintiff:—Held, on demurrer, that a good cause of action for libel was shewn, and that

such action lies against a municipal corporation. *McLay* v. *County of Bruce*, 14 O. R. 398.

Trader in Land — *Fraud.*]—The first count set out that the plaintiff was a trader in the purchase and sale of land, and in lending money; and that defendant had purchased a lot of land for himself and the plaintiff, which they agreed to divide by lot, one to take the east and the other the west half, the latter being of more value. And it was alleged that in speaking of the plaintiff in reference to his said trade and to the drawing lots, defendant had asserted that the slips were prepared by the plaintiff in such a way (explaining it) that defendant was precluded from getting anything but the east half. In another count, after stating the same trick, defendant was alleged to have added, "It then struck me I was swindled." And in another he was said to have prefaced the relation with, "He cheated me out of 100 acres of land," and concluded by saying, "so he cheated and swindled me out of the lot:"—Held, on demurrer, that no cause of action was shewn, for the words alleged in the first count could not be treated as spoken of the plaintiff in any trade or business, but in a private transaction; and the additional words stated in the other counts were not of themselves actionable. *Fellowes* v. *Hunter*, 20 U. C. R. 382.

Tradesman—*Cheating.*]—The plaintiff alleged that he was a commission merchant buying wheat, and that defendant spoke of him, in relation to his said trade, "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales, he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronize him any more:" —Held, clearly a slander of the plaintiff in his business. *Marsden* v. *Henderson*, 22 U. C. R. 585.

Tradesman — *Mercantile Agency—False Information.*]—Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when, by culpable negligence, imprudence, or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. *Cossette* v. *Dun*, 18 S. C. R. 222.

(*See*, also, *post* XII. 3 (a).

Tradesman — *Overcharging.*]—The libel sued for herein consisted of the statement, in substance, that the plaintiffs, who were manufacturers of lightning rods, were charging from 37 to 42½c. per foot for their rods, whereas the defendant could furnish the same and even a better rod for 7c. to 10c. per foot, and that defendant, having a thorough knowledge of the lightning rod business, felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices, when the rods could be sold at the above low prices. The publication was proved to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the sums named by the defendant only included the price of the rod, although the publication, as the jury found, was intended to convey the meaning that they included the cost of erecting it also; —Held, that the action was maintainable. The jury assessed the damages at $4,000, but the court, being of opinion that under the circumstances the damages were excessive, directed a new trial unless the plaintiffs would consent to reduce the verdict to $1,000. *Ontario Copper Lightning Rod Co.* v. *Hewitt*, 30 C. P. 172.

Tradesman—*Roguery.*]—Plaintiff and defendant were tailors, the latter also selling dry goods. Plaintiff went into defendant's shop to buy cloth to make up a pair of trousers for one A., who was with him, when defendant said to A., "Don't you have anything to do with that man; that man will rob you; he is a rogue." He also asked A. to let him make the trousers. The jury were directed that the words were actionable if spoken to the plaintiff in the way of his trade; and a verdict found for the plaintiff was upheld. *Sloman* v. *Chisholm*, 22 U. C. R. 20.

Tradesman — *Solvency.*]—The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning the plaintiff) had run away owing money to him and others; that he, the defendant, had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a nonsuit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved:—Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein. *Lott* v. *Drury*, 1 O. R. 577.

Tradesman — *Solvency—Message Sent by Telegraph Company.*]—The respondents, partners in trade, sued the appellants for defamation of the respondents in their trade, alleging: —1. That they were merchants at Halifax; that the appellants wrongfully, falsely, and maliciously, by means of their telegraph lines, transmitted, sent, and published from their office in St. John, and there caused to be printed, copied, circulated, and published the false and defamatory message following: "John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2. That the same message was caused also to be published in other parts of the Dominion. 3. That the appellants promised and agreed with the proprietor or publisher of the St. John Daily Telegraph newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages, and should publish them in his newspaper, and that, in pursuance of said agreement, the appellants wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated, and published, the above message, whereby many customers who had heretofore dealt with plaintiffs, ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. The appellants denied the several publications charged, and also the entering into the agreement mentioned in the third count, and the

forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do:—Held, that the appellants were responsible for the publication of the libel in question. 2. That the damages ($7,000) were excessive, and therefore a new trial ought to be granted. 3. That no special damage having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible. *Dominion Telegraph Co.* v. *Silver*, 10 S. C. R. 238.

Wife of Tradesman—*Loss of Custom.*]—In an action by husband and wife for a verbal slander of the latter, not actionable without special damage, an affidavit to hold to bail, made by the wife, stated only that persons not named had in consequence withdrawn their custom from her husband, who was a tailor. The Judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only. *Allman* v. *Kensel*, 3 P. R. 110.

II. Charging Crime.

Arson.]—Words spoken imputing the crime of arson, where the burning of the building of which plaintiff was accused would not have constituted such crime, are not actionable. *McNab* v. *Magrath*, 5 O. S. 516.

Forgery — "*False Writings.*"]—Declaration for slander averred that defendant used and published the words, "Old Groff made false writings," meaning that the plaintiff forged writings &c., and was guilty of forgery:—Held, good, on demurrer, as shewing a good cause of action for accusing plaintiff of forgery. *Groff* v. *Bricker*, 4 C. P. 154.

Incest — *Special Damage.*]—In an action for oral slander the words spoken imputed to the plaintiff that he had committed incest and adultery with his daughters, and alleged as grounds of special damage the loss of the society of friends and illness and expenses consequent thereon:—Held, that the words were not actionable without proof of special damage, incest not being a crime cognizable in our courts; and that the special damage alleged here was insufficient. *Palmer* v. *Solmes*, 30 C. P. 481. *S. C.*, 45 U. C. R. 15.

Larceny—*Words of Abuse.*]—"Go home, you whore, and steal more potatoes from Peggy's field, and steal more chemises from us;"—Held, actionable, for it imputed that the person addressed had previously stolen other things of the same kind; and the potatoes might have been severed, and so the subject of larceny. *Hunter* v. *Hunter*, 25 U. C. R. 145.

Larceny—*Words of Abuse—Understanding of Bystanders.*]—The declaration set out that the plaintiff carried on the business and trade of a weaver in, &c., and defendant had employed plaintiff to weave thirty-five pounds of yarn for him, and had delivered such yarn to the plaintiff for that purpose; that upon said yarn being wove, &c., it had been alleged by defendant that five pounds of the yarn was deficient, and had been feloniously stolen by the plaintiff. The declaration then, in the third count, alleged that the defendant, in a certain other discourse of and concerning the yarn, and in the presence and hearing of divers persons, spoke and published the following words, that is to say: "T. Y. (the plaintiff) stole five pounds of my yarn: it was a roguish trick." And in the fourth count the words were alleged to have been, "T. Y. stole five pounds of my yarn:"—Held, that the words, spoken in the presence of strangers, ignorant of the particular circumstances relating to the yarn, were actionable:—Held, also—on motion in arrest of judgment on the ground that the plaintiff being a bailee could not be guilty of larceny,—that the use of words imputing an indictable offence is actionable or not according to the sense in which they may be fairly understood by bystanders not acquainted with the matter to which they relate. *Young* v. *Sloan*, 2 C. P. 284.

Malicious Injury to Property — *Imprisonment—Fine.*]—Held, on demurrer to a statement of claim in an action of slander, that any defamatory charge referable to wrong-doing under s. 26 or s. 58 of the Act relating to malicious injury to property, R. S. C. c. 168, is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine, is imposed in the case of such offences; but it is otherwise in the case of a defamatory charge referable to s. 27 or s. 59 of that Act, for such offences are punishable by fine only. *Routley* v. *Harris*, 18 O. R. 405.

Misappropriation of Trust Moneys—*Misdemeanour.*]—To a declaration containing six counts, each charging defendant with having accused the plaintiff of misappropriation of moneys intrusted to him as trustee, defendant pleaded not guilty, only; and the jury gave a general verdict for $400. On motion for a new trial, the substantial ground being that the verdict was general, while some of the counts were defective:—Held, that if so, the proper course would not be a new trial but a trial de novo, which might be ordered on motion for a new trial; but that each count disclosed a sufficient cause of action, for in each the defendant was charged with a misdemeanour, within C. S. C. c. 92, s. 51, and there was no plea denying that he was a trustee as alleged. *Decow* v. *Tait*, 25 U. C. R. 188.

Murder — *Innuendo — Sense in which Words Used.*]—Declaration, that one A. had been murdered, and that defendant had said to the plaintiff, of the deceased, "that boy who is now lying a lifeless corpse on the floor, you have been the cause of his murder, and his blood lies upon your head," meaning thereby that the plaintiff had feloniously murdered the said A. Demurrer, because the innuendo was unwarranted by the charge:—Held, declaration good, for it was for the jury to determine whether the words were spoken in the sense imputed. *Jackson* v. *McDonald*, 1 U. C. R. 19.

Offence Committed out of the Jurisdiction.] — An action will lie for words spoken here imputing the commission in a colony subject to the British criminal law of a crime punishable by that law. *Mallock* v. *Graham*, 2 O. S. 341.

It is actionable to charge a man with the commission of felony in a foreign country. *Smith* v. *Collins*, 3 U. C. R. 1.

Perjury — *False Oath—Judicial Proceeding.*]—Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceeding, or on any occasion where it would be an offence in law, are not actionable; but where the jury on such a charge gave £2 10s. damages, the court refused a new trial in order to give defendant his costs, but arrested the judgment. *Hogle* v. *Hogle*, 16 U. C. R. 518.

Perjury — *False Oath—Judicial Proceeding.*]—Where a declaration in slander charged that the defendant had accused the plaintiff of having taken a false oath, meaning thereby that he was guilty of wilful and corrupt perjury:—Held, sufficient on motion in arrest of judgment, and that no allegation of the oath having been made in a judicial proceeding was necessary. In such a case it is a question for the jury whether such meaning existed, or was intended to be conveyed; and it is not necessary to shew the actual existence of the suit or proceeding in which the oath was alleged to have been taken. *McDonald* v. *Moore*, 26 C. P. 52.

Perjury—*Words of Abuse—Understanding of Bystanders.*]—In an action of slander for saying of the plaintiff on a public street in the presence of a number of people "you are a perjured villain and I can put you behind the bars, you are a forger and I can prove it," the trial Judge left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned:—Held, misdirection, and a new trial was ordered. What should have been left to the jury was whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of the crime according to what he actually said, the undisclosed intention of the defendant in this respect having nothing to do with the question and being wholly immaterial. *Johnston* v. *Ewart*, 24 O. R. 116.

Prospective Crime.]—No action will lie for words spoken when they only refer prospectively to some act which, if committed, would be a crime. *Conkey* v. *Thompson*, 6 C. P. 238.

Receiving Stolen Goods—*Innkeeper.*]—The declaration charged as a libel the following words: "You have stolen goods in your house, and you know it." Innuendo, that defendant knew the goods were in his house and were stolen:—Held, not actionable, though spoken of and to an innkeeper. *Paterson* v. *Collins*, 11 U. C. R. 63.

Theft — *Words of Abuse.*]—Declaration charged defendant with saying that one M. at the time of the election had mortgaged his property to the plaintiff without consideration, and that the plaintiff afterwards foreclosed and took it from him without paying anything, and adding, "The fact is, he is a villain, and a thundering thief:"—Held, not actionable. *Fellowes* v. *Hunter*, 20 U. C. R. 382.

Unnatural Offence—*Innuendo—Amendment.*]—Held, that a declaration in slander for calling defendant a "sodomite," sufficiently imputed the charge of an indictable offence, without any innuendo. But if this were otherwise, defendant having by his plea justified the words as imputing the statutable crime:—Held, that an amendment, by adding the innuendo, should have been allowed. *Anon.*, 20 U. C. R. 456.

III. Corporations.

Building Society — *Impugning Validity of Election of Directors.*]—The defendant published of the directors of the plaintiffs, an incorporated building society, in a newspaper, a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul, and fraudulent means, and in consequence, all business transacted by them * * * is wholly and entirely contrary to rules and regulations and law;"—Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, and as such it was defamatory of the plaintiffs. *Owen Sound Building and Savings Society* v. *Meir*, 24 O. R. 109.

Insurance Company—*Libel — Advertisement.*] — See *Holliday* v. *Ontario Farmers' Mutual F. Ins. Co.*, 33 U. C. R. 558, 1 A. R. 483.

Municipal Corporation—*Publication of Charges against Registrar of Deeds.*] — See *McLay* v. *County of Bruce*, 14 O. R. 398.

Newspaper Company — *Production of Documents—Liability to Criminal Prosecution.*]—See *D'Terry* v. *World Newspaper Co., of Toronto*, 17 P. R. 387. See also *post*, VIII., XI. 1.

Railway Company—*Libel—Authority of General Manager.*] — See *Tench* v. *Great Western R. W. Co.*, 32 U. C. R. 452, 33 U. C. R. 8.

Railway Company — *Slander.*]—An action for slander will not lie against a corporation. *Marshall* v. *Central Ontario R. W. Co.*, 28 O. R. 241.

Trading Company—*Injury to Business—Special Damage.*]—A company incorporated for the purpose of publishing a newspaper can maintain an action of libel in respect of a charge of corruption in the conduct of their paper, without alleging special damage. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 87, commented on and distinguished. South Hetton Coal Co. v. North-Eastern News Association, [1894] 1 Q. B. 133, followed. *Journal Printing Co.* v. *MacLean*, 25 O. R. 509.

An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business. South

Hetton Coal Co. v. North Eastern News Association, [1894] 1 Q. B. 133, followed. Journal Printing Co. v. MacLean, 25 O. R. 569, approved. *Journal Printing Co.* v. *MacLean*, 23 A. R. 324.

Trading Company — *Manager — Admissions of — Authority.*] — See *Carroll* v. *Peabody Injector Co.*, 16 A. R. 446.

Trading Company—*Security for Costs—Criminal Charge.*]—See *Georgian Bay Ship Canal, &c., Co.* v. *World Newspaper Co.*, 16 P. R. 320.

Trading Company—*Slander.*] — Semble, that an incorporated company may be liable, if slander is spoken by its servants or agents in direct obedience to its orders. *Rodger* v. *Anson Co.*, 19 P. R. 327.

IV. Costs.

(See, also, Security for Costs, *post*, XIII.)

Certificate—*Nominal Damages.*] — In an action of libel wherein the plaintiff recovered only 20s. damages, the Judge who tried the cause refused to certify. *Cameron* v. *McLean*, Tay. 381.

Certificate — *Nominal Damages.*] — The certificate under 16 Vict. c. 175, s. 26, did not necessarily entitle the plaintiff to full costs, but only to such costs as might otherwise have been recovered, and did not interfere with 21 Jac. I. c. 16. Where, therefore, in slander (no special damage being laid) the verdict was for 1s., and the Judge certified, under 16 Vict., that the grievance was wilful and malicious, the plaintiff was restrained by 21 Jac. from obtaining more costs than damages. *Pedder* v. *Moore*, 1 P. R. 117.

Certificate—*Nominal Damages.*] — Where in an action of libel a verdict for 81 damages was found, and the Judge at the trial gave no certificate for costs:—Held, that the plaintiff was entitled to tax full costs. Garnett v. Bradley, 3 App. Cas. 944, considered and followed. *Wilson* v. *Roberts*, 11 P. R. 412.

Certificate—*Nominal Damages.*]—Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages:—Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only. Wilson v. Roberts, 11 P. R. 412, followed. *Wellbanks* v. *Conger* (2), 12 P. R. 447.

Certificate—*Nominal Damages.*]—Where, in an action of slander, the jury returned a verdict for the plaintiff for 81, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered. *Bell* v. *Wilson*, 19 P. R. 167.

Certificate — *Special Damage.*] — In an action for slander plaintiff is entitled, under a certificate for full costs, pursuant to 31 Vict. c. 24 (O.), to tax full costs of suit; but, per Gwynne, J., he is not so entitled without a certificate, where some of the words mentioned in the declaration are not actionable without special damage laid. *Stewart* v. *Moffatt*, 20 C. P. 89.

Jury—*Finding of no Damage.*]—Order of Judge dismissing action and ordering defendant to pay plaintiff's costs where the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage—set aside. *Wills* v. *Carman*, 14 A. R. 656.

Jury — *Recommendation of.*] — Where the jury found, in an action of slander, damages and full costs of suit, full costs were allowed. *Skinner* v. *Muir*, 5 O. S. 337.

Jury — *Recommendation of.*] — Held, that the jury in an action for slander had no right to give costs by their verdict. *Campbell* v. *Linton*, 27 U. C. R. 563.

Jury—*Recommendation of.*]—See *Farquhar* v. *Robertson*, 13 P. R. 156.

Trial of Question of Costs—*Application at Chambers.*]—After action for libel brought, the defendants published a retractation and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—Held, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs. Knickerbocker v. Ratz, 16 P. R. 191, followed. *Eastwood* v. *Henderson*, 17 P. R. 578.

V. Criminal Proceedings for.

Application for Criminal Information—*Affidavit — Person Charged — Copy of Libel.*]—Where a party on moving for a criminal information for a libel, swears that the libel was published of him, and his affidavits set out the libel, which does not charge him in express terms, nor is made to refer to him by innuendo, the court will grant a rule. In such a case, a verified copy of the letter containing the libel is sufficient to move upon, without the production of the original. *Regina* v. *Crooks*, M. T. 3 Vict.

Application for Criminal Information—*Affidavits in Support and in Answer.*] On an application for a criminal information against defendants for a libel, the applicant's affidavit stated that he had read an article published in the "National" newspaper in Toronto, on the 16th July, 1874, setting it out; that he was the person referred to; that the statements therein were untrue, and that they were intended to prejudice and injure him; that the defendants were, on the 16th July, proprietors and publishers of said paper; and that the article was printed and published by them, and is the same article contained in the said newspaper, attached to the affidavit of R., "filed on this application." R.'s affidavit was sworn on the 22nd August, and stated that "the annexed copy of the 'National' newspaper, bearing date the 16th July, 1874, was on that day published in Toronto, at No. 21 Adelaide street east," by defendants, "who are the publishers and proprietors thereof." The newspaper contained the libel set out in

the applicant's affidavit. The application was not made until the 24th August, two days after the affidavit was sworn:—Held, that the applicant's affidavit was sufficient; that the reference to R.'s affidavit as "filed on this application" could only mean, there being only one application, the application about to be made on these affidavits. Held, also, that it was no objection that the rule nisi was stated to have been moved by counsel for the Crown, instead of for the applicant. Held, also, that it was no objection that the affidavit described the applicant as "esquire" only, for it was not necessary to shew that he occupied any public or official position. In answer to the application, defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they believed to be reliable and trustworthy; that the "Globe" newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice:—Held, no answer. *Regina* v. *Thompson*, 24 C. P. 252.

Application for Criminal Information—*Affidavit in Support—Denial of Truth of Charge—Affidavit in Answer.*]—S., the relator, a senator of the Dominion and president of a bank, applied on the last day of Michaelmas Term, 1875, for a criminal information against one W., the editor of a newspaper, for three alleged libellous articles published therein. The first, published on the 5th November, 1875, charged the relator with political intriguing, alleging that "his now famous circular to the electors of South Ontario, his extending credit at a suspicious time to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him, all point too clearly to the fact of intrigues in political matters." The second article, published on the 12th November, 1875, accused him of having purchased the votes of three members of Parliament on the occasion of a political crisis referred to, and of having boasted of so doing. The third article, published on the 19th November, 1875, accused the applicant of corruption, referred in terms of ridicule to his assertion that he had never spent a dollar to purchase or secure a vote, and reiterated the charge of buying up members. The substance of the libels of the 12th and 19th November had previously appeared in defendant's paper of the 17th September, but the relator swore he had no recollection of having seen it:—Held, that the application was not too late. The complainant must come to the court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless prevented by the accumulation of business in the court, to shew cause within that term; and this without reference to the fact whether an assize intervened or not. 2. As to the first article that the applicant's denial of the charge there made was not sufficient; for, though his affidavit denied in general terms the charges made, it contained no reference to the circular, or to the letter referred to in the article, or to the alleged consultation with the Government; and these matters being specified in the article as justifying the charge of political intriguing, the court should have been informed with regard to them, so as to enable it to judge whether they formed ground for the charge. The information as to this article was therefore refused, and the applicant left to his ordinary remedy. 3. The denial on such an application must, as a rule, be full, clear, and as specific as possible; and all the circumstances must be laid before the court fully and candidly, in order that they may deal with the matter. 4. Per Wilson, J., that upon the circular referred to, and upon other documents set out, and which were brought before the court by the defendant, the charge of political intriguing was so far sustained that the application should be refused on this ground also. 5. The charges in the second article were, on the affidavits set out in the report, held to be sufficiently denied. There was no affidavit of their truth, and no suggestion that the defendant had any personal knowledge of the facts on which the charges rested, so that he would be prejudiced by being excluded as a witness on his own behalf. As to these, therefore, the information was granted. *Regina* v. *Wilkinson*, 41 U. C. R. 1.

Application for Criminal Information—*Affidavits in Answer—No Reply—Costs.*]—In Trinity Term, 1876, an application was made for a criminal information against defendants, for the publication in their newspaper of certain alleged libellous articles, on the 23rd and 30th March and 25th May, 1876, respectively, against the applicant. On shewing cause, the defendants' affidavits reiterated the charge, giving full particulars, and pointing out that B., a person who could prove their truth, had since died, namely, in June. These affidavits had been in the hands of the applicant's solicitors for upwards of six months, but no affidavits were filed in reply; and Easter term, commencing shortly after the publication, had been allowed to elapse without moving. Under the circumstances the application was refused, but, in view of the virulent and unwarranted language of the articles, without costs. *Regina* v. *Kelly*, 28 C. P. 35.

Application for Criminal Information—*Position of Applicant—Nature of Libel.*]—The court, following recent English decisions, confining the granting of criminal informations for libel to the case of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature, refused leave to the manager of a very large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. *Regina* v. *Wilson*, 43 U. C. R. 583.

Application for New Trial—*Jurisdiction—Admissibility of Evidence.*]—The defendant, having been convicted on a criminal information for libel, obtained a rule nisi for a new trial for the rejection of evidence, and for misdirection in ruling that there was no evidence to support the pleas of justification. Upon this rule coming up for argument, the court, under the circumstances, as a matter of indulgence, allowed to be argued another ground of misdirection, not taken to the

charge at the trial, in ruling that the libel implied malice, whereas the jury should have been told that, it being a privileged communication, the inference of malice was repelled. The rule requiring any objections to the charge to be taken at the trial, applies in criminal as well as civil proceedings. The Judge at the trial told the jury that the defendant must prove all the charges which he had justified: that the evidence fell far short of doing so; and that in his opinion they should find the pleas of justification against the defendant. Per Harrison, C.J.—This was not so much a direction on the law as a strong observation on the evidence, and therefore not open to the objection of misdirection. But if so open, there was no misdirection, for the defendant was bound to such proof, and the observation was justified by the evidence, set out in this case. Per Wilson, J.—There was evidence, upon the facts stated in the report, to go to the jury in support of the pleas of justification; and defendant was entitled to a new trial for the misdirection. The libel, which formed the subject of the first count, began by saying, "The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. J. S.," the prosecutor. The second count was upon an alleged libel, in which, besides specific charges against the prosecutor, he was said to be the most corrupt man in Canada. Per Harrison, C.J.—The defendant was not entitled to put in evidence an article in a previous issue of his paper, charging the prosecutor with political intriguing, &c., on which a criminal information had been refused to the prosecutor; nor a letter written to the prosecutor alleged to be a request to supply money to be used for corrupt purposes, there being no evidence tendered of anything done by him in pursuance of such letter. Per Wilson, J.—Such evidence was admissible; but, as it was not formally pressed, the rejection of it formed no ground for a new trial. *Regina* v. *Wilkinson*, 42 U. C. R. 492.

Costs—*Payment of—Summons — Service.*]—Where an order for payment of costs is sought which may, under C. S. U. C. c. 24, s. 19, be followed by execution, as in this instance, for payment of costs of a prosecution for libel under C. S. U. C. c. 103, the service of the summons must in general be personal. The court may, under special circumstances, dispense with personal service. Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that defendant is keeping out of the way to evade service; and even in this case it is by no means clear that personal service will be dispensed with. Service on the attorney on the record, and on the wife of the defendant, it not being shewn that he was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada, and gone to reside in the United States. *Regina* v. *Simpson*, 10 L. J. 220.

Estoppel—*Libel Shewn to Prosecutor before Publication.*]—Upon an indictment for libel, published at defendants' instance in a newspaper, it appeared that the editor (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted:—Held, not such a defence for the parties indicted as to render a conviction illegal; and a new trial was refused. *Regina* v. *McElderry*, 19 U. C. R. 168.

Justification — *Proof Differing from Plea.*]—The defendant was indicted for a libel, which alleged that the prosecutor, G. N., had been prosecuted for perjury, in swearing that defendant had attempted to assassinate him. Defendant pleaded two pleas in justification, the gist of which was, that one G. N. had falsely laid an information on oath against the defendant, charging defendant with attempting to assassinate him by firing a pistol at him; and that said G. N. was presented for perjury for having laid this false information. It was shewn at the trial that the said G. N. had been presented by the grand jury for perjury, but not for the matters complained of by defendant, and the jury found for the Crown. The court refused a new trial. *Regina* v. *Gowan*, 7 C. P. 136.

Pleading—*Justification — Sufficiency.*] — A plea to an information for libel under C. S. U. C. c. 105, s. 9, must allege the truth of all the matters charged; and in this case the plea was clearly insufficient in that respect. *Regina* v. *Moylan*, 19 U. C. R. 521.

Trial—*Jury—Crown Case Reserved—Absence of Prosecutor — Justification — Judge's Charge.*]—The statute 37 Vict. c. 38, s. 11 (O.), enacts that the right of the Crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel;"—Held, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels; and that the fact of the prosecution being conducted by a counsel appointed by and representing the attorney-general, would make no difference. The Judge at the trial allowed the Crown counsel in such a case to direct jurors to stand aside, but after the verdict, entertaining doubts, he reserved a case for the opinion of the court, as to the propriety of his having permitted it:—Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute. The prosecutor's usual residence was in England, but he had come here with emigrants, and at the time of the publication of the libel had gone back for a temporary purpose, intending to return: —Held, that his absence was no answer to the indictment. The libel contained several distinct charges, all of which were justified by a general plea of their truth, and the jury were directed that unless all the charges which were libellous were justified, they should convict:—Held, that the charge was right. *Regina* v. *Patteson*, 36 U. C. R. 127.

See CRIMINAL LAW, IX. 29.

VI. DAMAGES.

Excessive Damages.]—In slander for accusing the plaintiff of larceny, and a verdict of £150 damages, the court refused a new trial for excessive damages. *Eakins* v. *Evans*, 3 O. S. 383.

Excessive Damages.]—In an action for libel, the imputations being of a very slanderous character, and a plea of justification

pleaded which was not attempted to be proved, the court refused a new trial for excessive damages, though they would have been much better satisfied with a smaller verdict. *Gfrocrer* v. *Hoffman*, 15 U. C. R. 441.

Excessive Damages.]—The evidence in support of one of the pleas of justification of a charge of theft was very strong, sufficient to have warranted a conviction if the plaintiff had been on his trial. The charge, however, was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $450 damages, the court refused to interfere. *Edgar* v. *Sewell*, 24 U. C. R. 215.

Excessive Damages.]—The plaintiff sued his step-mother for slander, in having said of him that when his father was ill, he and his sister went into his bedroom and gave him a drug, after which he went into a doze, and never recovered, and that the plaintiff and his sister had killed him. There was another count for charging the plaintiff with having robbed her. It appeared that the plaintiff and defendant were not on friendly terms, arising out of defendant's marriage with plaintiff's father: that defendant was a garrulous old lady, prone to talk of the family difficulties; and that the words alleged were spoken when the plaintiff's brother-in-law and another person went to see her to get her to sign a release of dower. The defendant denied having charged any criminal offence, and it appeared that the plaintiff, who was a medical student, had administered some medicine to his father shortly before his death. There was no proof of any actual damage, but the jury gave $500:—Held, that the verdict was excessive; and the Judge who tried the cause being dissatisfied with it on this ground, a new trial was ordered unless the plaintiff would reduce it to $100. Held, also, that it was admissible to ask the plaintiff's witness whether the plaintiff was not a student of medicine, although the declaration did not charge that the words were spoken of him in that character. *Cook* v. *Cook*, 36 U. C. R. 553.

Excessive Damages.]—See *Massie* v. *Toronto Printing Co.*, 11 O. R. 362.

Inadequate Damages—*New Trial.*]—The court will not grant a new trial for smallness of damages in an action for slander. *Atkins* v. *Thornton*, Dra. 239; *Proctor* v. *Allen*, T. T. 2 & 3 Vict.

Jury Finding No Damages—*Nominal Damages.*]—In an action for libel the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage:—Held, that there was no power to direct judgment for nominal damages; and a venire de novo was awarded. *Wills* v. *Carman*, 14 A. R. 656.

Jury Finding No Damages—*New Trial.*]—In an action for slander the jury returned a finding of no damage; but said they could not agree as to whether their verdict should be for the plaintiff or defendant; upon which the trial Judge directed judgment to be entered for the defendant, dismissing the action:—Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt; and a new trial was directed. Wills v. Carman, 14 A. R. 656, considered. *Bush* v. *McCormack*, 20 O. R. 497.

Mitigation of Damages—*Pleading.*]—Facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and unless this is done they cannot be given in evidence. Con. Rule 399 is inconsistent with Con. Rule 573, and governs. The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business. *Beaton* v. *Intelligencer Printing Co.*, 22 A. R. 97.

Special Damage—*Amendment at Trial.*]—The plaintiff, a schoolmaster, sued the defendant for a libel, and laid as its consequence, by way of special damage, his dismissal from his school; whereas it appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification for receiving a renewal certificate. The plaintiff applied to the Judge at nisi prius to amend his special damage to meet the evidence, which was allowed:—Held, on a motion for a nonsuit, that the Judge had power to make such amendment. *Jackson* v. *Simpson*, 4 U. C. R. 287.

Special Damage—*Pleading.*]—The second count of the declaration was for defamation in the use of words not actionable without special damage alleged, and the averment was, "whereby plaintiff lost the friendship, assistance, and hospitality of (specifying certain persons) and many others of his neighbours, divers of whom refused and were unwilling, as theretofore, to deal with and transact business with the plaintiff, and from whose friendship, hospitality, and business dealings plaintiff had derived profit and advantage":—Held, insufficient. *Ashford* v. *Choate*, 20 C. P. 471.

VII. Evidence.

1. *In Mitigation of Damages.*

Assault—*Slander of Wife.*]—In trespass for assault and battery the defendant offered to prove in mitigation of damages that the plaintiff had slandered his wife, and that he had committed the trespass immediately on being informed of such slander. The evidence having been rejected, and a verdict found for £140, a new trial was granted that all the circumstances might be elicited. *Short* v. *Lewis*, 3 O. S. 385.

Assault—*Newspaper Libel.*]—Held, in an action for assault, that libellous and abusive articles reflecting on the defendants, published on the day of, and preceding, the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages. But where the verdict was for $50 only, and though such evidence was rejected the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances, without costs in term to either party. *Percy* v. *Glasco*, 22 C. P. 521.

Bad Character.]—Held, that in an action of slander, evidence of the plaintiff's general

bad character is inadmissible, even in mitigation of damages. The verdict being for $15, and such evidence urged only in mitigation, the court refused leave to appeal. *Myers* v. *Currie*, 22 U. C. R. 470.

Bad Character—*Common Rumour—Specific Offence.*]—In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification:—Held, that evidence of the plaintiff's general bad character for honesty was properly rejected. Semble, that it would have been inadmissible even without the justification; but that if "not guilty" only be pleaded, defendant may shew, solely in mitigation of damages, and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged. *Edgar* v. *Newell*, 24 U. C. R. 215.

Facts and Circumstances.]—In slander the defendant may give facts and circumstances in evidence in mitigation of damages. *Johnson* v. *Eastman*, Tay. 243.

Previous Writings—*Provocation.*]—In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages. Percy v. Glasco, 22 C. P. 521, followed. Held, also, per Rose, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were also admissible as furnishing provocation for the second of the alleged libels: Meredith, C.J., contra. *Stirton* v. *Gummer*, 31 O. R. 227.

Statements Originated by Others.]—Slander of the plaintiff as a physician, with respect to his treatment of one H., deceased, whom he had attended after her confinement. Plea, not guilty. Evidence of statements made by H. to the same effect as the words charged was received, though objected to, as shewing that defendant did not originate the alleged slander; and the plaintiff had a verdict of 1s.:—Quære, whether such evidence was admissible, but held, that its proper reception would be no ground for a new trial, for the plaintiff had notwithstanding obtained a verdict, and he did not move for smallness of damages. *Rogers* v. *Munns*, 25 U. C. R. 153.

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2. *Of Malice.*

Justification—*Attempt to Prove.*]—In an action of slander for charging the plaintiff with perjury committed as a witness at a trial between defendant and another, the defendant pleaded and tried to prove a justification, but having failed in the attempt abandoned the plea. The jury were told that if defendant believed the charge to be true, and acted bonâ fide, and did not make it before more persons or in stronger language than was necessary, they might consider the circumstances of the speaking, and entertain them as evidence to rebut the legal inference of malice:—Held, there being no ground for saying that the communication was privileged, that this was misdirection. Held, also, that the jury should have been told that they might consider defendant's conduct in pleading and attempting to prove the justification as some evidence of malice, and an aggravation of the injury. *Faucitt* v. *Booth*, 31 U. C. R. 263.

Motive.]—In an action for malicious prosecution and slander:—Held, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here. *McCann* v. *Provencau*, 10 O. R. 575.

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3. *Of Publication.*

Examination of Defendant for Discovery—*Inferences from.*]—In an action for libel it was alleged that the defendant had, as a correspondent at T. of a newspaper, furnished several items, which included one reflecting on the plaintiff. In his examination for discovery defendant, while admitting he was a correspondent at T., could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated he had since ascertained that there were other correspondents at T., and on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—Held, that this did not constitute any evidence of publication to go to the jury. The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer. *Nunn* v. *Brandon*, 24 O. R. 375.

Incorporated Company—*Admissions of Manager—Authority.*]—The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular, signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff:—Held, that no authority can be inferred in a general manager or other officer of a bank

or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was therefore no proof of publication. If J. had been called as a witness and proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation. Tench v. Great Western R. W. Co., 33 U. C. R. 8, distinguished. *Carroll* v. *Peaberthy Injector Co.*, 16 A. R. 446.

Newspaper—*Failure to Read or File.*]—In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it, or read the article containing the alleged libel. Defendant's counsel opened his case, and said he would call no witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the Judge allowed, reserving leave to the defendant to move to enter a nonsuit, if according to strict practice the plaintiff was not entitled to read the paper:—Held, that the evidence offered was not admissible, except in the discretion of the Judge trying the cause, and a nonsuit was therefore ordered. *Cross* v. *Richardson*, 13 C. P. 433.

Post Card by Mail.]—Sending by mail a post card addressed to the plaintiff containing libellous matter is a publication of the libel. *Mothersill* v. *Young*, 18 C. L. T. Occ. N. 5.

Republication — *Letter—Possession of.*]—Evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to shew that the letter had been posted and given out by the postmaster to the plaintiff's mother:—Held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it showed that the letter was in the possession of the person to whom it was addressed shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so. Held, also, that it was not a ground for interfering with the verdict of the jury in favour of the plaintiff, that the trial Judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to others, and the damages awarded not being excessive. *Benner* v. *Edmonds*, 30 O. R. 676.

Statement Sent to Illiterate Plaintiff—*Read by Wife.*]—The plaintiff had been a servant of the defendant, and, on leaving the defendant's service, asked for a statement of account, whereupon the defendant made out an account as follows: "Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the following: "Stole hay during winter, $4," and "stole hatchet-hammer, $1.50." The account was placed in an unsealed envelope and handed to M., the plaintiff's then employer, who took it to the plaintiff's house and put it on the table between the plaintiff and his wife while at supper. The wife took up the envelope and taking out the account read it to the plaintiff, who could neither read nor write. There was no evidence to shew that the defendant knew that the plaintiff could not read, the only knowledge that defendant could have had being that the wife had signed plaintiff's contract with defendant, but it did not appear that the defendant's attention was called to this fact or that he knew that the signature was not the plaintiff's own handwriting; nor was there any evidence that M. read the account or took it out of the envelope, and he was not called as a witness:—Held, that there was no evidence of publication; and, as the onus of proof thereof was on the plaintiff, the action failed. *Jackson* v. *Staley*, 9 O. R. 334.

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4. *Proof of Defamatory Matter.*

(a) *Variance between Allegation and Proof.*

Words stated in the declaration as if narrated by defendant in the third person, are not supported by proof of words spoken by him in the first person. *Phillips* v. *Odell*, 5 O. S. 483.

Where, in case for slander of the plaintiff's steamboat, it was averred in the declaration that certain persons were going on a voyage in the steamboat, and that the slanderous words were spoken in the hearing of a particular person and others, but no proof was given of the voyage nor of the persons who were going on it, nor of the individuals in whose hearing the words were stated to have been spoken, and the jury found for the plaintiff, the court held that the evidence did not support the declaration, and a new trial was granted without costs. *Hamilton* v. *Walters*, 4 O. S. 24.

Where the words charged were, "You robbed the mail," and those proved, "I am not like you, running about the country with forged deeds, and robbing the mail as you did:"—Held, that the variance was fatal. *McBean* v. *Williams*, 5 O. S. 689.

Where the innuendo was, "that the plaintiff, in performing his duties of the office of treasurer of a district, had made a false return under oath to the Government of the amount of assessments received by him," and at the trial the witnesses stated that they understood the words to mean that the plaintiff had sworn that he had paid over moneys that he had not paid over, a verdict for the plaintiff was set aside, as the meaning charged was negatived by evidence. *Johnston* v. *McDonald*, 2 U. C. R. 209.

Where the words charged were, "He (meaning the plaintiff) burnt my barn," meaning thereby that the plaintiff had feloniously burnt defendant's barn, and the words proved were, "there is the man that burnt my barn: if he were not guilty of it he would not carry pistols:"—Held, that the proof did not support the declaration. *Vankeuren* v. *Griffis*, 2 U. C. R. 423.

Where the declaration only charged defendant with saying of the plaintiff, "he burnt

Knox's barn," and the proof was that defendant added, "because one of the girls would not marry him:"—Quære, whether there was not a fatal variance. *Manly* v. *Corry*, 3 U. C. R. 380.

Mere proof of the defendant saying of the plaintiff, "he burnt Knox's barn," without proof of the colloquium respecting Mrs. Knox's barn, alleged in the declaration, was insufficient. *Ib.*

The words charged were, "He stole wheat last winter." The words proved were, "he (the plaintiff) stole away the wheat in the night, and I was well aware of it, and could have put him in gaol for doing it:"—Held, a fatal variance. *McNaught* v. *Allen*, 8 U. C. R. 304.

The last sentence of the libel as set out was, "We supposed that they had become aware of the fact," &c. The sentence as proved was, "We supposed that they had by this time become aware of the fact:"—Held, variance immaterial. *Smiley* v. *McDougall*, 10 U. C. R. 113.

The words charged were spoken at an election, with reference to plaintiff's qualification, a matter in which defendant had an interest, and on which it is of consequence to encourage freedom of discussion. The evidence was doubtful as to the sense in which they were used, and the damages large. The court, under these circumstances, granted a new trial on payment of costs. *Swan* v. *Clelland*, 13 U. C. R. 335.

In an action against husband and wife, the declaration alleged the slander to have been spoken by both defendants, while the evidence proved the wife alone to have used the words:—Held, that the declaration was not supported by the evidence. *Wilson* v. *West*, 11 C. P. 127.

In an action against a mercantile agency company the alleged libel consisted of the publication among the general body of the defendants' subscribers of a notice or circular containing the words, after the plaintiff's name: "If interested inquire at the office." The defendants pleaded that the notice also contained words explanatory of the alleged libel, which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue. At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to and explanatory of it. The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired:—Held, that there was a variance between the libel alleged and that proved, and that, as the proposed amendment would have raised a new issue, to which the evidence did not apply, the plaintiff should not have been nonsuited. *Todd* v. *Dun*, 15 A. R. 85, 12 O. R. 791.

See Marsden v. *Henderson*, 22 U. C. R. 585, *post* (*b*).

(b) *Other Cases.*

Innuendo—*Office of — Not Supported by Evidence.*]—The declaration alleged that the defendant had spoken words (setting them out) to the effect that the plaintiff had stolen "the bond." There was no previous special inducement, but the innuendo was "meaning a certain bond from the defendant to the plaintiff for the payment of a certain sum of money." At the trial the words proved were, "If he has the bond he stole it when we settled," but the only bond spoken of in the evidence was one by the defendant to the plaintiff conditioned to secure the conveyance of some lands—the insinuation being that, after it had been delivered up by the defendant to be cancelled, it had been clandestinely abstracted by the plaintiff:—Held, that the innuendo went beyond its proper office; and the proof did not support the innuendo, for such a bond as was referred to in the evidence could not be the subject of larceny. *Caverley* v. *Caverley*, 3 O. S. 338.

Innuendo—*Onus — Jury — Newspaper—Report of Speech—"Blackmailing," Meaning of—Truth of Words.*]—In an action for libel the words complained of were: "It can be readily understood what interest Mr. M. has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when $4,000,000, which he controls, will be made available if (the plaintiff) can be elected mayor. In addition to this, Mr. M. has between $7,000 and $10,000 of claims against (the plaintiff), which in proceedings it was shewn under oath of Mr. M. that he hoped to be paid, should he succeed in qualifying (the plaintiff) for mayor, and then electing him." The innuendo was, that the defendants charged the plaintiff with having "entered into a corrupt arrangement" with one M., "whereby the plaintiff should use the office of mayor, when elected, for private gain," and with having "unlawfully and corruptly influenced or attempted to influence the said M. to support him in the mayoralty campaign, both financially and otherwise," and with being "unlawfully and corruptly influenced" by said M. "to use the said office of mayor to improperly advance the pecuniary and private undertakings of said M.:"—Held, that, there being no evidence apart from the newspaper article in which they appeared, to shew that the words bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them. The plaintiff also complained of a statement published by the defendants, that a speaker at a public meeting "characterized" the plaintiff's behaviour as "blackmailing." The defendant pleaded the truth of the words used:—Held, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate—that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover. The word "blackmailing" should not, at the present day and in this country, be limited in its meaning to the case of the crime of extortion by threats, or any other crime. Where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeeded in the action), receives $4,500 to hush a complaint

of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper and ordinary meaning of these words. There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed. Semble, also, that the innuendoes that the plaintiff "had committed a crime punishable by law," that he was "unworthy of any position of trust," and that he "was a blackmailer," could not be supported. Quære, whether the plaintiff, having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, could be permitted subsequently to reject the innuendoes, and rely upon the words (if untrue) having another libellous meaning, whether libellous in themselves or not. The respective functions of Judge and jury are in an action of libel in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R. S. O. 1897 c. 68, s. 2. It is the duty of the court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action. *Macdonald* v. *Mail Printing Co.*, 32 O. R. 163.

Innuendo—*Pleas of "Not Guilty," and "Fair Comment" — Evidence of Truth of Charge — No Finding as to Meaning.*] —In an action for libel contained in a newspaper article respecting certain legislation, the innuendo alleged by the plaintiff, the attorney-general for the Province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants adduced evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by the plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants, and in answer to the Judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:—Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received, evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Innuendo — *Words Capable of Meaning Imputed—Evidence to Support—Explanation of Insinuation.*]—A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in an agency of a bank, answer was returned that the drawee (plaintiff) was away from home, in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, the manager of the bank agency, added in his own handwriting to what the clerk had written, the words "or San Francisco or the Rocky Mountains," and the draft was thereupon returned to another bank, by which it had been sent for presentation, and by which after its return it was handed to the bankers of the drawers. Innuendo, "that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud" his creditors:—Held, that the words were capable of the libellous meaning alleged, and a nonsuit was therefore set aside and a new trial directed, in order to submit to the jury the question whether the words did in fact bear that meaning:—Held, also, on the facts set out in the report, that there was evidence to go to the jury in support of the innuendo. At the trial the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the Judge ruled that, in the absence of evidence (which it was admitted could not be given) that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following Daines v. Hartley, 3 Ex. 200) that, nevertheless, a proper foundation had not been laid for the question; that the witness should have first been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the Judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber* v. *Crookall*, 10 O. R. 475.

Innuendo — *Words Capable of Meaning Imputed — Not Supported by Evidence.*] — The first count of the declaration set out that the plaintiff was an unmarried woman; that there had been a coroner's inquest held on the body of an infant found on defendant's premises, whose death the jury found was caused by desertion and exposure by persons to them unknown; and it then alleged that the defendant, speaking of and concerning the plaintiff, the said infant, and the inquest then being held, said to one B., a constable attending on the inquest, "Why did you not bring Miss B. (the plaintiff) down with you? She has had time to change her appearance. I could see the child looked like the mother, Miss B., because she had red hair and so had the child," —meaning thereby that the plaintiff was the mother of the said child, and had deserted and left and exposed it, or caused and procured it to be left and exposed on or near the defendant's premises, whereby the child, being of so tender an age as to be unable to take care of itself, died in consequence of being deserted and left as aforesaid." In a second count the defendant was charged with saying that the child was the very image of its mother, and with naming the plaintiff in answer to a question who was the mother, the innuendo being the same as in the first count. Defendant pleaded only not guilty. The words charged were proved; and the jury having found for the plaintiff:—Held, that the words, coupled with the facts, were capable of the meaning imputed to them, and might therefore sustain

the action; but that, as there was nothing to shew that defendant was speaking of or alluding to the cause of the child's death, and not merely in reference to the question who was its mother, the innuendo was not supported by the evidence. Held, also, that the communication was not privileged. Remarks as to the effect of the C. L. P. Act, s. 110, and as to the decision in Hemmings v. Gasson, E. B. & E. 346. *Black* v. *Alcock*, 12 C. P. 19.

Meaning of Words—"*Lock Him up.*"]—In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump:"—Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up." *Stirton* v. *Gummer*, 31 O. R. 227.

Person Referred to—*Understanding of Witnesses—Variance between Allegation and Proof.*]—A declaration for libel set out the following words: "The farmers, as a class of producers, are the only ones that I am aware of who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision.* This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat-buyers, and make it their business to levy blackmail upon every man that sells them a load of wheat. This is done by a species of thimblerigging performed on the platform scales, by which from five to ten bushels are taken from every hundred bushels bought," with an innuendo that all this was intended to charge the plaintiff with such practices. In the libel proved, at the place marked with a star, this sentence was contained: "This state of helpless dependency has been introduced with the platform scales, which the farmer has not yet learned to use, for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected;"—Held, not a substantial variance, for the same imputation appeared upon the writing with or without the part omitted. Held, also, that though a class only was described, the plaintiff might be referred to, and that a verdict in his favour was justified by the evidence of witnesses who stated this to be their understanding and belief. *Marsden* v. *Henderson*, 22 U. C. R. 585.

Person Referred to—*Surrounding Circumstances—Public Meeting—Notes Taken.*]—The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part. The letter was addressed to the superintendent, referring to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established or until—which we are confident will never be—you are shewn to be the monster depicted in the public press." The plaintiff was not named in the letter. The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with $1,500 damages:—Held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy; the question really was whether the defendant had libelled the plaintiff; and this question had been determined by the jury. 2. That the surrounding circumstances were admissible in evidence for the purpose of shewing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended. 3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive. 4. That the evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place. 5. That the occasion was not one of privilege or qualified privilege. *Taylor* v. *Massey*, 20 O. R. 429.

Person Referred to—*Injury to Business.*]—It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question. It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiffs' business; but the court refused to interfere because of the admission of the opinion of one witness, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small. *Journal Printing Co.* v. *MacLean*, 23 A. R. 324.

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5. *Under the General Issue.*

In an action for libel the truth of defendant's remarks is not admissible under the general issue. *Small* v. *McKenzie*, Dra. 174.

In case, for slander, defendant may, under the general issue, shew that the words spoken were used in a privileged communication. *Richards* v. *Boulton*, 4 O. S. 95.

Or give evidence to repel the inference of malice. *McNab* v. *Magrath*, 5 O. S. 516; *Keegan* v. *Robson*, 6 U. C. R. 375.

All the circumstances immediately attending and preceding the speaking of the words may be given in evidence under not guilty. *Keegan* v. *Robson*, 6 U. C. R. 375.

In slander not guilty puts in issue the defamatory sense imputed to the words. *Forbes* v. *McClelland*, 4 P. R. 272.

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6. *Other Cases.*

Authorship of Libel—*Anonymous Circular—"Style"—Experts.*]—In an action for a libel contained in an anonymous letter, circulated among solicitors, charging the plaintiff, a solicitor, with unprofessional conduct, no direct evidence was given to shew that the defendant, another solicitor, was the author of the letter, but the plaintiff relied upon several circumstances pointing to that conclusion:—Held, reversing the judgment in 11 O. R. 541, that evidence of the defendant being in the habit of using certain uncommon expressions, which occurred in the letter, was improperly rejected; but semble, that a witness could not be asked his opinion as to the authorship of a letter; and evidence of literary style on which to found a comparison, if admissible at all, was not so except as expert evidence. *Scott* v. *Crerar*, 14 A. R. 152.

Authorship of Libel—*Refusal to Answer Question as to—Inference—Surrounding Circumstances.*]—The libel consisted of a letter published in a Boston, U. S., newspaper, alleged to have been written by defendant. The letter, which was signed by a person of the same name as the defendant, stated that it was written in answer to an anonymous letter, dated 15th September, published in the same newspaper, which the writer stated he had seen the manuscript of, and which was a clumsy attempt to make the writer believe was written further off than Ottawa, and had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the handwriting of both was the same. The anonymous letter referred to a trip made by defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter spoke of a certain machine called the Crescent Heel Plate Machine as "our" machine. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publishers, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant in his examination stated that both he and the plaintiff were boot and shoe dealers in Ottawa; that he was a subscriber and correspondent to this paper; that he had been on a trip to New Brunswick, and on his return saw the anonymous letter of 15th September in this newspaper, as also the manuscript thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that in addition to the above he intended proving that when plaintiff came to Ottawa, he stopped at the same hotel as defendant, and that defendant was the sole agent for the Crescent Heel Plate Machine:—Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question. Quære, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, afforded any evidence thereof, by way of admission or estoppel or otherwise. *Harkins* v. *Doney*, 17 O. R. 22.

Confession by Plaintiff—*Justification—Mitigation of Damages.*]—When in an action for slander and libel, imputing criminal offences, the defendant set up by way of mitigation of damages, that the plaintiff had confessed to a third party that he had done the acts charged against him:—Held, that evidence of such a confession was only admissible under a plea of justification, unless the defendant added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff, although she honestly believed it to be true at the time she repeated the words complained of:—Held, also, that objection should have been taken to the pleading either by demurrer or by application to strike it out as embarrassing. *Switzer* v. *Laidman*, 18 O. R. 420.

Document Referred to in Writing Complained of.]—In an action for libel the trial Judge ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling and put in the evidence:—Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, the only injury to the plaintiffs being to let the defendant's counsel have the last word with the jury. *Graham* v. *McKimm*, 19 O. R. 475.

Druggist—*Sale of Medicine.*]—Proof that several persons practising physic had purchased medicines from the plaintiff:—Held, sufficient to prove an allegation that plaintiff was a druggist, vendor of medicines, and apothecary. *Terry* v. *Starkweather*, Tay. 57.

Engineer—*Weight of Evidence.*]—In an action for a libel published in a newspaper against the plaintiff in his professional capacity as town engineer of, &c., where a verdict was rendered for the defendant on evidence preponderating greatly in plaintiff's favour, the court set aside such verdict, and granted a new trial, on payment of costs. *Peters* v. *Wallace*, 5 C. P. 238.

Fair Comment—*Defence of—Proof of Truth of Matters Commented on.*]—In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest:—Held, that he was entitled under this defence to shew that the matters upon which he commented were true. Lefroy v. Burnside, 4 L. R. (Ireland) 556, Davis v. Shenstone, 11 App. Cas. 187, and Riordan v. Willcox, 4 Times L. R. 475, followed. *Wills* v. *Carman*, 17 O. R. 223.

But see *Brown* v. *Moyer*, 20 A. R. 509, *post* VIII.

Falsity of Slander.]—Slander for calling a person "a contemptible thief." Justification not pleaded. Defence that the occasion was privileged. Semble, that evidence of the falsity of the words should not have been received on the plaintiff's examination in chief. *Ross* v. *Bucke*, 21 O. R. 692.

Newspaper—*Report of Trial—Comment.*]—In an action for libel the publication given in evidence consisted of the report of a trial given in a newspaper of which the defendant was editor and publisher, together with his comments thereon. The libellous matter set forth in the declaration was altogether contained in the comment, and at the trial defendant gave in evidence under the general issue in justification of his comments, that the report of the trial was correct; but the court, considering that this evidence was inadmissible, granted a new trial without costs. *Small* v. *McKenzie*, Dra. 174.

Physician and Surgeon — *License.*] — Where in an action for libel, the plaintiff set out with an inducement of character as "a physician and surgeon, licensed to practise according to the laws of the Province:"—Held, that proof that he acted as such was insufficient without shewing a license; but that, as he was libelled in his private character, he was entitled to recover on that ground, notwithstanding the failure of proof of the other averment; and the omission of part of the libel, which did not alter the sense, was considered immaterial. *Hamilton* v. *Burwell*, 2 O. S. 205.

Surgeon—*Unskilful Treatment.*] — In an action for libel against a surgeon respecting unskilful treatment by him of a fractured thigh, the question was raised, whether the failure to cure was not owing to the rough treatment of the patient by his master; and defendant desired to prove that the patient had been heard to complain of such usage:—Semble, that such evidence was admissible. *Smith* v. *McIntosh*, 14 U. C. R. 592.

VIII. Newspaper.

Advertisement—*Criticism Before Publication.*]—The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to insert it, and the plaintiffs took it away, intimating that it would be immediately published in another newspaper. It was so published; and on the day of its publication an article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiffs sued the defendant for libel. The trial Judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticise the advertisement because it had not been published before the article criticising it:—Held, that this was not a valid objection. *Graham* v. *McKimm*, 19 O. R. 475.

Apology—*Pleading.*]—See *Doyle* v. *Owen Sound Printing Co.*, 8 P. R. 69.

Apology — *Time.*] — Action brought for libels published in a newspaper called the "Daily Leader," of which defendant was proprietor. The first publication appeared on the 29th October, 1862, the second on the 5th November. This action was commenced on the 15th December, and the declaration was dated on the 24th December, 1862. On the same day an apology was published in the same paper, which the plaintiff's counsel, on the argument, admitted was sufficient, if published within a reasonable time, under the statute, which point being left to the jury, they found for the defendant. Upon motion for a new trial:—Held, that the question of the publication of the apology within a reasonable time was properly left to the jury to decide. Semble, the apology was too late; but the evidence shewed neither actual malice nor gross negligence in the publication of the libel, and the court refused to set aside a verdict for defendant. The publication of the apology "at the earliest opportunity" is to be construed as meaning within a reasonable time, the circumstances of the case and the opportunities of the defendant to publish it being considered. *Cotton* v. *Beaty*, 13 C. P. 243.

Fair Comment — *General Verdict — New Trial.*]—See *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518, *ante* VII. 4.

Fair Comment—*Truth of Statement.*]—Under a defence of "fair comment" in a libel action, evidence of the existence of a certain state of facts on which it is alleged the comment was fairly made, is admissible, but not evidence of the truth of the statement complained of as a libel. Wills v. Carman, 17 O. R. 223, discussed. Judgment in 23 O. R. 222 reversed. *Brown* v. *Mayer*, 20 A. R. 509.

See Wills v. *Carman*, 17 O. R. 223, *ante* VII. 6.

See, also, cases under XII. 2 (*b*).

Mercantile Agency—*Security for Costs.*]—A printed paper issued daily by the conductors of a mercantile agency, to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "newspaper," and "printed for sale," within the meaning of s. 1 of R. S. O. 1897 c. 68; and the publishers are therefore, in an action for libel brought against them, entitled to the benefit of the provisions as to security for costs contained in s. 10. *Slattery* v. *Dun*, 18 P. R. 168.

Notice of Action—*Statement of Claim.*]—In an action for libel contained in a public newspaper, the statement of claim must be confined to the statements complained of and specified in the notice required by R. S. O. 1887 c. 57, s. 5, s.-s. 2, to be given by the plaintiff before action; and where the plaintiff in such notice specified parts of an article published by the defendant, and in her statement of claim set out the whole article, the portions not specified in the notice were struck out. *Obernier* v. *Robertson*, 14 P. R. 553.

Notice of Action—*Sufficiency.*]—In an action brought against a newspaper company for alleged libellous articles published in the company's newspaper, the notice complaining of the publication given in pursuance of R. S. O. 1887 c. 57, s. 5, s.-s. 2, was addressed to the editor of the paper, and was served on the city editor at the company's office, and a similar notice was served on the chairman of board of directors at the said office:—Held, that this was a notice merely to the editor, and not to the defendants, and therefore was not sufficient under the statute. *Burwell* v. *London Free Press Printing Co.*, 27 O. R. 6.

Public Benefit—*Duty of Journalist.*]—To a statement of claim, charging the defendants with the publishing of the plaintiff, in their newspaper, that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, &c., whereby the plaintiff was injured in his credit, etc., the defendants pleaded that the article was published bonâ fide and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern:—Held, bad, for the publication complained of was in no sense for the public benefit, nor published in the course of the defendants' duty. *Farmer* v. *Hamilton Tribune, &c., Co.*, 3 O. R. 538.

Publication — *Affidavit of Proprietors — Incorporated Company — Malice — Special Damage—Loss of Custom.*]—By s. 13 of 50 Vict. c. 22 (M.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vict. c. 23, "An Act respecting newspapers and other like publications." By s. 1 of the latter Act, no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the Act directs, has been deposited with the prothonotary of the court of Queen's bench or clerk of the Crown for the district in which the newspaper is published; by s. 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher of the newspaper and of all the proprietors; by s. 6, if the number of publishers does not exceed four, the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; and s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the court of Queen's bench:—Held, that 50 Vict. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper. 2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. 3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director. 4. That in every proceeding under s. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples. 5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shewn. By s. 11 of the Libel Act, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed:—Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand. Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

IX. Parties.

Husband and Wife.]—Under R. S. O. 1877 c. 125, in an action for a tort (in this case the action was for slander) committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone. *Amer* v. *Rogers*, 31 C. P. 195.

See Lee v. *Hopkins*, 20 O. R. 666.

Husband and Wife.]—A married woman may bring an action of libel in her own name without joining her husband as plaintiff. The omission of the words "either in contract or in tort or otherwise," found in s. 2 (2) of the Married Woman's Property Act, 1884, from s. 3 (2), R. S. O. 1887 c. 132, does not limit the legal effect and operation of that section. *Spahr* v. *Bean*, 18 O. R. 70.

Husband and Wife—*Joint Action by—Husband a Witness for Defence—Adultery of Wife — Estoppel — Dominus Litis.*] — See *Campbell* v. *Campbell*, 25 C. P. 368.

Members of a Class.]—Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied:—Held, that either of the two members of the class was entitled to sue, but it was necessary for her to prove that the words were untrue of the other member, otherwise she could not recover. *Albrecht* v. *Burkholder*, 18 O. R. 287.

Several Defendants—*Joint Action.*]—A joint action may be maintained against several persons for the joint publication of a libel. *Brown* v. *Hirley*, 5 O. S. 734.

An action for oral slander will not lie against several defendants jointly. *Carrier* v. *Garrant*, 23 C. P. 276.

Several Persons Concerned in Libel —*Action against Some—Verdict—Bar against Others.*]—See *Willcocks* v. *Howell*, 8 O. R. 576.

X. Pleading.

1. *Before the Judicature Act.*

(a) *Declaration.*

Amendment.] — See *Anon.*, 29 U. C. R. 456.

Cause of Action.]—See *Fellowes* v. *Hunter*, 20 U. C. R. 382; *Groff* v. *Bricker*, 4 C. P. 154; *Jackson* v. *McDonald*, 1 U. C. R. 19.

Cause of Action — *Sufficiency.*] — The words alleged in the declaration were, "it's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker." Innuendo, that the plaintiff took medicine to procure abortion:—Held, that the declaration charged a good cause of action; also, that the damages (£100), though large, were not under the circumstances excessive. *Miller* v. *Houghton*, 10 U. C. R. 348.

Cause of Action — *Sufficiency.*] — Held, that in this case a sufficient cause of action for libel was stated, the article complained of charging the plaintiff with being concerned in a system of plundering visitors to the Falls, and that there was no ground for arresting judgment. *Barnet* v. *Davis*, 14 U. C. R. 271.

Cause of Action — *Trade-libel — Several Counts.*]—See *Russell* v. *Wilkes*, 27 U. C. R. 280.

Inducement.]—See *Johnston* v. *McDonald*, 1 U. C. R. 384.

Inducement—*Colloquium.*]—As to the degree of certainty formerly required in making the colloquium refer to the inducement. *Marter* v. *Digby*, 4 U. C. R. 441.

Inducement—*Innuendo.*]—A declaration on the following words, as varied in three different counts: "I saw Peter (meaning the plaintiff) with the heifer," (meaning that the defendant saw the plaintiff commit the crime of sodomy with the heifer); 2. "I saw Peter with the heifer just at the cross way," (meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer); 3. "I have seen Peter Johnson with my heifer; Peter Johnson is the man that did it, and I can swear within a foot to the ground where he stood when he committed the crime aforesaid:"—Held, bad, in arrest of judgment, on the ground that the words did not themselves import what was charged as their meaning, and that there was no sufficient inducement or statement of prefatory matter, to which the innuendoes in the declaration could refer. *Johnson* v. *Hodge*, 6 U. C. R. 337.

Inducement — *Innuendo.*] — The plaintiff averred that she was the mother of one B., and then complained that the defendant, well knowing this, published in his paper the following libel, which she averred imported that she was the mother of an illegitimate child: "Of the Barkers—that was the name of his reputed father; what was his mother's I either never knew, or have forgot, but I know it was not Barker." On demurrer to the declaration, as not containing inducements sufficient to support such an innuendo: — Held, declaration good. *Anderson* v. *Stewart*, 8 U. C. R. 243.

Inducement — *Innuendo.*] — Where the words spoken were, "Green, you have been mad with me ever since I caught you with your daughter;" innuendo, having sexual intercourse with his daughter under the age of twelve:—Held, that the declaration should have averred that the plaintiff had a daughter either under the age of ten or above that age and under twelve, and that the words spoken had reference to such daughter. *Green* v. *Campbell*, 6 U. C. R. 50.

Remarks as to the effect of C. L. P. Act, s. 110 (C. S. U. C. c. 103, s. 2), and as to the decision in Hemmings v. Gasson, E. B. & E. 346. *Black* v. *Alcock*, 12 C. P. 19.

Innuendo.]—Words cannot be amplified in their meaning by unwarranted innuendoes. *Morley* v. *Nichols*, 1 U. C. R. 235.

Misjoinder of Counts—*Partnership.*]—One count for slander stated a cause of action accruing to the plaintiffs as partners, by reason of its being an injury to them in their joint business; other counts in the same declaration charged defendant with imputing forgery to the plaintiffs as partners, &c.:—Held, the imputation of forgery not being a partnership imputation, that the declaration was bad for misjoinder of counts. *Morley* v. *Nichols*, 1 U. C. R. 235.

Part of Count — *Demurrer to.*] — A defendant will not be allowed in slander to single out some of the words of a count and demur to them as not actionable, while the same count contains other words uttered in the same conversation which are clearly actionable. *Taylor* v. *Carr*, 3 U. C. R. 306.

Particular Calling or Character of Plaintiff.]—When words are libellous in themselves, it is not necessary to aver that they were spoken of the plaintiff in any particular character or in reference to any particular fact. *Bell* v. *Stewart*, E. T. 11 Geo. IV.

Particular Calling or Character of Plaintiff.] — When the plaintiff declares against the defendant for charging him with being "a public robber," with an innuendo that "he, the plaintiff, had defrauded the public in his private dealings with them," it is not necessary for the plaintiff to aver that he is in any office, trade, or employment, in which he could have defrauded the public. *Taylor* v. *Carr*, 3 U. C. R. 306.

Repetition of Slander — *Several Counts.*]—Several counts for repeated utterances of the alleged slander on the same occasion were allowed. *Forbes* v. *McClelland*, 4 P. R. 272.

Special Damage — *Amendment.*] — The plaintiff, a schoolmaster, sued defendant for libel, and laid as special damages his dismissal from his school. It appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent with a view to his qualification for receiving a renewed certificate. The plaintiff applied at the trial for leave to amend the allegation of special damage to meet the evidence, which was allowed:—Held, that the Judge at nisi prius had power to make the amendment. *Jackson* v. *Simpson*, 4 U. C. R. 287.

Special Damage — *Loss of Society — Names of Persons.*]—A declaration by a married woman for slander imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage, (1) the loss of the consortium of her husband, (2) the loss of the society of friends, was:—Held, on demurrer, good, although the second ground was clearly insufficient in not naming the friends. *Palmer* v. *Solmes*, 45 U. C. R. 15.

Special Damage — *Husband and Wife — Loss of Hospitality and Consortium—Amendment.*] — In a declaration by a husband and wife for the slander of the wife in accusing her of adultery, it was alleged as special damage that the wife had lost and been deprived of the hospitality of friends with whom she was in the habit of associating, and who now refused to associate with her:—Held, on a motion for arrest of judgment, a sufficient allegation of special damage to support the action. Quære, whether the allegation of the loss of the consortium of the husband would have been alone sufficient:—Held, that the declaration claiming the damages as the wife's, although when recovered they might belong

to the husband, was no objection, and, at all events, was merely a matter of form and so amendable. *Campbell* v. *Campbell*, 25 C. P. 368.

Words Not Set Out—*Joinder of Husband and Wife.*]—The first and second counts of a declaration, in an action by husband and wife, charged slander of the wife, consisting of imputations of adultery and prostitution, without setting out the words:—Held, clearly bad. The third count was for assaulting the wife, whereby, &c.; and the fourth and fifth counts were respectively for assault of the wife, per quod consortium amisit, and of the husband himself. The plaintiffs claimed damages jointly under the first four counts, and the husband alone under the fifth count:—Semble, that the claim for damages by both plaintiffs, though bad as to the fourth count, was good as to the first three; but that both plaintiffs being expressed in the declaration to sue in respect of all the counts, though the husband alone, at the conclusion, claimed in respect of the fifth count, the whole declaration was bad. *Breen* v. *McDonald*, 22 C. P. 298.

See ante VII. 4.

(b) *Pleas of Justification.*

Argumentativeness—*Insufficiency.*]—In case for a libel charging the plaintiff with being a "convicted felon," a plea that in a memorial to the Lieutenant-Governor he had confessed being guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification. *Longworth* v. *Hyndman*, 1 U. C. R. 17.

Attributing Different Meaning.]—A plea seeking to justify the use of the words in a sense different to that imputed was disallowed, but defendant was permitted to justify generally. *Forbes* v. *McClelland*, 4 P. R. 272.

Generality.]—Held, upon the declaration for libel and the several pleas thereto, set out in this case, that the pleas were bad: the second and third as being too general, and not stating the facts on which defendant formed his opinion as given in the libel of the plaintiff's want of respectability and influence, and the fourth as not co-extensive with that part of the publication which it attempted to justify. *Gibb* v. *Shaw*, 18 U. C. R. 165.

Generality.]—Declaration for a libel charging defendant, an inspecting field officer of militia, with swearing and drunkenness on a specific occasion and generally. Plea, that the statements complained of were true in the sense in which they were alleged to have been used:—Held, plea bad, as being too general. *Baretto* v. *Pirie*, 26 U. C. R. 468.

Immateriality.]—The first count set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words, "Chronometer makers to the Queen." The libel complained of charged in substance that a large proportion of the watches advertised by them were merely Swiss watches, imposed upon the public as English, and at twice their true value. In the second count the libel alleged charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public. Plea to each count, that the plaintiffs marked their Swiss watches with the name, "Thomas Russell & Sons, London and Liverpool," not "Thomas Russell & Sons," only, as alleged:—Held, bad, as offering an immaterial issue. Held, also, that each count shewed a good cause of action. *Russell* v. *Wilkes*, 27 U. C. R. 280.

In Criminal Proceedings.] — See *ante* V.

Sufficiency.] — To an action for slander, in saying of the plaintiff, "I am told that Muma was the man that killed the pedlar, and I believe it," the defendant pleaded that he was told that the plaintiff was the man that killed the pedlar, and he did believe it:—Held, insufficient. *Muma* v. *Harmer*, 17 U. C. R. 293.

Sufficiency.]—The sixth count was for a libel, in which the defendant had stated that the plaintiff stood charged with the crime of forgery, committed not against one man, but a whole community. Defendant pleaded, justifying this charge by setting out at length a fraud committed by plaintiff and others at an election by falsifying the poll books, and inserting fictitious votes, and his trial and conviction therefor; and he alleged that this was what he referred to in that part of the libel, and was understood to mean by all to whom it was published:—Held, sufficient. *Fellowes* v. *Hunter*, 20 U. C. R. 382.

Sufficiency.]—Declaration, that the plaintiff was a conductor in the employment of a railway company of which the defendant was manager, and had been dismissed therefrom, and that defendant falsely and maliciously published of the plaintiff, in relation to his conduct while so employed and his dismissal, in the form of a hand-bill addressed to the employees of the company, the following: "It having come to the knowledge of the directors of the company that an envelope was mailed at Hamilton, containing four coupon tickets for passages from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office in accordance with the regulations, and which envelope was addressed in the handwriting of conductor T. (the plaintiff) to a conductor on the New York Central Railway Company, conductors and others are informed that conductor T. has been dismissed from the service of the Great Western Railway Company." Innuendo, that the plaintiff had conducted himself fraudulently in his said employment, and attempted to defraud the company, and had been dismissed therefor. Plea, that it is true, as stated in the alleged libel, that an envelope was mailed at Hamilton containing four coupon tickets for passages from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office in accordance with the regulations, and which envelope was addressed in plaintiff's handwriting to a conductor on the New York Central Railway Company, and that conductors and others were informed that the plaintiff had been dismissed from the service of the Great Western Railway Company:

—Held, on demurrer, that under C. S. U. C. c. 103, s. 2, the plea was a good defence, for that the defendant undertook by it to justify the libel with the innuendo. *Tench* v. *Swinyard*, 29 U. C. R. 319.

Sufficiency.]—The libel for which the plaintiff sued alleged in substance that the plaintiffs, a life assurance company, had lost heavily on debentures taken at par, and nearly worthless, which they had nevertheless continued to value; that they were compelled by public opinion to call in an actuary, but prevented him from making a proper valuation; that their history was one of outrageous extravagance and dangerous debility; that for years they had trembled on the very verge of disaster; and that they were in an unsound and precarious condition, &c. The plea to the whole declaration alleged only, in substance, that defendants had for several years made untruthful annual statements; that they had lost large sums of money by investments; and that they paid larger bonuses and dividends and salaries than their true financial position would justify:—Held, that the plea did not justify all the material charges in the declaration, and was therefore bad. *Canada Life Assurance Co.* v. *O'Loane*, 32 U. C. R. 379.

Sufficiency.]—Declaration, that the plaintiff voted at a certain parliamentary election, and took the oath prescribed by s. 41 of the Election Act of 1868, and that in reference to such oath defendant falsely and maliciously spoke, &c., of the plaintiff the words, "He swore to what was false, and I can prove it," meaning that the plaintiff was guilty of wilful and corrupt perjury. Plea, to so much of the declaration as related to the speaking of the alleged words without the alleged meaning, that the plaintiff did swear false in swearing that he was a resident of a certain electoral division, and as such entitled to vote, &c:—Held, on demurrer, plea bad, because if it intended to specify perjury, it should have distinctly charged that offence, and if not, the general issue should have been pleaded. *Strachan* v. *Barton*, 34 U. C. R. 374.

Sufficiency—*General Charge—Particular Instance.*]—As to part of a libel complained of, charging that the plaintiff had narrowly escaped being indicted for perjury, defendant justified, alleging that in a certain suit the plaintiff, as plaintiff's attorney therein, in an affidavit for a ca. sa. had sworn falsely to certain specified statements made to him by one R.; that defendant in that suit had recovered damages against the plaintiff for falsely and maliciously making such affidavit, and contemplated a prosecution of the plaintiff for perjury, but was dissuaded:—Held, a good plea. In the second count, the libel alleged was in part the publication of an affidavit made by R., in which he set out the action against the plaintiff, and the statements sworn by plaintiff to have been made to him by R., and averred that on the trial of that action he, R., had sworn that these statements were false, as in fact they were. Defendant, in a plea to this part of the libel, averred that the e statements made by R., repeating them, were true:—Held, sufficient. In a third count the libel was, that the plaintiff, a practising barrister and attorney, was a pettifogger and without character. This defendant justified, by setting out one matter (the suit mentioned in the other pleas) in which the plaintiff was alleged to have acted as charged in the libel:—Held, bad, for the general charge could not be justified by a single instance. *Fitch* v. *Lemmon*, 27 U. C. R. 273.

Sufficiency—*Justifying Words without Innuendo.*]—See *Davis* v. *Stewart*, 29 U. C. R. 441.

Sufficiency—*Multifariousness.*]—As to an assertion in the libel complained of, that the plaintiff "left New York with his creditors in the lurch," defendant pleaded that before the alleged grievances the plaintiff resided in New York, and came to Canada permanently to reside without having paid or satisfied his creditors in New York:—Held, upon demurrer, bad, as for all that was stated in the plea the plaintiff might have left New York with the consent and approbation of his creditors. As to a charge that the plaintiff "resorted to that style of financiering which in the vernacular is called swindling," defendant pleaded that the plaintiff obtained from one W. R. B. a certain promissory note, with the understanding that he, W. R. B., should at the maturity thereof pay the amount actually due between the plaintiff and himself, and that the plaintiff should retire the note; and that W. R. B. did pay plaintiff the amount so due, but plaintiff did not retire the note, and W. R. B. was sued thereon. Secondly, that the plaintiff obtained from one W. a promissory note for $200, and upon its maturity a renewal for $100 and $100 in cash, upon the express understanding that he would retire the $200 note, which he did not, but used and appropriated the funds and new note to his own use:—Held, that the receipt and application of the funds as above stated did not in the first case amount to swindling; and that the facts of the second case stated as a justification were sufficiently stated to entitle defendant to the decision of a jury thereon. *Brown* v. *Beatty*, 12 C. P. 107.

Sufficiency—*Multifariousness.*]—The matter relied upon as libellous was that the plaintiff "has for the past twelve months made his paper a receptacle for coarse abuse, scurrilous personalities, and in some cases gross slanders on private individuals who happened to come within the pale of his displeasure. That he has dragged into print in the most offensive manner the names of some of our most respectable and philanthropic citizens, invaded the privacy of their personal relations, and held their peculiarities up to ridicule, and has, by heaping unmerited abuse on some of our most valued institutions, endeavoured to turn them into a bye-word and a laughing stock. There is, no doubt, a generous impulse in our nature, * * * but it is surely carrying such an impulse a great deal too far * * * if we so far lose the sense of his moral turpitude as to elevate into an oppressed hero the man who is suffering the merited consequences of a long course of deliberate, determined, and reckless wickedness." Defendant justified, setting out articles from the newspaper published by the plaintiff twelve months previous to the publication by the defendant of the communication complained of, and alleging that the said matters published by the plaintiff were false and malicious, and that the persons so libelled were persons of good name," &c:—Held, that primâ facie the articles set forth in the pleas afforded a justification for the alleged libel:—Held, also, in accordance with Brown

v. Beatty, 12 C. P. 107, that the plea was not bad for multifariousness. *Stewart* v. *Rowlands*, 14 C. P. 485.

See Small v. *McKenzie*, Dra. 174, *ante*, VII. 6.

(c) Other Pleas.

Not Guilty—*Inconsistent Plea.*]—In an action for libel the plea of not guilty was held inconsistent with a plea of apology and payment into court, and was ordered to be struck out. *Doyle* v. *Owen Sound Printing Co.*, 8 P. R. 69.

Plea Negativing Inducement—*Immaterial Issue.*]—See *Johnston* v. *McDonald*, 1 U. C. R. 384.

Public Matter—*Fair Comment.*]—The alleged libel purported to be founded on information given to defendant by "a resident of this city yesterday," meaning the day before the publication. One of the pleas sought to be pleaded alleged that the gravamen of the charge was matter of "public notoriety and discussion," and that the words used were a fair comment, &c., and made other statements which it was alleged would enable defendant to introduce evidence of irrelevant matters:—Held, that the general plea that the publication was a fair bonâ fide comment, &c., might be pleaded, but the plea as framed and set out in the case was inconsistent with the words used in the alleged libel, and could not be allowed. *Devlin* v. *Moylan*, 4 P. R. 150.

(d) Replication.

Conviction—*Reversal.*]—The declaration was for a libel of the plaintiff, in the following words: "Old S., who was naturalized by serving a term in the penitentiary of New York state." Innuendo, that the plaintiff had served a term as a convict in said prison. Defendants justified by setting up a conviction of the plaintiff of an indictable offence before the recorder's court in Buffalo, prior to the publication of the libel, his sentence of imprisonment in the state prison of New York state for two years, and his detention there for that period. Replication, that within three months from the alleged conviction, and before the plaintiff was imprisoned for said term, the conviction was reversed by the supreme court of the state, and the plaintiff released from custody upon the charge against him:—Held, on demurrer, replication good. *Davis* v. *Stewart*, 18 C. P. 482.

Conviction — *Reversal.*]—The plaintiff complained of a libel describing him as an ex-penitentiary bird from the state prison at Auburn, in the state of New York. Innuendo, that the plaintiff had served a term in the penitentiary as a convict, to which it was alleged that he was sent on a conviction for obtaining money by false pretences. Defendant pleaded, as to the words without the meaning alleged, that the plaintiff, before the libel, had been duly convicted of the offence mentioned, and imprisoned at Auburn under sentence therefor. The plaintiff replied that the alleged conviction was obtained without legal evidence, and afterwards, on appeal to the proper court, was reversed and annulled, as defendant well knew before publishing the libel:—Held, on demurrer, replication good. Held, also, plea good, although pleaded to the words without the innuendo. *Davis* v. *Stewart*, 29 U. C. R. 441.

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2. Since the Judicature Act.

(a) Statement of Claim.

Amendment.]—See *Todd* v. *Dun*, 12 O. R. 791, 15 A. R. 85.

Cause of Action — *Municipal Corporation.*]—See *McLay* v. *County of Bruce*, 14 O. R. 398.

General Allegations—*Necessity for Details.*]—In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed:—Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend, by giving details, upon payment of costs. *Paterson* v. *Dunn*, 14 P. R. 40.

Innuendo—*Words not Capable of.*]—W., a Judge of the supreme court of B. C., brought an action against H., editor, for a libel contained in the following article published in his paper: "The McNamee-Mitchell suit. In the sworn statement of Mr. McNamee, defendant in the suit of McKenna v. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership (in the dry dock contract) out in British Columbia, one of whom was the Premier of the Province.' The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a Judge of the supreme court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be labouring under a mistake. Had the statement been made off the stand, it would have been scouted as untrue; but having been made under the sanctity of an oath, it cannot be treated lightly or allowed to pass unheeded." The innuendoes alleged by the declaration to be contained in this article were: 1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the Government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench:—Held, that the article was susceptible of the first of the above innuendoes, but not of the others, which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial. On the trial the jury found a verdict for the plaintiff, with $2,500 damages:—Held, that the case was improperly left to the jury, but the only prejudice

sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to $500. *Higgins* v. *Walkem*, 17 S. C. R. 225.

See Huber v. *Crookall*, 10 O. R. 475, *ante* VII. 4; *Farmer* v. *Hamilton Tribune, &c., Co.*, 3 O. R. 538, *ante* VIII.

Notice of Action—*Conformity to.*]—See *Obermier* v. *Robertson*, 14 P. R. 553.

Slander—*Names of Persons—Times and Places.*]—In an action of slander the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added "and to others at present unknown to the plaintiff:"—Held, sufficient. It was also alleged that during a period of five months the defendant spoke and published various slanders to certain named persons and to others not known to the plaintiff:—Held, bad, for it did not shew which of the persons mentioned were present when the different statements were made, nor at what times and places they were made. Leave to the plaintiff to amend by adding further charges within reasonable limits. *Townsend* v. *O'Keefe*, 18 P. R. 147.

Special Damage—*Loss of Custom—Particulars.*]—*Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

Trade-libel—*Frame of Statement.*]—The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills issued by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors:—Held, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have the words of the alleged libel set out in the pleading. Flood v. Jackson, [1895] 2 Q. B. 21, and Riding v. Smith, 1 Ex. D. 91, specially referred to. *Robinson* v. *Sugarman*, 17 P. R. 419.

Trade-libel — *Malice—Special Damage—Demurrer.*] — In an action of libel the plaintiffs' statement of claim alleged that defendants falsely and maliciously published of and concerning the plaintiffs' goods " * * * We do not keep Acme or common plate," and also alleged special damage:—Held, on demurrer, that, as the allegation was that the defendants "falsely and maliciously" published of and concerning the plaintiffs, &c., and as special damage was alleged in direct terms, following Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Ex. 218, if the plaintiffs were able to prove that allegation, they would be entitled to judgment, and the demurrer was overruled. *Acme Silver Co.* v. *Stacey Hardware Co.*, 21 O. R. 261.

Trade-libel — *Partnership—Company.*]—See *Bricker* v. *Campbell*, 21 O. R. 204.

See ante, VII. 4.

(b) *Statement of Defence.*

Inaccuracy — *Correction—Materiality—Defence to Portion of Damages.*]—The statement of claim in an action of libel brought by plaintiff, an insurance inspector and adjuster, and at the time of action brought the liquidator of an insurance company, alleged that defendant, in an article published in his newspaper commenting on the trial of a previous action of libel brought by plaintiff against defendant in which plaintiff had recovered one shilling damages, stated that he would not have been surprised if the jury had found more favourably for plaintiff, for, though evidence of general reputation was admitted, the court had refused to allow evidence of specific acts of improper conduct, unless directly connected with the insurance company; and that, in further commenting on said trial in his said article, he falsely and maliciously published of the plaintiff, in his business as an insurance adjuster, that plaintiff would have been asked to explain the purchase of a claim in respect of a loss, one-half of the amount of which he afterwards received from the company while their adjuster; and as to gifts received from persons whose losses he had adjusted; the innuendo alleged being that plaintiff had been dishonest in adjusting claims and had accepted bribes, &c.; and that the article was an unfair and false report of the trial. The defendant by his statement of defence admitted the publication of the article, but denied the innuendo, and also any malice, &c.; and alleged that there was an inaccuracy in the article as to the question which might have been asked plaintiff, by which a wrong impression might have been conveyed, which was corrected at the earliest opportunity in defendant's newspaper by an article stating that the question referred to should have been that the purchase was made in respect of a loss which occurred while he was the company's adjuster, but that the payment was after he had left the company:—Held, on demurrer, that the difference between the first and second articles as to the payment on the alleged purchase was material, for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and would probably materially affect the damages; but even if immaterial the plaintiff was not prejudiced; that it was only offered as a defence to a portion of the damages. The demurrer was therefore overruled. *Livingston* v. *Trout*, 9 O. R. 488.

Mitigation of Damages—*Justification.*]—To an action of slander the defendant set up as a defence facts which amounted to a justification, but restricted their effect to the mitigation of the damages:—Held, that this constituted a good defence. *Wilson* v. *Woods*, 9 O. R. 687. But see the next case.

Mitigation of Damages—*Justification—Bad Character of Plaintiff.*]—In libel a plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery should be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such a plea, based upon the plaintiff's bad character, must either shew that the plaintiff is a man of bad general reputation or character, or that the

plaintiff has a bad character with regard to some specific act which relates to the charge in the libel complained of. It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages. Wilson v. Woods, 9 O. R. 687, disapproved of. *Moore* v. *Mitchell*, 11 O. R. 21.

Mitigation of Damages—*Justification—Confession.*]—See *Switzer* v. *Laidman*, 18 O. R. 420, *ante* VII. 6.

Mitigation of Damages — *Privilege—Fair Comment—Confusion—Embarrassment.*]—The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment and the matters alleged in mitigation under their appropriate heads. *Dryden* v. *Smith* (No. 2), 17 P. R. 505.

Privilege—*Trial.*]—The omission to plead privilege as a defence does not preclude the defendant from setting it up at the trial. *Blagden* v. *Bennett*, 9 O. R. 593.

Public Matter — *Fair Comment — Newspaper—Privilege.*]—See *Macdonell* v. *Robinson*, 12 A. R. 270.

(c) Other Cases.

Counterclaim for libel excluded in an action for negligence. See *McLean* v. *Hamilton Street Railway Co.*, 11 P. R. 193.

And in an action on a promissory note. See *Central Bank of Canada* v. *Osborne*, 12 P. R. 160.

Amendment of pleadings. See *McCann* v. *Princecraw*, 10 O. R. 573.

XI. PRACTICE.

1. *Examination for Discovery.*

Before Defence.]—In an action for a libel published in a newspaper, the defendants, on a motion under rules 285, O. J. Act, were, with certain restrictions, allowed to examine the plaintiff before defence filed. *Tate* v. *Globe Printing Co.*, 11 P. R. 253. See the next case.

Before Defence.]—Rule 566 does not apply to examinations for discovery. Fisken v. Chamberlain, 9 P. R. 283, and cases following it, overruled. But were that rule applicable, it was not "necessary for the purposes of justice," in the circumstances of this case, an action for libel, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence. Decision in 15 P. R. 473 reversed. Tate v. Globe Printing Co., 11 P. R. 251, and cases following it, specially referred to. Gourley v. Plimsoll, L. R. 8 C. P. 362, and Zierenberg v. Labouchere, [1893] 2 Q. B. 183, followed. *Beaton* v. *Globe Printing Co.*, 16 P. R. 281.

Before Statement of Claim.]—In actions of slander when the court is satisfied of the bona fides of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered under rule 566; but in such case a further examination after pleading will not be allowed except upon special grounds. Fisken v. Chamberlain, 9 P. R. 283, Gordon v. Phillips, 11 P. R. 540, McLean v. Barber, 13 P. R. 500, followed. *Campbell* v. *Scott*, 14 P. R. 203. See the preceding case.

Damages in Way of Trade.]—In an action for damages for libelling the plaintiffs in the way of their trade, the plaintiffs did not allege special damage but alleged generally that their business and commercial reputation had suffered. Upon the examination of the plaintiffs for discovery they refused to answer as to what business they had lost by reason of the alleged libels:—Held, that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place figures before the jury to shew a general diminution of profits since the publication of the alleged libels; and if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled on the examination for discovery to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery. It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and if particulars given, that the examination should be continued and discovery afforded; but if particulars were not given, that evidence of diminution of profits should not be given at the trial. *Blackford* v. *Green*, 14 P. R. 424.

Disclosure—*Justification—Immorality.*]—The defendants having in their newspaper charged the plaintiff with immorality, he sued them for libel, and the defendants pleaded that the charges were true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her. *Macdonald* v. *Sheppard Publishing Co.*, 19 P. R. 282.

Officer of Newspaper Company—*Sub-editor.*]—Held, that the assistant or sub-editor of the defendants was an officer of the company examinable for the purpose of discovery under R. S. O. 1877 c. 50, s. 156. *Maitland* v. *Globe Printing Co.*, 9 P. R. 370.

Officer of Newspaper Company—*Editorial Writer.*]—In an action against a newspaper publishing company for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendants pleaded justification:—Held, that the writer was not in the position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under rule 487. Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification. *Murray* v. *Mail Printing Co.*, 14 P. R. 465.

Privilege—*Criminating Answers.*]—See *Nunn* v. *Brandon*, 24 O. R. 375; *Derry* v. *World Newspaper Co. of Toronto*, 17 P. R. 387.

Privilege—*Criminating Answers.*]—No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him:—Held, that he was entitled to the privilege, and that it was not too late to claim it. The costs of the motion to commit, were made costs to the plaintiff in the cause. *Hall* v. *Gowanlock*, 12 P. R. 604.

Privilege—*Criminating Answers.*]—In an action of libel and slander, the plaintiff complained that the defendant had communicated to several persons the contents of a letter received from another person in which the plaintiff was accused of larceny, &c. Upon an examination of the defendant for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so:—Held, that the reason given was sufficient to privilege the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of inquiry at the outset. Semble, that *s.* 5 of the Dominion statute of 1893 respecting witnesses and evidence will, when it comes into force, supersede the privilege now existing in cases of this kind. *Weiser* v. *Heintzman*, 15 P. R. 258. See the next case.

Privilege—*Criminating Answers.*]—The Ontario statute as to evidence, R. S. O. 1887 c. 61, s. 5, limits the scope of all preliminary examinations for discovery or otherwise in civil actions. Jones v. Gallon, 9 P. R. 296, followed. It has not been affected by s. 5 of the Dominion statute 56 Vict. c. 31, which, by necessary constitutional limitations, as well as by express declaration (s. 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction. The language used in a previous decision in this case, 15 P. R. 258, at p. 260, is too broadly expressed, in the absence of concurrent Ontario legislation. And therefore, a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Vict. c. 31 (D.), be compelled to answer questions which may tend to criminate him. *Weiser* v. *Heintzman*, 15 P. R. 407.

See Gould v. *Beattie*, 11 P. R. 329, *infra*; *Robinson* v. *Sugarman*, 17 P. R. 419, *post*, 2.

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2. *Particulars.*

Damages.]—See *Blachford* v. *Green*, 14 P. R. 424, *ante*, 1.

Justification.]—In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the government in his business of distiller. To this the defendant pleaded justification:—Held, that the plaintiff was entitled to particulars of the defence intended to be set up under this plea. *Corcoran* v. *Robb*, 8 P. R. 49.

Names of Persons to whom Words Spoken.]—In an action for slander in charging the plaintiff with theft, particulars were ordered shewing the person to whom the words were spoken, or if such person were unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard or might have heard the words spoken. *Thornton* v. *Capstock*, 9 P. R. 535.

Names of Persons to whom Words Spoken—*Examination for Discovery.*]—An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars:—Semble, in actions of slander the practice laid down in Thornton v. Capstock, 9 P. R. 535, as to particulars to be furnished, should be followed in preference to that prevailing in England. *Gould* v. *Beattie*, 11 P. R. 329.

Names, Times, and Places.]—In an action for slander the statement of claim alleged that the defendant, on a specified day, spoke to C. and others the slanderous words alleged. In answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of the others to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts. An order of a master requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom, the places where, and the times when the words were spoken, was affirmed by a Judge in chambers, was reversed by a divisional court:—Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not

plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order the particulars. Thornton v. Capstock, 9 P. R. 555, approved. *Winnett* v. *Appelbe*, 16 P. R. 57.

Names, Times, and Places.]—The plaintiff alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words:—Held, that the defendant was entitled to some particulars as to the times when and the places where the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken. Winnett v. Appelbe, 16 P. R. 57, distinguished. Held, also, that the plaintiff should have leave to examine the defendant before delivering particulars, in order to enable him to furnish them. *Robinson* v. *Sugarman*, 17 P. R. 419.

Necessity for Details in Pleading.]—See *Paterson* v. *Dunn*, 14 P. R. 40, *ante* X. 2 (a).

Slander of Title to Goods—*Damping Auction Sale.*]—In an action for slander of title to goods the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised, a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done:—Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article in respect of which damage was claimed a larger price than was realized at the sale; all that he could reasonably be required to particularize was the amount by which his sale had been damped. *Catton* v. *Gleason*, 14 P. R. 222.

Sufficiency—*Striking out—Discretion.*]—Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the Judge at the trial will exercise his discretion as to the admission of evidence thereunder. *Citizens' Insurance Co.* v. *Campbell*, 10 P. R. 129.

See Macdonald v. *Sheppard Publishing Co.*, 19 P. R. 282, *ante* (1); *Townsend* v. *O'Keefe*, 18 P. R. 147, *ante* (X. 2 (a)).

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3. *Production of Documents.*

Privilege—*Criminating Answers—Incorporated Company.*]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded. The statute R. S. O. 1887 c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery. In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party. The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal prosecution. Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, specially referred to. Legislation suggested, similar to 32 & 33 Vict. c. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published. *D'Arcy* v. *World Newspaper Co. of Toronto*, 17 P. R. 387.

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4. *Venue.*

Fair Trial—*Convenience—Expense.*]—An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense, was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudice against the plaintiff, arising from a political excitement occasioned by an election held there three years previously:—Held, that the venue must be changed, the action being for a private injury, and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favour of the change. *Roche* v. *Patrick*, 5 P. R. 210.

Fair Trial—*Convenience—Newspaper.*]—When in an action for a libel contained in a newspaper, the plaintiff lays the venue in a county distant from that in which the newspaper is published and the parties reside, so that the trial may be free from local influences, it will not be changed to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county. The obtaining of a fair trial must overbear every consideration of convenience. *Blackburn* v. *Cameron*, 5 P. R. 341.

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5. *Other Cases.*

Interlocutory Judgment—*Assessment of Damages—Slander.*]—The action was commenced by a writ of summons indorsed, "The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to Form 146, and set the cause down for assessment of damages at a sittings of the high court:—Held, that there being nothing to shew that the action was brought under s. 5 of the Act respecting Libel and Slander, R. S. O. 1897 c. 68, it must be treated as an ordinary action of slander; rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had the right to sign interlocutory judgment and have the damages assessed as she proposed. Origin of rule 578. *Stanley* v. *Litt*, 19 P. R. 101.

XII. Privilege.

1. *Generally—Absence of Malice.*

Express Malice.]—Where the words were spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice, upon evidence sufficient to warrant their finding, before defendant can be pronounced guilty. *Richards* v. *Boulton*, 4 O. S. 95.

Express Malice — *Falsity.*] — Where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself, as in other causes it might be, but the plaintiff must give extrinsic evidence of actual express malice; he must also prove the statement to be false, as well as malicious; and defendant may still make out a good defence by shewing that he had good ground to believe the statement true, and acted honestly under that persuasion. *McIntyre* v. *McBean*, 13 U. C. R. 534.

Functions of Judge and Jury.]—In actions for slander or libel it is the province of the Judge to determine whether the occasion of uttering the slanderous words, or writing the libellous matter complained of, was or was not privileged; and if privileged, in the absence of evidence of malice, there is nothing to be left to the jury as to bona fides or otherwise. *McIntee* v. *McCulloch*, 2 E. & A. 390, reversing the decision below, 13 C. P. 438.

Malice—*Justification.*] — Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion. *Corridan* v. *Wilkinson*, 20 A. R. 184.

Malice—*What Constitutes—Knowledge of Untruth.*]—The alleged offence for which a fine was inflicted by a trade union upon a member was the causing an extra apprentice to be brought into the yard in which plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed:—Held, by the trial Judge, that the publication was not privileged. On appeal to a divisional court:—Held, that the evidence did not support the finding that the defendants knew that the words complained of were untrue, nor was there evidence of malice, and that in the absence thereof the communication was privileged; and the appeal was allowed. *Beaulieu* v. *Cochrane*, 29 O. R. 151, 598.

Malice—*What Constitutes—Misdirection.*]—In an action for slander, where the occasion was privileged, the Judge at the trial in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, of a statement not true, made without consideration of what the probable consequences might be to another person, and of a statement not made in good faith—not truly, but wantonly and recklessly, and without proper consideration:—Held, misdirection, for it should have been left to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed. *English* v. *Lamb*, 32 O. R. 73.

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2. *Discharge of Duty.*

(a) *Actions by and against Public Officers.*

Attorney-General—*Newspaper Attack—Fair Comment.*] — See *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Commissioners of Court of Requests—*Petition to Government.*]—A petition to the lieutenant-governor complaining of the conduct of commissioners of the court of requests, and charging them with partiality, corruption, and connivance at extortion, signed by a number of persons, and praying for redress, is absolutely privileged, even though defendant had circulated it and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in it, and supposed it to be a totally different matter. *Stanton* v. *Andrews*, 5 O. S. 211.

Corporation Solicitor.]—See *Douglas* v. *Stephenson*, 29 O. R. 616, *post* (b).

Government Clerk—*Accusations of Fellow Clerk.*]—Where defendant, a clerk in the receiver-general's office, told his principal that the plaintiff, another clerk, had robbed him (the receiver-general), there being no proof that any money had been stolen, or that the receiver-general had ever suspected it:—Held, not privileged. *Prentice* v. *Hamilton*, Dra. 398.

License Inspector—*Resolution of Commissioners—Ultra Vires.*] — Claim, that the defendant, an inspector of licenses, falsely and maliciously published of the plaintiff a circular which he caused to be sent to all licensed victuallers, &c., in the riding, containing the following words: "W. R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, &c., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family or household of the said parties." Defence, that the commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "that no intoxicating liquors shall, under any pretence, be sold in any tavern, &c., to any person who has the habit of drinking intoxicating liquors to excess, or the wife, &c., of such person, or any person concerning whom notice had been given to the landlord by the husband, &c., of such person, or any justice of the peace or inspector, that such person is in the habit of drinking," &c.; that the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. And the defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution:—Held, on demurrer, that the license commissioners had no power to pass the resolution, and therefore that the defence was bad, for the communication was not privileged, and the defendant's

belief in the validity of the resolution could not create any privilege. *Roberts* v. *Climie*, *Murphy* v. *Climie*, 46 U. C. R. 264.

Post Office Inspector—*Malice—Onus.*]—The appellant, having been appointed chief post office inspector for Canada, was engaged, under directions from the postmaster-general, in making inquiries into certain irregularities which had been discovered at the St. John post office. After making inquiries, he had a conversation with the respondent, W., alone in a room in the post office, charging him with abstracting missing letters, which the respondent strongly denied. Thereupon the assistant postmaster was called in, and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from these money letters, and I have concluded to suspend him." The respondent, having brought an action for slander, was allowed to give evidence of the conversation between himself and the appellant. There was no other evidence of malice. The jury found that the appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster:—Held, on appeal, that the appellant was acting in the due discharge of his duty and in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged. 2. That the onus lay upon the respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a nonsuit should be made absolute. *Deuce* v. *Waterbury*, 6 S. C. R. 143.

Post Office Inspector—*Malice—Interest.*]—See *Hanes* v. *Burnham*, 26 O. R. 528, 23 A. R. 90.

Postmaster.]—See *Jones* v. *Stewart*, Tay. 453.

Postmaster—*Excessive Language.*]—Defendant wrote to R., who was M. P. for the county in which the parties resided, requesting him to have plaintiff, a postmaster, removed from office, as his "roguery" was unbearable in the locality, and stating that he (defendant) could not trust his bank-book through the post office lest plaintiff should go to the bank and draw or keep the money; that he had sent a declaration to the P. O. department at Ottawa to have him removed; and demanding to know what the country would "turn to" if the government kept such men in office; and that if the people could not send their money through the post office they had better rise in rebellion at once. The defendant then wound up his letter with a demand upon R., as their representative, to have the "scoundrel removed:" that he had "broken up seven or eight money letters and used the money for his own purpose:"—Held, that the Judge at the trial had rightly ruled that the occasion of writing the letter was not privileged; and that, on the authority of Fryer v. Kinnersley, 15 C. B. N. S. 430, the violence of the language was so much in excess of the occasion as to exclude it from the rule as to privileged communications. *Graham* v. *Crozier*, 44 U. C. R. 378.

Public School Master—*Mistake.*]—A representation by the assessed inhabitants of a school section as to the character of the teacher, made with a view of obtaining redress, is a privileged communication, which it is of importance to the public to protect; and such a statement would not be the less privileged if made by mistake to the wrong quarter. Quære, whether a communication of this nature, made by an inhabitant of any part of the Province, would not be privileged. *McIntyre* v. *McBean*, 13 U. C. R. 534.

Sheriff—*Malice—Motive.*]—A complaint addressed to a public body or to Government respecting the conduct of an officer (in this case a sheriff) under their control, is not necessarily privileged. That depends on the motives with which it was made. *Corbett* v. *Jackson*, 1 U. C. R. 128.

Warden of Prison—*Newspaper Attack.*]—See *Massie* v. *Toronto Printing Co.*, 11 O. R. 362, *post* (b).

(b) *Newspaper Criticism.*

Advertisement—*Criticism before Publication.*]—See *Graham* v. *McKimm*, 19 O. R. 475.

Fair Comment—*General Verdict—New Trial.*]—See *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Fair Comment—*Public Benefit—Absence of Malice—Pleading.*]—In an action of libel, paragraphs 3 and 4 of the defence set up that the alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and bonâ fide comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed and published by the defendant bonâ fide, for the public benefit, and without malice:—Held, affirming the judgment in 8 O. R. 53, a good defence. Farmer v. Hamilton Tribune Co., 3 O. R. 538, and Murphy v. Halpin, Ir. R. 8 C. L. 127, distinguished. *Macdonell* v. *Robinson*, 12 A. R. 270.

Fair Comment—*Public Matter—Warden of Prison.*]—The alleged libel consisted of letters of a very gross character published in the defendants' newspaper reflecting on the plaintiff as warden of a prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. The Judge told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose * * * Such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously." The jury found for the plaintiff with $8,000 damages:—Held, that the libel was not privileged, or published on a privileged occasion; that no exception could be taken to the Judge's charge; nor could it be said that the libel was a fair comment upon a matter in which the public had an interest. *Massie* v. *Toronto Printing Co.*, 11 O. R. 362.

Fair Comment—*Public Official—Conduct of—Belief in Truth of Statements.*]—The discussion of the conduct of a solicitor of a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticise or make fair comments thereon; but the statements on which the criticism or comments are based must be true and not merely believed to be true on reasonable grounds. Where, therefore, in an action for libel for statements published in a newspaper on which comments were made criticising the plaintiff's conduct as such solicitor, the jury, although they were told by the trial Judge in his charge that any criticism on the plaintiff's conduct must be based on the truth, were at the same time told that it was sufficient if the statements on which the criticism was founded, were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial directed. *Douglas* v. *Stephenson*, 29 O. R. 696.

Fair Comment—*Truth of Statement.*]—See *Wills* v. *Carman*, 17 O. R. 223; *Brown* v. *Moyer*, 23 O. R. 222, 20 A. R. 509.

Public Benefit—*Duty of Journalist.*]—See *Farmer* v. *Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538.

Public Benefit—*Letter to Newspaper—Liberty of Discussion.*]—The defendant published a letter addressed to the editor of a public paper, in which he stated that the plaintiff, a medical practitioner, was unlicensed:—Held, that the Judge might either have ruled that this was privileged, or at all events have left it to the jury with a strong caution as to the usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those in the charge in Turnbull v. Bird, 2 F. & F. 508. *Shaver* v. *Linton*, 22 U. C. R. 177.

See Beaulieu v. *Cochrane*, 29 O. R. 151, 598, *ante* 1.

(c) *Other Cases.*

Petition to Government—*Malice.*]—An action for libel contained in communications to the Government with a view of obtaining redress, cannot be sustained, unless the party making them acted maliciously and without probable cause. *Rodgers* v. *Spalding*, 1 U. C. R. 278.

Petition to License Commissioners—*Reflection on Tavern Keeper—Express Malice.*]—The defendants and others signed a petition to the license commissioners of the city of Hamilton, praying that a license might not be granted to the plaintiff, and stating that his tavern was one of the worst drinking holes in the county; that it was kept very disorderly; that there was no suitable accommodation; and that the landlord was very much given to drinking:—Held, that the occasion of the presentation or publication of the petition was not absolutely privileged, but that the onus lay upon the plaintiff to prove express malice, and that the defendants used the occasion for some indirect or wrong motive. The jury gave a verdict for the plaintiff for $1,000, and the court was of opinion, on the evidence, verdict, and general merits, that there should be a new trial. *Willcocks* v. *Howell*, 5 O. R. 360.

Prosecution before Magistrate—*Statement Made by Defendant's Father.*]—The defendant's son, alleged to be an infant, was brought before a magistrate charged with assault. The defendant attended before the magistrate. On the plaintiff being called as a witness on the prosecutor's behalf, the defendant objected to his giving evidence, stating that "he," plaintiff, "is a perjurer, he perjured himself three times at Butt's trial before you." There was no evidence to shew that the defendant was acting for and on behalf of his son, with his son's consent, nor was it absolutely proved that the son was a minor:—Held, that the communication was not privileged, and could not be withdrawn from the jury. Semble, that under like circumstances a counsel, attorney, or party to the action or proceeding would be privileged; and even a stranger when permitted by another to act for him with the magistrate's sanction. If the defendant was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege, but the question of malice would be for the jury. *Cowan* v. *Landell*, 13 O. R. 13.

Public Interest — *Charging Corruption against Political Candidate—Justification—Challenging Suit—Costs.*]—See *Gauthier* v. *Jeannotte*, 28 S. C. R. 590.

3. *Interest.*

(a) *Communications Concerning Standing of Traders.*

Inspector of Insolvent Estate—*Letter by Former Partner of Insolvent.*]—The plaintiff and one S. had been in partnership, S. having retired and left the country. Subsequently the plaintiff made an assignment for the benefit of creditors. The defendant was a creditor, and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, a portion of which the plaintiff complained of as libellous, the remainder being admittedly privileged. F. forwarded the whole letter to the defendant, who shewed it to his co-inspector, a creditor, and also to another creditor:—Held, that the occasion of the publication was privileged, and that the privilege attached to the whole letter, it having been shewn only to persons equally interested with the defendant in the matter. *Howarth* v. *Kilgour*, 19 O. R. 640.

Mercantile Agency — *False Information.*]—See *Cossette* v. *Dun*, 18 S. C. R. 222.

Mercantile Agency—*False Information—Express Malice—Onus.*]—A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject. In an action by the customer against the local agent for an alleged libel consisting of the information given by him to the company in answer to their request:—Held, reversing the judgment in 12 O. R. 791, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing

in the language in excess of what the defendant might fairly state, the communication was privileged, and there being no proof of express malice, the plaintiff was not entitled to recover. It is the occasion of publishing the alleged libel which constitutes the privilege. Where privilege exists, implied malice is negatived, and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that the defendant knew that what he was stating was untrue, is not evidence of express malice. Clark v. Molyneux, 3 Q. B. D. 235, and McIntee v. McCulloch, 2 E. & A. 390, followed. Semble, that a mercantile agency company have no higher privilege for their business publications than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged. *Todd* v. *Dun*, 15 A. R. 85.

Mercantile Agency—*False Information—Publication in Circular.*]—The defendant published of and concerning the plaintiff, a business man, in a written circular, called "The Legal Record, Co. Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned one held by him against another:—Held, libellous, and not privileged. *Lemay* v. *Chamberlain*, 10 O. R. 638.

Mercantile Agency—*False Information—Reasonable Care.*]—In an action of libel brought by a trader against the conductors of a mercantile agency, it appeared that the libellous matter was sent to a few subscribers on their personal application. The information on which the statement complained of was founded, in reality related to another trader of the same surname as the plaintiff:—Held, that the publishing of the information was a matter of qualified privilege, but that the want of reasonable care in collecting the information was evidence of malice which destroyed the privilege. Todd v. Dun, 15 A. R. 85, followed. Cossette v. Dun, 18 S. C. R. 222, discussed. *Robinson* v. *Dun*, 28 O. R. 21.

Held, on appeal, that a mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness. Cossette v. Dun, 18 S. C. R. 222, considered. Judgment in 28 O. R. 21 reversed. *Robinson* v. *Dun*, 24 A. R. 287.

Trade Association—*Publication to Clerk—Finding of Jury.*]—One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person whom he occasionally employed, with instructions to copy it. This statement contained an allegation that the plaintiff was unworthy of credit:—Held, that, as the publication to the members of the association would have been privileged, in the absence of malice, on the ground of interest, the publication to the copyist was also privileged, being a reasonable means employed to make the communication to the others. Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 262, followed. Held, also, that the finding of the jury that "there was no ground of action" was in fact a finding that the words were not defamatory. *Harper* v. *Hamilton Retail Grocers' Association*, 32 O. R. 295.

(b) *Communications to Relatives.*

Family of Plaintiff—*Express Malice.*]—The plaintiff's daughter had been in the defendant's service for some time, and after she had left, the defendant's wife went to where she was staying, at her sister's, and claimed some things as her property, as being taken by the girl. The girl and her sister went and told this to their father, the plaintiff; and the plaintiff, his wife, the girl, the sister, and the sister's husband, went together to the defendant. The plaintiff said he came to inquire about the charge against his daughter. The defendant said she had been stealing all the time she had been at his house. The plaintiff then said that if so the defendant should not have kept her in his service. The defendant then said that the plaintiff was a thief, and that his family were all thieves, and that they were all tarred with the same stick:—Held, not a privileged communication, so as to require proof of express malice. *Miller* v. *Johnston*, 23 C. P. 580.

Father of Plaintiff—*Charging Crime.*]—The plaintiff had been working for a couple of days for the defendant as a seamstress, when the defendant missed $11, and so informed the plaintiff. She drove the plaintiff home that evening, stating she would require her again in a week or so. Next day the defendant laid the case before the chief of police, who said the plaintiff must have taken the money. The defendant then went to a Mrs. W., for whom she thought the plaintiff was working, and on being informed that the plaintiff was not there, asked to see Mrs. W. alone, and said: "I have missed $5. I went to the chief of police and laid the case before him," and he said "plaintiff had taken the money:" that plaintiff was the only one at defendant's house except defendant's children and sister. Defendant asked what she should do, and asked if she could have the plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B., for whom the plaintiff was working, and called the plaintiff outside and told her what the chief had said; she then put her hand on plaintiff's shoulder and said, "You did, you must have taken it," and asked her to confess and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be driven to her father, and the defendant drove her to her father's residence. Before doing so, Mrs. B. asked plaintiff what was the matter, and plaintiff said that defendant accused her of taking some of her money. Mrs. B. said that, through the door having been blown open, she heard the defendant say, "You did, you must have," and then the door slammed to. On arrival at her father's, the defendant did not want to go in, but on his pressing her, asking what was the matter between her and plaintiff, defendant informed him she had missed some money, and told him what the chief of police had said. The father asked her if she knew plaintiff's character, and why she should be accused more than defendant's sister. The defendant appeared shocked at the suggestion, and said she would have plaintiff arrested; and the father then said that she would do so on her own responsibility. In an action of slander:—Held, that the action was not maintainable; that the words spoken to the plaintiff's father were privileged, while those heard by Mrs. B. and those spoken to Mrs. W. did not impute any criminal offence. *Gorst* v. *Barr*, 13 O. R. 644.

Husband of Plaintiff.]—See *Hanes* v. *Burnham*, 26 O. R. 528, 23 A. R. 90.

Mother of Plaintiff—*Protection of Defendant's Interests — Excessive Language.*]—The defendant received a letter from the solicitor of the plaintiff's mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter the plaintiff, annoyance, and threatening to begin an action for slander unless a retractation were signed and costs paid. This letter was not answered by the defendant, but the threatened action having been brought, the defendant wrote a letter to the plaintiff's mother, with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff, and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in court and in newspapers: — Held, in an action for libel based upon this letter, that it did not come within the rule as to "statements necessary to protect the defendant's interests" so as to make the occasion privileged; and even if it did, the privilege was destroyed by the excess of the language. *Benner* v. *Edmonds*, 30 O. R. 676.

Promised Husband of Plaintiff—*Express Malice—Excess.*]—The defendant, who was the superintendent of a public asylum, said to a person who had formerly been a servant at the asylum, and who was engaged to be married to the plaintiff, that the latter, a maid-servant at the asylum, was a "contemptible thief," for which she brought an action of slander. Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken, and that he had reasonable grounds for his belief:—Held, that the occasion on which the words were spoken was one of qualified privilege, in that the person addressed had an interest in receiving the communication, and that the plaintiff could not recover without proof of actual malice. Held, also, that the use of the qualifying adjective "contemptible" was not evidence of actual malice. Coxhead v. Richards, 2 C. B. 569, Whiteley v. Adams, 15 C. B. N. S. 392, and Stuart v. Bell, [1891] 2 Q. B. 341, followed. *Ross* v. *Bucke*, 21 O. R. 692.

Wife of Plaintiff—*Malice—Excess.*]—W. was in the employ of a mining company, of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the headquarters of the company (her home). After he ceased to be employed by the company, but while still in the mining district and before he was settled with and his wages paid up, his wife, with a companion, went to L. to apply for some of her husband's wages, and he replied, "We don't owe him anything now, he stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the company had previously received a letter stating that the plaintiff had done what the defendant said he had. The defendant by his statement of defence denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The Judge held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial it was:—Held, that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice. *Wells* v. *Lindop*, 15 O. R. 434.

Where one used defamatory language of another under circumstances of quasi-privilege, but used the words in bad faith, not believing them to be true:—Held, that the expressions must be considered as in excess of the requirements of the occasion, and malicious, and he was not protected in an action for damages. Jacob v. Lawrence, 4 L. R. (Ir.) 582, followed. *Wells* v. *Lindop* (2), 14 O. R. 275. Affirmed, 15 A. R. 695.

(c) *Communications to and Concerning other Persons.*

Candidate for Municipal Office—*Qualification.*]—*See Swan* v. *Clelland*, 13 U. C. R. 335.

Loan Company—*Statement as to Borrowers — Absence of Malice.*] — Differences having arisen between a municipal council and a road company, of which the plaintiff was a director, defendant was appointed by the council to act as their attorney, and to examine the books of the company and report to the council. The directors were then negotiating with the Trust and Loan Company for a loan for the purposes of the road, and defendant, in the name of the firm of which he was a member, wrote a letter to the company, saying that they had been requested by three of the councillors of the township to inform them that the loan was contrary to the wishes not only of the majority of the council, but of the majority of the stockholders; that the directors were strongly suspected of misappropriation of the funds of the company, and refused an account of their expenditure to the council, &c. "All of which we can ourselves vouch for." It appeared that the directors of the road company had been acting in a manner of which the council disapproved: that defendant was told that a majority of the council were opposed to the loan, and was urged to interpose and prevent it. It was also proved that the affairs of the road company were in confusion, and that the council had good reason for wishing to check the proceedings of the directors:—Held, that the term "misappropriation" might be considered in its gravest sense libellous, but that in this case it was necessary to shew a malicious intent on the part of the defendant, for otherwise the communication would be privileged, and he would stand excused on account of his particular and legitimate connexion with the subject of which he was writing. *Hanna* v. *De Blaquiere*, 11 U. C. R. 310.

Partner of Plaintiff.] — Defendant, a government detective, knowing that one M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars which defendant had been the means of breaking up, and put him on his guard: — Held, that the communication was privileged. *Smith* v. *Armstrong*, 26 U. C. R. 57.

School Trustee—*Express Malice—Special Damage.*]—The plaintiff, a school trustee, with another trustee, under the authority of

the school board, purchased a quantity of firewood for use in the school house. In December, shortly before the municipal and school trustee elections, the defendant and H., another school trustee, were discussing the taxes, when defendant said that the trustees had paid too much for the wood; that plaintiff had culled it, and sold the best of it, and had drawn the culled wood to the school house; and, on H. remonstrating with him, said: "Oh, but he did, and I can prove it;" that he could prove it by a person named N. Subsequently in the same month, a discussion took place between defendant and B., first as to council, and then as to school matters, when defendant related the conversation he had had with N. in which he had said to N. that the wood was dear, and that N. had said that it was No. 2 at that; that there was something strange about the wood, and it must have been culled, for they bought No. 1, and drew No. 2 to the school house:—Held, that the words having been spoken by a person interested to another, also interested, the occasion was privileged; and in the absence of proof of malice no action would lie. Quære, whether defamatory words spoken of a person holding an elective office with regard thereto, not followed by special damage, are actionable when they would not be so when spoken of the holder in his private capacity. *Blagden* v. *Bennett*, 9 O. R. 593.

Servant of Defendant—*Person Searching for Stolen Goods.*]—The defendant, while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it:—Held, that both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman the material did not belong to the person from whom he had received it, the statement was primâ facie privileged. *Bourgard* v. *Barthelmes*, 24 A. R. 431.

Servant of Defendant — *Railway Company — Malice — Excess.*] — S., the general manager of the defendants' railway, without special instructions of the directors dismissed the plaintiff, a conductor, for alleged dishonesty; and, by his directions, placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in the circular books of the conductors, for the information and warning of the company's employees, two thousand in number:—Held, that defendants were liable for the publication, as being an act done by their general manager in their interest and within the general scope of his duty. 2. That the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest. 3. That the evidence shewed a reasonable mode of publication, and no excess such as to take away the privilege or shew malice. 4. That this was not an action within 16 Vict. c. 99, s. 10, which must necessarily be brought within six months. *Tench* v. *Great Western R. W. Co.*, 33 U. C. R. 8; *S. C.*, 32 U. C. R. 452.

Sheriff — *Words Spoken to, of Medical Practitioner—Gaol Attendance.*]—Defendant, being clerk of the peace, in conversation with the sheriff as to the medical examination of a lunatic in gaol, said he would not employ the plaintiff, as he had not the governor's license, adding that he thought the sheriff had more pluck than to ask him after what he, the defendant, had written (referring to some article in a medical journal). On being applied to by one M. on the plaintiff's behalf for an apology, he rejected that defendant was not a qualified physician in Upper Canada, and could not legally practise here without the governor's license:—Held, that both conversations were privileged, and that there being no evidence in either, and no extrinsic evidence, of malice, there was nothing to leave to the jury. *Shaver* v. *Linton*, 22 U. C. R. 177.

Sureties of Plaintiff's Husband — *Postmaster—Partner of Surety—Malice.*]—The plaintiff, the wife of a postmaster, complained of slander by the defendant, an assistant post office inspector, to the effect that she had taken money from letters and had given him a written confession of her guilt:—Held, that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged; but not so as to statements made to a partner of one of the sureties, who used the post office, and to whose business premises the defendant contemplated removing it; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public or moral or social duty resting on the defendant which justified him in making it. Even had the evidence shewn that the defendant honestly believed that such a duty rested upon him or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged. 2. Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false. And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted in a qualified way that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one:—Held, that, in the absence of a clear admission by the plaintiff, there was evidence of malice in fact to go to the jury. 3. The defendant was not entitled to notice of action as a public officer; the statutes requiring such notice applying only to actions brought for acts done. Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, followed. Murray v. McSwiney, 1 L. R. 9 C. L. 545, distinguished. Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice. *Hanes* v. *Burnham*, 26 O. R. 528.

Held, on appeal, that the statement to the sureties was primâ facie privileged, because of the financial interest of the sureties in the investigation. Semble, that such a statement to a partner of one of the sureties was not protected. The facts that the plaintiff at the trial denied having stolen the letters and having made any confession, and that the inspector did not produce the alleged confession, or in any way account for it, was some evidence that he made the accusation knowing it to be untrue, and therefore maliciously, so as to displace the primâ facie case of privilege. A post office inspector is not entitled to notice of

an action to recover damages for defamatory statements made by him. Judgment in 26 O. R. 528 affirmed. *Hance* v. *Burnham*, 23 A. R. 90.

Township Treasurer—*Letter in Newspaper—Malice—Excess.*]—The plaintiff had been treasurer of the township of C. from 1882 to 1886, when by reason of the auditors' report, shewing that two sums of $1,400 and $132.32 were not accounted for by him, he was dismissed. A commissioner was appointed by the Lieutenant-Governor, who examined into the matter, and in December made his report stating that the $1,400 item was a mistake of the auditors, and that, except as to the $132.32, all the township moneys were accounted for. The commissioner subsequently attended a meeting of the council, at which defendant, who was a councillor, was present, and after examining plaintiff on oath informed the council that he was satisfied with plaintiff's explanation as to $125 of this sum, namely, being interest on his own moneys deposited with the township funds; and he made an addition to his report to that effect. In February following the plaintiff wrote to a newspaper that he was ready to pay the township any moneys either the council, auditors, or commissioner could shew he owed, whereupon the defendant wrote to the paper, stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted in $125, and also stating that plaintiff had made several thousand dollars out of the township, and could well afford to pay his shortage and still have some thousands to the good:—Held, that the matter discussed in the defendant's letter being one in which defendant was interested as a ratepayer and a member of the council, there might be a qualified privilege; still it was for the jury to say whether under the circumstances the language employed was within the privilege, or was in excess of what the occasion justified; and if in excess, they could properly draw inference of malice. The jury having found for plaintiff, the court refused to interfere. *Colvin* v. *McKay*, 17 O. R. 212.

Tradesman—*Customer—Honest Belief.*]—The plaintiff claimed damages for slander in respect of words spoken to him by the defendant, in the presence of others, to the effect that he had sold certain seed given to him by the defendant to plant in order to raise seed for sale. The jury found that the words were not spoken in good faith in the usual course of business affairs for the protection of his own interests:—Held, that there was no evidence to sustain such a finding; that the evidence shewed that the defendant honestly and justifiably believed that the plaintiff had defrauded him; that the occasion was privileged, and the plaintiff had failed to shew actual malice; and therefore he could not recover. *Stewart* v. *Sculthorp*, 25 O. R. 544.

Unmarried Woman—*Body of Child Found on Defendant's Premises—Statement as to Mother of Child.*]—See *Black* v. *Alcock*, 12 C. P. 19.

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4. *Other Cases.*

Advertisement in Newspaper—*Publication by Insurance Company—Reflections on Former Agent.*]—The plaintiff, who was at one time an agent of defendants, having left them, defendants published in a newspaper an advertisement headed "Caution" and containing the words, "N.B.—Notwithstanding the false statements of (plaintiff) to the contrary he is no longer an agent of this company." Defendants justified, pleading that after he ceased to be in defendants' employ, the plaintiff stated to M. and G. that he was still defendants' agent. At the trial it appeared that the plaintiff, after he had ceased to be defendants' agent, asked G., who had been insured in defendants' company, to insure. G. believed he was still acting for defendants, but after signing the application discovered that it was to another company, and the plaintiff then refused to allow him to withdraw. One M., who had previously insured with plaintiff in defendant company, said the plaintiff called when the time to renew came, and being asked if he came to renew the policy, said "yes," and expressed annoyance when he found she had already renewed it with defendants. The plaintiff denied these statements:—Held, that this evidence, if believed, was sufficient to prove the plea; and it having been withdrawn from the jury, a new trial was granted for misdirection. Semble, that the communication was privileged; but this ground was not taken at the trial. This case was carried to appeal, but the appeal was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial. *Holliday* v. *Ontario Farmers' Mutual Fire Ins. Co.*, 33 U. C. R. 558.

After the new trial:—Held, reversing the judgment in 38 U. C. R. 76, that the publication was not privileged; that the statement, although made under the belief of its truth, was in point of fact false; and that, even if the occasion precluded the implication of malice, the privilege had been exceeded both in the language used and in the publication in a newspaper, so as to afford evidence of malice; that the language might have been privileged if made to any one dealing with the company, but that the privilege had been forfeited by its publication in a newspaper. *Holliday* v. *Ontario Farmers' Mutual Ins. Co.*, 1 A. R. 483.

Charge Laid Against Plaintiff—*Answers of Defendant to Questions.*]—There was no evidence to sustain the slander laid in this case; but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made at the trial by the defendant was that he should be allowed to examine witnesses on the new count, which was done. An objection to the amendment in term was therefore not allowed. The evidence in support of the amended count consisted not of statements made voluntarily by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to the nature of it:—Held, that this was not sufficient to sustain an action for slander; and that words so spoken were privileged. *McCann* v. *Prenceveau*, 10 O. R. 573.

Investigation—*Meeting of Persons Concerned in Slander—Repetition of Words.*]—The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having in the presence of a witness accused the plaintiff of having taken $4 from her trunk upstairs, her husband told C. that the plaintiff must be discharged, or he would send

him no more prescriptions. A meeting was, however, arranged between the parties in the presence of the witness, for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated, and the plaintiff was discharged from C.'s employment:—Held, that what was said at this meeting was privileged, and the case having been left to the jury generally a verdict for the plaintiff was set aside. *Hargreaves* v. *Sinclair*, 1 O. R. 260.

Production of Document—*Injury to Public Service.*]—See *Bradley* v. *McIntosh*, 5 O. R. 227.

Production of Document—*Exposure to Criminal Charge.*]—See *Bromley* v. *Graham*, 11 P. R. 451.

Question on Examination—*Exposure to Criminal Charge.*]—See *Hall* v. *Gowanlock*, 12 P. R. 604.

Resolution of Association—*Strictures on Member.*]—The plaintiff, being a member and a vice-president of the Commercial Travellers' Association, incorporated by 37 Vict. c. 96 (D.), was charged with using abusive language towards the president and other members, and with improper conduct at a meeting of the directors. A committee of seven was appointed, of whom the plaintiff chose three, to investigate these charges, and four of the committee made a report finding the charges proved. This report was adopted by the association, and the directors afterwards passed a resolution expelling the plaintiff. The plaintiff appealed to the next general meeting, which decided to let the appeal drop, and to sustain the action of the directors; but at a subsequent general meeting the resolution of expulsion was rescinded. The railway companies had been notified by the defendants of the plaintiff's removal, by which he was compelled to pay higher fares than if he had been a member. The plaintiff published a paper purporting to be on behalf of the association, in which the whole matter was discussed in an address from himself, and very offensive and violent language was used towards the president and other members; and the directors, in reference to this, passed a resolution repudiating the publication as being on behalf of the association and censuring the plaintiff in strong language for its appearance. The plaintiff having sued the association for the expulsion, and for the libel contained in the resolution:—Held, that the plaintiff could not recover; that the expulsion by the directors, without having themselves tried the matter, and without notice to the plaintiff was informal and void; that the plaintiff therefore was not expelled as alleged, so that there was no cause of action therefor; that any loss sustained was the loss of his employers, not his own; and that the alleged libel was privileged. *Cuthbert* v. *Commercial Travellers' Association of Canada*, 39 U. C. R. 578.

XIII Security for Costs.

1. *Libel by Newspapers.*

Candidate for Public Office.] — The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election:—Held, that the plaintiff was not a candidate for a public office in this Province within the meaning of R. S. O. 1887 c. 57, s. 5, s.-s. (2) (*a*), before the date of the writ for the election; and that as to the libels alleged to have been published before that date, a notice before action under the statute was necessary; but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under rule 387, nor the action as to them summarily dismissed; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of s. 5, s.-s. (2) (*a*), and the statute did not apply, there having been no retractation. *Counsee* v. *Weidman*, 16 P. R. 239.

Correspondent.]—The expressions in the Act respecting the law of libel, 50 Vict. c. 9, s. 4 (O.), shew that the provisions as to security for costs apply only to the publisher, editor, or proprietor of a newspaper. So held in an action for libel against a correspondent. *Egan* v. *Miller*, 7 C. L. T. Occ. N. 443.

Criminal Charge.]—The legislation in R. S. O. 1887 c. 57, s. 9, as to security for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public. In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel," and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her:—Held, that this did not involve a criminal charge within the meaning of s. 9 (*a*). The defendants did not contend that the grounds of action were trivial or frivolous; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action. The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith and without malice or ill-will towards the plaintiff:—Held, that, under these circumstances, an appeal from the discretion of a Judge in chambers in reversing a referee's decision and ordering security for costs, should not prevail. *Bennett* v. *Empire Printing and Publishing Co.*, 16 P. R. 63.

Criminal Charge—"*Blackmail*"—"*Trivial or Frivolous.*"]—Upon an application under R. S. O. 1887 c. 57, s. 9, for security for costs in an action for libel, in which the words complained of, published in the defendants' newspaper, accused the plaintiff of attempted "blackmail:"—Held, that the words might bear such a meaning as to charge the indictable offence defined by s. 406 of the Criminal Code, and the question whether they did so, when read with the context, was for the jury, and one which should not be determined upon this application; and the master in chambers having held that they "involved a criminal charge," his decision should not be interfered with. An action cannot be considered "trivial or frivolous" within the meaning of s. 9 merely because the existence of a good defence on the merits is shewn by the defendant's affidavit, and not contravened

by an affidavit of the plaintiff. The latter may properly consider that upon an application for security for costs a denial on oath of the truth of the charges against him is unnecessary. *Macdonald* v. *World Newspaper Co. of Toronto*, 16 P. R. 324.

Criminal Charge — *Incorporated Company.*]— The words "involves a criminal charge" in R. S. O. 1887 c. 57, s. 9, s.-s. (1) (a), mean "involves a charge that the plaintiff has been guilty of the commission of a criminal offence." And where the words published by the defendants in their newspaper of which the plaintiffs, an incorporated company, complained in an action of libel, alleged that the plaintiffs had tried to bribe aldermen by issuing to them paid-up stock in the company:—Held, upon an application for security for costs under the above section, that the words did not involve a criminal charge, for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender. Mayor of Manchester v. Williams, [1891] 1 Q. B. 94, followed. Journal Printing Co. v. MacLean, 25 O. R. 509, distinguished. And where the defendants by affidavit shewed publication in good faith and other circumstances sufficient under the above section to entitle them to security for costs, and the case made was not displaced by the cross-examination of the deponent on his affidavit, an order was made for such security. *Georgian Bay Ship Canal and Power Aqueduct Co.* v. *World Newspaper Co.*, 16 P. R. 329.

Criminal Charge—*Pleading—Innuendo.*]—Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (*a*) of s. 9 (1) of the Act respecting Actions of Libel and Slander, R. S. O. 1887 c. 57, and the defendant is not entitled to security for costs. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge. *Smyth* v. *Stephenson*, 17 P. R. 374.

Disclosing Defence.]—On an application under R. S. O. 1887 c. 57, s. 9, for security for costs in an action of libel, the Judge is not to try the merits of the action; if it appears on the affidavits filed by the defendant that there is a primâ facie case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied, and security should be ordered; it is not for the Judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application. *Swain* v. *Mail Printing Co.*, 16 P. R. 132.

Disclosing Defence—*Good Faith.*]—In an action of libel against the publishers and editor of a newspaper, the defence suggested by affidavits filed upon an application under R. S. O. 1887 c. 57, s. 9, for security for costs, was that the statements complained of as defamatory did not refer to the plaintiff. The Judge who heard an appeal from an order made by a master for security being of opinion that, upon the fair reading of the statements complained of, they did refer to the plaintiff:—Held, that it did not appear that the defendants had a good defence on the merits, and that the statements complained of were published in good faith, and therefore the order should be set aside. Swain v. Mail Printing Co., 16 P. R. 132 distinguished. *Lennox* v. *Star Printing and Publishing Co.*, 16 P. R. 488.

Frivolous Action.]—Where an action of libel was brought by one Græme complaining of statements published in a newspaper imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper, after the commencement of the action, it was stated that the person referred to in the former article was not the plaintiff, and there were other facts shewing that the plaintiff was not the person referred to:—Held, that the action was frivolous, and the defendants were entitled to security for costs under R. S. O. 1887 c. 57, s. 9. *Græme* v. *Globe Printing Co.*, 14 P. R. 72.

Mercantile Agency — *Paper Issued to Subscribers—"Printed for Sale"—"Newspaper.*]—See *Slattery* v. *Dun*, 18 P. R. 138 (*ante*, VIII.)

Motion—*Contentious Affidavit in Answer.*]—Upon an application for security for costs made under R. S. O. 1887 c. 57, s. 9, by the defendant in an action for an alleged libel contained in a public newspaper, the plaintiff desired to read and have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendants on which the motion was based, and contended that the object was not to try the facts on affidavits, but to shew that the agent had not knowledge of the facts, that many statements made by him were not true, and therefore that his affidavit was not such as required by s. 9:—Held, that the plaintiff's affidavit could not be read or used upon the application. *Bartram* v. *London Free Press Printing Co.*, 18 P. R. 11.

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2. *Slander of Women.*

Disclosing Defence.]—In an action for slander brought under 52 Vict. c. 14 (O.), the defamatory words complained of, imputing want of chastity to the plaintiff, an unmarried female, and also for an assault, the defendant moved under s.-s. 3 of s. 1 of the Act, for security for costs, upon an affidavit which stated, among other things, that the defendant had a good defence on the merits, but did not disclose such defence:—Held, that the affidavit was not sufficient, for a primâ facie defence must be shewn; but the cross-examination of the defendant upon her affidavit might be read in aid of the affidavit itself; and counter affidavits could not be received. Held, also, that the stay of proceedings in the order made for security for costs should not apply to the count for assault. *Lancaster* v. *Ryckman*, 15 P. R. 199.

Disclosing Defence—*Meaning of Words Used.*]—In an action for slander brought by a married woman the words alleged to have been spoken were, "you are a blackguard; you

are a bad woman;" and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant under 52 Vict. c. 14, s. 1, s.s. 3 (O.), for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believed he did not use, the word "blackguard," and he denied that he used the words with the meaning attributed to them by the plaintiff:—Held, that the defendant had not shewn a good defence to the action on the merits, and his application was properly refused. Per Boyd, C., and Ferguson, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity. *Paladino* v. *Gustin*, 17 P. R. 553.

Property Sufficient to Answer Costs.]—Upon an application under 52 Vict. c. 14, s. 1, s.s. 3 (O.), for security for costs of an action for slander imputing unchastity to a female, the onus is on the defendant to shew that the plaintiff has not sufficient property to answer the costs of the action; and to defeat such an application it is not necessary that the plaintiff should have property to the amount of $800 over and above debts, incumbrances, and exemptions. And where it was shewn that the plaintiff had property of the value of $500 at least, and it was not shewn that she had not property of much greater value, the application was refused. Bready v. Robertson, 14 P. R. 7, considered. *Feaster* v. *Cooney*, 15 P. R. 290.

XIV. Slander of Title.

Bona Fides — *Assertion of Right.*]—An action for slander of title will not lie when the alleged slander is spoken bonâ fide and in assertion of right. *Boulton* v. *Shields*, 3 U. C. R. 21.

Mortgage Action — *Counterclaim for Slander of Title.*]—See *Odell* v. *Bennett*, 13 P. R. 10.

Particulars—*Damping Auction Sale.*]—See *Catton* v. *Gleason*, 14 P. R. 222.

Pleading — *Justification — Estoppel.*] — Case for libel in publishing a printed notice denying the plaintiff's title to certain land, of which the declaration alleged that he was seised in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in chancery to establish her undoubted right. Second plea, that the plaintiff was not, at the said time when, &c., seised as of fee of or in the land, or any part thereof. Third plea, that the matters published by the defendant were at the said times when, and still are, true in substance and effect. Fourth plea, that the said C. J. had and still has an undoubted right to the land; and that the defendant so believing, as her agent, and at her request, published the notice to protect her right, and without malice. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee; that the said indenture was given to secure usurious interest; that the said K. died intestate, and his heir gave to the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c., (as in the fourth plea.) The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious:—Held, on demurrer, second plea good: third plea bad, as too general: fourth and fifth pleas bad, for omitting to justify the statement that a chancery suit was pending, that being a very material part of the libel. Semble, that the replication to the fifth plea shewed an estoppel. *Mair* v. *Culy*, 12 U. C. R. 71.

Pleading—*Malice—Special Damage.*]—In an action for slander of title, the declaration should not only contain an allegation that the words complained of as conveying the slander are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander, actually sustained, which must appear upon the declaration to be the mere natural and direct consequence of the words complained of. In this case the averment, "whereby said M. was prevented from carrying out and completing, and refused to carry out and complete, said contract for the purchase of said land from plaintiff, and plaintiff has hitherto lost the sale of said land and the use of the purchase money thereof, and has been unable to sell and dispose of said land, and has incurred and been put to great loss and expense in and about said contract with M., and the enforcement thereof, and in and about quieting the title to said land," was held a sufficient averment of special damage. *Ashford* v. *Choate*, 20 C. P. 471.

Pleading — *Two Causes of Action — General Verdict—New Trial.*] — Declaration for publishing of and concerning plaintiff, and of and concerning him in relation to his business, and of and concerning certain letters patent and the invention patented, and the plaintiff as inventor and proprietor thereof, the following: "Caution—to all persons who may be entering into any arrangements with J. M. C. for his self-acting cattle and stock pump, who claims to have patented the same in April last, I wish by this notice, to caution the public against having anything to do with Cousins or his pumps, it being an infringement on my patent, which was obtained by me in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs:"—Held, that the declaration set out a cause of action for slander of title, in the allegation that plaintiff's pumps were an infringement on defendant's patent, for which defendant intended to prosecute plaintiff immediately. Held, also, that it disclosed a libel on plaintiff personally in the caution against having anything to do with plaintiff or his pumps, and in the words, "beware of the fraud," in relation to the infringement of the patent. The evidence shewing that defendant was entitled to a verdict as to the slander of title, and the verdict for plaintiff being general:—Held, that the verdict must be set aside, unless plaintiff would confine it to the general issue applicable to the personal part of the libel. In such an action the attention of the jury should be directed to the separate character of the publication, in view of their finding one part to be true and the other

untrue; and the damages should be specially awarded for that part which is untrue. *Cousins* v. *Merrill*, 16 C. P. 114.

XV. Miscellaneous Cases.

Arrest—*Action for Libel.*]—An order to arrest was refused in actions for malicious arrest and libel. *O'Connor* v. *Anon.* and *Darcus* v. *Hall*, T. T. 2 & 3 Vict. See *Allman* v. *Kensel*, 3 P. R. 110.

Bar to Action — *Verdict in Former Action.*]—A recovery of a verdict in an action for libel against some of several persons concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Willcocks* v. *Howell*, 8 O. R. 576.

Husband and Wife—*Husband a Witness for Defence—Estoppel—Dominus Litis.*]—In an action by a husband and wife for the slander of the wife in accusing her of adultery:—Held, that the course adopted by the husband at the trial, with the defendant's concurrence, in conceding the action to be, in substance, that of the wife alone, and coming forward as a witness for the defence in support of a plea of justification, and allowing the case to be submitted to the jury on the question of the truth or falsity of the accusation, precluded a motion in arrest of judgment. The husband had sued the person accused of the adultery, for charging which this action was brought, and recovered a judgment against him in an action of crim. con., and judgment had been given in chancery against the wife, on the ground of adultery, in a suit brought by her against the husband for alimony:—Held, that under these circumstances the verdict entered for the plaintiffs must be set aside, when the plaintiff Robert Campbell, if so advised, might raise the question whether he was not dominus litis. *Campbell* v. *Campbell*, 25 C. P. 368.

Jury—*Functions of.*]—It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it. *Wills* v. *Carman*, 17 O. R. 223.

Jury — *Separation of, after Judge's Charge.*]—See *Stilwell* v. *Rennie*, 7 O. R. 355.

Jury — *Finding of* — "*No Ground of Action*" — *Meaning of.*] — See *Harper* v. *Hamilton Retail Grocers' Assn.*, 32 O. R. 295, *ante* XII. 3 (a).

Limitation of Actions for Libel.]—See *Veach* v. *Great Western R. W. Co.*, 32 U. C. R. 452, 33 U. C. R. 8, *ante* XII. 3; *Mayor of Montreal* v. *Hall*, 12 S. C. R. 74.

Partners — *Slander of Firm.*] — The two plaintiffs were the members composing a firm, which firm had sold out the business to a company composed of the plaintiffs and another, the old firm continuing in existence for the purpose of being wound up. In an action of slander, the innuendo charging insolvency of the company, the jury found that the imputation of insolvency had no reference to the company but to the plaintiffs as members of the firm:—Held, that on a record properly framed, the two plaintiffs might recover for any damage accruing either to them as individuals or to the firm, without proof of special damage, and also as members of the company, for any special damage suffered by the company by reason of the slander of two members thereof, but on the record as framed here the plaintiffs must fail; and as no amendment was asked for at the trial, and no reason given for allowing one on appeal to a divisional court, it was refused. *Bricker* v. *Campbell*, 21 O. R. 204.

Poster Advertising Account For Sale—*Justification.*]—Two of the defendants, merchants, placed in the hands of the other defendant, a collector of debts, an account against the female plaintiff, wife of the other plaintiff, for collection, well knowing the method of collection adopted by the collector, who, after a threatening letter to the female plaintiff, which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the female plaintiff), Princess Street, dry goods bill, $59.35." The evidence shewed that she owed $24.33 only:—Held, that the publication was libellous and could only be justified by shewing its truth, and, as the defendants had failed to shew that she was indebted in the sum mentioned in the poster, they were liable in damages. *Green* v. *Minnes*, 22 O. R. 177.

Trial—*Nonsuit After Verdict for Plaintiff — Functions of Judge and Jury.*] — See *Macdonald* v. *Mail Printing Co.*, 32 O. R. 163.

See Company—Mercantile Agency—New Trial. IX. 1.

DELEGATION.

See Company, V. 4—Constitutional Law, II. 1—Principal and Agent, I. 3.

DELIVERY.

See Deed, V. 1—Gift—Sale of Goods, II. 5 (*b*)—Ship, II. 3—Warehousemen and Warehouse Receipts, II.

DEMAND OF POSSESSION.

See Ejectment, III.—Landlord and Tenant, XVI.

DEMURRAGE.

See Ship, VI.

DEMURRER.

See Pleading—Pleading at Law before the Judicature Act, V.—Pleading in Equity before the Judicature Act, IV.—Pleading since the Judicature Act, VII.

DEPARTURE.

See PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, I. 7.

DEPOSIT RECEIPTS.

See BANKS AND BANKING, IV.—GIFT, III.

DEPOSITIONS.

See CRIMINAL LAW, VII. 2—EVIDENCE.

DEPUTY REGISTRAR.

See REGISTRY LAWS, VI.

DEPUTY RETURNING OFFICER.

See PARLIAMENT, I. 7 (c).

DEPUTY SHERIFF.

See SHERIFF, VI.

DESCENT.

See ESTATE, VII.

DESCRIPTION OF LAND.

See ASSESSMENT AND TAXES, X. 2, 4 (a), (b)—BOUNDARY—DEED, III. 4—MISTAKE, I. 2—SPECIFIC PERFORMANCE, V. 20—VENDOR AND PURCHASER, II. 2—WILL, IV. 6.

DESERTION.

See CRIMINAL LAW, IX. 11.

DESISTANCE.

See RAILWAY, XV. 5 (i).

DETENTION.

See SHIP, II. 5, VI.

DETINUE.

See TROVER AND DETINUE.

DEVIATION.

See INSURANCE, VI. 3—SHIP, II. 4.

DEVOLUTION OF ESTATES ACT.

Administrator ad Litem.] — See *Re Williams and McKinnon*, 14 P. R. 338.

Assignment for the Benefit of Creditors—*Debt by Assignor to Executors—Security.*]—See *Tillie* v. *Springer*, 21 O. R. 585.

Devise of Incumbered Land.] — The Devolution of Estates Act has not superseded but is to be read in conjunction with R. S. O. 1877 c. 106, ss. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts. *Mason* v. *Mason*, 13 O. R. 725.

Devise of Incumbered Land—*Exoneration from Incumbrance — Distribution of Estate.*]—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death:"—Held, that the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised. Such residue was to be treated as one fund and as if it were all personalty, under s. 4 of the Devolution of Estates Act, R. S. O. 1887 c. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Supple*, 23 O. R. 393.

Devise of Land to Executors in Trust to Sell—*Necessity for Approval of Official Guardian.*]—Where a will devised lands to the executors on trust to sell the same:—Held, that the case was not within s. 8 of the Devolution of Estates Act, and the approval of the official guardian or an order of the court was not necessary to validate a sale. The word "devolve" in s. 8 is not used in its strict and accepted meaning of falling upon by way of succession, but in the sense merely of "passing," and what is meant is that where infants are concerned no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian. *In re Booth's Estate*, 16 O. R. 429.

Dower—*Election — Marriage Settlement.*]—Section 4 of the Devolution of Estates Act, R. S. O. 1887 c. 108, which gives the widow a right of election between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands. *Toronto General Trusts Co.* v. *Quin*, 25 O. R. 250.

Dower — *Election — Money in Court.*] — Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an attested instrument in writing, pursuant to

s. 4, s.-s. 2, even where the lands have been sold under an order of the court at her instance, free from her dower, and the proceeds are in court. *Re Galway*, 17 P. R. 49.

Dower—*Election—Money in Court—Lapse of Year.*]—Where in the administration by the court of the estate of an intestate lands have been sold and the purchase money paid into court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act. Judgment in 29 O. R. 388 affirmed. *Baker* v. *Stuart*, 25 A. R. 445.

Dower—*Election—Restraint of Marriage.*] A testator divided his real estate among his three sons, the portion of A. C., the eldest son, being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of $50 per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said $50 on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, that the widow of A. C. was entitled to dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands. *Cowan* v. *Allen*, 26 S. C. R. 292.

Lease—*Covenant to Renew—Power of Executor of Lessor to Execute Renewal of Lease.*]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Mortgage by Devisee within Twelve Months from Death—*Absence of Caution.*]—The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives. And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith:—Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes. *Re McMillan, McMillan* v. *McMillan*, 24 O. R. 181.

Mortgage Action—*Heirs-at-law of Deceased Mortgagor.*]—Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available. Werderman v. Société Générale D'Electricité, 19 Ch. D. 246, followed. In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the grounds that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them:—Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under rule 324 (a) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

Mortgage Action—*Personal Representative of Deceased Mortgagor.*]—The court will, on the application of a mortgagee in a mortgage action, appoint an administrator to the estate of an intestate mortgagor. *McLaren* v. *Rivett*, 7 C. L. T. Occ. N. 202.

Mortgage Action—*Personal Representative of Deceased Mortgagor—Infants.*]—In a mortgage action for foreclosure, it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them. Rules 309 and 1005 considered. *Keen* v. *Codd*, 14 P. R. 182.

Mortgage Action—*Personal Representative of Deceased Mortgagor.*]—A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death:—Held, that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the court, no administrator having been appointed, and no caution registered under 54 Vict. c. 18, s. 1, amending the Devolution of Estates Act. *Ramus* v. *Dow*, 15 P. R. 219.

Nephews and Nieces—*Rights of Children of Predeceased Sister of Intestate.*]—On the death of a person, intestate, leaving no issue, the children of a predeceased sister or brother are not entitled under s. 6 of the Devolution of Estates Act, R. S. O. 1887 c. 108, to share in competition with a surviving father, mother, brother, or sister of the intestate. *Re Colquhoun*, 26 O. R. 104.

See the next case.

Under s. 6 of the Devolution of Estates Act, R. S. O. 1887 c. 108, where brothers or sisters are entitled to share on an intestacy, the children of a deceased brother or sister of the intestate are entitled to share per stirpes. Re Colquhoun, 26 O. R. 104, overruled. *Walker* v. *Allen*, 24 A. R. 336.

Payment of Debts—*Real and Personal Property.*]—The Devolution of Estates Act, R. S. O. 1897 c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise specially provided for by s. 7, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act. *Re Hopkins*, 32 O. R. 315.

Personal Estate—*Surrogate Courts Act.*]—The words "personal estate" in s. 31 (2) of the Surrogate Courts Act, R. S. O. 1887 c. 50, mean personal estate proper, notwithstanding that by the Devolution of Estates Act, R. S. O. 1887 c. 108, the whole estate is now to be administered as personalty. *Re Nixon*, 13 P. R. 314.

Power of Sale—*Surviving Executors.*]—Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor. The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by these Acts. *In re Koch and Wideman*, 25 O. R. 262.

Power of Sale—*Devise to Executors—Grant of Probate to One—Caution.*]—A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds as they might deem best, and to pay the income thereof to the husband during his lifetime, and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate, which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—Held, that he had power to make a valid sale, and that the devise being to the executors, s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power. In re Koch and Wideman, 25 O. R. 262, followed. *In re Hewett and Jermyn*, 29 O. R. 383.

Powers of Administrator—*Conveyance of Land by—Debts.*]—Land was conveyed in 1874 to a husband and wife who were married in 1864:—Held, that they took like strangers, not by entireties, but as tenants in common. Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay. Martin v. Magee, 19 O. R. 765, distinguished. *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397.

Powers of Administrator—*Sale of Land—Objection of Adult Beneficiaries.*]—Under the Devolution of Estates Act, where the persons beneficially interested are both adults and infants, and the former object, and there is no necessity for a sale to pay debts, the administrator has no power to sell the real estate. *In re Mallandine*, 10 C. L. T. Occ. N. 226.

Powers of Executor — *Exchange of Lands.*]—An executor or administrator cannot, having regard to R. S. O. 1887 c. 108, s. 9, and 54 Vict. c. 18, s. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own. The court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

Powers of Executor—*Mortgage—Infants—Official Guardian.*]—Where infants are interested in real estate, executors or administrators have power under s. 9 of the Devolution of Estates Act, R. S. O. 1897 c. 127, with the consent of the official guardian, to mortgage lands. *In re Bennington*, 18 C. L. T. Occ. N. 239.

Powers of Executor — *Will — Trustee Act.*]—The Devolution of Estates Act, R. S. O. 1897 c. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 O. R. 680.

Registration of Caution.]—The provisions of 56 Vict. c. 20 (O.), as to registration of cautions, apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of s. 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purpose of administration. The provisions of 56 Vict. c. 20 (O.) are so engrafted on 54 Vict. c. 18 as to make both Acts apply to all persons dying after 1st July, 1886. In re Baird, 13 C. L. T. Occ. N. 277, reconsidered. *In re Martin*, 26 O. R. 465.

Registration of Caution after Twelve Months—*Sale to Pay Debts—Devise.*]—The effect of the Devolution of Estates Act and amendments acted upon by the registration of a caution, under an order of a county Judge, after the twelve months had expired, is to place lands of a testator again under the power of his executors so that they can sell them to satisfy debts; and the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; the operation of a devise of lands is by the Act only postponed for the purposes of administration; and the estate does not pass through the medium of the executors, but by the operation of the devise. *Ianson* v. *Clyde*, 31 O. R. 579.

Sale of Infants' Lands—*Consent of Official Guardian—Liability of Personal Representatives for Neglect to Sell.*] — Under 54 Vict. c. 18, s. 2 (O.), the approval of the official guardian to a sale of land by executors or administrators is now required only where the sale is for the purpose of distribution simply, and then only where there are infants interested, or heirs or devisees who do not concur. Where administrators in contracting

to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout in good faith and to the best of their judgment:—Held, that they were not liable to make good to the estate the deficiency resulting from a resale. Under the above Act, executors and administrators are not, in all respects, in the same position as a trustee for sale of lands. Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events. Semble, where the approval of the official guardian is not required, notice need not be given to him under rule 1005. *In re Fletcher's Estate*, 26 O. R. 499.

Title to Land—*Conveyance—Executors—Beneficial Owner—Debts.*]—On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged, and (2) that the title being deduced through the devisee of a person who had died since the coming into force of the Devolution of Estates Act, R. S. O. 1887 c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid:—Held, by the chancery division, that both matters were matters of conveyancing, and not of title. Under the Devolution of Estates Act, where debts have been paid, or where there are no debts, executors will hold the bare legal estate for the devisee of the land of the deceased:—Held, by the court of appeal, that under the Devolution of Estates Act the legal estate in the deceased's land vests in his legal personal representative; and the beneficial owner, whether the debts of the deceased are paid or not, cannot make a good title without a conveyance from the legal personal representative. Judgment in 19 O. R. 705 reversed. *Martin* v. *Magee*, 18 A. R. 384.

Widow's Charge—*Quantum of—Foreign Estate.*]—Under 58 Vict. c. 21 (O.) (s. 12 of R. S. O. 1897 c. 127), the widow of an intestate who has left no issue is entitled to $1,000 out of his real estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country. *Sinclair* v. *Brown*, 29 O. R. 370.

See DOWER, IV. 1—EXECUTORS AND ADMINISTRATORS.

DIRECTORS.

See BANKS AND BANKING, I.—COMPANY, III. —RAILWAY, VIII.

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DISCHARGE OF BAIL.

See BAIL, IV.

DISCHARGE OF MORTGAGE.

See MORTGAGE, VII. 3.

DISCLAIMER.

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DISCONTINUANCE.

See LIMITATION OF ACTIONS, II. 11—PRACTICE — PRACTICE AT LAW BEFORE THE JUDICATURE ACT, VI. — PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, III. 2—PRACTICE SINCE THE JUDICATURE ACT, IV.

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DISMISSAL OF ACTION.

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DISTRESS.

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   (a) *Exemptions*, 2003.
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   (d) *Goods Seized after Removal*, 2007.
   (e) *Goods Subject to Chattel Mortgage*, 2008.
   (f) *Other Cases*, 2009.

IV. Miscellaneous Cases, 2009.

I. Damage Feasant.

Fences.]—A land-owner in this country must fence against cattle. *Spafford* v. *Hubbell*, M. T. 2 Vict.

Fences—*Disputed Right of Way—Pleading.*]—Plaintiff sued defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof, and the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way to prevent horses, &c., straying therefrom; that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter, that the lease contained covenants allowing the plaintiff to enter on the land and view the state of repair, and that defendant would repair according to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that, upon the evidence, the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury was directed that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 U. C. R. 307.

Fences—*Height—Municipal By-law—Running at Large.*]—A municipal council by by-law, passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin:—Held, that, as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O. 1877 c. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Crowe* v. *Steeper*, 46 U. C. R. 87.

Fences—*Height—Pleading.*]—Trespass for taking, impounding, and selling plaintiff's horses. Plea, that horses were damage feasant. Replication, that, by town meeting regulations, fences should be five feet high, and that defendant's fences not being that height, but ruinous and out of repair, plaintiff's horses escaped out of his close into defendant's close without the knowledge and consent of plaintiff:—Held, good, on general demurrer. *Ives* v. *Hitchcock*, Dra. 247.

Fences—*Running at Large—Straying from Enclosure.*]—The effect of ss. 2, 3, 6, 20, and 21 of the Act respecting pounds, R. S. O. 1887 c. 215, is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damage can be obtained by the impounding, whatever may be done in an action of trespass. Cattle feeding in the owner's enclosure, or shut up in his stables, cannot be held to be running at large when they may happen to escape from such stable or enclosure into the neighbouring grounds. Ives v. Hitchcock, Dra. 247, commented on. *McSloy* v. *Smith*, 26 O. R. 508.

Fences — *Sufficiency — Award.*]—On the question of the sufficiency of a fence according to township regulations, where cattle are distrained damage feasant, the award of fence viewers is conclusive. *Stedman* v. *Wasley*, 1 U. C. R. 464.

Immediate Re-taking of Animal—*Whether Distrainable.*]—The plaintiff's horse escaped from his stable and got into the plaintiff's pasture field, but was immediately pursued by M., the plaintiff's son-in-law, who saw

it escape, and was leading it out of defendant's field, when defendant seized and detained it. The plaintiff replevied, and defendant avowed as for distress damage feasant:—Held, that the horse, under the circumstances, was not distrainable. *McIntyre* v. *Lockridge*, 28 U. C. R. 204.

Re-entry of Cattle Driven Out—*Seizure for Former Damage — Pound-keeper.*]—Defendant seized the plaintiff's oxen damage feasant in his wheat field, and being unable to find a pound-keeper, turned them loose near the plaintiff's gate. On the evening of the same day the defendant again seized them for doing damage to his meadow and impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow:—Held, that the damage to the wheat had been abandoned, and that the impounding and sale of the oxen for the damage so claimed were illegal. The plaintiff forbade the sale, when defendant told the pound-keeper to sell and that he would be responsible; —Held, that the defendant and pound-keeper were both liable. Spafford v. Hubbell, M. T. 2 Vict., *aute*, explained. *Buist* v. *McCombe*, 8 A. R. 598.

Right of User of Land—*Right to Distrain.*] — The defendants, by an agreement under seal with one S., acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals or those of others to enter upon the land in question:—Held, that the defendants had no right under this agreement to distrain the plaintiff's cattle damage feasant upon the land. Semble, the defendants' remedy (if any) was by action on the covenant against S. A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage, they cannot on their re-entry be seized for the former damage. *Graham* v. *Spettigue*, 12 A. R. 261.

Running at Large—*Municipal By-law—Pound-keeper—Notice of Action.*]—Replevin will not lie against a pound-keeper. In this case the sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance:—Held, that the sheep were not "running at large," in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper:—Held, also, that the constables were not entitled to notice of action. *Ibbottson* v. *Henry*, 8 O. R. 625.

II. For Mortgage Money.

[See R. S. O. 1897 c. 121, s. 15; c. 126, 2nd sched., cl. 15.]

Distress Clause—*Arrears of Interest—Abandonment of Seizure—Second Seizure—Goods of Stranger.*]—By a mortgage under the Short Forms of Mortgages Act, the interest was made payable on the 30th January in each year, and the mortgage contained a power of distress for arrears of interest. On the 30th January, 1879, two years' interest was overdue, and on 23rd May following, the defendants, under power of attorney from the mortgagee, and as his agents, entered upon the mortgaged premises, and distrained the plaintiff's goods for arrears of interest. The plaintiff was tenant of the mortgagor, and had entered after the mortgage. The defendants notified the plaintiff that they had distrained, but they did not remove the goods, nor place any one in charge. On the 18th August following, the defendants distrained and sold the plaintiff's goods for $8.75 and costs, being for a half-year's interest, ending 30th July, 1879, in addition to the previous seizure and demand:—Held, that the defendants, having abandoned the first seizure, could not seize a second time for the same demand:—Held, also, that the half-year's interest claimed by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal:—Quære, whether the goods of a stranger could be seized under such a distress clause. *La Vassaire* v. *Heron*, 45 U. C. R. 7.

Distress Clause—*Attornment, Absence of —Mere License — Goods of Stranger.*]—A mortgage of land contained no attornment clause, and no provision expressly creating the relationship of landlord and tenant between the mortgagors and mortgagees, but it provided for possession by the mortgagors until default; that on default in payment of any one instalment for two months all should become due; and that on default in payment of any instalment the mortgagees might distrain therefor, and by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The first instalment fell due on the 1st November, 1879, and the mortgagors being in possession, the mortgagees distrained therefor on the 6th October, 1880:—Held, that this right to distrain was a mere license, and did not warrant the taking of a stranger's goods upon the premises. Semble, that the mortgagors, on default, ceased to hold as tenants, and the distress therefore was illegal, as having been made more than six months after their term had expired. *Laing* v. *Ontario Loan and Savings Co.*, 46 U. C. R. 114.

Distress Clause — *Damages.*]—See *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677, 18 A. R. 347.

Distress Clause—*Insolvency of Mortgagor —Assignee Taking Possession of Goods on Mortgaged Premises—Right of Mortgagee to Distrain.*]—See *Munro* v. *Commercial Building and Investment Society*, 36 U. C. R. 464.

Distress Clause — *Intention to Omit— Construction of Deed—Wrongful Distress.*]—M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerased in its usual place, viz., after the covenants. T. assigned the mortgage to H., who,

on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay* v. *Howard*, 6 O. R. 135.

Distress Clause—*Authority of Bailiff—Agent—Evidence.*]—Mortgagees, by their warrant, authorized their bailiff to distrain the goods of the mortgagor upon the mortgaged premises for arrears due under the mortgage. The mortgagor being dead, the bailiff seized the goods of a stranger upon the premises:—Held, that he was acting within the scope of his authority, as agent for a principal, in making the seizure upon the premises, and the mortgagees were liable for his act. Lewis v. Read, 13 M. & W. 834, and Haseler v. Lemoyne, 5 C. B. N. S. 530, followed:—Held, also, that there was evidence upon which the jury might properly find that a local appraiser of the mortgagees was their agent for the purpose and interfered in and directed the seizure, after being informed that the goods were not those of the deceased mortgagor. Semble, that a letter written before action by the solicitor of the defendants to the solicitor for the plaintiff was improperly received in evidence. Wagstaff v. Wilson, 4 B. & Ad. 339, referred to. *McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

Distress Clause — *Creation of Relationship of Landlord and Tenant — Possession after Maturity of Mortgage—Tenancy at Will —Goods of Strangers.*]—A clause in a mortgage, that the mortgagor shall continue in possession, coupled with his occupation in pursuance of it, and with a covenant for distress, in accordance with the terms of cl. 15 of the 2nd sched. to 27 & 28 Vict. c. 31, creates the relationship of landlord and tenant at a fixed rent:—Held, that by the indenture of mortgage set out, the tenancy created was until the day of repayment of the principal, for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. *Royal Canadian Bank* v. *Kelly*, 19 C. P. 196.

In replevin, charging a distress of plaintiff's goods, defendant avowed setting out a mortgage executed to him by one D., in pursuance of the Act respecting Short Forms of Mortgages, and averred that under the proviso therein D. was possessed of the premises as tenant of defendant, and so continued until after said distress; that D. made default in payment under the mortgage, but defendant did not enter by reason thereof, but permitted D. to continue in occupation as his tenant; avowing the taking of plaintiff's goods as distress for arrears of interest:—Held, on demurrer, good, for that D., so occupying, was tenant of defendant at a fixed rent, being the interest on the principal sum secured; that defendant had the right to distrain for such interest, "by way of rent reserved," upon the property of third persons on the lands mortgaged; and that the continuance of the mortgagor in possession, after the day named for payment, with the permission of the mortgagee, constituted him thereafter tenant at will of the mortgagee, and on the terms of distress contained in the mortgage. *S. C.*, 19 C. P. 459. See, also, *S. C.*, 20 C. P. 519, reversed on appeal, 22 C. P. 279.

Distress Clause—*Mere License—Attornment—Mortgagee's Right as Against Execution Creditor.*]—The distress clause in the Short Forms of Mortgages Act is merely a license to take the goods of the mortgagor; the intention being to provide in a concise referential manner for the disposal of the goods when seized in the same manner as goods seized for rent. A mortgage made in pursuance of this Act, contained the following: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees on default of payment for two months might on one month's notice enter on and lease or sell the lands; that they might distrain for arrears of interest; and that until default of payment the mortgagors should have quiet possession:—Held, reversing the judgment in 45 U. C. R. 176, that though the relation of landlord and tenant may have been thereby created, yet there was no rent fixed for which there was power to distrain, and the plaintiffs therefore could not claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff. *Trust and Loan Co.* v. *Lawrason*, 6 A. R. 286. Affirmed, 10 S. C. R. 679.

Distress Clause — *Sale under Power — Purchaser Distraining.*]—The plaintiff mortgaged his land to the F. L. & S. Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company, the defendant should be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default having been made, the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land expressed to be under the power of sale in the company's mortgage:—Held, that the plaintiff's estate having paid the mortgage debt to the company in full, the defendant could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor. *Barron* v. *Yemen*, 3 O. R. 126.

Re-Demise Clause — *Creation of Relationship of Landlord and Tenant—Death of Mortgagor — Distress for Principal.*] — The plaintiff's father executed a mortgage, declared to be in pursuance of the Short Forms of Mortgages Act, of certain land, dated 17th November, 1881, to the defendants, but which was not executed by them, for the term of seven years, the principal and interest being repayable by instalments on the 1st November in each year. The mortgage contained a demise clause for the term of the mortgage, at a rental equal to the instalment of principal and interest and due at the same time, and also a distress clause. The mortgagor was to remain in possession until default. He remained in possession and paid the instalments due on the 1st November, 1882 and 1883. He died intestate in December, 1884, when the

plaintiff, a son, by arrangement with the other heirs-at-law and the widow, occupied the land. At the father's death there was due for principal $100, and for interest $147. The interest was subsequently paid by the plaintiff. In October, 1885, after the interest had been so paid, the defendants executed a distress warrant to their bailiff, directing him to levy $112.55, "the amount of interest due on the 1st November, 1884," under which the bailiff distrained the plaintiff's goods:—Held, that by reason of the provisions of the mortgage, the mortgagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor:—Held, also, that, notwithstanding that the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor. *McDonell* v. *Building and Loan Association*, 10 O. R. 580.

Re-Demise Clause — *Creation of Relationship of Landlord and Tenant — Mortgagee's Right as against Execution Creditor.*] On the 31st May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of $20,000 then advanced by them to him. The advances were repayable as follows: $500 on the 1st December, 1883; $500 in each of the months of June and December in each of the four following years; and $15,500 on the 1st June, 1888; together with interest at the rate of seven per centum per annum from the 1st June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forms of Mortgages, and contained the following clause, described in the margin as "Re-demise clause:" "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause or the statutory clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. At the time it was given D. was himself in occupation of certain of the properties comprised in it of the annual rental value of about $1,200, while the other properties comprised in it were in the occupation of tenants of D. and were producing an annual rental of about $2,000. After the execution of the mortgage the properties continued to be occupied in the same manner by D. or his tenants, and some payments under the mortgage were duly made by D. In 1887 the goods of D. on one of the properties comprised in the mortgage, and occupied by him, were seized under executions against him and sold, and the plaintiffs claimed that as landlords they were entitled to be paid out of the proceeds of the sale the amount due to them for the unpaid instalments of principal and interest of June and December, 1886:—Held, reversing the judgment in 15 O. R. 440, that this claim was well founded, the relation of landlord and tenant having been validly created between the parties, and the execution creditors in the absence of fraud not being entitled to complain. Trust and Loan Co. v. Lawrason, 6 A. R. 286, 10 S. C. R. 679, distinguished. *Ontario Loan and Debenture Co.* v. *Hobbs*, 16 A. R. 255.

Re-Demise Clause — *Rent or Interest after Maturity of Mortgage.*]—In 1881 plaintiff made a mortgage to the defendants maturing in 1886, in which was contained a proviso under the Short Forms of Mortgages Act, that the mortgagees might distrain for arrears of interest, and a special provision by which plaintiffs leased the lands until the maturity of the mortgage, at a rental of the same amount as the interest. In August, 1888, while plaintiff was in possession, the defendants distrained on his goods for rent or interest due at the maturity of the mortgage in 1886 and also for the amounts due in 1887 and 1888:—Held, in an action for illegal distress, that no right of distress existed as to the rent due at the maturity of the mortgage, as more than six months had elapsed after the expiry of the tenancy. Held, on the evidence, that there was no definite tenancy after the maturity of the mortgage, and that the interest thereafter being recoverable not by the terms of the contract, but as damages, the rent became uncertain, and therefore there was no right of distress. *Klinck* v. *Ontario Industrial Loan and Investment Co.*, 16 O. R. 562.

See Lambert v. *Marsh*, 2 U. C. R. 39, *post*, III. 5.

III. For Rent.

1. *For What Rents.*

(a) *Amount not Determined.*

Abatement—*Expropriation—Arbitration.*] Defendant leased to plaintiff certain land at a yearly rent of 15s. per acre, and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbitration in case of dispute. A railway company gave notice to defendant that they required a portion of the land, which he conveyed to them after an arbitration as to price:—Held, that the land taken by the company was sold by defendant within the meaning of the lease. 2. That the abatement from the rent should not be measured by the interest of the money paid by the railway company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s. per acre as the average value of the whole. 3. That after the sale the lessor could not distrain, without first arranging or offering to arbitrate as to the amount to be deducted. 4. That there was no ground for claiming any abatement of the taxes from the £10 on account of the sale. *Bickle* v. *Beatty*, 17 U. C. R. 465.

Arbitration—*Rent Due—Arrears.*]—The defendant leased certain land to the plaintiff

for a term, during which the latter was to make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. The defendant having distrained for rent claimed to be due:—Held, that, there being no fixed rent agreed upon, there was no right of distress, and the defendant was therefore merely a trespasser and liable in damages to the actual value of the goods, but not to double their value, as it was not a case within 2 Wm. & M., sess. 1, c. 5, s. 5, which refers to the wilful abuse of the power of distress. Semble, that although there may be no rent in arrear until the same is fixed by arbitration, there cannot be said to be none due. *Mitchell* v. *McDuffy*, 31 C. P. 266. See *S. C.*, *ib.* 649.

(b) *Insolvency of Tenant.*

Acceleration Clause — *Additional Sum for Goodwill — Payment of, as Rent.*] — See *Griffith* v. *Brown*, 21 C. P. 12.

Restriction—*One Year's Rent—Distress.*] —See *Mason* v. *Hamilton*, 22 C. P. 190, 411; *May* v. *Severs*, 24 C. P. 386.

See BANKRUPTCY AND INSOLVENCY—LANDLORD AND TENANT, XXIII. 9 (*a*).

(c) *Rent not Payable in Money.*

A distress may be made for rent for a sum certain payable in produce at the market price, and the goods seized may be sold. *Thompson* v. *Marsh*, 2 O. S. 355.

A rent of a sum certain reserved payable in leather, may be distrained for. *Cumming* v. *Hill*, 6 O. S. 303.

Quære, as to the right to distrain for the non-fulfilment of a contract respecting certain rails agreed to be delivered in lieu of rent. *Robinson* v. *Shields*, 15 C. P. 386.

Defendant leased a farm to the plaintiff for five years from 31st March, 1866. He was to find the team and seed for the first year, "to receive as rent for the first year two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half." Semble, that the rent was sufficiently certain to warrant a distress, and that the goods seized might be sold. *Nowery* v. *Connolly*, 29 U. C. R. 39.

(d) *Other Cases.*

Agreement to Abate Rent—*Sum in Gross.*]—The first and second counts of the declaration were respectively for distraining where no rent was due and for excessive distress for rent. It appeared that defendant had leased to plaintiff for a term of years certain premises, portions of which were at the time in the possession of other parties, and that these parties retained possession against the plaintiff, and refused to give them up to him. In consequence of this, defendant, after the expiration of the first year, agreed with plaintiff to an abatement in the rent for that year, and gave him a receipt for the balance, which plaintiff paid as the amount of rent due upon the premises; defendant, however, subsequently distrained for the sum agreed to be remitted:—Held, distinguishing Watson v. Waud, 8 Ex. 335, that the agreement between plaintiff and defendant as to the abatement of the rent did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor, because the agreement was not made until after the expiration of the year, to which it alone had reference, so that the relationship of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but a mere sum in gross, and could not consequently have been distrained for. Held, also, that the plaintiff could not recover on the first and second counts, which were framed upon the assumption that the plaintiff was tenant to defendant at a certain rent. *Kelly* v. *Irwin*, 17 C. P. 351.

Agreement to Charge Work against Rent.]—A landlord agreed with his tenant that if he should not paint the tavern outside, and the sheds and driving house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the buildings on the 12th July, 1845, when the landlord distrained for a quarter's rent due on the 1st July, 1845:—Held, in replevin, that under the terms of the lease with respect to the painting, the landlord might distrain for the quarter's rent due on the 1st July, 1845, though the painting which had been then begun, but not completed, exceeded the quarter's rent for which the landlord had distrained. *Millmine* v. *Hart*, 4 U. C. R. 525.

Arrears Due by Deceased Tenant.]—A plea of distress for rent, on a demise of a house and other premises to A. at a certain rent, and that the plaintiff occupied the house with A. during A.'s lifetime, and after his death continued as defendant's tenant, and that defendant distrained for the rent of the house and other premises on the plaintiff's goods in the house, was held bad, as the plaintiff, under the demise to him, was liable for the rent of the house only after A.'s death, and could not be distrained on for the rent due for the entire premises demised to A. *Strathey* v. *Crooks*, 6 O. S. 587.

Assignment of Rent—*Rent Charges.*]—A landlord may assign rent, and since 4 Geo. II. c. 28, s. 5, rent charge or rent seck may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord. *White* v. *Hope*, 17 C. P. 52; *S. C.*, 19 C. P. 479.

Subsequent to Notice of Forfeiture—*New Tenancy.*]—After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due:—Held, that such course did not per se set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year. *McMullen* v. *Vannatto*, 24 O. R. 625.

Whole Rent—*Sub-tenants.*]—Defendant leased to the plaintiff by deed for three years, there being another person in possession of part, as a monthly tenant, who was succeeded by two others, holding under defendant:—Held, that the lease to the plaintiff, being under seal, operated as a grant of the reversion (with the rent incident thereto), as to the part thus held, and that defendant was entitled therefore to distrain for the whole rent in arrear. Kelly v. Irwin, 17 C. P. 357, remarked upon, and not followed. *Holland* v. *Taunstone*, 27 U. C. R. 15.

See Laur v. *White*, 18 C. P. 99.

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2. *How and Where to be Made.*

Appraisement.]—See *Maguire* v. *Post*, 5 O. S. 1; *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Appraisement.]—The statute 1 Vict. c. 16 has not dispensed with the necessity for two sworn appraisers. *Stoddart* v. *Arderly*, 6 O. S. 305.

Ingress—*Breaking Door—Sub-tenant.*]—Where a sub-tenant has an apartment with an outer door, it is illegal to break into that apartment to make a distress. *McArthur* v. *Walkley*, M. T. 4 Vict.

Ingress—*Breaking Window.*]—See *Nattrass* v. *Phair*, 37 U. C. R. 153.

Ingress—*Trap-door—Bailiff—Liability of Landlord.*]—An entry by a bailiff under a distress warrant for rent must be through the ordinary and natural means of ingress to the place where the distress is about to be made. In this case the plaintiff's and the adjoining house were under one roof, as were also the kitchens in the rear, over which there was a dark loft, which was undivided, and access to which was through a trap door in the ceiling of each kitchen. The bailiff, acting under a distress warrant delivered to him by the landlord, entered the adjoining house, got through the trap door in that house into the loft, and then removing the trap door in the plaintiff's house, descended into the kitchen, and distrained:—Held, that the distress was illegal. Held, also, that the landlord was liable for the bailiff's act. *Anglehart* v. *Rathier*, 27 C. P. 97.

Sufficiency of Seizure—*Distress off Demised Premises.*]—It appeared that when the bailiff went to distrain, the lessee's mare and yoke of oxen, the subject of the distress, had strayed off the demised premises to the lessor's land adjoining, and the bailiff then, and before making a seizure, served the lessee with a notice of distress, and taking a bridle from the lessor's stable, he, the lessor, and one L. went to the place where the mare and oxen were, off the demised premises, and the bailiff having put the bridle on the mare, L. mounted her, and they all drove the oxen before them to the lessee's premises, where they put a yoke on them:—Held, that there was evidence to go to the jury that the distress was made off the demised premises, and therefore illegal, and in an action for the seizure a nonsuit entered was set aside. *Peacey* v. *Ovas*, 26 C. P. 464.

Sufficiency of Seizure—*Intention of Tenant to Replevy.*]—Replevin against a landlord and his bailiff for goods distrained. It appeared that the bailiff had gone to the plaintiffs' store, who told him to proceed and they would replevy, and they requested him to seize some barrels of spirits, which he did, and afterwards advertised them for sale in the usual manner; he did not touch the casks, or leave any one in possession, or take security for their production at the time of sale, relying, as he said, on the plaintiffs' assurance, and knowing that they intended to replevy:—Held, a sufficient seizure. *Finn* v. *Morrison*, 13 U. C. R. 568.

Sufficiency of Seizure—*Tenant Left in Possession as Agent.*]—A bailiff seized certain goods under a landlord's warrant, for rent in arrear, but did not remain in possession, or take any further steps to execute it, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, a person having a mortgage on the goods took possession under it, and removed the goods, for which the landlord replevied:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

Sufficiency of Seizure—*Tenant Left in Possession as Agent—Acknowledgment.*]—A bailiff, under a distress warrant, entered and made an inventory of "the several goods and chattels distrained by me, viz., in front shop, quantity of millinery," &c., "together with sundry articles on the premises." The tenant then gave to the bailiff the following receipt: "I acknowledge to have received from G., bailiff, all the goods and chattels in house No. 113," &c., "seized for rent," &c., "to be delivered to him, the said bailiff, when demanded," &c.:—Held, sufficient to constitute a distress executed. *Black* v. *Coleman*, 29 C. P. 507.

Sufficiency of Seizure—*Visits of Landlord—Absence of Formalities—Waiver.*]—The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenant's waiving an inventory, advertising, &c., sold them within two days to a nephew of the landlord:—Held, that the landlord's two visits of 17th and 24th February did not amount to a distress. Quære, whether a tenant can waive all statutable formalities as to inventory, &c., as regards the mortgagee. *Whimsell* v. *Giffard*, 3 O. R. 1.

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3. *Illegal Distress, Actions for.*

(a) *Costs.*

See McCallum v. *Snider*, 6 L. J. 187; *Clark* v. *Irwin*, 8 L. J. 21.

(b) *Damages.*

Double Value—*Agent of Landlord.*]—The action for double value, under 2 Wm. & M., sess. 1, c. 5, s. 5, for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right. *Hope* v. *White*, 17 C. P. 52.

Double Value—*Costs.*]—Held, that the words, "recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit," in the Imperial statute 2 Wm. & M., sess. 1, c. 5, s. 5, does not mean double the value of the goods, &c., distrained *and* double costs, but only double the value of goods, &c., and full or ordinary costs of suit. *McCallum* v. *Snider*, 6 L. J. 187.

Double Value—*No Rent Due—Doubtful Lease.*]—Remarks as to the hardship of the statute allowing double damages for distraining when no rent due, when the landlord has acted upon an erroneous construction of a doubtful lease. *Brown* v. *Blackwell*, 35 U. C. R. 239.

Double Value—*No Rent Due—Jury.*]—In an action for distraining when no rent was due, where the case was left to the jury as an ordinary case, without being expressly left to them to find double damages, and without their being apprised of the provisions of the statute, the court refused to increase the verdict to double the value of the goods distrained. *Shipman* v. *Graydon*, 5 C. P. 465.

Double Value—*No Rent Due—Jury.*]—Where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the trial and ask to have the jury directed upon it. *Bell* v. *Irish*, 45 U. C. R. 167.

Double Value—*No Rent Reserved.*]—In an action for illegal distress, in which the Judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, upon which the plaintiff claimed double the value or the goods as damages, under 2 Wm. & M., sess. 1, c. 5, s. 5:—Held, that the 5th section of the statute, by reference to the 2nd section, does not extend to a holding of land where there is no rent reserved, and that the plaintiff was not entitled to double value. *McCaskill* v. *Rodd*, 14 O. R. 282.

Double Value—*Rent not Due—Conversion—Jus Tertii—Measure of Damages.*]—In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 Wm. & M., sess. 1, c. 5, s. 5, nor that the goods distrained were "sold," but merely an allegation that the defendant "sold and carried away the same and converted and disposed thereof to his own use;" nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute:—Held, that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable. Held, also, that a wrong-doer taking goods out of the possession of another, cannot set up jus tertii, but the person out of whose possession the goods are taken, may shew it, and in such case the wrong-doer may take advantage of it; and the plaintiff, having shewn a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of such portion without protecting the defendant against another action at the suit of the mortgagee. Held, also, per Ferguson, J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value thereof; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due. Hoare v. Lee, 5 C. B. 754, followed. Judgment being given in favour of the plaintiff upon his claim, and in favour of the defendant upon his counterclaim: — Held, that the amounts should be set off. *Williams* v. *Thomas*, 25 O. R. 536.

Double Value—*Set-off against Rent.*]—See *Brillinger* v. *Ambler*, 28 O. R. 368.

Excessive Damages — *Pretence of Distress to Obtain Possession.*]—Defendant in October, 1855, leased certain premises to one W. and the plaintiff as joint tenants, to hold for seven years from the 1st October, at a yearly rent, payable quarterly in advance, on the 1st October, &c., the first payment to be made at the commencement of the term; and in the conclusion of the lease it was agreed that the first three quarters' rent should be due and paid "on the day when the said term commences." On the 1st January, 1856, defendant distrained for two quarters' rent, due on the 1st October preceding. Plaintiff brought trespass, complaining that the distress, if rightful, was merely a pretence for getting possession. He gave evidence tending to shew this, and proved that defendant entered into the house, assumed the management of it as if the term were at an end, insisted on the plaintiff's wife leaving a room down stairs which she occupied as a bed room, and taking another above; and remained there nine days against the plaintiff's will. For the defendant it was proved that W., the co-tenant, had surrendered to him his interest in the lease, and that the plaintiff, who had never paid his rent, though not then assenting, a few days afterwards (on the 9th January), entered into an arrangement by which he gave up possession. The jury gave £75 damages:—Held, that any authority derived from W., the co-tenant, could not be given in evidence under the general issue, by statute (11 Geo. II. c. 19); that at all events it could not have justified the defendant's conduct; and that, although the damages seemed excessive, the verdict must stand. *Chase* v. *Scripture*, 14 U. C. R. 598.

Measure of Damages—*Illegal Distress—Illegal Sale — Tender.*]—After a tender, as found by the jury, the goods distrained (illegally so, in the first place) were sold by the bailiff:—Held, that by reason of the illegal distress the plaintiff would be entitled to recover as damages the difference between the goods and the rent due; but, as the sale was after the tender, the plaintiff could recover the full value of the goods. Held, also, on the evidence, that the damages found were not excessive. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Measure of Damages—*Illegal Sale.*]—In an action for an illegal sale of goods distrained, the measure of damages is the difference between the actual value of the goods and the amount of the rent in arrear. Lucas v. Tarleton, 3 H. & N. 116, 27 L. J. Ex. 246, distinguished. *Shultz* v. *Reddick*, 43 U. C. R. 155.

Measure of Damages—*Wrongful Seizure only.*]—Where a tenant, to relieve his goods from an illegal distress, pays the amount of the distress and recovers his goods:—Semble, that in an action of trespass for the wrongful seizure, he is not entitled to recover as damages at least the value of the goods. *Matheson* v. *Kelly*, 24 C. P. 598.

Nominal Damages—*No Appraisement.*]—In case for illegal distress, the plaintiff is entitled to succeed on shewing that there was no such appraisement as the law directs, even though but for nominal damages. *Maguire* v. *Post*, 5 O. S. 1.

Special Damage—*Excessive Distress.*]—In an action for excessive distress the plaintiff may recover, though no special damage be proved. *Black* v. *Coleman*, 20 C. P. 507.

Special Damage—*Second Distress.—Time.*]—Trespass lies for a seizure and sale of goods where they have been left on the premises after a distress longer than five days, no person being in charge of them, the seizure and sale for which the action is brought being subsequent to the five days after the first seizure; but in such case the full value of the goods cannot be recovered, but only special damages. *Thompson* v. *Marsh*, 2 O. S. 355.

Treble Value—*Reference to Arbitration—Jury.*]—A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under 2 Wm. & M., sess. 1, c. 5, s. 4. The word "recover," used in the statute, means "recover by the verdict of a jury." *Clark* v. *Irwin*, 8 L. J. 21.

(c) *Evidence.*

Admissibility—*General Issue—Justification under Authority from Co-tenant.*]—See *Chase* v. *Scripture*, 14 U. C. R. 598.

(d) *Form of Action or Proceeding.*

Case—*Part of Rent not Due.*]—Where some of the rent distrained for was not due:—Held, that case and not trespass was the proper remedy. *Kendrick* v. *Lee*, 6 O. S. 27.

Conversion—*Rent not Due—Measure of Damages—Jus Tertii.*]—See *Williams* v. *Thomas*, 25 O. R. 536.

Injunction—*Set-off—Damages.*]—The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was indebted to him in damages for breach of the covenants in the lease to repair and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress, which was dissolved on the ground of concealment of facts:—Held, that the damages claimed by the plaintiff were not a "debt" within s. 3 of 50 Vict. c. 23 (O.), so as to constitute a set-off against the rent; and, although under the O. J. Act they might be the subject of counterclaim, they would not justify an injunction as against a distress levied as here. *Walton* v. *Henry*, 18 O. R. 620.

Trespass—*Continuance in Possession.*]—Where goods had been distrained for rent:—Held, that the plaintiff was entitled to maintain trespass for a wrongful continuance in possession beyond the time defendant was reasonably authorized to keep the same. *Lynch* v. *Bickle*, 17 C. P. 549.

Trespass—*Receiver—Restraining Action.*]—The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant brought trespass against the receiver. The court restrained the action. *Simpson* v. *Hutchison*, 7 Gr. 308.

Trespass—*Sale after Five Days.*]—Trespass lies for the sale of property seized as a distress and allowed to remain on the premises more than five days after seizure, but the full value of the property cannot be recovered. *Thompson* v. *Marsh*, 2 O. S. 355.

Trespass—*Trover—Distress off Premises.*]—Part of the plaintiff's goods having been distrained for rent off the premises:—Held, that he might recover their value either in trespass or trover. *Huskinson* v. *Lawrence*, 26 U. C. R. 570.

Trespass.]—See *Laur* v. *White*, 18 C. P. 99.

(e) *Justification.*

As Owner.]—A landlord when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale. *Gibbs* v. *Crawford*, 8 U. C. R. 155.

As Owner.]—Where a person distrained, as landlord, on goods which as a matter of fact had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely:—Held, that he might justify the taking on this latter ground. *Bell* v. *Irish*, 45 U. C. R. 167.

Under Authority of Co-tenant.]—See *Chase* v. *Scripture*, 14 U. C. R. 598.

Under Warrant of Distress.]—A bailiff distraining for rent need not have a written warrant of distress, for if the warrant be insufficient, but the landlord adopt the distress, the bailiff may justify under him. *Halsted* v. *McCormack*, E. T. 3 Vict.

Where a party assumes to act as principal in making a distress for rent, he cannot afterwards justify as bailiff, on the subsequent confirmation of the party entitled to the rent. *Lambert* v. *Marsh*, 2 U. C. R. 39.

To an action of trespass q. c. f., defendant justified the entry under a warrant of distress, and the plaintiff replied de injuriâ:—Held, that under these pleadings, and under the facts

proved, there could be no inquiry into defendant's motives; and that the plaintiff, having prevented the defendant from distraining, was not at liberty to shew that he had no intention of executing the warrant when he entered, although nothing was done inconsistent with such an intention. Lucas v. Nockells, 4 Bing. 740, distinguished. *Scott* v. *Vance*, 9 U. C. R. 613.

(f) *Pleading.*

Declaration — *Case — Duplicity.*] — A count in case for maliciously seizing a horse of large value as a distress for a very small sum, when there were other chattels of smaller value, and that the defendant afterwards sold the horse for much less than he was worth, is not bad for duplicity. *Higson* v. *Thompson*, 8 U. C. R. 561.

Declaration — *Contract — Variance.*] — In an action by a tenant against his landlord for wrongful distress and sale, the gist of the action is the wrong complained of, and therefore a variance between the contract set out in the declaration and that proved is immaterial. *Robinson* v. *Shields*, 15 C. P. 386.

Declaration — *Excessive Distress — Malice.*]—The second count, after stating the tenancy, and that the plaintiff's goods were on the premises, alleged that the defendants wrongfully distrained for arrears of rent the said goods of greater value than such arrears and costs, although a small part would have sufficed, and although the tenant's goods also distrained were of themselves sufficient; and that defendants thereby made an excessive and unreasonable distress for said arrears, contrary to the statute:—Held, good, and that it was clearly unnecessary to allege malice. *Huskinson* v. *Lawrence*, 25 U. C. R. 58.

Declaration — *More Rent than Due — Admission—Place of Distress.*]—Declaration for distraining for more rent than due, &c.:—Held, bad, because it did not admit the amount of rent distrained for to be in arrear, or shew where the distress really took place. *Mooney* v. *Jackson*, 1 C. L. Ch. 29.

Declaration — *More Rent than Due — Tender—Excessive Distress.*]—The first count alleged that one H. held premises as tenant to defendants at a certain rent; that the plaintiff's goods being there, defendants wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, to wit, $401, then claimed by defendants, and afterwards sold the same for such arrears and costs, whereas only $38 was really due, for which one-fifth of the goods would have sufficed, and the tenant's goods alone would have been more than sufficient:—Held, under the authority of French v. Phillips, 1 H. & N. 654, that the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, and though the plaintiff could make no tender, he could avail himself of one made by the tenant; and if for excessive distress, it should have alleged distinctly that the distress was excessive and unreasonable, or that the proceeds were more than reasonably sufficient. *Huskinson* v. *Lawrence*, 25 U. C. R. 58.

Declaration—*No Rent Due—Tenancy.*]—In an action upon 3 Wm. & M. c. 5, for taking a distress when no rent was due, the declaration need not set forth any tenancy between the parties; it is sufficient if it appear that the seizure was made under colour of a distress. *Stoddart* v. *Arderly*, 6 O. S. 305.

Declaration—*Rent Due — Admission.*] — Count in a declaration for a wrongful distress, admitting that some rent was due: — Held, bad, on demurrer. *Cochran* v. *Welsh*, 7 C. P. 21.

Plea—*Exemptions—Duplicity.*]—A plea to an avowry was held not objectionable for duplicity, for stating that the articles distrained and replevied were beasts of the plough and an implement of husbandry, and also that they were in actual use of the plaintiff, because the articles were not absolutely privileged, but only sub modo; and to constitute an absolute privilege it was necessary further to have alleged that there was a sufficiency of other goods on the premises liable to be distrained; but, as that could not be alleged in this case, the plaintiff was entitled to rely on the actual user at the time of distress, which exempted them as fully as if there had been other goods liable to seizure. A plea which alleged that there were other articles on the premises besides the privileged article:—Held, good, as affording a sufficient answer to the seizure. *Miller* v. *Miller*, 17 C. P. 226.

Plea—*General Issue—Evidence of Authority of Co-tenant.*] — See *Chase* v. *Scripture*, 14 U. C. R. 598, *ante* (b).

Plea—"*Not Guilty.*"]—In such an action it is necessary to state correctly to whom the rent is due. "Not guilty" puts in issue the tenancy and the ownership of the goods. *Robinson* v. *Shields*, 15 C. P. 386.

Reply—*No Right to Rent.*]—In trespass to land and goods, the defendant justified the seizure of the goods as a distress for rent under a demise to A. B. The plaintiff replied that A. B. and the plaintiff at the time of said demise were partners in trade; that before the rent accrued A. B. died, and the defendant and A. B.'s executors, in consideration that the plaintiff would carry on the business for his and their benefit, demised the same premises to plaintiff for so long as he should so carry it on, without payment of rent; that the plaintiff under this demise entered and occupied, and thereupon the demise to A. B. was surrendered and determined:—Held, a good answer to the plea, as shewing that there was no right to the rent distrained for. *Strathey* v. *Crooks*, 6 O. S. 587.

Reply—*No Rent Payable—Release.*]—Action for taking goods. Third plea, avowry as bailiffs of W. H., for rent due by one W. B., the goods being on the demised premises. Third replication, that on the 7th May, 1870, the tenant, by deed, released to the plaintiff all his estate in the land, and the landlord, in consideration thereof, released the tenant from the rent and covenants: — Held, good, for though the plaintiff would be estopped from denying the landlord's right to distrain, the release shewed that no rent was payable. *Hayward* v. *Thacker*, 31 U. C. R. 427.

Reply—*Plaintiff in as Owner.*] — Third plea, avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication, that before the demise one W. H. was seized in fee of the

land, and by deed dated 30th October, 1869, granted it to the plaintiff, who entered and took possession, and held it as owner in fee at the time of the distress. It was objected that, consistently with this replication, A. H. might have held such an interest in the land as would enable him to make the lease prior and paramount to plaintiff's title:—Held, replication clearly good. *Ib.*

Statement of Claim—*Conversion—Rent not Due—Double Value.*]—See *Williams* v. *Thomas*, 25 O. R. 536.

(g) *Tender.*

Necessity for—*Sum Due—Excess Paid.*]—An action for distraining for more rent than is due, cannot be maintained without a tender of the sum which is really due; and the excess paid cannot be recovered back as money had and received. *Owen* v. *Taylor*, 39 U. C. R. 558.

Proof of.]—To divest a landlord of his right to distrain, a strict legal tender must be shewn. *Matheson* v. *Kelly*, 24 C. P. 598.

Proof of—*Bailiff—Landlord—Finding of Jury.*]—In proof of an alleged tender to the bailiff, the plaintiff said that he asked the bailiff for a bill of demands, with all costs, and he would pay him; that he, plaintiff, had then 88*7* in his hand, which was sufficient to pay the rent and costs, and said, "Here is your money;" but that the bailiff refused to receive it. This was denied by the bailiff; but the question was left to the jury, who found that there was a tender. The goods distrained were afterwards sold by the bailiff:—Held, that on the evidence the finding of the jury could not be interfered with, and there must be held to have been a tender to the bailiff; and the landlord was responsible for the bailiff's act. Matheson v. Kelly, 21 C. P. 598, distinguished. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

(h) *Other Cases.*

Bailiff — *Illegal Charges — Liability of Landlord.*]—A count charging the landlord with selling the goods for extortionate and illegal charges, cannot be sustained, for the charge of extortion lies only against the bailiff who received the fee. See 1 Vict. c. 16, s. 4 (C. S. U. C. c. 123, ss. 7, 8). *Nichols* v. *Mooney*, 1 U. C. R. 199.

Bailiff—*Seizure Off Premises—Liability of Landlord.*]—The bailiff, having a warrant from defendant to distrain, seized property off the premises. This was done without defendant's knowledge, and there was no evidence of his having adopted the act:—Held, that defendant was not liable, and that the plaintiff could not maintain replevin against him. *Ferrier* v. *Cole*, 15 U. C. R. 561.

Excessive Distress.]—The rent due was $401, and the value of the goods distrained $469:—Held, that the difference was insufficient to support an action for excessive distress. *Huskinson* v. *Lawrence*, 26 U. C. R. 570.

Mortgagee of Goods—*Right of Action—Ingress of Landlord—Breaking Window.*]—The defendant, in order to seize the goods under the distress, broke into the house by forcing the window open:—Quære, as to the right of action of the plaintiff (the mortgagee of the goods) therefor. A new trial was granted in order to ascertain the facts more fully. *Nattrass* v. *Phair*, 37 U. C. R. 153.

Pretended Sale of Goods by Tenant—*Right of Action.*]—A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser. *Whitelock* v. *Cook*, 31 O. R. 463.

Removal of Goods.]—The plaintiff having remained in possession and paid rent after the expiry of his term, the defendants levied a distress upon plaintiff's goods in the premises, situate six miles from Toronto, for two months' arrears of rent, and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendant's tenant:—Held, that the relationship of landlord and tenant existed at the time of the distress. 2. That the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action. *MacGregor* v. *Defoe*, 14 O. R. 87.

Surplus Proceeds of Sale—*Receipt by Tenant.*]—In an action for wrongful distress, the receipt by the tenant from the bailiff of the surplus of the proceeds of the sale:—Held, no condonation of the wrong complained of, the payment having been neither made nor accepted in satisfaction or compromise of the injury suffered. *Robinson* v. *Shields*, 15 C. P. 386.

4. *Notice of Distress.*

Omission of—*Effect.*]—On a distress for rent no notice thereof in writing was given to the lessee; nor a legal appraisement made before sale; and the actual value of the goods sold was much greater than the amount due for rent:—Held, that the distress was illegal. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Waiver of.]—After the distress was made, the tenant, on being informed by the bailiff that he had eight days in which to redeem, said he did not require an inventory of the goods to be given him:—Held, that this did not constitute a waiver of the notice of distress. *Shultz* v. *Reddick*, 43 U. C. R. 155.

5. *Persons Distraining.*

Agent of Landlord—*Ratification.*]—A distress made by an agent for the benefit of his principal, in his own name, and subsequently ratified by the principal:—Held, legal. *Grant* v. *McMillan*, 10 C. P. 536.

Assignee of Landlord.]—One of the defendants in an action for wrongful distress, had assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:—Held, that such an assignment conferred an estate, and that under 4 Anne c. 16, ss. 9, 10,

the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not. *Hope* v. *White*, 17 C. P. 52.

Assignee of Landlord.]—A landlord, after leasing certain premises, by deed "assigned, transferred, and set over" to M. two instalments of the rent reserved, and appointed him his attorney to sue for, collect, or levy by landlord's warrant, if necessary, in his (the landlord's) name:—Held, that the instrument contained a grant, and of a rent charge, as an incorporeal hereditament, accompanied with a clause of distress, and therefore not of a rent seck, and that M. could distrain for the rent in his own name; but that, whether rent charge or rent seck, he had equally the power of distress under 4 Geo. II. c. 28. *Hope* v. *White*, 19 C. P. 479, affirming *S. C.*, 18 C. P. 430.

Executors.]—A testator by his will desired that his executors should sell and dispose of his land, and then nominated and appointed his executors, their executors and administrators, to seal, execute, and deliver any deeds that might be necessary for making a title to the purchaser:—Held, that this devise vested no interest in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nicholl* v. *Cotter*, 5 U. C. R. 564.

Infant.]—Semble, that an infant may make a warrant of distress. *Owen* v. *Taylor*, 39 U. C. R. 358.

Landlord — *Interest Expired.*]—A landlord cannot distrain after his interest in the estate has expired. *Hartley* v. *Jarvis*, 7 U. C. R. 545.

Mortgagee.] — Where a mortgagee received rent from a tenant of the mortgagor by lease subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he did:—Held, that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent. *Lambert* v. *Marsh*, 2 U. C. R. 39.

Mortgagee.]—See *ante*, II.

Receiver.]—The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant brought trespass against the receiver. The court restrained the action. *Simpson* v. *Hutchison*, 7 Gr. 308.

Receiver.]—An order had been made giving a receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon, for discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that distress could not be made under 8 Anne c. 14, ss. 6 and 7. The order to distrain was therefore discharged. No notice need be given to a tenant of an application for an order giving a receiver leave to distrain. *Paxton* v. *Dryden*, 6 P. R. 127.

6. Sale of Goods Distrained.

Delay in Sale—*Collusion.*]—Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties. *Anderson* v. *Henry*, 29 O. R. 719.

Goods of Third Person—*Resort First to Goods of Tenant.*]—Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the court to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person. *Pegg* v. *Starr*, 23 O. R. 83.

Purchase by Distrainor.]—Plaintiff distrained upon his tenant, and at the sale, with the latter's consent, purchased a portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, and partly by the delivery of the tenant to him:—Held, that though as a general principle no one can sustain the double character of seller and buyer, yet where, as in this case, the tenant consents to the purchase by the landlord, the sale can be supported; and therefore that the property sold passed to the plaintiff, and that he could hold it against defendant's execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession, under C. S. U. C. c. 45, s. 4. *Woods* v. *Rankin*, 18 C. P. 44.

Purchase by Distrainor.]—In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for $75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 extra in settlement with him, making $200 in all:—Held, that the evidence sufficiently shewed the piano to be the plaintiff's property, and that he was entitled to maintain trover for it against defendant. Held, also, that the sale to the defendant passed nothing, for as landlord he could not himself purchase goods sold by his bailiff, under 2 Wm. & M., sess. 1, c. 5, s. 2; and, although, as between J. and defendant, the defendant's claim might be complete by the subsequent arrangement with J., yet the plaintiff (the owner) was not bound by it. Held, also, that defendant could not set up a lien for the rent as against the plaintiff, for the distress was at an end, and the goods in no way in the custody of the law. *Williams* v. *Grey*, 23 C. P. 561.

Purchase by Distrainor.]—The plaintiff caused the goods in question to be distrained for rent in arrear of a farm, and, after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenants' consent to the plaintiff, and one P. was put in charge, who, however, allowed the tenants to remain in possession as before. Subsequently, the goods were seized and sold by the sheriff under

executions against the tenants, whereupon the plaintiff brought trover:—Held, affirming the judgment in 28 C. P. 263, that he could not, as landlord, claim as purchaser at the bailiff's sale; nor could he claim as vendee of the tenants, it appearing that there was no registered bill of sale, nor any actual or continued change of possession. It was urged in appeal, for the first time, that some of the goods belonged to one of the tenants, and that the sheriff seized before he had any execution against them:—Held, that the evidence failed to shew any such seizure: and quære, whether the objection should be permitted at this stage. *Burnham* v. *Waddell*, 3 A. R. 288.

Purchase by Distrainor.]—H., who was the president of the defendants, an incorporated company, and also a member of an incorporated gas company, purchased the goods at the sale for the gas company. The Judge charged the jury that H. was both seller and buyer, and that the sale was void:—Held, a misdirection: but, as it appeared that no substantial wrong or miscarriage was occasioned thereby, the court, under rule 311, O. J. A., could not interfere. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Time—*Period after Distress—Jury.*]—In the case of distress for rent, there must be five clear days between the day of distress and the sale, at the expiration of which the landlord is at liberty to sell; but he has a reasonable time after the five days so to do, and what is a reasonable time is a question for the jury. In this case, therefore, the Judge having directed the jury that the landlord was bound to proceed to sell on the sixth day:—Held, that the direction was improper, and that the right direction would have been, after having told the jury the time when the goods could first have been sold, for them to find whether under all the facts the defendant had remained an unreasonable time in possession after the five days before selling. *Lynch* v. *Bickle*, 17 C. P. 549.

Time—*Period after Notice of Distress.*]—Under 2 Wm. & M., sess. 1, c. 5, goods distrained cannot be sold until the expiration of five days after a written notice of distress, with the cause of the taking, shall have been given. In this case the only notice was one given on the 8th February, and the sale took place on the 12th:—Held, that the sale was invalid. *Shultz* v. *Reddick*, 43 U. C. R. 155.

Time — *Removal of Goods Purchased — Trespass.*]—The purchaser of property sold for rent must remove the same off the premises within a reasonable time after the sale. Where the property was sold on the 15th February, and the purchaser entered to remove it off the premises on the 26th March following, he was held liable as a purchaser. *Alway* v. *Anderson*, 5 U. C. R. 34.

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7. *Second Distress.*

Abandonment — *Grounds of — Sale of Goods.*]—A. having distrained the goods of B. for rent said to be due to him by B., and abandoned the same without realizing, and subsequently, upon a second distress for the same rent, having sold the goods:—Held, in an action for illegal distress, that the defendant having shewn no sufficient ground for the abandonment of the first distress without realizing, the second was illegal; and a verdict against him for $20 in the county court was upheld. *Lyness* v. *Sifton*, 13 C. P. 19.

Abandonment — *Agreement to Look to Insolvent Estate—Time.*]—D. was tenant to M. under a lease which provided that in the event of D. making an assignment in insolvency the term should become forfeited and void, but that the then current quarter's rent, as well as the next succeeding current quarter's rent, should immediately become due and payable. On the 21st June, 1872, D. made an assignment in insolvency to K., an official assignee; and M. immediately distrained for the rent, including two quarters due by virtue of the forfeiture. At the request of the official assignee, M. abandoned the distress, and in lieu thereof agreed to look to the insolvent estate, the assignee thinking that there would be abundance of property to pay it, but repudiating any interest in the term. Subsequently, the goods proving insufficient by reason of a chattel mortgage, the assignee told M. that he could not continue responsible, and M. thereupon, on the 24th September, issued a second distress for same rent:—Held, that the second distress was bad, for on the abandonment of the first distress, which could not be said to have been at the request of the tenant, M.'s right to distrain was gone, and he could only look to the insolvent's goods, which passed, without the term, to the assignee. Held, also, that the second distress could not be supported under the statute of Anne, as having been made within six months after the determination of the term. *May* v. *Severs*, 24 C. P. 396.

Withdrawal by Arrangement with Tenant—*Fraud.*]—A landlord may lawfully distrain a second time for the same rent when the first distress is withdrawn by an arrangement for the benefit of the tenant, which arrangement is at an end at the time of the second distress. Semble, when the withdrawal has been effected through the fraud of the tenant, the landlord can again distrain. Section 4 of 58 Vict. c. 26 (O.), the Landlord and Tenant Act, 1895, does not take away the common law right of distress, but merely renders it unnecessary that the relation of landlord and tenant should depend upon tenure or service or that a reversion should be necessary to the relation. In any event the section is not retrospective. *Harpelle* v. *Carroll*, 27 O. R. 240.

See Thompson v. *Marsh*, 2 O. S. 355, *ante* 3 (d); *La Vassaire* v. *Heron*, 45 U. C. R. 7, *ante*, II.

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8. *Set-off or Counterclaim.*

Damages—*Injunction to Stay Distress.*]—The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress, which was dissolved on the ground of concealment of facts:—Held, that the damages claimed by the plaintiff were not a "debt" within s. 3 of 50 Vict. c. 23 (O.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the

subject of counterclaim they would not justify an injunction as against a distress levied as here. *Walton* v. *Henry*, 18 O. R. 620.

Notice—*Illegal Distress—Double Value.*]—The service by the tenant, after distress but before sale, of a notice of set-off, pursuant to R. S. O. 1887 c. 143, s. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, under 2 Wm. & M., sess. 1, c. 5, s. 5, which requires both seizure and sale to be unlawful. *Brillinger* v. *Ambler*, 28 O. R. 368.

See Williams v. *Thomas*, 25 O. R. 536, *ante*, 3 (b).

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9. *Time of Distraining.*

A distress more than six months after expiration of the tenancy is illegal, and a continuation of the tenancy will not necessarily be implied from the mere fact of the party remaining in possession. *Soper* v. *Brown*, 4 O. S. 103.

A plea of distress for rent under a demise after the lease had expired, was held bad, for not stating that the distress was made within six calendar months after the determination of the lease, according to 8 Anne c. 14. *Strathcy* v. *Crooks*, 6 O. S. 587.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year, if the tenant remain in possession; and the landlord may distrain for the first year's rent at the end of the second year. 4 Wm. IV. c. 1, s. 20 (C. S. U. C. c. 88, s. 9), does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards. *McClenaghan* v. *Barker*, 1 U. C. R. 26.

A landlord cannot distrain after his interest in the estate has expired. *Hartley v. Jarvis*, 7 U. C. R. 545.

Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law of the lease; the relation of landlord and tenant no longer exists; and consequently the right to distrain is gone. *Lewis* v. *Brooks*, 8 U. C. R. 576.

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10. *What may be Distrained.*

(a) *Exemptions.*

Benefit of Trade—*Vessels—Material.*]—M., a ship-builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M.'s men, when A. distrained both it and the vessels for rent:—Held, that both it and the vessels were exempt from distress. *Gildersleeve* v. *Ault*, 16 U. C. R. 401.

Benefit of Trade—*Goods Consigned for Sale.*]—Goods were consigned to R. by plaintiff, with certain prices affixed in the invoice, below which he was not to sell, and all above which he might keep for himself; and it appeared that he was in the habit of transferring them when convenient in payment of his own debts, charging himself with them as sold at the invoice prices. Under any circumstances, therefore, he was not paid by commission on the sales:—Held, that such goods were not exempt from distress for rent due by R. *Hurd* v. *Davis*, 23 U. C. R. 123.

Benefit of Trade—*Goods Left for Repair and Sale.*]—An engine and boiler were left with D. by the plaintiff to be repaired and sold by him, the repairs to be made in consideration of the use of the engine and boiler while in his possession; if a sale should be made within six months, D. to pay plaintiff $400, and retain anything over as his commission; if not sold in six months, plaintiff to be at liberty to retain the goods; D. to leave the same in repair, without charge, and to pay nothing for their use:—Held, that D. acquired no beneficial interest until the repairs were made; and semble, that they were exempt from seizure for his rent. *May* v. *Severs*, 24 C. P. 396.

Benefit of Trade — *Machine Left at Hotel.*]—The defendant distrained for rent a reaping machine on premises leased by him to one G., from whom the plaintiff, an hotel keeper, had the use of the yard and stable. The machine had been left at the plaintiff's hotel about six months before by one R., an agent for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility therefor. At the trial it was sought to prove that it was essential to the plaintiff's business to receive and keep such machines brought by his customers, but the evidence merely shewed that a refusal to do so would or might render his hotel less popular:—Held, that the machine was not exempt from distress. *Mitchell* v. *Coffee*, 5 A. R. 525.

Benefit of Trade—*Saw Logs—Property of Stranger.*]—The exemption from distress of goods intrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade. In this case saw logs were taken to a saw mill by the plaintiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by defendant:—Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber. *Paterson* v. *Thompson*, 46 U. C. R. 7, 9 A. R. 326.

Chattels in Use.]—The actual user of goods, of whatever kind, exempts them from seizure, either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other goods on the premises liable therefor. *Miller* v. *Miller*, 17 C. P. 226.

See Couch v. *Crawford*, 10 C. P. 491, *post* (c).

Militia Horses.]—A person serving with or attached to a militia cavalry troop as quartermaster is an officer thereof, and his horse

protected from distress under s. 31 of 18 Vict. c. 77. *Davey* v. *Cartwright*, 20 C. P. 1.

Sheep.]—It is illegal to distrain sheep for rent when there are other goods upon the premises sufficient to satisfy the claim. *Hope* v. *White*, 22 C. P. 5.

(b) *Goods in Custodiâ Legis.*

Assignment for Benefit of Creditors —*Distress before Possession Taken by Assignee.*]—The tenant of certain freehold premises executed an assignment under 48 Vict. c. 26 (O.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment:—Held, that the landlord's right of distress was not affected by the assignment:—Held, also, that goods so assigned were not to be therefore deemed in custodiâ legis. *Everett* v. *Kent*, 15 O. R. 9.

Assignment for Benefit of Creditors —*Distress after Possession Taken by Assignee.*]—See *Linton* v. *Imperial Hotel Co.*, 16 A. R. 337.

Execution.]—A landlord cannot distrain goods held under execution and in custody of the law. *Grant* v. *Grant*, 10 P. R. 40.

Execution—*Goods Left with Tenant.*]—A sheriff seized goods under execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested:—Held, that the sheriff had not such a possession of the goods as precluded the landlord from distraining. *McIntyre* v. *Stata*, 4 C. P. 248.

See Roe v. *Roper*, 23 C. P. 76; *Whimsell* v. *Giffard*, 3 O. R. 1; *Langtry* v. *Clark*, 27 O. R. 280; *Anderson* v. *Henry*, 29 O. R. 719.

Execution — *Sale under — Removal by Purchaser—Time.*]—Although goods seized by the sheriff cannot be distrained in his custody, still they must be removed within a reasonable time after sale, in order to protect the purchaser against a distress for rent; and in this case, under the facts set out:—Held, that the goods had not been removed within a reasonable time either after the sale or after notice to plaintiffs to remove them, and that in either view they were liable to defendant's distress for rent. *Hughes* v. *Towers*, 16 C. P. 287.

Execution—*Sheriff's Bailiff — Constable.*] —Plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer, who was also a county constable. He was committed for trial and was tried but acquitted. In an action for false arrest and malicious prosecution:—Held, that the grain was properly under lawful seizure and in the custody of the law and that by R. S. C. c. 164, s. 50, anyone taking it away without lawful authority was guilty of larceny, and that by R. S. C. c. 174, s. 25, anyone found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs. *Beatty* v. *Rumble*, 21 O. R. 184. See next case.

A sheriff is identified in interest with his bailiff and liable for whatever the latter does under colour of the writ. The plaintiff, assisting a person acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by the defendant as sheriff's officer, and was arrested by the defendant:—Held, that the sheriff was liable for the act of his officer, Beatty v. Rumble, 21 O. R. 184, distinguished. The jury having assessed the damages against the officer at a nominal sum, the court, instead of ordering a new trial, directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

Sale for Taxes—*Removal by Purchaser—Time.*]—C. owned a boiler and smoke-pipe, which had been erected in a building of which he was sub-lessee. On the 19th February they were sold for city taxes due by him, and bought by the plaintiff; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord:—Held, that the goods could not be considered as in the custody of the law after the sale on the 19th February. *Langton* v. *Bacon*, 17 U. C. R. 559.

Seizure for Taxes—*Priorities.*]—There is nothing in the Assessment Act, R. S. O. 1897 c. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods which, being under distraint by a landlord, are in custodiâ legis; and in this case subsequent rent having accrued due during the joint possession of the landlord and the collector, the landlord was also held to have priority in respect to another distress made by him for such subsequent rent. *City of Kingston* v. *Rogers*, 31 O. R. 119.

See, also, *post*, (*e*).

(c) *Goods of Third Persons.*

[*See* R. S. O. 1897 c. 170, s. 31.]

Person in Possession under the Tenant.]—The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages:—Held, by the supreme court of Canada, reversing the judgment of the court of appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress. *Farwell* v. *Jameson*, 27 O. R. 141, 23 A. R. 517, 26 S. C. R. 588.

Purchaser at Tax Sale—*Delay in Removal of Goods.*]—See *Langton* v. *Bacon*, 17 U. C. R. 559, *ante* (*b*).

Stranger—*Horses in Actual Use.*]—Held, that a pair of horses belonging to a stranger, which were driven on to the premises and tied, the party in whose charge they were going into the house, were not seizable for rent if they were in actual use at the time of the distress. *Couch* v. *Crawford*, 10 C. P. 491.

Stranger—*Landlord's Right to Demise.*]—A stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant himself, question the landlord's right to demise. *Smith* v. *Aubrey*, 7 U. C. R. 90.

Tenant of Person in Possession without Title.]—A. demises to B. for a term; B. during the term absconds and abandons the property; C., finding the place vacant, puts a person in possession, and makes a demise to D.; A. distrains for rent under his lease to B.:—Held, distress legal. *Rudolph* v. *Bernard*, 4 U. C. R. 238.

Unpaid Vendor — *Scheme — Creation of Relationship of Landlord and Tenant.*]—C., having paid rent due by R. to H., in order to secure the sum so paid and other advances, took an assignment of the residue of the term from R., who forthwith took a lease from C. for a term of three months, the rental being the amount of C.'s advances to R.:—Held, that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable C. to distrain the goods of third parties (unpaid vendors) on the premises, the intention, as disclosed by the evidence set out in the report, being manifestly not to create such relation except as a scheme to enable C. to seize such goods. *Thomas* v. *Cameron*, 8 O. R. 441.

See (*a*), (*b*), (*d*), (*e*).

(d) *Goods Seized after Removal.*

Cattle on Highway.] — Cattle may be taken on the highway as a distress, if driven off the land in view of the bailiff; and if the legality of a distress turn upon the place of seizure, as to whether it was a highway or not, that point should be left clearly to the jury. *Halsted* v. *McCormack*, E. T. 3 Vict.

Forbidding Removal—*Seizure on Highway.*]—A landlord on the day of the removal of goods, rent being in arrear, forbade such removal until it was paid. Upon a seizure on the highway for such rent:—Held, that a sufficient inception of distress had taken place to warrant such seizure. *Pulver* v. *Yerex*, 9 C. P. 270.

Fraudulent Removal—*Goods of Stranger.*]—In case of a fraudulent removal, the landlord can follow the goods of his tenant only, and not those of a stranger, which had been on the premises. *McArthur* v. *Watkley*, M. T. 4 Vict.

Fraudulent Removal — *Goods not on Demised Premises.*]—A tenant is not liable to prosecution under 11 Geo. II. c. 19, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises. *Martin* v. *Hutchinson*, 21 O. R. 388.

(e) *Goods Subject to Chattel Mortgage.*

Agreement Between Bailiff and Tenant—*Removal of Goods.*]—A bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession or take any further steps to execute the warrant, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, the defendant, having a chattel mortgage on the goods, took possession under it and removed the goods, for which the landlord brought replevin:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

Agreement Between Bailiff and Tenant — *Taking Goods — Pound Breach.*] — Where the goods of a tenant, which had been mortgaged by him, were distrained for rent and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress they were seized and taken away by the mortgagee:—Held, as regards the mortgagee, that the goods were no longer in custodiâ legis, and that in taking them he had not committed a breach of the pound within the meaning of 2 Wm. & M., sess. 1, c. 5. *Langtry* v. *Clark*, 27 O. R. 280.

Agreement Between Bailiff and Tenant—*Tenant's Bond — Abandonment—Collusion.*]—Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary. Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee. McIntyre v. Stata, 4 C. P. 248, Roe v. Roper, 23 C. P. 76, and Whimsell v. Giffard, 3 O. R. 1, distinguished. Langtry v. Clark, 27 O. R. 280, distinguished and not followed. *Anderson* v. *Henry*, 29 O. R. 719.

Growing Crops.]—A land mortgage provided that on default in payment of any one instalment for two months all should become due, and that in default of payment of any instalment the mortgagees might distrain. The first instalment fell due 1st November, 1879, and, the mortgagors being in possession, the mortgagees distrained therefor on the 6th October, 1880. They distrained crops produced from the land after the 1st November, 1879, and the plaintiffs claimed them under a chattel mortgage given on 31st May, 1880, of such crops, which had then been just sown:—Held, that the growing crops passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants. *Laing* v. *Ontario Loan and Savings Co.*, 46 U. C. R. 114.

Tenant—*Duty of, to Protect Mortgaged Goods.*]—See *Herring* v. *Wilson*, 4 O. R. 607.

(f) Other Cases.

Garnishment of Rent.]—A landord's right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment, by the service on the tenant, before such distress, of an order attaching the rent, and distress for such portion is wrongful. *Patterson* v. *King*, 27 O. R. 56.

Interest of Tenant in Goods—*Unpaid Vendor.*]—An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question:—Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent and must be read out as mere surplusage; and so reading the agreement, the transaction was one of conditional sale, and under 57 Vict. c. 43 (O.) only the interest of the tenant in the goods could be distrained on. Held, also, that 57 Vict. c. 43, which repeals s. 28, s.-s. 1, of R. S. O. 1887 c. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by s. 42 of R. S. O. 1887 c. 143, applied. *Carroll* v. *Beard*, 27 O. R. 349.

Property of Joint Owners.]—Where the plaintiff had not shewn that he was solely entitled to possession of the logs, the subject of distress, and the seizure as regarded his co-owner being lawful, the plaintiff could not maintain replevin. *Patterson* v. *Thompson*, 9 A. R. 326.

Vessels at Wharves.]—Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent, not being on the premises demised. *Sanderson* v. *Kingston Marine R. W. Co.*, 3 O. R. 168.

IV. MISCELLANEOUS CASES.

Annuity.]—See *Crone* v. *Crone*, 27 Gr. 425.

Costs of Distress.]—The form of order given in the schedule to C. S. U. C. c. 123 (respecting the costs of distress for rents and penalties not exceeding $80) states the unlawful charges to have been taken from the complainant "under a distress for (as the case may be:)"—Held, sufficient to say "a distress for rent," and that it was unnecessary to state such rent to have been under $80, in order to shew jurisdiction. *Regina* v. *Stewart*, 25 U. C. R. 327.

Proceedings in Insolvency—*Right to Distrain.*]—See *Munro* v. *Commercial Building and Investment Society*, 36 U. C. R. 464; *McEdwards* v. *McLean*, 43 U. C. R. 454; *Laur* v. *White*, 18 C. P. 99; *Timmins* v. *Surples*, 26 C. P. 49.

Taking Note for Rent.]—The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to await until it has been dishonoured. The plaintiff being unable to pay his rent in arrear, defendant, his landlord, proposed to him to go to the bank, and that defendant would indorse his note for the amount, on which defendant could get the money, defendant saying that if the plaintiff could not pay it in full at maturity he would renew. This was done, and defendant by discounting the note, which was not due until March, obtained the money. The bank already held other notes given for previous rent. In January, however, the notes being still in the bank, the defendant distrained:—Held, that this evidence shewed that defendant obtained the notes upon an express agreement that his right to distrain should be suspended until they were dishonoured; and that the distress therefore was not warranted. *Simpson* v. *Howitt*, 39 U. C. R. 610.

See ASSESSMENT AND TAXES, III. 3—REPLEVIN, I.

DISTRIBUTION OF ESTATES.

Allowance for Improvements.]—A testator placed his two sons in possession of portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Gr. 135.

Allowance for Improvements.]—A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land:—Held, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. Quære, in such a case, whether the son is not entitled to an absolute decree for the land. *Bichn* v. *Bichn*, 18 Gr. 497; *Hovey* v. *Ferguson*, *ib.* 498.

Appropriation—*Mistake—Unequal Division—Readjustment—Laches.*]—A division of the residuary personal estate of a testator was made between his legatees, with their concurrence, appropriating to one of them, as

part of her share, a mortgage for about £10,000, assumed to be good, but which, from defective title and other causes, was not worth one-fourth of that sum:—Held, that in consequence of the mistake as to the character and value of the mortgage, the appropriation was not binding on such legatee. An unequal and unjust division of a residuary estate was agreed to in 1858, under circumstances which rendered the transaction invalid. The division was acted on to a certain extent by both parties, though conveyances had not been executed. A bill being filed in 1864 to set aside the division, and the delay sufficiently accounted for, a decree was made as prayed, and it was referred to the master to make a new division, not disturbing the old division more than should be necessary. *Clarke* v. *Hawke*, 11 Gr. 527.

Compensation—*Mistake—Rectification — Contribution.*]—A testator devised to his son a certain named lot: the residue of his estate, after certain other specific devises, he directed to be divided between his two brothers and sister, amongst whom, after the death of the testator, the property was divided. In this division, by mistake, the lot devised to his son was included, and was allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake which had been committed, applied to those interested in the residuary estate to have the mistake rectified. It then appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible, and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate, at its present value, and one-third of such value, with interest from the date the first division was made, to be contributed ratably by the other residuary devisees, or their representatives, or, if desired, by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Gr. 94.

Creditors—*Estate of Deceased Debtor—Division Pari Passu — Overpayment—Action against Executrix.*]—By 29 Vict. c. 28, s. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors pari passu, without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors and execution to be issued, under which they were paid nearly in full, when by applying to the court in that action the proper distribution of the estate would have been ordered, the court charged her, in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the court, and to this extent they were held entitled to recover their costs. *Taylor* v. *Brodie*, 21 Gr. 607.

Creditors—*Estate of Deceased Debtor—Division Pari Passu—Overpayment—Action by Administratrix.*]—An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being raised against the estate, sought to recover a portion of the money back as on an overpayment:—Held, that she had no locus standi to maintain the action. *Leitch* v. *Molsons Bank*, 27 O. R. 621.

Division of Chattels—*Personal Representative.*]—A., who was domiciled in Scotland, died there intestate, leaving some personal property. Three of his next of kin, a brother and two sisters, concurred in appointing an agent in Scotland to wind up the estate and transmit and account to them therefor; the agent did so, and transmitted to the brother some money and personal chattels as all that remained after paying the intestate's debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of the deceased in this country, was overruled. *Sutherland* v. *Ross*, 13 Gr. 507.

Lunatic—*Sale of Lands—Proceeds—Realty.*]—One of several heirs of an intestate being lunatic, an Act was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share for the benefit of the lunatic "and his representatives." The lunatic afterwards died:—Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided among his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Gr. 254.

Married Woman—*Husband's Right to Residuum—Next of Kin.*]—The Legislature of New Brunswick, by 26 Geo. III. c. 11, ss. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. II. c. 10 (Statute of Distributions), as explained by s. 25 of 29 Car. II. c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of femes coverts dying intestate, but that their husbands should enjoy their personal estate as theretofore. When the statutes of New Brunswick were revised in 1854, the Act 26 Geo. III c. 11 was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a feme covert her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission:—Held, that the personal property passed to her husband and not to the next of kin of the wife; that the Married Woman's Property Act of New Brunswick, C. S. N. B. c. 72, which exempts the separate property of a married woman from liability for her husband's debts, and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Statute of Distributions—*Grand-nephews.*]—The proviso in the Statute of Distributions that "there be no representatives admitted amongst collaterals after brothers' and sisters' children" excludes the children of a deceased nephew of the intestate. *Crowther* v. *Cawthra*, 1 O. R. 128.

Statute of Distributions.]—See *Arkell v. Roach*, 5 O. R. 699; *Re Quimby, Quimby v. Quimby, ib.* 738.

See DEVOLUTION OF ESTATES ACT—EXECUTORS AND ADMINISTRATORS — PARTITION—WILL.

DISTRICT COURTS.

Appeal—*Court of Appeal—Final Order.*]—There is an appeal to the court of appeal from the judgments of the district courts of the provisional judicial districts. Section 34 of R. S. O. 1877 c. 90 imports that when by the law in force with regard to county courts an appeal lies from these courts to the court of appeal, it lies also from the district courts. *Bank of Minnesota v. Page*, 14 A. R. 347.

An order for leave to sign judgment under Rule 80 is in its nature final and not merely interlocutory, and therefore such an order if made in a county court would be appealable by virtue of 45 Vict. c. 6, s. 4 (O.), and is also appealable when made in a district court. *Ib.*

47 Vict. c. 14, s. 4 (O.), assumes the existence of the right of appeal from district courts; and the optional right to move against the verdict in the high court, provided by s.-s. 5, is not the appeal referred to in the first part of the section, in the words "subject to appeal." *Ib.*

Appeal—*High Court—Interpleader.*]—The high court of justice has no jurisdiction by virtue of R. S. O. 1887 c. 91, s. 56, s.-s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the district court in an interpleader issue. *Isbister v. Sullivan*, 16 O. R. 418.

Execution — *Transcript from Division Court.*]—Upon a transcript from a division court to a district court, it is not necessary to issue a fi. fa. goods from such district court before a valid sale can take place under a fi. fa. lands issued therefrom. Kehoe v. Brown, 13 C. P. 549, observed upon. *Daby v. Gehl*, 18 O. R. 152.

Jurisdiction — *Interpleader.*]—The district court of the provisional judicial district of Thunder Bay has jurisdiction in interpleader under R. S. O. 1887 c. 91, s. 56; for it has "the jurisdiction possessed by county courts," which is by R. S. O. 1877 c. 45, s. 19, s.-s. 6, "in interpleader matters as provided by the Interpleader Act;" and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the district court, and not by the amount for which the recovery was had or the process issued. *Isbister v. Sullivan*, 16 O. R. 418.

Jurisdiction—*Title to Land.*]—The jurisdiction conferred on the district court of the provisional judicial district of Thunder Bay by 47 Vict. c. 14, ss. 4, 5 (O.), is not subject to the exceptions to the general jurisdiction of the county courts mentioned in R. S. O. 1877 c. 43, s. 18, and therefore, the district court has power to try actions in which the title to land comes in question. *McQuaid v. Cooper*, 11 O. R. 213.

Jurisdiction of Judge — *Vendors and Purchasers Act—Land Titles Act.*]—Notwithstanding anything in R. S. O. 1897 c. 109, s. 7, and R. S. O. 1897 c. 51, s. 185, Judges of district courts who are local Judges of the high court, have no jurisdiction to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act. *In re Michell and Pioneer Steam Navigation Co.*, 31 O. R. 542.

Order of Master for Trial of Action Therein — *Subsequent Judgment of High Court Judge.*]—In an action brought for damages to the plaintiff's house, situated in a provisional judicial district, an order was made by the master in chambers, assuming to act upon the Unorganized Territory Act, R. S. O. 1887 c. 91, directing that the issues of fact be referred to the district Judge, reserving further directions and questions of law arising at the trial for the disposal of a Judge in court. Notice of trial was given for the district court, and the case was heard by the district Judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a Judge in court, the defendant at the same time appealing from the judgment or report, whereupon the Judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the district Judge. On appeal to a divisional court:—Held, that, apart from the question of the jurisdiction of the master to make the order, as the parties had treated it as valid, and the subsequent order of the Judge in court remained unreversed and not appealed from, the court would not interfere; that if the question of the jurisdiction of the master were involved, the appeal should have been to the court of appeal. *Fraser v. Buchannan*, 25 O. R. 1.

See CERTIORARI, I. 3.

DISTRINGAS.

Action against a Corporation.]—See *Cooper v. Canada Co.*, Dra. 189.

Proceeding against a Corporation—*Enforcement of Decree—Sequestration.*]—*Attorney-General v. Brantford*, 1 Ch. Ch. 26.

Special Jury—*Venire and Distringas.*]—See *Morvey v. Maynard*, 4 O. S. 323.

DISTURBING PUBLIC WORSHIP.

See CONSTITUTIONAL LAW, I.

DITCHES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, IV.

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See WATER AND WATERCOURSES, V.

DIVISION COURTS.

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I. Appeal.

Evidence — *Omission to Take down.*] — The right of appeal from the division court is not lost because the Judge omits in an appealable case to take down the evidence at the trial in writing. *Sullivan* v. *Francis*, 18 A. R. 121.

Garnishee—*Party.*]—An appeal does not lie under the Division Courts Act, 1880, on a question arising between a primary creditor or plaintiff and a garnishee. Section 17 of the Act gives the right of appeal to "any party to a cause," but a garnishee is not a "party to a cause;" he is merely a party to the proceedings. Beswick v. Bappy, 9 Ex. 315, followed, but not approved of. *Cameron* v. *Allen*, 10 P. R. 192.

In Interpleader.]—See *In re Turner* v. *Imperial Bank of Canada*, 9 P. R. 19; *Fox* v. *Symington*, 13 A. R. 296.

Nonsuit—*Refusal to Set aside.*]—At the trial the plaintiff elected to take a nonsuit, and the Judge refused a new trial:—Held, that the plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal. *Bank of Ottawa* v. *McLaughlin*, 8 A. R. 543.

Prohibition pending Appeal.] — See *Wiltsey* v. *Ward*, 9 P. R. 216.

Security—*Form and Amount.*]—The security to be given on a division court appeal is regulated by 53 Vict. c. 19 (O.), and is to be either by a bond in the sum of $100, or a cash deposit of $50. *Sullivan* v. *Francis*, 18 A. R. 121.

Security — *Time for Giving.*]—Security upon a division court appeal may be given by deposit after the ten days' delay allowed by s. 149 of the Division Courts Act, R. S. O. 1887 c. 51. *Simpson* v. *Chase*, 14 P. R. 280.

"Sum in Dispute" — *Interest.*] — The "sum in dispute" upon an appeal from a division court, under R. S. O. 1887 c. 51, s. 148, is the sum for which judgment has been given in the division court. Where judgment was given for $100:—Held, that subsequently accrued interest did not make the sum in dispute exceed $100. *Foster* v. *Emory*, 14 P. R. 1.

"Sum in Dispute"—*Right of Appeal.*]—Where the subject-matter of the claim in a division court is one cause of action exceeding $100, and the amount recovered at the trial is under that sum, an appeal lies to a divisional court under s. 148 of the Division

Courts Act, "the sum in dispute upon the appeal" being the amount claimed, and not that amount less the sum recovered at the trial. *Petrie* v. *Machan*, 28 O. R. 504.

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

Time — *Extension of—Delay of Clerk—Jurisdiction of Divisional Court.*]—Where, through the delay of the clerk in furnishing a certified copy of the proceedings, the appellant in a division court action was unable to file the same within the two weeks prescribed by 58 Vict. c. 13, s. 47 (4), while the junior county court Judge refused to make an order allowing any other period for so doing:—Held, that this court had no jurisdiction to grant relief; but application might be made to the senior county court Judge. *Owen* v. *Sprung*, 28 O. R. 607.

II. ATTACHMENT OF DEBTS.

Accounts—*Small Sums—Superior Courts.*]—Semble, that debts of accounts within the jurisdiction of division courts, will not be attached by the superior courts under C. L. P. Act, 1856, s. 194. *Topping* v. *Salt*, 3 L. J. 14.

Amount of Sum Attached — *Jurisdiction.*]—Held, reversing the judgment in 8 P. R. 374, that a primary creditor can garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor and the garnishee, a suit could not be maintained in the division court by reason of the amount being in excess of the jurisdiction. *Re Mead* v. *Creary*, 32 C. P. 1.

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

See In re Dyer v. *Evans*, 30 O. R. 637 (*post* XIV. 2.)

Assignment of Debt Attached—*Trial of Validity of Assignment — Assignee not Called Upon as Claimant.*]—Each of the three primary creditors began an action in a division court against the primary debtor for the recovery of an amount within the jurisdiction of the court, and also attached in the hands of garnishees the amount of the debt in each case; the sum of $500 having been admittedly due by the garnishees to the primary debtor, who, however, asserted that before the actions were commenced he had assigned the debt for valuable consideration. Upon the court day, the primary creditors, the primary debtor, and the assignee of the debt, appeared before the Judge in the division court, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment was entered upon and evidence given upon it, the assignee producing his books and giving his evidence. Judgment was then given declaring the assignment void as against the primary creditors as a fraud upon them. From this judgment the assignee gave notice of appeal, which he afterwards abandoned, and in the style of cause he named himself as "claimant." Upon motion by the assignee for prohibition:—Held, that he had submitted himself to the jurisdiction of the court, and could not be heard to say that he was there merely as a witness; and that the Judge, having all parties before him, was justified under s. 147 of the Division Courts Act, R. S. O. 1887 c. 51, in trying their rights without going through the formality of calling them before him:—Held, also, that the division court had jurisdiction to try the right of the primary creditors to garnish portions of the $500 sufficient to satisfy their claims; and, under s. 197, to determine whether or not the $500 was at the time of the attachment the property of the debtor. *Re Perras* v. *Keefer*, *Re Barry* v. *Keefer*, *Re Andrews* v. *Keefer*, 22 O. R. 672.

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

Effect of Attachment and Payment—*Wrong Primary Debtor—Recovery by Rightful Owner.*]—In an action to recover a deposit of money to the credit of the plaintiff with the defendants, it appeared that the whole amount had been innocently but wrongfully paid by the defendants either into court or directly to the creditors of another person of the same name as the plaintiff, under garnishee proceedings in a division court:—Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover, or to protect the defendants against his claim, and that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff:—Held, also, that s. 195 of R. S. O. 1887 c. 51 only protects a garnishee against being called upon by a primary debtor to pay over again, and does not protect him against any third person. *Andrew* v. *Canadian Mutual L. and I. Co.*, 2 O. R. 365.

Exemption—*Salary of Medical Health Officer.*]—The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in the hands of the city corporation, in a division court action. It was claimed by the defendant that $25 of the amount due him was exempt from attachment under R. S. O. 1877 c. 47, s. 125. No facts were in dispute, and the division court Judge determined, as a matter of law, upon the construction of the above section, and of the Public Health Act, 1884, and amending Acts, the Municipal Act, 1883, s. 281, and a by-law of the city of London, that the defendant's

salary was not so exempt:—Held, in chambers, that the decision of the Judge could be reviewed upon a motion for prohibition, and that he had determined wrongly:—Held, by a divisional court, that the defendant was not an employee within the meaning of R. S. O. 1887 c. 47, s. 125, and that it was therefore rightly determined that his salary was not exempt. *Re Macfie* v. *Hutchinson*, 12 P. R. 167.

Insurance Moneys.]—A claim under an insurance policy for a loss, the amount of which has been settled and adjusted, is not a debt which can be attached under s. 178 of R. S. O. 1887 c. 51; and Con. Rule 935 does not apply to division courts. Semble, even if it did, that such a claim could not be attached so long as the insurance company's right to have the money applied in rebuilding was open. *Simpson* v. *Chase*, 14 P. R. 280.

Judgment Summons — *Defendant.*]—A garnishee is not a defendant within the meaning of ss. 235 et seq. of the Division Courts Act, R. S. O. 1887 c. 51, and is not examinable under after-judgment summons. Judgment in 23 O. R. 493 affirmed. *In re Hanna* v. *Coulson*, 21 A. R. 692.

See *Re Dowler* v. *Duffy*, 29 O. R. 40 (*post* X.); *In re Holland* v. *Wallace*, 8 P. R. 186, *post*.

Money Paid to Clerk — *Demand.*]—Semble, that money paid to a division court clerk for a suitor in a cause is paid in to the use of the suitor, and is garnishable. Where the garnishee, who was clerk of the 1st division court in a county, had submitted himself to the jurisdiction, and had paid the money in his hands into the 10th division court in the county, from which latter court the summons issued, and the Judge of the division court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable:—Held, that the order discharging a summons for a prohibition was right; and a rule nisi to rescind the same, and for a writ of prohibition, was discharged. Dolphin v. Layton, 4 C. P. D. 130, remarked upon. *Bland* v. *Andrews*, 45 U. C. R. 431.

Money Paid to Clerk by Garnishee—*Attachment under Absconding Debtors' Act—Payment to Sheriff.*]—Where money comes into the hands of a division court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, he must pay the money to the sheriff and not to the primary creditor, under the provisions of s. 16 of the Absconding Debtors' Act, R. S. O. 1877 c. 66. Where after the service upon the garnishees of a division court garnishee summons a county court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor, to the sheriff, but the Judge in the division court ordered the sheriff to pay the money to the division court clerk, and the clerk to pay it out to the primary creditors in the division court:—Held, that the Judge was right in ruling that the money should have been paid by the garnishees to the division court clerk under s. 189 of the Division Courts Act, R. S. O. 1887 c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to s. 16 of the Absconding Debtors' Act; and prohibition to restrain the clerk from so paying out the money was directed. *Re Moore* v. *Wallace*, 13 P. R. 201.

Motion for New Trial after Fourteen Days.]—The time limit for applying for a new trial in ordinary litigation in the division court does not apply to garnishment trials, and so long as the money remains unpaid after judgment against a garnishee, he may apply for relief by paying into court, or for a new trial, in the event of a new claim being made known to him. In re McLean v. McLeod, 5 P. R. 467, followed. Prohibition refused. *Hobson* v. *Shannon*, 26 O. R. 554. Affirmed by a divisional court, 27 O. R. 115.

New Trial in Garnishment Cases.]—See *post*, XII.

Party—*Garnishee.*]—A garnishee is not a "party to a cause," under 43 Vict. c. 8, s. 17 (O.), for the purpose of an appeal. *Cameron* v. *Allen*, 10 P. R. 192.

Proof of Amount Owing by Garnishee—*Repayment to Garnishee.*]—The Judge of a division court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor, and for such a cause prohibition will lie. There is nothing in the sub-section substituted by 49 Vict. c. 15, s. 12, for R. S. O. 1877 c. 47, s. 136, s.-s. 2, which repeals the condition precedent in s. 132 to the Judge's giving judgment against the garnishee. If necessary, the writ of prohibition should go to compel the re-payment to the garnishee of money paid by him into the division court. *Re Johnston* v. *Therrien*, 12 P. R. 442.

Proof of Garnishable Debt—*Jurisdiction—Garnishee—"Defendant."*]—A plaintiff in a division court proceeding against a primary debtor and a garnishee in a court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee; otherwise, a prohibition will lie. A garnishee is not a defendant within the meaning of R. S. O. 1877 c. 47, s. 62. *In re Holland* v. *Wallace*, 8 P. R. 186.

Removal into High Court—*Garnishee Plaint — Judgment against Primary Debtor only.*]—An application under s. 79 of the Division Courts Act, R. S. O. 1887 c. 51, to remove an action from a division court into the high court will not lie after judgment in the division court; and this rule will be applied where the action in the division court is brought under s. 185, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined. Gallagher v. Bathie, 2 C. L. J. 73, applied and followed. *Re Brodericht* v. *Mercer*, 17 P. R. 264.

Residence of Garnishee—*Jurisdiction—Transfer to Proper Court.*]—A garnishee summons before judgment may be issued out of the court of the division in which the garnishee lives or carries on business, notwithstanding that the cause of action does not arise and the primary debtor does not reside or carry on business therein. A garnishee proceeding under s. 185 of the Division Courts Act, R. S. O. 1887 c. 51, is an "action" or a "cause" within the meaning of s. 87, and may

be transferred from a wrong to the proper forum, under the last mentioned section. Hobson v. Shannon, 26 O. R. 554, Re McLean v. McLeod, 5 P. R. 467, and Re Tipling v. Cole, 21 O. R. 276, specially referred to. *Re McCabe* v. *Middleton*, 27 O. R. 170.

Service—*Notice of Defence.*]—Service of a division court after-judgment garnishee summons upon the local agent of a foreign insurance company, whose powers were limited to receiving and transmitting applications:—Held, effective, having regard to the provisions of ss. 182 and 185, s.-s. 3, of R. S. O. 1887 c. 51. Where the defence of the garnishee is put in after the expiration of the eight days from service of the summons allowed by s. 188, s.-s. 2, of R. S. O. 1887 c. 51, so long as it is put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter is not bound to attend the trial if such last mentioned notice is not given, and the creditor cannot proceed to the trial of the action until that is done. *Simpson* v. *Chase*, 14 P. R. 280.

Service — *Partnership—Notice Disputing Jurisdiction.*]—The garnishees, though partners, resided in different places out of the jurisdiction of the division court, and but one of them was served. No order was made dispensing with service on the other. The division court Judge gave judgment against both in their absence:—Per Armour, J.—The prohibition might be supported on this ground. R. S. O. 1877 c. 47, s. 134, construed. The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act. Held, that where a garnishee does not file a notice disputing the jurisdiction of a division court within the time required by 43 Vict. c. 8, s. 14 (O.), though no objection can be taken to the jurisdiction of the division court in that court, the jurisdiction of the high court of justice to prohibit the proceedings is not ousted. *Clarke* v. *Macdonald*, 4 O. R. 310.

Solicitor's Lien.] — Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a division court:—Held, that the Judge in the division court had power under s. 197 of the Division Courts Act, R. S. O. 1887 c. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer it elsewhere. *Davidson* v. *Taylor*, 14 P. R. 78.

See Victoria Mutual Fire Ins. Co. v. *Bethune*, 1 A. R. 398; *In re Franklin* v. *Owen*, 15 C. L. T. Occ. N. 105, 158, 185, *post*, XI. 7.

III. Attachment of Goods.

Affidavit for — *Requirements of—Form—Statute.*]—In trespass for taking goods, defendant justified under an attachment from a division court, which he averred to have been issued on his affidavit that the plaintiff was about to abscond from this Province, or leave the county in which he lived, with intent and design to defraud him of his said debt, taking away personal estate liable to seizure under execution for debt:—Held, plea bad, the affidavit neither averring the conditions enacted by the statute on which an attachment may issue, nor answering to the form of affidavit given in the schedule. *Boyle* v. *Ward*, 11 U. C. R. 416.

Semble, as there is a material difference between the enacting clause and the form of affidavit given, that the former must govern. *Ib.*

Affidavit for—*Requirements of—Statute.*]—The affidavit on which the attachment issued, stated the indebtedness of plaintiffs to defendant; that defendant had good reason to and did believe that plaintiffs "hath" absconded from the Province of Canada, with intent, &c., to defraud, &c., or that the plaintiffs "is" about to abscond, &c., to defraud, &c., or leave the county of Prince Edward, with intent, &c., taking away personal property liable to seizure, &c., or that plaintiffs "is" concealed within the county of Prince Edward, to avoid being served with process, with intent, &c.:—Held, bad, as not containing any one of the three alternatives in C. S. U. C. c. 19, s. 199. *Quackenbush* v. *Snider*, 13 C. P. 196.

Affidavit for—*Absence of—Jurisdiction.*]—A magistrate having issued a warrant of attachment under s. 200 of the Division Courts Act, without the affidavit required, under which goods were seized:—Held, that he had no jurisdiction whatever, and was therefore a trespasser. *Gray* v. *McCarty*, 22 U. C. R. 568.

Affidavit for—*Necessity for Filing.*]—Defendant, a justice of the peace, issued a warrant of attachment under the Division Courts Act, s. 199:—Held, that it was unnecessary, in order to give defendant jurisdiction, that the affidavit should be filed with the clerk, though his neglect to do so might be a breach of duty. *Moore* v. *Gidley*, 32 U. C. R. 233.

Claim of Third Party — *Replevin.*]—Goods seized under an attachment from the division court may be replevied by a third party claiming them as his own. *Arnold* v. *Higgins*, 11 U. C. R. 194.

Claim of Third Party—*Detinue—Demand.*] — The defendant, having a claim against one R., sued out an attachment from a division court, under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the division court, in whose possession they continued until the bringing of this action:—Held, that, as the goods were seized in the possession of the defendant in the attachment, an action of detinue could not be maintained against this defendant, even admitting the goods to have been all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim, and demanded to have them given up. *Clark* v. *Orr*, 11 U. C. R. 436.

Claim of Third Party—*Trespass—Estoppel.*]—In an action for seizing goods under division court attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer:—Held, that this plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiffs' creditors, and to maintain trespass for

seizing the same goods as if they were his own. *McPhatter* v. *Leslie*, 23 U. C. R. 573.

Constable — *Execution of Warrant.*]—A constable of any town within the county in which a warrant of attachment is issued under 12 Vict. c. 69, s. 1, may execute such warrant. *Delaney* v. *Moore*, 9 U. C. R. 294.

Seizure of Attached Goods under Execution.]—Goods in the hands of a division court clerk under an attachment are liable to an execution issuing from a superior court before the attaching creditor has obtained judgment. The sheriff, therefore, may seize such goods; but quære, if the seizure were illegal, whether an action on the case would lie by the attaching creditor against the sheriff and the plaintiff in the execution. *Francis* v. *Brown*, 11 U. C. R. 558.

Seizure of Attached Goods under Execution — *Original Process—Fraud.*]—Sections 55 and 56 of C. L. P. Act only apply to suits in which an original process has been served. An execution of a superior court always takes precedence of an attachment of the division court. Attaching creditors in a division court of the defendant in a judgment in the superior court, will not be admitted to except to such judgment on the ground of fraud. *Fisher* v. *Sulley*, 3 L. J. 89.

Setting aside Attachment.] — Power over the process of his own court is inherent in the Judge of a division court as well as of other courts; and, notwithstanding the provisions of s. 262 of the Division Courts Act, R. S. O. 1887 c. 51, a Judge may set aside an attachment which has been improperly issued. *Re Mitchell* v. *Scribner*, 20 O. R. 17.

IV. Bailiffs.

1. *Actions Against.*

(a) *Seizure of Goods.*

Judgment on Improper Service — *Pleading.*]—Trespass q. c. f., with a count for taking goods. The defendants justified as commissioners and bailiff of the court of requests, and the plaintiff replied that he was not duly summoned to attend at the court at which judgment was recovered: — Held, replication bad, on general demurrer. *Stevens* v. *Cowan*, 5 O. S. 572.

Judgment without Jurisdiction — *Pleading.*]—Held, that the bailiff seizing under an execution issued by the Judge of a district court under the Division Courts Act, on a judgment given by the commissioners of the court of requests under the old Court of Requests Act, in a matter beyond their jurisdiction, was not liable, but that his defence must be pleaded specially; but quære, whether he was not within 21 Jac. I. c. 12. *Davis* v *Moore*, 2 U. C. R. 180.

Judgment — *Dispute as to Effect of — Minute of Adjudication—Informality.*] — In an action of trespass against a division court bailiff and one B. for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered a judgment in a division court against the plaintiff's mother, and the goods in question having been seized under an execution issued thereon, the plaintiff claimed them, whereupon the bailiff obtained an interpleader summons, on which the Judge, after hearing the parties, adjudged that the goods were the property of the said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute indorsed by the Judge, adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff called witnesses who swore that the Judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days:—Held, that the minute of adjudication and order were conclusive to shew that the summons was not enlarged, and that the jury should have been so directed. Held, also, that although the minute was informal, in adjudging that the goods were the property of the execution creditor, instead of saying that they were the claimant's, or not the execution debtor's, yet it was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff. *Oliphant* v. *Leslie*, 24 U. C. R. 398.

Jurisdiction—*Acting in Wrong District —Pleading.*]—The plaintiff declared in trespass for breaking and entering the plaintiff's close in the Niagara district, &c. The defendant pleaded that, being bailiff of a division court in the district of Brock, he committed the alleged trespass in discharge of his duty as such; and that no notice was given to him of the action one month before it was brought. Demurrer to the plea, on the ground that it is not shewn by what authority the defendant, though a bailiff in the district of Brock, acted in the district of Niagara, where the trespass is laid:—Held, plea bad. *Davis* v. *Moore*, 4 U. C .R. 209.

Leaving Goods Seized on Premises—*Acknowledgment—Transfer to Third Person —Pleading.*]—The defendant, a bailiff of a division court, having an execution against L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving an acknowledgment of the levy indorsed on the writ. L. absconded, leaving the oxen with the plaintiff. The defendant took them away, whereupon she brought trespass, alleging that she had received them from L. on the day of his departure in payment of a debt:—Held, that under a plea denying the plaintiff's property, it was competent for the defendant to give in evidence the execution and seizure under it. Held, also, that, by the acknowledgment given, the debtor had put it out of his power to transfer the goods seized. *Lossing* v. *Jennings*, 9 U. C. R. 406.

Local Venue — *Mistake — Amendment— Costs.*]—In an action against a bailiff of a division court, the venue being local was by mistake laid in the wrong county, and the plaintiff discovering the mistake did not go to trial in pursuance of his notice. Cross-rules having been obtained, the plaintiff was allowed to amend by changing the venue, and the defendant's rule for judgment as in case of nonsuit was discharged on the peremptory undertaking, and on payment of costs. *Ward* v. *Sexsmith*, 1 P. R. 382.

Notice of Action—*Service of—Time for Commencement of Action.*]—Section 231 of the Division Courts Act, R. S. O. 1877 c. 47, enacts that any action or prosecution against

any person for any thing done in pursuance of the Act, shall be commenced within six months after the act was committed, &c., and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action:—Held, that personal service was not required, but that service on the wife at the defendant's residence was sufficient. The court in which the action is to be brought, need not be stated in the notice; but even if required, semble, that the statement in the notice that the action would be brought in the high court of justice, without naming the particular division, was sufficient. In computing the time in which the action must be brought, the day on which the act was committed must be excluded, so that an action commenced on the 5th June, for an act committed on the 5th December, was in time. *Hanna* v. *Johnston*, 3 O. R. 100.

Two Executions—*Joint Action.*]—In an action against a division court bailiff and two execution creditors for seizing goods:—Held, upon the facts set out in this case, that there was evidence to shew that it was one seizure and one sale under the direction and for the benefit of the two defendants holding separate executions, and that they were therefore jointly liable. *Lough* v. *Coleman*, 29 U. C. R. 267.

(b) *Other Matters.*

False Swearing—*Service.*]—Case held maintainable against a bailiff of a court of requests for falsely swearing to the service of a summons, whereby judgment was given against the plaintiff. *Cline* v. *McDonald*, E. T. 2 Vict.

Injury to Property while in Possession of Bailiff.]—The defendant, a bailiff of a division court, under an execution against plaintiff's father, seized two horses, waggon, &c., which, on an interpleader proceeding, were decided to be the goods of the plaintiff, who at the end of three weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damages done to the horses during the time they were in his possession, the jury, under the direction of the Judge, found a verdict for the plaintiff and 80*l* damages, which verdict the Judge subsequently refused to set aside:—Held, that the finding of the Judge on the interpleader proceedings formed no ground of defence to a suit for damages for the alleged injury to the property. *Farrow* v. *Tobin*, 10 A. R. 69.

Misconduct—*Demand of Warrant.*]—The statute 16 Vict. c. 177, s. 14 (C. S. U. C. c. 19, s. 195), requiring demand of perusal and copy of warrant does not apply in an action against a bailiff acting under a warrant of attachment or execution from a division court, where the wrong complained of is the misconduct of the defendant, and not anything illegal in the writ itself, or in the act of granting it. *Sayers* v. *Findlay*, 12 U. C. R. 155. Followed in *Oliphant* v. *Leslie*, 24 U. C. R. 398, and *Pearson* v. *Ruttan*, 15 C. P. 79.

Neglect to Levy—*Pleading.*]—A declaration against a division court bailiff for not levying under an execution, alleged that the plaintiff recovered a judgment in the first division court in the county, and thereupon sued on an execution directed to defendant as bailiff of the second division court, commanding him to make the money out of the goods of defendant in the suit, whereseever the same might be found; and that there were goods of such defendant within the bailiwick of defendant, out of which he could have levied:—Held, that the count was bad; that the writ was not shewn to be within 32 Vict. c. 23, ss. 18, 19, for it was not alleged that the fi. fa. was to be executed in the defendant's division or near to it, or that the goods were within such division, the defendant's "bailiwick" extending to the whole county. *Davy* v. *Johnson*, 31 U. C. R. 153.

Neglect to Execute Writ of Execution—*False Return — Damages — Summary Proceedings—Bar.*]—To an action against a division court bailiff and his sureties for neglect to execute a writ or return it in due time, and for a false return, defendants pleaded that the execution was not enforced owing to a threat by the principal creditors of the debtor to place him in insolvency if it was proceeded with, and that while the goods were being advertised for sale an attachment was issued against the debtor, and the plaintiffs suffered no damage in consequence of the breaches alleged. At the trial the jury was directed to find a verdict for defendants, on the ground that this plea and another had been proved:—Held, that it was for the jury, and not for the Judge, to say whether the bailiff's inaction had caused the plaintiffs damage; and a new trial was therefore ordered. Semble, also, that under s. 221 of the Division Courts Act, R. S. O. 1877 c. 47, the plaintiffs were entitled to nominal damages upon proof of a breach of duty, without shewing any actual damage. Before the commencement of this action the plaintiffs had taken summary proceedings against the bailiff for neglecting to levy under s. 220, when their complaint was dismissed. Held, no bar to this action, which was brought under s. 221. *Nerlich* v. *Malloy*, 4 A. R. 430.

Neglect to Sell after Seizure—*Damages.*]—Defendant, a division court bailiff, received an execution against K. on the 12th May, 1873, on a judgment recovered on that day, under which, on the 14th, he seized two horses. On the 10th K. executed a voluntary assignment under the Insolvent Act, but the assignee on being made acquainted with it advised a private settlement, and did not receive and act on the assignment until the 7th June. The bailiff, who had left the horses in K.'s possession, taking a bond for their forthcoming, took them again and advertised them for sale on the 2nd June, but on being notified by the official assignee, he delivered them over to him on the 9th. The plaintiff then sued the bailiff and his sureties on their covenant for not selling and paying over the money between the seizure and the claim by the assignee:—Held, that he could not recover; for (1) there was no misconduct, because the horses passed to the assignee on the execution of the assignment, which was before the judgment; and (2) if the delivery was a breach of duty, the plaintiff had sustained no damage from it, for if the bailiff had proceeded to sell sooner, the assignee would no doubt have claimed the horses, as he did afterwards. *Brown* v. *Wright*, 35 U. C. R. 378.

See post VII.

2. *Sureties.*

Judgment for Tort — *Remedy against Sureties Lost.*]—The plaintiff sued C., a division court bailiff, and his sureties, on their covenant, alleging a judgment recovered by himself against C., for selling his goods under execution, contrary to the orders of the plaintiff in the suit:—Held, declaration bad; for the plaintiff, having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause. *Sloan* v. *Creasor*, 22 U. C. R. 127.

Mistake of Bailiff—*Money Received—Joint Action against Sureties—Remedy Lost by another Action.*]—Declaration against a bailiff of a division court and his sureties on their covenant, under C. S. U. C. c. 19, s. 25, alleging that the bailiff, under an execution against B., wrongfully seized and sold the plaintiff's goods, and received the proceeds; that the plaintiff having sued the bailiff in the county court, the bailiff issued an interpleader summons, on which the Judge of the division court determined that the plaintiff owned the goods, and was entitled to the money received by defendant, with the costs; that the bailiff still refused to pay the money to the plaintiff, whereupon the plaintiff proceeded with his suit in the county court, and issued execution thereon, which was returned nulla bona. And so the plaintiff alleged that the bailiff had neglected to pay said money so received by him as such bailiff to the plaintiff, being the party entitled thereto, and had misconducted himself in his office, to the plaintiff's damage. Plea, by the sureties, that the said bailiff did pay to the plaintiff all the money he had received by virtue of his office, to which the plaintiff was entitled, and had not misconducted himself, &c.:—Held, on demurrer to the declaration, (1) that the defendants could be properly sued on the covenant in a joint action; but (2) that no cause of action upon the covenant was shewn; that the wrongful act of the bailiff, in seizing by mistake the goods of a stranger, was not misconduct or neglect of duty for which his sureties were liable; that the money received by him, though not received for the plaintiff at first, became the plaintiff's by virtue of the interpleader order, but that the plaintiff lost his right to sue for it upon the covenant, by proceeding with the county court action and obtaining judgment therein. *McArthur* v. *Cool, Nixon* v. *Stafford*, 19 U. C. R. 476.

Non-Execution of Covenant by Principal.]—Held, that the surety of a division court bailiff under C. S. U. C. c. 19, s. 25, is not relieved from liability under his covenant by neglect of his principal to execute such covenant. *Miller* v. *Tunis*, 10 C. P. 423.

Non-Residence in County.]—Section 25 of C. S. U. C. c. 19 is directory, not mandatory:—Held, therefore, in an action against a bailiff and his sureties for an excessive seizure by the former, &c., that the fact of the sureties of a division court bailiff being non-residents of the county in which the bailiff's duties lay, did not avoid their covenant. *Pearson* v. *Ruttan*, 15 C. P. 79.

See, also, *Nerlich* v. *Malloy*, 4 A. R. 30; *Brown* v. *Wright*, 35 U. C. R. 378; *Cool* v. *Switzer*, 19 U. C. R. 199.

3. *Other Cases.*

Action by Bailiff against Sureties of Clerk—*Moneys not Paid over — Pleading — Evidence.*]—*See Cool* v. *Switzer*, 19 U. C. R. 199.

Canvassing.]—Observations on the impropriety of division court bailiffs canvassing voters during an election. *North Victoria Election, Cameron* v. *Maclennan*, H. E. C. 612.

Constable — *Justification as Bailiff — Absence of Warrant.*]—Defendant M., a magistrate, gave a warrant to defendant K., a constable, on the 23rd September, under s. 200 of the Division Courts Act, to attach the goods of G. in the possession of the plaintiff and others, who were about to abscond. Under this certain goods were seized, and to an action brought against the constable, the magistrate, and the creditor, the constable, K., pleaded not guilty, by ss. 196, 197, and 198 of the Act:—Held, that these sections had clearly no application, for K. was not shewn to be a bailiff of any division court, and had no warrant from the clerk. *Gray* v. *McCarty*, 22 U. C. R. 568.

Deputy of Bailiff.]—It was objected that the father of the person who acted as division court bailiff was the duly appointed bailiff, and the son had no authority to act for him; but the evidence shewed that the father being an aged man, the son was in fact the acting bailiff, and was clearly recognized and treated as such by the plaintiff's attorney. *McDougall* v. *Waddell*, 28 C. P. 191.

See post, VII.

V. CLERKS.

1. *Actions Against.*

Malicious Issue of Warrant—*Pleading.*]—Held, not necessary in a declaration against a clerk, charging that he "as such clerk maliciously, &c., issued a warrant of commitment," to allege that it was so issued without the order of the Judge. *McBride* v. *Howard*, 12 C. L. J. 280.

Money Received for Municipality—*Action by Treasurer—Pleading.*]—In an action by a treasurer of a district, under the Division Courts Act, against the clerk of a division court, for not paying over moneys received, it is sufficient to declare in the treasurer's own name for money had and received by defendant to the use of the plaintiff for the purposes of the Act. *Howard* v. *Walton*, 2 U. C. R. 266.

Money Received from Sale of Goods Attached—*Action on Covenant.*]—Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the division court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro rata. Plaintiff thereupon sued defendant and his sureties as for money received to his use:—Held, that he could not recover, for the money

was not received by defendant, in his official capacity, as the plaintiff's money, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quære, whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 U. C. R. 348.

Notice of Action.]—Semble, that notice to a division court clerk is sufficient if it complies with C. S. U. C. c. 19, ss. 193, 194, though it may not contain all that is required by c. 126, for the latter Act does not overrule the former, but they establish rules for distinct cases. *McPhatter* v. *Leslie*, 23 U. C. R. 575.

Payment—*Cheque—Failure of Bankers.*]—Defendant, clerk of a division court in York, sent a transcript of the entry of a judgment recovered therein by the plaintiff to one M., the division court clerk of Essex, with directions to remit the money by post-office order or by cheque. M. having recovered the money paid it into his private account at McB. Bros., private bankers, and sent their cheque to defendant for the amount, as he had been accustomed to do, which the defendant acknowledged in the following words: "McLeish v. Richards; received from the D. C. clerk, Windsor, $70.40." Before the cheque was presented McB. Bros. failed, and the plaintiff sued defendant for the money:—Held, that the cheque and receipt operated as payment between M. and the defendant, and that the plaintiff was entitled to recover the money from defendant as money received to his use. *McLeish* v. *Howard*, 3 A. R. 503.

2. *Sureties.*

Duty of Judge as to Amount and Number—*Freeholders—Residents—Filing of Security.*]—Held, that it is the duty of the Judge to fix the amount and number of sureties to be given by the division court clerk, before the clerk enters on his duty; and permitting the clerk to enter on his duty without it gives a right of action to a party grieved, if damage be shewn resulting from it. A count admitting the fulfilment of the requirement of the statute, but denying that the sureties were freeholders or residents of the county:—Held, bad, on demurrer. The Judge is not responsible for the filing of the security of the division court clerk; and the non-filing of it would not relieve the sureties. *Parks* v. *Davis*, 10 C. P. 229.

Moneys Collected for Suitors—*Action by Crown.*]—The sureties of the clerk, having entered into the bonds authorized by 4 & 5 Vict. c. 3, and 8 Vict. c. 37, are liable upon such bond to the Crown for moneys collected by the clerk for suitors. Semble, that in such action the Crown would be entitled to a verdict for the penalty of the bond, and not merely for the sum received and not paid over. *Regina* v. *Patton*, *Regina* v. *McCullough*, *Regina* v. *Moran*, 7 U. C. R. 83.

Moneys Received for Bailiff—*Pleading—Evidence.*]—The bailiff of a division court may sue the clerk's sureties upon the bond given under 13 & 14 Vict. c. 53, for fees on the service of process. The declaration in such a case need not specify the names of the parties from whom, or the suits in which, the moneys claimed were received. Whether the money received was payable before action brought, or whether the clerk was justified in withholding it under the Act, is a question of evidence as to each sum. *Cool* v. *Switzer*, 19 U. C. R. 199.

Moneys Received for Bailiff—*Evidence—Entries.*]—In an action against a clerk of the division court for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provision of an Act for that purpose:—Held, evidence against the sureties. *Middlefield* v. *Gould*, 10 C. P. 9.

Set-off—*Private Account against Clerk.*]—An action against the sureties of a division court clerk for moneys received by him for the plaintiff having been referred to arbitration, the arbitrator submitted a special case, stating that in 1858 the plaintiff sued the clerk for goods sold to him; that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the division court, which shewed a sum of £30 0s. 8d. due to the clerk; and that the Judge, thereupon, against the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off and deducted it from the plaintiff's claim. The sureties, defendants in the suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff:—Held, that what had been done in the former suit could not be thus reviewed, and that, as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin* v. *Gream*, 20 U. C. R. 84.

3. *Other Cases.*

Fees of—*Arrangement Made as to.*]—See *Victoria Mutual Fire Insurance Co.* v. *Davidson*, 3 O. R. 378.

Office for.]—There is no obligation upon a municipality to provide an office for the clerk of the division court. *Griffin* v. *City of Hamilton*, 37 U. C. R. 519.

Removal of—*Refusal to Give up Papers—Mandamus.*]—A mandamus was granted against the clerk of a court of requests to give up the books and papers of the court, which he had refused to do on being removed from office. *In re Lacroix*, 4 O. S. 339.

VI. Costs.

Motion for Prohibition.]—See *post*, XIV. 1 (*b*).

Order for—*High Court—Action on, in Division Court.*]—See *Re Kerr* v. *Smith*, 24 O. R. 473.

Reserving Judgment as to—*Jury Trial—Time for Moving for New Trial.*]—See *Bland* v. *Rivers*, 19 O. R. 407, *post*, XII.

Revision of—*Prohibition.*]—Prohibition was granted restraining a Judge of the division court from proceeding upon an order for a revision of costs, the application for such order not having been made within fourteen days from the judgment, and such order being in this case equivalent to a reversal of the judgment on the question of costs. *Bell v. Lamont*, 7 P. R. 397.

Security for.]—Under R. S. O. 1877 c. 47, s. 244, an order for security for costs may be made in a division court. *Re Fletcher and Noble*, 9 P. R. 255.

Witness—*Travelling Expenses.*]—A plaintiff who is entitled only to division court costs of an action can tax as part of such costs his travelling expenses from abroad to attend the trial, if he is a necessary and material witness. *Talbot v. Poole*, 15 P. R. 274.

VII. Execution.

Malicious Issue of—*Mistake—Payment of Debt—Transcript of Judgment—Liability of Execution Creditor—Seizure of Goods—Remedy — Restoration.*] — See *Tuckett v. Eaton*, 6 O. R. 486, *post* (Malicious Procedure).

Priorities — *From what Time Property Bound.*]—Executions from a division court do not bind the property before they are placed in the bailiff's hands; and quære, whether before an actual seizure. *Cullodca v. McDowell*, 17 U. C. R. 359.

Priorities — *From what Time Property Bound.*]—Held, in an action for a false return of a writ of fi. fa. goods, that under s. 266 of the C. L. P. Act, when a writ has issued against the goods of a party from a superior court, and a warrant of execution against the goods of the same party from the division court, the right to the goods seized is to be determined by the priority of the time of delivery of the writ or warrant to the sheriff or bailiff respectively, and not by the priority of seizure. Held, also, that the right acquired by such prior delivery, which in this case was to the division court bailiff, was not, under the evidence set out in the report, defeated by his omission to indorse on the warrant, as required by the same section, the time of such delivery. *McDougall v. Waddell*, 28 C. P. 391.

Priorities — *From what Time Property Bound—Assignment before Sale.*] — Section 59 of the Insolvent Act of 1869 applies to judgment debts recovered in division courts, on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delievered to the sheriff. In this action by the assignee in insolvency for money levied under executions against the insolvent, or received by defendant, the clerk of a division court, it was objected that the defendant received the money only as clerk of the court, but it appeared that the sale had taken place after the assignment:—Held, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff, as assignee, was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be. *Patterson v. McCarthy*, 35 U. C. R. 14.

Priorities—*Mortgagee — Assignee — Jus Tertii.*]—The bank, the three defendants C., and the defendant R., each had executions in the division court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July, 1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant. On the 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them. The plaintiff, having sued in trespass and trover, was nonsuited:—Held, that, as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them; that the assignee had priority over the execution creditors, but not necessarily over the plaintiff as mortgagee; and a new trial was granted in order to determine whether the plaintiff could, by setting up the insolvency proceedings and the claim of the assignee, recover against defendants. On a second trial, the jury having found a general verdict for defendants—Held, that the plaintiff, unless suing under and by authority of the assignee, and of which there was no evidence, had no right to avail himself of the assignee's title; and the verdict was affirmed. Quære, if this were otherwise, whether the plaintiff, on the evidence set out, could have recovered against the defendants as for a joint trespass or conversion. *O'Callaghan v. Cowan*, 41 U. C. R. 272.

Priorities—*Sale of Property—Expiry of Executions.*]—On the 18th March, 1855, the Buffalo, Brantford, and Goderich Railway Company mortgaged the goods in question to Her Majesty, to secure £15,000; and on the 17th April, 1855, they executed a second mortgage of the same property to other parties. These mortgages were duly filed. On the 20th February, 1856, an execution was issued at the suit of Her Majesty for the same debt, on which the property was seized, and afterwards other executions were issued. The sheriff put defendant, who was a bailiff of a division court, in possession on the 29th April, 1856, to hold, first, on account of the sheriff, and next on account of several executions which defendant had in his hands from division courts. On the 11th February, 1856, the Buffalo, Brantford, and Goderich Railway Company sold out to the Buffalo and Lake Huron Railway Company; the sale was confirmed by 19 Vict. c. 21; and that company having arranged the executions, the sheriff afterwards delivered possession to their agent of the property at Brantford, in the name of the whole. Defendant, however, claimed to hold, notwithstanding, under the division court executions. These executions were all subsequent to the sale made on the 11th February, 1856, and had expired before the sheriff gave up possession. The plaintiffs (the Buffalo and Lake Huron Railway Company) having replevied from defendant:—Held, that they were entitled to recover. *Buffalo and Lake Huron R. W. Co. v. Brooksbanks*, 16 U. C. R. 337.

Priorities — *Superior Court Execution—Surplus.*]—A seizure of goods under a division court execution being entitled, under s. 206, C. S. U. C. c. 22, to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being, under the division court writ, already in the custody of the law. *Aying* v. *Macdonald*, 15 C. P. 397.

Held, also, in the absence of a count in the declaration for money had and received, that the plaintiff could not recover for the surplus money which, under s. 251, the sheriff could have seized in the hands of the division court bailiff, after satisfaction of the prior execution. *Ib.*

Renewal — *Neglect — Sale.*] — Plaintiff claimed a horse as purchaser. Defendant claimed under a sale upon a division court execution, which it appeared had not been regularly renewed:—Held, that the execution not having been kept regularly in force, the sale in the interval cut it out, and that the plaintiff was entitled to recover. *Carroll* v. *Lunn*, 7 C. P. 510.

Renewal — *Time—Computation.*]—By s. 141 of C. S. U. C. c. 19, it is enacted that every execution "shall be returnable within thirty days from the date thereof:"—Held, that in computing such thirty days the day of issue is excluded, so that a writ issued on the 24th April was in force on the 24th May, and capable of being renewed on that day under 32 Vict. c. 23, s. 24 (O.), which, even if introducing the rule of the C. L. P. Act, s. 342, in computing the time for renewal of writs, so as to make both days inclusive, does not affect their original duration. *Clarke* v. *Garrett*, 28 C. P. 75.

Return—*Expired Execution—Nulla Bona —Transcript of Judgment.*] — The plaintiffs recovered judgment in a division court and issued an execution thereon, under which nothing was made and which expired by lapse of time. At the request of the plaintiffs' solicitor the bailiff returned the writ nulla bona, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their division court judgment in regular form and filed the same in the office of the clerk of the county court and sued out a writ of fi. fa. goods in order to obtain the benefit of the provisions of the Creditors Relief Act. The respondent S., the holder of a warrant of execution in the division court, then moved to set aside the plaintiffs' proceedings, and they were accordingly set aside by the county court Judge, on the ground that the judgment in the court was void, being founded on a return to an expired execution:—Held, that a return of nulla bona where there were goods, was no more than an irregularity to be complained of by the defendant. Ontario Bank v. Kirby, 16 C. P. 35, followed. Nor could a third party object that such a return was made at the instance of the solicitor of the plaintiffs. Held, also, that a return of nulla bona could be properly made after the expiration of the writ, and that the transcript and judgment in the county court founded thereon were valid and regular. *Molsons Bank* v. *McMeekin, Ex parte Sloan*, 15 A. R. 535.

Return — *Nulla Bona — Creditors' Relief Act.*]—On the return of nulla bona to a division court execution, the plaintiff, under 57 Vict. c. 23 (O.), amending the Division Courts Act, issued out of the division court an execution against lands to the sheriff of another county, but before the sheriff had taken any steps to enforce it, the defendant paid to him the amount thereof, with the request that it should be applied on plaintiff's execution. At the time of such payment there were other executions in the hands of the sheriff against the goods and lands of the defendant:—Held, that the Creditors' Relief Act applied to the moneys so received by the sheriff. *In re Young* v. *Ward*, 27 O. R. 588.

What may be Seized—*Crops.*]—Growing crops are seizable under a division court execution. *McDougall* v. *Waddell*, 28 C. P. 191.

What may be Seized—*Debt—Money.*]—In an action by the plaintiff upon an agreement for moneys alleged to be due him, a special plea setting out that while the moneys remained in defendant's hands they were seized by a bailiff of a division court, under an execution issued from that court against the plaintiff, at the suit of one O.:—Held, bad, on demurrer, as it imported only that defendant was indebted to the plaintiff in a certain sum, and such a claim could not be seized under 13 & 14 Vict. c. 53, s. 89. Quære, if defendant had set out the amount of plaintiff's money in his hands, and averred that this sum remained separate and apart from his own for the plaintiff when it was seized, whether that would have been a good defence. *Clarke* v. *Easton*, 14 U. C. R. 251.

What may be Seized—*Promissory Note.*] —See *McDonald* v. *McDonald*, 21 U. C. R. 52.

What may be Seized—*Separate Personal Estate.*]—A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the division court. The omission to prove the existence of such personal estate, though it may be urged as a defence, does not affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer* v. *McMahon*, 32 C. P. 187.

What may be Seized—*Term of Years.*] —A term for years in land cannot be sold under a division court execution, but only such things as can be delivered over to the purchaser, or such securities as C. S. U. C. c. 19, s. 151, expressly authorizes the seizure of. *Duggan* v. *Kitson*, 20 U. C. R. 316.

Where Goods may be Seized.]—The bailiff of a division court from which a warrant of execution issued could, under 13 & 14 Vict. c. 53, execute it in any other county in which defendant had goods. *Chrysler* v. *Serpell*, 10 U. C. R. 647.

[*See* R. S. O. 1897 c. 60, s. 220.]

Where Goods may be Sold.]—Executions for about $200 issued against the plaintiff from a division court, the 1st in the county, under which lumber was seized at his mill, within that division. A sale was attempted there without success, and, by direction of one of the execution creditors, the bailiff had the lumber removed to the county town, thirty miles off, in the 5th division, which cost $160. It was there bought by G., the deputy sheriff, for $100, and defendant purchased from him. The plaintiff having

brought trover, a nonsuit was ordered, for, though s. 151 provides only for sale in the division where the goods have been seized, yet a sale in another division to a bonâ fide purchaser would pass the property, leaving the party injured to sue the bailiff:—Held, that G. must be assumed to be such a purchaser, and that defendant could not be made liable for purchasing from him. Quære, whether, on the evidence stated in the case, the jury might not have found that G. was in fact purchasing for defendant, who was a division court bailiff: and, if so, under s. 157 the sale would have been void. Remarks as to the hardship of the case upon the plaintiff. *Campbell* v. *Coulthard*, 25 U. C. R. 621.

Words.]—The terms "fieri facias" and "warrant of execution," used in the Division Courts Act, are convertible terms. *Macfie* v. *Hunter*, 9 P. R. 149.

See IV., XV.

VIII. Interpleader.

1. *Effect of, on Other Proceedings.*

Finality of Judgment in Interpleader—*Trespass against Bailiff and Another.*]—In trespass against a division court bailiff and one B., for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered judgment and execution in a division court against O., the plaintiff's mother, and these goods having been seized there, the plaintiff claimed them, whereupon, on an interpleader, the Judge adjudged that the goods were the property of said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute indorsed by the Judge, adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff's witnesses swore that the Judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days; but:—Held, that the minute of adjudication and order were conclusive:—Held, also, that the minute, though informal, was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff. Defendant B. having declared that he owned the debt, and that the execution was issued at his instance, and having appeared for the execution creditor on the interpleader summons:—Held, sufficient evidence to go to the jury of his being a joint trespasser. *Oliphant* v. *Leslie*, 24 U. C. R. 308.

Finality of Judgment in Interpleader—*Trover against Execution Creditor.*]—Trover for goods seized under the defendant's division court execution. An interpleader issue was tried by the Judge of the division court, who decided that the goods did not belong to the plaintiffs:—Held, that the decision of the Judge of the division court was final under C. S. U. C. c. 19, s. 175. *Keane* v. *Stedman*, 10 C. P. 435.

Finality of Judgment in Interpleader—*Trover by Bailiff against Claimant.*]—The plaintiff, a division court bailiff, having seized a quantity of wheat under a warrant of execution against one P., which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the Judge made this order: "The claimant, not having put in his claim or complied with the order above made, is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons:—Held, that the minute so made by the Judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter* v. *Vanstone*, 7 A. R. 750.

Finality of Judgment in Interpleader—*Claims arising out of Execution of Process—Stay of Proceedings—Appeal.*]—On an interpleader proceeding in the division court under 48 Vict. c. 14, s. 6, s.-s. 3 (O.), in respect of a claim to goods taken in execution, any claims between the parties themselves for damages arising out of the execution of the process, must also be brought before and adjudicated upon by the Judge who hears the interpleader summons. Whether such claims are then brought forward or not, the adjudication upon the summons is final and conclusive between the parties, and no action can afterwards be maintained in respect of them. In such an action the fact of the previous adjudication may be properly pleaded as a defence. Judgment in 9 O. R. 767 reversed. Quære, whether the proceedings therein can be summarily stayed on motion. Quære, whether an appeal lies under c. 14, s. 7, s.-s. 2, from the adjudication of the Judge of the division court on a claim for damages. *Fox* v. *Symington*, 13 A. R. 296.

Sale of Goods Seized—*Validity of Proceedings after Sale.*]—Goods seized under a division court execution were claimed by the plaintiff, and the bailiff sold them expressly subject to the result of an interpleader, for which he intended to apply. Nothing was paid, and they were to remain in his custody until the decision. Afterwards, on an interpleader, the Judge determined that the goods belonged to the execution debtor, and the plaintiff sued the bailiff in this action for selling the property:—Held, that he could not recover, for the interpleader proceedings were not invalid, as having taken place after sale, the sale upon such conditions being ineffectual: and the goods, therefore, still remained subject to the execution. *Harmer* v. *Cowan*, 23 U. C. R. 479.

Sale of Goods Seized—*Interpleader as to Proceeds—Replevin against Purchaser.*]—The Division Courts Act, C. S. U. C. c. 19, s. 175, does not authorize a bailiff, when a claim is made by a third person to goods seized under execution, to sell the goods and issue an interpleader for the proceeds, and thus compel the claimant to try his right merely to such proceeds, and deprive him of his goods. The claimant, having proved his right to the goods—a quantity of timber—was therefore held entitled to recover in replevin against the purchaser under the execution. *Reid* v. *McDonald*, 26 C. P. 147.

Stay of Proceedings — *Trespass—Regularity of Proceedings in Division Court—Review.*]—A. had claimed certain steers under a division court attachment against one F. The

bailiff who seized obtained a summons to determine such claim, which was heard on the 24th June, 1853; and on the 8th July, 1853, an order was made by the Judge of the division court deciding against A.'s claim. A. then brought trespass against the bailiff:—Held, that the regularity of the proceedings on the interpleader summons could not be inquired into, and that all proceedings in this action since the issuing of such summons must be stayed. *Finlayson* v. *Howard*, 1 P. R. 224.

Stay of Proceedings—*Trespass—Laches—Forum.*]—The plaintiff in November, 1856, sued defendant, a bailiff of a division court, in trespass for seizing his goods. Defendant thereupon, in February, 1857, obtained a summons in the Queen's bench calling on the plaintiff to shew cause why the action should not be stayed, and why the Judge issuing the summons should not adjudicate upon the plaintiff's claim. When the summons was obtained, an interpleader was pending in the division court, which the Judge of that court determined in March, by deciding that the plaintiff was entitled to the proceeds of the goods sold, and £15 as damages for taking them, which the execution plaintiff then paid into the division court. In the meantime, however, the summons in this court had been discharged; and afterwards the plaintiff proceeded with this action by filing a declaration in August, to which the defendant pleaded; and a trial took place, which resulted in a verdict for the plaintiff. The defendant applied to rescind the order discharging the summons, and to stay proceedings:—Held, that the summons should not have been discharged altogether, but proceedings should have been stayed, as directed by 16 Vict. c. 177, s. 7; and that the defendant was still entitled to a stay of proceedings, under the statute, notwithstanding the laches; but on account of his delay the rule was made absolute without costs. Under 13 & 14 Vict. c. 53, s. 102, and 16 Vict. c. 177, s. 7, amending it, the Judge of the division court must adjudicate upon the claim to goods seized; but the application to stay proceedings in any action brought for the seizure, must be made to the court, or a Judge of the court, in which such action is pending. *Washington* v. *Webb*, 16 U. C. R. 232.

Stay of Proceedings — *Replevin—Division Court Clerk.*]—Certain goods, being seized under an attachment from the division court, were placed by the bailiff in custody of the clerk, from whom they were replevied by the plaintiff. A summons then issued from the division court, calling before the Judge there the attaching creditors and the plaintiff as claimant of the goods:—Held, that under 16 Vict. c. 177, the proceedings in the replevin suit in the Queen's bench must be stayed. Held, also, that if the plaintiff had been allowed to proceed, he must have failed, for neither trespass nor trover would lie against the clerk, and therefore replevin could not be maintained. Quære, as to the remedy which the defendant, the clerk of the division court, or the attaching creditors, would have in case the plaintiff in replevin should be held by the Judge to have no claim. *Caron* v. *Graham*, 18 U. C. R. 315.

Stay of Proceedings — *Subsequent Action.*]—Held, following Jones v. Williams, 4 M. & N. 706, that under the Division Courts Act, C. S. U. C. c. 19, s. 175, this court has no power to stay proceedings in an action brought after the adjudication by the Judge in the division court. *Shamchorn* v. *Traske*, 30 U. C. R. 543.

Stay of Proceedings—*Sale of Goods—Interpleader as to Proceeds.*]—A stay of proceedings will not be granted under 16 Vict. c. 177, s. 7, where the goods have been sold, the interpleader being for the proceeds of the sale of the goods. *Washington* v. *Webb*, 3 L. J. 75.

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2. *Other Cases.*

Appeal.]—There is no right of appeal from the decision of the Judge in an interpleader suit in a division court, even when the amount in dispute exceeds $150. *In re Turner* v. *Imperial Bank of Canada*, 9 P. R. 19.

Certiorari—*Removal of Issue.*]—An interpleader issue in a division court was held not to be within s. 51 of the Division Courts Act, and so not removable by certiorari. *Russell* v. *Williams*, 8 L. J. 277.

Equitable Interest.]—On an interpleader in the division court, the Judge may determine the claimant's right to an equitable interest. *McIntosh* v. *McIntosh*, 18 Gr. 58.

Sheriff's Interpleader — *Division Court Executions.*]—The term "execution creditors," used in s. 11 of the Interpleader Act, R. S. O. 1877 c. 54, taken in connection with s. 12, includes persons holding executions in division courts, who are therefore proper parties to, and should be called upon in, an interpleader application by a sheriff. *Macfie* v. *Hunter*, 9 P. R. 149.

IX. JUDGE.

Appointment—*Provincial Government—Right of.*]—See *In re Wilson* v. *McGuire*, 2 O. R. 118.

Deputy Judge — *Powers of — Appointment.*]—"Belleville, Ont., 24th July, 1880. I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy to hold the second division court of the county of Hastings, on Monday the 26th day of July instant, at the town hall, in the township of Sydney. T. A. Lazier, junior Judge, C. H." The person named in this deputation tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following, at the Judge's chambers in Belleville, outside the limits of the 2nd division court, but within the county, without having named a day and hour for delivery thereof in writing at the clerk's office:—Held, (1) that the word "Judge" in s. 29 of R. S. O. 1877 c. 47 includes the junior Judge, and that the deputation was therefore valid. (2) That the proper construction of the same was, "to hold the 2nd division court of the county of Hastings, to be holden on Monday," &c., and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the junior Judge during the time of his appointment, wherever he might be within the county. And the rule was therefore made absolute to rescind the order made for a prohibition. *In re Leibes* v. *Ward*, 45 U. C. R. 375.

Deputy Judge — *Trial by — Death of County Court Judge—Delay in Appointment of Successor—Motion for New Trial.*]—See *Applebe* v. *Baker*, 27 U. C. R. 486, *post* (Subtitle NEW TRIAL.)

Interest — *Attachment.*]—Attachment lies against commissioners of a court of requests who try causes in which they have an interest. *Rex* v. *McIntyre*, Tay. 22.

Jurisdiction—*Excess—Liability for Seizure.*]—Commissioners of the court of requests under the old Court of Requests Act, who had given judgment in a matter beyond their jurisdiction:—Held, not to be liable for a seizure committed under an execution issued on the judgment by the Judge of the district court, under the Division Courts Act. *Davis* v. *Moore*, 2 U. C. R. 180.

Jurisdiction—*Excess—Liability for Seizure — Evidence — Waiver.*]—An action was brought in a division court of Hastings by A. and B. against C., who lived in Wolford, county of Grenville, for the price of a reaping machine. No defence was offered or objection taken, and judgment was given for the plaintiff, it being proved by a witness that the machine had been ordered by C. in Hastings, or contracted for there by him. The clerk of the court, on the application of one of the plaintiffs, transmitted a transcript of the judgment to the clerk of the division court of Wolford, on which he issued execution, and gave it to the bailiff, who made the money under it, being indemnified. The defendant in the division court thereupon sued the Judge who decided the case, the clerk of his court, the two plaintiffs in the suit, the clerk of the court in Wolford, the bailiff, and the two persons who indemnified him, resting his case on the ground that the Judge had no jurisdiction:—Held, that the clerks and the bailiff were clearly not liable, as they acted only in a ministerial capacity and in the performance of their duty, and that the parties indemnifying them for doing so were equally free; that no action would lie against the Judge, for the evidence justified him in assuming that the cause of action arose within his jurisdiction, and the plaintiff (defendant in the suit) had at all events waived the objection by not taking it at the trial; and that the plaintiffs in the suit were not liable, as they had done nothing but state their claim. Held, also, that evidence to shew want of jurisdiction, which had not been given in the division court, was rightly rejected. *Graham* v. *Smart*, 18 U. C. R. 482.

Security of Clerk—*Responsibility as to.*]—Held, that it is the duty of the Judge to fix the amount and number of sureties to be given by the division court clerk, before the clerk enters on his duty; and that permitting the clerk to enter on his duty without it, gives a right of action to a party grieved, if damages be shewn resulting from it. A count admitting the fulfilment of the requirements of the statute, but denying that the sureties were freeholders or residents of the county:—Held, bad, on demurrer. The Judge is not responsible for the filing of the securities of the division court clerk, and the non-filing of the security would not relieve the sureties. *Parks* v. *Davis*, 10 C. P. 229.

X. JUDGMENT DEBTORS.

Arrest — *Order to Commit—Execution—Return—Residence of Debtor—Examination—False Pretences.*]—The plaintiff demurred to the replication to a plea justifying an arrest under an order to commit, issued by a division court for disobedience of an order to pay a judgment debt within a named time. Defendant joined in demurrer and excepted to the plea:—Held, as to the plea, that it was unnecessary to state the proceedings before the judgment, so as to give the division court jurisdiction, the amount stated being clearly within it. 2. That the issue of execution in due course, and its delivery to the plaintiff and return, were sufficiently stated. Semble, that the issue and return of execution is not, under the Division Courts Act, a condition precedent to the examination of defendant. It was alleged that when the summons to examine issued the plaintiff resided in the county, but not that he continued so resident at the issue of the summons to commit:—Held, sufficient, for this would be presumed. It was not averred that the plaintiff was examined on oath before the Judge, or any other evidence adduced. The warrant, set out in the replication, recited that it appeared to the satisfaction of the Judge that he had contracted the debt under false pretences:—Held, sufficient, for it is not necessary in all cases to take evidence on oath, and the Judge might have acted on the plaintiff's admission. Semble, that the omission of the clerk to enter an order of commitment in the procedure book, could not affect a defence under such warrant:—Held, also, that the Judge had power to make an order to pay in nine weeks or for commitment on default; and, as a summons and order to commit issued before the plaintiff's arrest, it was immaterial that the first order had not been entered or that three months had elapsed after it before the warrant issued. The order to pay or for commitment issued in May. In October, on the return of a summons, an order was made to commit for non-appearance and disobedience of the order to pay. The warrant of commitment recited that the order of May issued because it appeared to the satisfaction of the Judge that the plaintiff had incurred the debt under false pretences, and that on the return of the summons in October he had not appeared:—Held, that the ground for commitment sufficiently appeared. *Peck* v. *McDougall*, 27 U. C. R. 353.

Arrest outside of County.]—The proceeding by judgment summons in a division court, and its consequences, are of a strictly local character. A warrant of commitment must be directed to a bailiff of the county and to the gaoler of the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it issued, nor does the "backing" of the warrant by a magistrate in another county give it any force or validity there. History of ss. 242 and 243 Division Courts Act, R. S. O. 1887 c. 51. *Re Hendry*, 27 O. R. 297.

Committal upon Default—*Day to Shew Cause—Issue of Order—Duty of Clerk—Prohibition.*]—The order of a division court Judge upon judgment summons directed that the defendant should pay the judgment debt within a fixed period, and in default that he should be committed to gaol:—Held, that the part of the order as to imprisonment was not sustainable; the defendant, if he did not pay within the time limited, was entitled to a day to shew cause why he did not pay; and prohibition was ordered:—Semble, the defendant should have called upon the clerk of the court to shew

cause against the issuing of any order for imprisonment, as such order is merely a ministerial act. *Re Woltz* v. *Blakely*, 11 P. R. 430.

Garnishee — *Defendant.*]—A garnishee is not a defendant within the meaning of ss. 235 et seq. of the Division Courts Act, R. S. O. 1887 c. 51, and is not examinable under after-judgment summons. Judgment in 23 O. R. 403 affirmed. *In re Hanna* v. *Coulson*, 21 A. R. 692.

Garnishee — *Examination—Committal—Affidavit — Prohibition.*]—The county court Judge, presiding in a division court, has no power to commit a garnishee for default in making payments pursuant to an order after judgment; and s. 18 of 57 Vict. c. 23 (O.) has not extended his powers in that behalf. Before a garnishee can be examined under ss. 235 to 248 of R. S. O. 1887 c. 51, as now permitted by s. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by s. 235. Prohibition against enforcement of committal order. *Re Doucler* v. *Duffy*, 29 O. R. 40.

Indorsement on Judgment Summons.]—Held, following Regina v. Judge of Brompton County Court, 18 Q. B. D. 213, that the Judge's indorsement on the judgment summons was the order upon such summons; and that a subsequent order was illegal. *Re McLeod* v. *Emigh*, 12 P. R. 450.

Insolvency — *Discharge.*] — A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Acts. *In re Mackay* v. *Goodson*, 27 U. C. R. 263.

Married Woman—*Examination — Committal.*]—A judgment against a married woman by virtue of the Married Woman's Property Act creates no general personal liability, but merely charges her separate estate; and the provisions of s. 177 of the Division Courts Act, R. S. O. 1877 c. 47, as amended by 43 Vict. c. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the division court, and even if liable to be examined, such a person is not liable to be committed to gaol under s. 172. Metropolitan L. & S. Co. v. Mara, 8 P. R. 355, distinguished. *Re McLeod* v. *Emigh*, 12 P. R. 450.

Married Woman — *Examination—Committal—Execution.*]—A married woman was sued in a division court for a debt contracted before marriage, and judgment was given against her personally for the amount of the debt:—Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; and an application, upon habeas corpus, to discharge her from custody under an order made in the division court for her committal for failure to attend upon an after-judgment summons, was refused. Scott v. Morley, 20 Q. B. D. 123, followed. Re McLeod v. Emigh, 12 P. R. 450, distinguished, and doubted in view of Aylesford v. Great Western R. W. Co., [1892] 2 Q. B. 626. Quære, whether such an order to commit is by way of punishment or execution. *Re Teasdall* v. *Brady*, 18 P. R. 104.

Partnership—*Judgment against—Examination of Partner by Estoppel.*]—After judgment obtained against the firm of P. & Co. in a division court, upon service of summons on M. P., who was in fact the only member of the firm, an after-judgment summons was issued and served on R. P. The division court Judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor:—Held, on motion for prohibition, that ss. 4, 5, and 6 of s. 108 of the Division Courts Act, R. S. O. 1887 c. 51, are applicable only to persons who are in truth partners; and prohibition was ordered. Munster v. Railton, 10 Q. B. D. 475, 11 Q. B. D. 435, 10 App. Cas. 680, referred to. *Re Young* v. *Parker*, 12 P. R. 646.

Partnership—*Judgment against—Examination of Partner.*]—An order for committal under the judgment summons provisions of the Division Courts Act is not process of contempt, but is in the nature of execution or limited or qualified execution. A member of a partnership against which a judgment has been recovered in a division court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons. The judgment in 25 O. R. 573 reversed on this point, and prohibition granted. *In re Reid* v. *Graham*, 26 O. R. 126.

XI. Jurisdiction.

1. *Abandonment of Excess.*

At Trial.]—The plaintiff sued the defendant in the division court for $100, and indorsed on the summons as particulars a promissory note for $125:—Held, that the plaintiff might at the trial abandon in his particulars the excess above $100, so as to bring the case within division court jurisdiction. *In re Stogdale and Wilson*, 8 P. R. 5.

At Trial—*Amendment.*]—The plaintiff, in a suit in a division court brought before the passing of 39 Vict. c. 15 (O.), sued for $30 due as a balance of an account for board for self and horse, which appeared at the trial to be a balance of an unsettled account exceeding $200. He also sued for $82 for board for self and horse for a subsequent period, and abandoned the excess of $12 over $100. On objection being taken to the jurisdiction, the Judge allowed an amendment. The plaintiff then altered his claim, reducing it to $82 only, and the case was again tried and judgment reserved, whereupon application was made for prohibition:—Held, that the division court had no jurisdiction, independently of 39 Vict. c. 15, s. 2, which gives jurisdiction in cases of unsettled accounts under $400. 2. That under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was therefore no necessity for any amendment. 3. The plaintiff, to give a division court jurisdiction where his claim is in excess, must abandon the excess in his claim, and cannot wait until the hearing, and then do it. *In re McKenzie and Ryan*, 6 P. R. 323.

At Trial — *Amendment—Prohibition.*]—Plaintiff stated his claim to be for goods sold, £26 14s., and four years' interest thereon, and for two promissory notes, £15 each, and interest, in all, £73, and gave credit for cash

payments of £46, abandoning the excess of the balance above £25. At the trial defendant objected to the jurisdiction, and judgment having been given against him, he afterwards obtained a new trial on affidavit of merits. In granting it, the Judge allowed the plaintiff to amend his claim, and the account then rendered claimed only the balance due on the notes, in all £49, gave credit for £23, and abandoned all but £25 of the balance. Held, that as amended the claim was clearly within the jurisdiction, and that the amendment being improper would form no ground for prohibition. Quære, whether the first account shewed a claim beyond the jurisdiction, as without the notes, which were liquidated demands, the account would not exceed £50. *In re Higginbotham* v. *Moore*, 21 U. C. R. 326.

At Trial—*Amendment—Mandamus—Discretion.*]—General rule 8 of the division courts provides that when the excess of a claim is abandoned to bring the amount within the jurisdiction, it must be done in the first instance on the claim:—Held, that this rule does not prevent the Judge before or at the trial from permitting the plaintiff to amend his claim upon such terms as he thinks fit; general rule 118 and s. 304 of the Division Courts Act afford ample authority for permitting such amendment; but the Judge cannot be compelled by mandamus to exercise his discretion to permit an amendment. *Re White* v. *Galbraith*, 12 P. R. 513.

At Trial—*Notarial Fees.*]—The Judge of a division court has power, under revised rule 7 of the division courts, to permit at the trial the abandonment of the excess caused by a claim for notarial fees in an action upon a promissory note. *Pegg* v. *Howlett*, 28 O. R. 473.

Effect of Abandonment—*Judgment—Release of Excess.*]—The commencement of a suit in the division court for part only of an entire claim, and indorsing an abandonment of the balance on the summons, is not per se a release of the excess; but the part so abandoned cannot be sued for after recovery of judgment in such suit. *Winger* v. *Sibbald*, 2 A. R. 610.

General Abandonment—*Several Items of Claim—Damages.*]—The plaintiff sued in the division court on a claim which was originally composed of a solicitor's bill of costs, $36.06; damages, $69.33; due for advice, $6; total $111.39. The plaintiff abandoned as to $11.39, without specifying from what items he threw the amount off. The plaintiff, at the trial, agreed to take $30 for the first item, and the Judge reduced the $69.33 to $62, the $6 item was struck out, and the total then stood $92.33. This sum was further reduced to $80, for which judgment was entered:—Held, that prohibition was properly directed; that the abandonment being general, it could not be assumed that the plaintiff had made a reduction in his demand for damages, so as to give the court jurisdiction; and, even if the court had power to confine the prohibition to the claim for damages, it could not be done here, for it did not appear how much of the $80 was applicable to such claim. *Meek* v. *Seabell*, 4 O. R. 553.

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2. *Accounts, Unsettled.*

Claim for Balance—*Original Amount beyond Jurisdiction.*]—A balance of account originally exceeding $200, but reduced by payment (not set-off) to $100, is within the jurisdiction of a division court. *In re Miron* v. *McCabe*, 4 P. R. 171.

An action on an unsettled account exceeding $200 reduced by payment to $100:—Held, not to be within the jurisdiction. In re Miron v. McCabe, 4 P. R. 171, considered. *Waugh* v. *Conway*, 4 C. L. J. 228.

The plaintiff in a division court may recover $100, being the balance of an unsettled account not exceeding $200, but where the whole account exceeds that sum there is no jurisdiction. An unsettled account means an account the amount of which has not been adjusted, determined, or admitted by some act of the parties. The plaintiff here sued for $84, being the balance due for rent of premises occupied by defendant as his tenant for several years, at $160 a year, after deducting the payments made from time to time:—Held, not within the jurisdiction. In re Miron v. McCabe, 4 P. R. 171, overruled. *In re Hall* v. *Curtain*, 28 U. C. R. 533.

The plaintiff claimed $94.88, annexing to his summons particulars of claim, shewing an account for goods for $384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of $33 given for some returned barrels, but which still left an unsettled balance of upwards of $200:—Held, not within the jurisdiction, and a prohibition was ordered. *In re Judge of County Court of Northumberland and Durham*, 19 C. P. 290.

Plaintiff, having been employed by defendants to purchase wool for them on commission, sued them in the division court for this commission, and for $10 paid to an assistant. It appeared that the defendants had furnished the plaintiff with $1,100, and that the plaintiff had expended $36 beyond this sum in the purchase of the wool, but no question was made at the trial as to the due expenditure of the $1,100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the $36, or any portion of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid:—Held, not an action for the balance of an unsettled account exceeding $200, the balance of the unsettled account between the parties being $36, which was not in question in this suit; and a prohibition was therefore refused. *McRae* v. *Robins*, 20 C. P. 135.

Claim for Balance—*Original Amount beyond Jurisdiction—Interest—Part Prohibition.*]—The summons in a division court plaint stated the plaintiffs' claim to be $109.73, the amount of an account with interest. The account, as shewn by the particulars annexed, was a debit and credit one, consisting on the debit side of a number of items, aggregating $456.50, and on the credit side of items of cash payments, amounting to $361.50, leaving a balance of $95, which, with $14.73 claimed for interest, made the $109.73. Judgment for the plaintiffs was signed for that amount for default of a dispute note:—Held, that it did not appear on the face of the proceedings that the account was an unsettled one; for all that appeared, the account, though exceeding $400,

might have been a settled account, and the balance of $95 an admitted balance; and therefore the jurisdiction of the division court was not excluded by s. 77 of the Division Court Act, R. S. O. 1887 c. 51. But the amount claimed (being more than $100) was beyond the jurisdiction of the division court, as defined by s. 70, s.-s. (1), clause (b). As, however, the claim for interest was severable, the prohibition should be limited to the excess over $100. Trimble v. Miller, 22 O. R. 500, followed. *Re Lott* v. *Cameron*, 29 O. R. 70.

Equitable Claim—*Surplus Proceeds of Mortgage Sale.*]—A division court has jurisdiction to entertain a claim for less than $100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than $400. Such a claim is an equitable cause of action for money had and received. *Re Legarie* v. *Canada Loan and Banking Co.*, 11 P. R. 512.

Set-off—*Unconnected Items.*]—The plaintiff sued defendant, a married woman, on a demand exceeding $200, but abandoned the excess above $99.75. Defendant claimed a set-off exceeding $400, but consisting of various unconnected items:—Held, that no ground was shewn for a prohibition to the division court; that the suit was clearly within the jurisdiction; and that the defence of coverture should have been set up in the court below. *Read* v. *Wedge*, 29 U. C. R. 456.

Set-off—*Admission of—Question of Fact.*] The plaintiff brought his action in a division court for $74.31, his claim being $156.36, an unascertained amount, as against which he admitted a set-off of $82.05. At the trial in the division court the plaintiff affirmed, and the defendant denied, that there had been an agreement between them to set off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and the Judge at the trial found, as a matter of fact, that there had been such an agreement:—Held, following Fleming v. Livingstone, 6 P. R. 63, and Dixon v. Snarr, 6 P. R. 336, that it was a question of fact for the Judge of the division court to determine whether or not there was an agreement between the plaintiff and defendant; and the Judge having determined that there was, there was jurisdiction, and a prohibition was refused. *In re Jenkins* v. *Miller*, 10 P. R. 95.

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3. *Ascertainment of Amount.*

(See, also, COSTS, VI.—COUNTY COURT, IV. 3.)

(a) *Promissory Notes.*

Husband and Wife—*Purchase by Wife—Signature of Husband—Agency.*]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both husband and wife, but on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in a county court for the balance due on the goods, being the amount for which the note had been given:—Held, that the debt was not cognizable by the division court, the claim not having been ascertained by the signature of the wife; that the note signed by the husband could not be treated as such, it not having been signed by the husband as her agent, but as his own promise. *Davidson* v. *McClelland*, 32 O. R. 382.

Instalments.]—An action for the first instalment due on a promissory note for $400, payable in three annual instalments, is for an amount ascertained by the signature of the defendant, and may be brought in a division court before the maturity of the second instalment. "In three annual instalments" in such a note means equal instalments. Prohibition refused. *In re Babcock* v. *Ayers*, 27 O. R. 47.

Interest.]—Plaintiff sued on a promissory note for $73.14, payable with interest at 7 per cent.; the principal and interest together amounting to $103.44:—Held, that under the Division Courts Act, 1889, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of defendant, and the above claim could therefore be recovered in a division court. *McCracken* v. *Creswick*, 8 P. R. 501.

Interest.]—The plaintiff sued on a promissory note for $158, payable with interest at ten per cent., the principal and interest amounting to $185.65:—Held, following McCracken v. Creswick, 8 P. R. 501, that under the Division Courts Act, 1880, 43 Vict. c. 8 (O.), the above claim could be recovered in the division court. *In re Widmeyer* v. *McMahon*, 32 C. P. 187.

Interest.]—In an action in a division court on a promissory note for $200 and interest, the Judge entered judgment for $200, the amount of the note, $7.17 accrued interest, and costs:—Held, on a motion for prohibition, that the wording of the statute is clear, namely, "all claims for the recovery of debt or money demand the amount or balance of which does not exceed $200;" and the motion was granted. McCracken v. Creswick, 8 P. R. 501, and In re Widmeyer v. McMahon, 32 C. P. 187, distinguished. *Re Young* v. *Morden*, 10 P. R. 276.

Interest.]—In an action in a division court against the makers and indorsers of a promissory note expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210:—Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, and might be recovered, in addition to the claim, under 56 Vict. c. 15, s. 2 (O.), notwithstanding that the interest and the amount of the claim, so ascertained, together exceeded $200. *Pegg* v. *Howlett*, 28 O. R. 473.

Unorganized District—*Stipendiary Magistrate.*]—*See In re Ontario Bank* v. *Harston*, 9 P. R. 47.

(b) *Whether Signature alone Sufficient.*

Acknowledgment in Writing—*Condition.*]—The defendant signed a writing in these words: "Brantford, Oct. 9th, 1886. If

anything happens to me sudden, this is to insure my son Joseph (the plaintiff) to take $100 from his sister Hannah's share, to repay money lent to her; if I live until this time next year I will settle it with him:"—Held, that this was not a sufficient ascertainment of the amount due, by the signature of the defendant, within the meaning of R. S. O. 1887 c. 51, s. 70, to allow of a claim upon it and other items (amounting to about $60) being joined in a division court action. McDermid v. McDermid, 15 A. R. 287, followed. Re Graham v. Tomlinson, 12 P. R. 367, referred to. *Moses* v. *Moses*, 13 P. R. 12, 144.

Contract—*Condition.*] — By the Division Courts Act, 1880, these courts have jurisdiction in an action for a debt, the amount or balance of which does not exceed $200, where the amount or original amount of the claim is ascertained by the signature of the defendant. The claim was upon the following document signed by the defendant: "Received from R. W. an order from C. B. ordering me to pay him the sum of $140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker:"—Held, that the division court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced. *Wiltsie* v. *Ward*, 8 A. R. 549.

Contract — *Condition.*] — "Mr. Thomas Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1885, for the sum of $115 and shafting.—G. Climie & Son;"—Held, that the foregoing order did not ascertain the amount due, so as to bring the case within the increased jurisdiction of the division courts under 43 Vict. c. 8 (O.) *Forfar* v. *Climie*, 10 P. R. 90.

Contract—*Conditions.*]—A division court has no jurisdiction to entertain a claim for $200 on a contract signed by defendant where, to entitle plaintiff to recover, evidence ultra must be given to shew that conditions of the contract on the plaintiff's part have been complied with. *Re Shepherd and Cooper*, 25 O. R. 274.

Contract — *Extrinsic Evidence.*]— In an action in a county court for $37.50, balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for an open account for $27.35, against which the defendant was allowed $25 for defective work and material:—Held, that a division court had no jurisdiction, and that the plaintiff was entitled to his costs on the county court scale. Kinsey v. Roche, 8 P. R. 515, approved of. McDermid v. McDermid, 15 A. R. 287, followed. Re Graham v. Tomlinson, 12 P. R. 367, not followed. *Kreutziger* v. *Brox*, 32 O. R. 418.

Covenant in Lease—*Balance.*]—The defendant covenanted in a lease to pay the plaintiff $210 on a certain day as rent reserved. A payment of $34 having been made, leaving the sum of $180.40 due for principal and interest, the plaintiff brought his action in the division court for that sum, and prohibition was applied for upon the ground that the claim was not within the jurisdiction of the division court:—Held, that the original amount of the claim was ascertained by the signature of the defendant under s.-s. (c) of s. 70, R. S. O. 1887 c. 51, and that the division court had jurisdiction. McDermid v. McDermid, 15 A. R. 287, and Robb v. Murray, 16 A. R. 503, specially referred to and considered. *In re Wallace* v. *Virtue*, 24 O. R. 558.

Loan of Money—*Indorsement of Cheque.*] Where a cheque was given to the defendant by the plaintiff as a loan of the money represented by it:—Held, that the indorsement of the signature of the defendant on the cheque, which was payable to his order, was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy s. 54 of R. S. O. 1877 c. 47, as amended by s. 2 of 43 Vict. c. 8 (O.), and to give a division court jurisdiction where the amount claimed without ascertainment would have been beyond its competence. Kinsey v. Roche, 8 P. R. 515, overruled; and Wiltsie v. Ward, 8 A. R. 549, and Forfar v. Climie, 10 P. R. 90, specially referred to. Cushman v. Reid, 20 C. P. 147, distinguished. *Re Graham* v. *Tomlinson*, 12 P. R. 367.

Promissory Note—*Payment by Surety—Recovery over against Principal.*]—Plaintiff having paid a note of which he and defendant were joint makers, for $169, but which the plaintiff signed as a surety only:—Held, that plaintiff could not sue defendant in a division court for the money so paid, the amount not being ascertained by the signature of defendant. A summons for prohibition was made absolute without costs, there being no meritorious defence. *Kinsey* v. *Roche*, 8 P. R. 515.

Rent — *Signature to Memorandum of Lease.*]—See *Re Gordon* v. *O'Brien*, 11 P. R. 287.

Sale of Goods — *Commission.*] — The defendant, by an instrument signed by him, authorized the plaintiff to dispose of the goods mentioned therein for the sum of $1,000 net to the defendant, the latter reserving to himself the right to dispose of the goods without the plaintiff's assistance, and agreeing in such case to pay the plaintiff a commission of ten per cent. on the above mentioned sum. The defendant, unassisted by the plaintiff, afterwards disposed of the goods for $350, and the plaintiff then claimed ten per cent. commission on $1,000, and interest:—Held, that he was entitled to recover the amount, and that the claim was within the jurisdiction of the division court, the original amount thereof being ascertained by the signature of the defendant. *Petrie* v. *Machan*, 28 O. R. 642.

Sale of Goods—*Price.*]—Under a written agreement for the sale of a machine, signed by the defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved security, for $1.25, the price thereof; and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by the plaintiffs f. o. b. cars addressed to the defendant to an outside railway station, was received and used by him, and shortly after was returned to the plaintiffs. In an action on the agreement:—Held, that there was jurisdiction in the division court to entertain an action for the price

of the machine, as the amount was "ascertained by the signature of the defendant." Petrie v. Machan, 28 O. R. 642, followed. *Re Sawyer-Massey Co. and Parkin*, 28 O. R. 662.

(c) *Other Cases.*

Combination of Claims — *Liquidated and Unliquidated Sums.*]—A claim aggregating more than $100 and less than $200, which is made up of two amounts, one liquidated and one unliquidated and both less than $100, cannot be sued in a division court. Per Armour, J.—The claims could not have been sued together before 49 Vict. c. 15, s. 6 (O.), and that Act does not expressly or impliedly affect the question. Per O'Connor, J.—But for 49 Vict. c. 15, s. 6 (O.), the case would be governed by Vogt v. Boyle, 8 P. R. 249. It must be assumed that the Legislature intended by that enactment to lay down a rule of combination to regulate the whole subject; and the enactment being silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction. *Re Walsh* v. *Elliott*, 11 P. R. 520.

Original Demand Ascertained — *Balance Sued for.*]—Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding $200 remains due, the division courts under the Act of 1880 have jurisdiction. *Bank of Ottawa* v. *McLaughlin*, 8 A. R. 543.

See Re Lott v. *Cameron*, 29 O. R. 70 (*ante*, 2).

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4. *Judgments, Actions on.*

County Court Judgment—*Abandonment of Excess.*]—Application for a prohibition to the Judge of the 1st division court in the county of Kent, and to the plaintiffs, to prohibit them from prosecuting an action, which was brought upon a county court judgment for $211.87, the plaintiffs abandoning the excess of their claim over $100, and claiming $100:—Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a superior court. *Re Eberts* v. *Brooke*, 10 P. R. 257. Reversed, 11 P. R. 296.

Division Court Judgment.]—An action is not maintainable in this court on a judgment obtained in a division court, under 13 & 14 Vict. c. 53. *McPherson* v. *Forrester*, 11 U. C. R. 39.

Division Court Judgment—*Action on, in County Court.*]—Held, following the previous case, that an action would not lie in a county court upon a division court judgment. *Donnelly* v. *Stewart*, 25 U. C. R. 398.

High Court—"*Final Judgment*"—*Abandoning Excess.*]—A division court has jurisdiction to entertain an action brought upon a judgment of the high court, where the judgment of that court is a final judgment. Re Eberts v. Brooke, 11 P. R. 296, followed. In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and in the usual form for alimony, at the rate of $225 per year, payable in equal quarterly instalments at specified times:—Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that a division court had jurisdiction under R. S. O. 1887 c. 51, s. 70 (*b*), to entertain a suit by the plaintiff for $100 in respect to the costs, as being a claim for a debt owing to the plaintiff by the defendant, she expressly abandoning the balance of the taxed costs awarded. *Aldrich* v. *Aldrich*, 23 O. R. 374. Affirmed, 24 O. R. 124.

High Court — *Order for Payment of Costs.*]—Prohibition granted to restrain the enforcement of a judgment in a division court in an action brought upon an order of a Judge in an action in the high court ordering the defendant in the division court action to pay certain costs arising out of his default as a witness. Notwithstanding the broad provisions of rule 934, an order of the court or of a Judge is not for all purposes, and to all intents, a judgment; and no debt exists by virtue of such an order as was sued on here. Rule 896 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order. *Re Kerr* v. *Smith*, 24 O. R. 473.

Magistrate's Order — *Maintenance of Wife—Final Judgment.*]—See *Re Sims* v. *Kelly*, 20 O. R. 291.

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5. *Notice Disputing Jurisdiction.*

Necessity for—*Prohibition.*]—Held, that where a garnishee does not file a notice disputing the jurisdiction of a division court within the time required by 43 Vict. c. 8, s. 14 (O.), though no objection can be taken to the jurisdiction of the division court in that court, the jurisdiction of the high court of justice to prohibit the proceedings is not ousted. *Clarke* v. *Macdonald*, 4 O. R. 310.

Held, affirming the judgment reported 8 P. R. 374, that the notice mentioned in s. 14 of 43 Vict. c. 8 (O.) refers only to suits otherwise of the proper competence of the division court, but which have been brought in the wrong division. *Re Mead* v. *Creary*, 32 C. P. 1.

Held (disagreeing with the court below, 11 O. R. 138, and approving Mead v. Creary, 8 P. R. 374, 32 C. P. 1), that the notice under 48 Vict. c. 14, s. 1 (O.), amending 43 Vict. c. 8, s. 14 (O.), disputing the jurisdiction, is only required when a suit otherwise of the proper competence of the division court has been brought in the wrong division, and the want of such notice cannot give the division court jurisdiction if the title to land is brought in question. *Re Knight* v. *Medora*, 14 A. R. 112.

Held, doubting, but following Re Knight v. Medora, 14 A. R. 112, and Re Mead v. Creary, 32 C. P. 1, that the operation of s. 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the division courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction where the

amount claimed is beyond the competence of a division court. *Re Graham* v. *Tomlinson*, 12 P. R. 367.

Power to Extend Time for Giving.]—A division court Judge has no power, after the expiry of the time limited by s. 205 of the Division Courts Act, R. S. O. 1897 c. 60, for the giving of notice of intention to contest the jurisdiction of the court, to grant leave to file a notice disputing it. *Re McLean* v. *Osgoode*, 30 O. R. 430.

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6. *Splitting Causes of Action.*

Account—*Items.*]—Plaintiff rendered an account to defendant, commencing with the amount of an account rendered on the 30th June, 1862, and continued to the 14th October, when the balance, after allowing a credit of $4.25, was $106.43. In February, 1863, he sued in the division court, the statement of claim commencing with the 24th April, and ending on the 10th October, 1862, amounting to $99.31. He was allowed to recover without abandoning the excess, notwithstanding the production of the larger account rendered; and in May he sued for the items included in that account, but not in the former action, and was also allowed to recover. Defendant then applied for a prohibition. Semble, that the application should have been made in the first suit, but the point was not settled, as, after rule nisi granted, the plaintiff consented to the writ going without costs. *In re Grace* v. *Walsh*, 3 P. R. 196.

Contract of Hiring—*Claim for Hire—Claim for Injury.*]—Where plaintiff sued defendants on an alleged promise to return a yoke of oxen in as good condition as when hired, alleging as a breach that they were not so returned, &c., but were injured, &c., and it appeared on the trial that defendants had been before sued by the plaintiff for the hire of the same oxen on the same contract for hiring, which suit resulted in judgment for the plaintiff:—Held, a splitting of the plaintiff's cause of action, within the meaning of the Division Courts Act; and judgment was given for defendants. *Light* v. *Lyons*, 7 L. J. 74.

Money Deposited—*Interest.*] — Where the plaintiff sued in a division court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectable:—Held, that the action came within s. 77 of the Division Courts Act, R. S. O. 1887 c. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted. In re Clark v. Barber, 26 O. R. 47, followed, but commented on as irreconcilable with such cases as Dickenson v. Harrison, 4 Pri. 282, approved in Attwood v. Taylor, 1 M. & G. 307. *Re McDonald* v. *Dowdall*, 28 O. R. 212.

Money Paid by Indorser — *Several Promissory Notes.*]—Claims, such as promissory notes, which would each constitute a distinct cause of action if sued upon directly, come within the rule as to splitting of causes of action when sued upon indirectly, as in an action for money paid by an indorser to the use of the maker. *Gilbert* v. *Gilbert*, 4 C. L. J. 229.

Mortgage—*Instalments of Interest—Assignee of Covenant — Indemnity.*] — A mortgagee cannot sue in the division court for the amount of an instalment of interest within the jurisdiction of that court, when other instalments of interest are due which bring the whole amount beyond the jurisdiction. Subsection 2 of s. 79, R. S. O. 1897 c. 60, permitting separate actions for principal and interest on a mortgage, applies only to an action brought upon the mortgage by a person to whom the money is payable thereon, and does not apply to an action brought by the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it. *Re Real Estate Loan Co.* v. *Guardhouse*, 29 O. R. 602.

Mortgage—*Obligation to Indemnify—Interest.*] — The plaintiff conveyed land to the defendant subject to a mortgage, and after the maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a division court:—Held, that there was no splitting of the cause of action within s. 77 of the Division Courts Act, R. S. O. 1887 c. 51. Decision in 26 O. R. 123 reversed. *Re Ball* v. *Bell*, 26 O. R. 601.

Promissory Notes.]—In settlement of an action on a promissory note for $383 given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern-keeper, agreed in writing to give and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of $125 each:—Held, that each note was a separate cause of action and could be sued in the division court. *Re McGodrick* v. *Ryall*, 26 O. R. 435.

Purchase Money — *Instalments — Interest.*]—Under an agreement for sale of land, the balance of the purchase money was payable by instalments with interest at a named rate half-yearly; and at a time when three of the instalments of principal, and interest amounting to $70, and three years' taxes, were overdue, an action was commenced in a division court for the arrears of interest and two years' taxes, $95.30:—Held, reversing the decision in 25 O. R. 253, that the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a superior court; and therefore there was a dividing of their cause of action within the meaning of s. 77 of the Division Courts Act, R. S. O. 1887 c. 51. Re Gordon v. O'Brien, 11 P. R. 287, approved and followed. Public School Trustees of Section 9 Nottawasaga v. Township of Nottawasaga, 15 A. R. 310, distinguished. *Re Clark* v. *Barber*, 26 O. R. 47.

Rent — *Monthly Instalments.*] — The defendant rented certain premises from the plaintiff for a year, agreeing in writing to pay monthly $125 therefor, but no formal lease was executed. When the rent had become four months in arrear the plaintiff entered three plaints in a division court against the defendant, each for a month's rent, $125:—Held, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count under the old system of pleading; and, therefore, that the division into three plaints was

improper under R. S. O. 1877 c. 47, s. 59:—Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered. *Re Gordon* v. *O'Brien*, 11 P. R. 287.

Surplus School Rates—*Claims for Different Years.*]—In 1887 the plaintiffs sued the council in the division court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the county court for the surplus received in the five subsequent years. The defendants contended that the claim was res judicata by reason of the judgment in the division court, and also that the plaintiffs were not entitled to recover, because, by suing in the division court for the surplus of 1881 alone, they had divided their cause of action into two or more suits, contrary to s. 77 of the Division Courts Act, R. S. O. 1887 c. 51:—Held, (1) that the recovery in the division court being for a wholly distinct and separate cause of action, and not upon a balance of account under s. 77, or after abandonment of excess under D. C. rule No. 8, was no defence to an action for the surplus rates received by the defendants in the subsequent years. (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action. Semble, that the several claims, being entirely distinct and unconnected, did not form "one cause of action" so as to come within the prohibition of s. 77 against dividing a cause of action. Re Ackroyd, 1 Ex. 479, referred to. *Public School Trustees of Section 9 Nottawasaga* v. *Township of Nottawasaga*, 15 A. R. 310.

Work and Labour—*Money Overpaid.*]—Held, on the facts, that there was no splitting, the plaintiff having two separate causes of action, one for work and labour, and the other for a balance due for money paid by him for goods in excess of the amount furnished to him. *McRae* v. *Robins*, 20 C. P. 135.

See In re Franklin v. *Owen*, 15 C. L. T. Occ. N. 105, 158, 185, *post*, 7; *Beattie* v. *Holmes*, 29 O. R. 264, *post*, 10.

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7. *Territorial Jurisdiction.*

Application to Transfer Cause—*Forum—Convenience.*]—Held, affirming Bongard v. McWhirter, 32 U. C. R. 143, that under 16 Vict. c. 177, s. 9, a suitor desiring to remove the cause to another division, must apply to the Judge who ordinarily would have cognizance of the cause, not to the Judge of the division to which he desires to transfer it. But the only issue taken being as to which division was most convenient to try in, upon that point the decision of the Judge who had granted the order was held to be decisive. *McWhirter* v. *Bongard*, 14 U. C. R. 84.

Application to Transfer Cause—*Pending Motion for Prohibition.*]—Held, that, although before the motion for prohibition came on to be heard the plaintiff in the division court caused the plaint to be transferred to the proper division court in the county of Lambton, nevertheless the defendant, upon being sued in a wrong division court, had the right to apply for prohibition, and the Judge in chambers having in his discretion given the defendant his costs of the motion for prohibition, that discretion could not be interfered with. *Re Olmstead* v. *Errington*, 11 P. R. 366.

Application to Transfer Cause—*Refusal of—Prohibition.*]—See *In re Brazill* v. *Johns*, 24 O. R. 269.

Application to Transfer Cause—*Trial of Question Raised by Notice Disputing Jurisdiction—Refusal of Judge to Try.*]—Where the Judge presiding at the trial of an action in a division court declines to try the question of the jurisdiction of that court raised by a notice disputing the jurisdiction, he may be prohibited. Such question may be tried at the time and place of the trial of the action; and the defendant is in no way bound by anything contained in R. S. O. 1887 c. 51, s. 87, as amended by 52 Vict. c. 12, s. 5, to apply for an order transferring the action to a division court having jurisdiction over it, or to apply to the Judge at any other time or place for the trial of the question so raised. In re Watson v. Woolverton, 9 C. L. T. Occ. N. 480, distinguished. *Re Thompson* v. *Hay*, 22 O. R. 583.

Under R. S. O. 1887 c. 51, s. 87, as amended by 52 Vict. c. 12, s. 5 (O.), either party in a division court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because the Judge has assumed that as no application for a transfer had been made he had jurisdiction, i.e., has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction, the objection still holds good, and prohibition will be granted. Judgment in 22 O. R. 583 affirmed. *In re Thompson* v. *Hay*, 20 A. R. 379.

Application to Transfer Garnishee Proceeding.]—*See Re McCabe* v. *Middleton*, 27 O. R. 170, *ante* II.

Carrying on Business—*Railway Company.*]—Held, that a railway company does not "live and carry on business," within the meaning of 32 Vict. c. 23, s. 7 (O.), at any other place than its head office, at which its business is managed. Where the garnishees had their principal station at Montreal, and a local station at Berlin, at which they took passengers and received goods, and the plaintiff issued a garnishee summons against the company out of the division court at Berlin, under that section, on the ground that they lived and carried on business there:—Held, that the Judge of said division court had no jurisdiction, and a prohibition was ordered. Statutes regulating the practice and procedure of a court apply only to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question. *Ahrens* v. *McGilligat*, 23 C. P. 171. Followed in *Westover* v. *Turner*, 26 C. P. 510.

Section 7, s.-s. 1 of the Division Courts Act, 32 Vict. c. 23, provides that the garnishee summons shall issue, "out of the division court of the division in which the garnishee lives or carries on business:"—Held,

in the case of a foreign railway company doing business within this Province, to mean that proceedings may be taken in the division in which the principal offices for the Province are located. By 29 & 30 Vict. c. 92, the Grand Trunk Railway Company, whose head office was at Montreal, leased the line of the Buffalo and Lake Huron Railway Company, whose principal offices were at Brantford:—Held, that garnishee proceedings against the company were properly taken at Brantford. *Fair v. James*, 6 C. L. J. 320.

The Grand Trunk Railway Company, having their head office in Montreal, Que., are not defendants residing or carrying on business in this Province, within the meaning of R. S. O. 1877 c. 37, s. 62. *In re Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372.

Cause of Action—*Contract, where Made —Where to be Performed.*]—On an application for a prohibition on the ground that the cause of action did not arise within the jurisdiction of the Judge of the county of Lambton, it appeared that the defendant resided at G., where a bargain was made for the delivery of goods at W., and the bargain was fulfilled by such delivery and acceptance:—Held, that the cause of action arose partly at G. and partly at W., and the Judge of the county where W. was situate had no authority in respect of the cause of action. *Kemp v. Owen*, 14 C. P. 432.

Defendants, residing at Toronto, agreed to sell to the plaintiffs at Kingston certain barrels of oil. Upon the oil being delivered at Kingston, it was found to run short, and an action was brought for the shortage in the division court there:—Held, that the cause of action did not wholly arise there, and the action should have been brought at Toronto, where defendants resided. *Carsley v. Fisken*, 4 P. R. 255.

Where defendants, residing at Goderich, made a contract at Brantford with one W. to deliver to him certain goods at the railway station at Goderich:—Held, that an action in the division court for the bad quality of the goods delivered must be brought at Goderich, as the whole cause of action did not arise at Brantford. *Watt v. Van Every*, 23 U. C. R. 196.

"Cause of action," within the Division Courts Act, C. S. U. C. c. 19, s. 71, means the "whole cause of action:" and therefore, where the plaintiffs sued defendant in the division court at Ingersoll, in the county of Oxford, on a note payable there, but made at Strathroy, in the county of Middlesex, where defendant resided:—Held, that, as the whole cause of action did not arise at Ingersoll, the action would not lie there, but should have been brought at Strathroy, where defendant resided; and that a prohibition was properly ordered. Vaughan v. Weldon, L. R. 10 C. P. 47, and the cases on the C. L. P. Act, s. 44, distinguished. *Noxon v. Holmes*, 24 C. P. 541.

The defendant, who resided within the limits of the 10th division court in the county of York, drew a cheque in the plaintiff's favour within the limits of the 1st division court in the same county, upon a bank situate in the 10th division. The cheque having been dishonoured, the plaintiff sued upon it in the 1st division court:—Held, that the action was improperly brought there, and that a summons for a prohibition thereto, on the ground of want of jurisdiction, must be made absolute. *King v. Farrell*, 8 P. R. 119.

The defendant, residing at Port Elgin, by letter instructed the plaintiff, an attorney at Toronto, to take certain legal proceedings. The plaintiff, having performed these services, brought an action in a division court at Toronto to recover his fees:—Held, that the cause of action partly arose in each place, and that a prohibition should issue. *In re Hagel v. Dalrymple*, 8 P. R. 183.

The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and, a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendants' solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. On an action brought in the division court in Ottawa for the recovery of the money so paid under protest:—Held, that when the plaintiff made the payment, by reason of the action against him, the defendants' former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa. *Garland v. Omnium Securities Co.*, 10 P. R. 135.

A promissory note was dated at Milton, in the county of Halton, 17th September, 1877, and was for $100, payable three months after date at Milton, with interest at eight per cent. per annum. The amount claimed was $149.50. The maker died in the county of Essex, long after the maturity of the note; her will was proved in Essex, and the defendants, at the time of the action, resided in that county. The plaintiff having sued upon the note in a division court of the county of Halton:—Held, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors were no part of the cause of action, which was complete before the granting of the probate. Held, also, that the division court of Halton, which was sought to be prohibited, had jurisdiction by virtue of 43 Vict. c. 8, s. 12 (O.). *Re McCallum v. Gracey*, 10 P. R. 514.

A plaint was brought in the 1st division court of Middlesex upon a contract signed by the defendant, dated at London, to pay to the order of the plaintiffs at London, "$16 in wood delivered on the Hamilton and North-Western Railway," which was not in Middlesex. The defendant resided in the county of Simcoe:—Held, that the court in which the plaint was brought had no jurisdiction. *Re Elliott v. Norris*, 17 O. R. 78.

The plaintiffs resided in the district of Algoma, and the defendant in the county of Wentworth. The defendant telegraphed from Wentworth an order for a ton of fish to be

sent to him by the plaintiffs, and the latter shipped the fish from Algoma to Wentworth. The plaintiffs sued for the price of the fish:—Held, that the whole cause of action arose in Algoma, and a division court there had jurisdiction. Cowan v. O'Connor, 20 Q. B. D. 640, and Newcombe v. De Roos, 2 E. & E. 271, followed. *Re Noble* v. *Cline*, 18 O. R. 33.

The plaintiff gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship via G. T. R." at a certain named date. The goods were not so shipped, and a correspondence ensued, ending in the defendants refusing to supply the goods:—Held, that the breach was the non-shipment via Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and, as the whole cause of action did not arise where the order was given, a mandamus to a division court Judge to try the action was refused. *Re Diamond* v. *Waldron*, 28 O. R. 478.

Residence of Defendant — *Foreign Country — Garnishing Claim — Place Where Garnishees Carry on Business—57 Vict. c. 23, s. 12 (O.).*]—Prohibition granted and order affirmed by a divisional court. *In re Franklin* v. *Owen*, 15 C. L. T. Occ. N. 105, 158, 185.

Residence of Defendant — *Outside of County.*] — The jurisdiction of the division court, under 13 & 14 Vict. c. 53, did not extend to persons residing out of the county. *Dubuque* v. *Judge of Leeds and Grenville*, 12 U. C. R. 32.

Residence of Defendant—*Promissory Note—Indorser.*]—Where the holder of a promissory note, payable to "A. B. or bearer," indorsed it over to a third party:—Held, that under C. S. U. C. c. 19, s. 71, an action might be brought against the maker and indorser in the division court for the division in which the indorser resided; and that on a motion for a writ of prohibition, the question whether or not the indorsement was made for the purpose of giving jurisdiction could not be inquired into. *Bridges* v. *Douglas*, 13 C. L. J. 358.

Residence of Defendant—*Employment abroad — Wife's Residence.*] — Defendant worked at Aylmer, in the Province of Quebec, whilst his wife and family lived at Rochesterville, across the Ottawa, in the Province of Ontario, where his wife kept a store, and where defendant often came to see her:—Held, that his residence was with his family, and he was subject to be sued in the proper division court in the Province. *In re Ladouceur* v. *Salter*, 6 P. R. 305.

Residence of Defendant—*Court Near-est to.*]—An action was brought in a division court against a firm consisting of two partners, which had been dissolved before action, one of the partners being resident out of Ontario, and the other where the cause of action arose, being in a county other than that comprising the division in which the action was brought, although such division was nearest to where the firm had carried on business and the applicant resided. The Judge having overruled an objection to his jurisdiction and tried the case and pronounced judgment on the merits, prohibition was, under the circumstances, refused:—Semble, the Judge at the trial might have made an order permitting the plaintiff to proceed. *Re Sinclair* v. *Bell*, 28 O. R. 483.

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8. *Title to Land.*

Breach of Covenant in Lease—*Custom.*]—In an action brought in the high court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husbandlike, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings:—Held, not so; for the defendant was, on the face of the record, estopped from pleading non demisit, and his denial could only be read as a traverse of the actual execution of the lease. Purser v. Bradburne, 7 P. R. 18, commented on. Held, also, that the "custom" pleaded was not the "custom" meant by s. 69, s.-s. 4, of the Division Courts Act, R. S. O. 1887, c. 51, which refers to some legal custom by which the right or title to property is acquired, or on which it depends. Legh v. Hewitt, 4 East 154, followed. Held, therefore, that the action was within the competence of the division court, and that the costs should follow the event in accordance with rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

Conveyance of Land as Security.]—In settlement of an action on a promissory note for $383, given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of $125 each:—Held, that the title to land did not come in question. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Highway — *Liability to Repair.*] — The judgment in 11 O. R. 138, refusing to order prohibition to a division court, was affirmed on appeal on the ground that defendants were liable to repair the road in question, which was not a public road "vested as a Provincial work in Her Majesty or in any public department or board," and that the title to land was not brought in question. *Re Knight* v. *Township of Medora*, 14 A. R. 112.

Interpleader as to Goods — *Title to Land Involved.*]—The Judge of a division court may entertain an interpleader application to try the property in goods, even though the inquiry may involve the title to land. The Judge himself must decide such application without the aid of a jury. *Munsie* v. *McKinley*, 15 C. P. 50.

Line Fence—*Mistake as to Boundary—Ownership of Rails.*]—A., intending to make

a line fence between his land and that of B., by mistake made the fence on B.'s land. Afterwards, a correct line having been run, it was agreed that A. and B. should each make a portion of the fence on the correct line. B., in making his share, used the rails of the old fence made by A. A. sued B. in the division court for the price of the rails so used, and the Judge having decided in his favour, B. applied for a prohibition:—Held, that the Judge had jurisdiction. *Re Bradshaw* v. *Duffy*, 4 P. R. 50.

Prima Facie Case.]—Prima facie proof of a title to land being given, and that such title must come in question, and no cause being shewn to the contrary, a prohibition was granted. *Macara* v. *Morish*, 11 C. P. 74.

Rent—*Dispute as to Surrender of Lease.*]—The bare assertion of the defendant in a division court action that the right or title to any corporeal or incorporeal hereditament comes in question is not sufficient under R. S. O. 1887 c. 51, s. 69, s.-s. 4, to oust the jurisdiction of that court. The Judge has authority to inquire into so much of the case as is necessary to satisfy himself on the point, and if there are disputed facts or a question as to the proper inference from undisputed facts, that is enough to raise the question of title. If the facts can lead to only one conclusion, and that against the defendant, then there is no such bonâ fide dispute as to title as will oust the jurisdiction of the court. In an action in a division court for rent on a covenant in a lease, in which it was contended that the lease had been surrendered, prohibition was refused. *Re Moberly* v. *Town of Collingwood*, 25 O. R. 625.

Rent—*Dispute as to Terms of Tenancy.*]—In an action in a division court to recover $79.50 for taxes on certain land, which defendant was to pay as rent therefor, the facts as to the terms and conditions of the tenancy were disputed, but the defendant did not dispute the plaintiff's title. On the plaintiff obtaining judgment for the amount claimed, the defendant applied for a prohibition, on the ground that the title to land was brought in question:—Held, that the amount was properly recoverable in a division court. *In re English* v. *Mulholland*, 9 P. R. 145.

Use and Occupation—*Contract for sale.*]—The plaintiff agreed to sell to the defendant a parcel of land for $1,750, of which $10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went into possession as the purchaser. The plaintiff was unable to make title, and the defendant continued in possession for a considerable time. The plaintiff brought a division court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession and that he never became tenant to the plaintiff nor liable to pay rent:—Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to do so, it might have been necessary to shew when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the division court. In prohibition the court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice. Purser v. Bradburne, 7 P. R. 18, distinguished. *Re Crawford* v. *Seney*, 17 O. R. 74.

See, also, COSTS, VI.—COUNTY COURTS, III. 5.

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9. *Tort or Contract.*

Breach of Warranty.]—Held, that an action for breach of a warranty of a horse, where the damages recovered were over $40 and under $100, was within the jurisdiction of the division court. *Morris* v. *Cameron*, 12 C. P. 422.

Negligence of Bailee.]—A plaint in a division court charging that the defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of the same as bailee, with an averment that the defendant so carelessly, &c., drove said horse, &c., that the horse was killed, &c., is a plaint in contract and not in tort, and therefore within the judisdiction. *In re Rumble* v. *Wilson*, 5 P. R. 38.

The plaintiff sued in a division court for $90 as the value of his horse employed by defendant, the injury complained of being that the defendant allowed the horse to be worked after he took sick, by which his death was occasioned:—Held, that this was an action for breach of contract in not taking proper care of the horse, and that the division court had jurisdiction. *O'Brien* v. *Irving*, 7 P. R. 308.

Penalty.]—Held, that a penal action for not returning a conviction is founded on tort, and for that reason cannot be brought in a division court, where the amount in question is more than $40. *Corsant q. t.* v. *Taylor*, 10 C. L. J. 320.

Uncertain Damages.]—The jurisdiction of division courts is restricted to $40 in actions brought purely and simply to recover uncertain damages depending on matters of opinion whether the cause of action arose out of tort or breach of agreement. *Hyland* v. *Warren*, 6 L. J. 116.

See Re London Mutual Fire Ins. Co. v. *McFarlane*, 26 O. R. 15, *post*, XII. 3.

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10. *Other Cases.*

Claim for Balance of Larger Sum.]—Courts of requests can entertain a suit for the balance remaining due upon a written undertaking to pay a larger sum. *Longworth* v. *McKay*, 6 O. S. 149.

Courts of Record.]—Division courts are, by virtue of 32 Vict. c. 23, s. 1 (O.), courts of record. *Corsant q. t.* v. *Taylor*, 10 C. L. J. 320.

Detinue.]—Division courts have jurisdiction in actions of detinue. Where, therefore, the plaintiff sued in a county court, and the value of the article detained was found to be $1, and no certificate granted for full costs, the plaintiff was restricted to division court costs only, and set-off of costs allowed. *Lucas* v. *Elliott*, 9 L. J. 147.

Infants—*Wages—Labour.*]—Section 27 of 13 & 14 Vict. c. 53 does not restrict infants from suing in the division courts for anything but wages, but enables them to recover for their own labour, contrary to the principles of the common law. *Ferris* v. *Fox*, 11 U. C. R. 612.

Judgment—*Motion to Set aside—Fraud.*]—A Judge in an action in the division court, apart from the jurisdiction conferred by s. 152 of the Division Courts Act, R. S. O. 1897 c. 60, to grant a new trial within fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud, and to order a new trial. *Re Vilick* v. *Marks*, 31 O. R. 677.

Liquors.]—The words "liquors drunk in a tavern or alehouse," in s.-s. 2, and "such liquors," in s.-s. 3 of s. 49 of the Division Courts Act, R. S. O. 1887 c. 51, mean liquors drunk in the tavern or alehouse of the vendor. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Married Woman—*Debts.*]—As to proceeding for debts within the jurisdiction of the division or county courts against married women. *In re Widmeyer* v. *McMahon*, 32 C. P. 187.

Mechanics' Liens—*Mortgage—Account.*]—Section 23 of R. S. O. 1887 c. 126, which allows proceedings to recover the amount of a mechanic's lien, to be taken under certain circumstances in the county court and division court, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those courts cannot entertain an action in the nature of an action of account by a lienholder against a mortgagee who has sold the land in question under a mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

New Trial — *Application — Time.*]—See *In re McLean* v. *McLeod*, 5 P. R. 467, and other cases, *post*, XII.

New Trial—*Raising Question of Jurisdiction.*]—Held, that a party not raising the question of jurisdiction on the first trial of a case in the division court, is not prohibited from raising the question upon the second trial, a new trial having been granted. *Deadman* v. *Agricultural and Arts Association*, 6 P. R. 176.

See, also, *Graham* v. *Smart*, 18 U. C. R. 482.

Outside Ontario.]—The process of division courts is of no effect outside the Province of Ontario. *Ontario Glass Co.* v. *Swartz*, 9 P. R. 252.

Preferential Transfer of Goods in Trust—*Setting aside—Distribution of Proceeds amongst Creditors.*]—Within sixty days of the making of an assignment for the benefit of creditors, the insolvent transferred to a person in trust for certain of his creditors a quantity of butter, which was sold, realizing $1,800, and the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee then sued one of the creditors to recover back the money paid him as his share, the amount so sought to be recovered being within the jurisdiction of the division court:—Held, that the transfer was divisible into as many parts as there were shares, and the division court had jurisdiction to entertain the action. *Beattie* v. *Holmes*, 29 O. R. 264.

See, also, *Re Perras* v. *Keefer*, 22 O. R. 672, *ante* II.

Replevin — *Damages.*]—The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the division court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ; and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by plaintiff to recover the amount of the note as damages he had sustained by the replevin:—Held, that, even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs. Under the Division Courts Act, R. S. O. 1887 c. 51, s. 266, the whole matter could have been litigated in the division court. Quære, as to the amount of damages recoverable. *Kennin* v. *Macdonald*, 22 O. R. 484.

School Rates—*Action by Collector.*]—A township collector might sue for an assessment for common schools, under 4 & 5 Vict. c. 48, s. 10, in a division court. *McGregor* v. *White*, 1 U. C. R. 15.

Unorganized District — *Stipendiary Magistrate.*]—The Division Courts Act, 1880, does not apply to the division courts in territorial divisions and unorganized tracts; and a prohibition was ordered to restrain a stipendiary magistrate from adjudicating upon a claim on a promissory note for $110. *In re Ontario Bank* v. *Harston*, 9 P. R. 47.

Wager — *Amendment at Trial—Waiver—Prohibition.*]—A division court Judge has power to allow a plaintiff to amend his particulars at the trial so as to bring within the jurisdiction a case which, from the nature of the cause of action (in this case a claim for the amount of a wager), was, as originally launched, outside it; and where in such a case the defendant did not insist on re-service of the summons, but answered the claim, and the trial proceeded and the Judge found facts shewing jurisdiction, upon which judgment was entered, prohibition was refused. *In re Sebert* v. *Hodgson*, 32 O. R. 157.

XII. New Trial.

Application for—*Bar to Motion for Prohibition.*]—See *Robertson* v. *Cornwell*, 7 P. R. 297; *Archibald* v. *Bushey*, 7 P. R. 304; *In re Evans* v. *Sutton*, 8 P. R. 367; *McGregor* v. *Norton*, 13 P. R. 28, 223.

Application for—*Death of Judge—Delay in Appointment of Successor.*]—A suit in the division court having been tried on the 18th July, before a deputy Judge duly appointed, the defendant on the 22nd July applied for a new trial, by which, under rule 52 of the division courts, proceedings were stayed. The Judge died on the 26th; the deputy Judge before whom the case had been tried did nothing in the matter; and the new Judge was not appointed until October. In January following he ordered a new trial:—Held, that he was authorized to do so under s. 117 of the Division Courts Act, C. S. U. C. c. 19, and the Interpretation Act, C. S. C. c. 5, s. 6, s-s. 23, taken together. *Appelbe* v. *Baker*, 27 U. C. R. 486.

Application for—*Time.*]—Held, that C. S. U. C. c. 19, s. 107, giving the Judge power to grant a new trial within fourteen days, is imperative, and that the Judge has no power to grant a new trial after the expiration of that time. *Mitchell* v. *Mulholland*, 14 C. L. J. 55; *Re Foley* v. *Moran*, 11 P. R. 318.

Application for—*Time—Commencement of.*]—Where at the sittings of a division court a case is "adjourned for plaintiff on payment of costs within ten days otherwise judgment for the defendant," the two weeks within which a motion can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment. *Thompson* v. *McCrae*, 31 O. R. 674.

Application for—*Time—Commencement of—Notice of Judgment.*]—Under the amendment made to s. 144 of R. S. O. 1887 c. 51, by 57 Vict. c. 23, s. 4, allowing judgment to be given without previously naming a day and directing that the parties shall be notified, the time within which to move for a new trial does not begin to run until the day on which the party has notice of the judgment. *In re Moore* v. *Farquhar*, 15 C. L. T. Occ. N. 103.

Application for — *Time — Revision of Costs.*]—See *Bell* v. *Lamont*, 7 P. R. 307.

Application for — *Time — Filing Affidavit.*] — After judgment in an action in a division court in the county of Victoria, the defendant within the fourteen days required by the Division Courts Act, R. S. O. 1877 c. 47, s. 107, moved, on notice filed with the clerk of the court, for a new trial on the ground of the discovery of fresh evidence, but did not within the fourteen days file an affidavit as required by the division court rule 142. An affidavit was subsequently filed, the motion heard, and a new trial granted by the county court Judge. A motion for prohibition was refused, the transgression of a rule of practice forming no ground for such motion. *Fee* v. *McIlhargey*, 9 P. R. 329.

Application for—*Time—Filing Papers.*]—Quære, can a division court Judge set aside a judgment and execution on which the money has been regularly made, on application to him for a new trial, where the papers were not regularly filed with the clerk of the court? *McKenzie* v. *Keene*, 5 L. J. 225.

Application for — *Time—Garnishment.*]—Under 32 Vict. c. 23 (O.), a Judge of a division court has power in garnishment proceedings, when the justice of the case requires it, to grant a new trial after the lapse of fourteen days, notwithstanding C. S. U. C. c. 19, s. 107. *In re McLean* v. *McLeod*, 5 P. R. 464.

Application for — *Time—Garnishment.*]—The provisions of s. 145 of the Division Courts Act, R. S. O. 1887 c. 51, as to applying for a new trial within fourteen days, do not apply to a garnishee. In re McLean v. McLeod, 5 P. R. 467, followed. Re Tipling v. Cole, 21 O. R. 276, distinguished. Judgment in 26 O. R. 554 affirmed. *Hobson* v. *Shannon*, 27 O. R. 115.

Application for — *Time — Jury Case — Judgment Reserved as to Costs.*] — An action was tried in a division court with a jury on the 15th January, when they found for the plaintiff with a recommendation that plaintiff should pay his own and defendant's costs, whereupon judgment was entered for the plaintiff, and costs reserved. On 24th January the Judge directed "judgment for plaintiff with costs on verdict of jury." On 5th February an application was made for a new trial, which was granted on 16th February:—Held, that the application for the new trial was too late, not having been made within fourteen days from the trial, as required by s. 145 of the Division Courts Act, R. S. O. 1887 c. 51; and a prohibition was therefore directed. *Bland* v. *Rivers*, 19 O. R. 407.

Jurisdiction — *Raising Question of, at New Trial.*] — See *Deadman* v. *Agricultural and Arts Association*, 6 P. R. 176.

See Re Nilick v. *Marks*, 31 O. R. 677, *ante*, XI. 10.

XIII. Practice and Procedure.

1. *Parties.*

Examination of—*By Judge at Trial.*]—A division court Judge may, of his own motion, under s. 102 of the Division Courts Act, have the plaintiff or defendant sworn at the trial and examine him, although the demand exceed $8. *In re Burrowes*, 18 C. P. 493.

Examination of—*For Discovery.*]—Sections 24 et seq. of the A. J. Act, 1873, authorizing the examination of parties to a suit, does not apply to division courts. *Willing* v. *Elliott*, 37 U. C. R. 320.

Substituting Defendant.] — A witness in a division court suit having admitted that he was the real debtor, the plaintiff was allowed, under D. C. rule 115, to substitute the witness as a defendant and obtain a judgment against him:—Held, that the division court Judge had the power to do this. *In re Heaney* v. *Scott*, 8 P. R. 251.

Substituting Plaintiff.]—Held, that revised rules 211, 216, and 224 of the division courts authorized the Judge to substitute the name of the plaintiff for that of the original

holder of the note as plaintiff in the action. *Pegg* v. *Howlett*, 28 O. R. 473.

Third Parties.]—Quære, whether the third party clauses of the O. J. Act apply to division courts. *In re Merchants' Bank* v. *Van Allen*, 10 P. R. 348.

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2. *Service.*

Added Party—*Service of Notice only—Appearance at Trial—Waiver.*]—In an action on a promissory note, brought in a division court, M., the indorser, was made a defendant by the order of the Judge, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiff's demand. M. filed a notice disputing the defendant's claim against him and the jurisdiction of the court to try it, and also appeared at the trial and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.:—Held, that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but that, by appearing in the suit and taking part in the proceedings both before and at the trial, M. had waived service of the summons and demand. *In re Merchants' Bank* v. *Van Allen*, 10 P. R. 348.

Blank Summons—*Bailiff Inserting Name of Defendant.*]—The issue by the clerk of a division court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of s. 44 of the Division Courts Act, R. S. O. 1887 c. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the division court. *Re Gerow* v. *Hogle*, 28 O. R. 405.

Out of the Jurisdiction.]—A bailiff may serve a summons out of the jurisdiction, though he is not obliged to do so. It is immaterial that a defendant is without the jurisdiction at the time he is served, if at such time he is in law a resident within the jurisdiction. *In re Ladouceur* v. *Salter*, 6 P. R. 305.

Out of the Jurisdiction—*Taking Chances at Trial—Waiver.*]—Service upon a defendant resident out of the jurisdiction is not a principle of practice within the meaning of s. 244 of the Division Courts Act, but a branch or system of practice, or a means of relief which the procedure in division courts does not admit of being applied. Neither R. S. O. 1877 c. 47, s. 244, nor rules 8 and 45 O. J. Act, make applicable to division courts the statutory rules and practice governing service on defendants out of the jurisdiction in actions in the superior courts:—Held, that the service of the writ in this action on the station master of the defendants at Bowmanville, was void, but the defendants having appeared at the trial, and, after their objection to the jurisdiction had been overruled, having proceeded with the defence and cross-examined witnesses, &c:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *In re Guy* v. *Grand Trunk R. W. Co.*, 10 P. R. 372.

Substitutional Service—*Defendant out of Jurisdiction — Taking Chances at Trial — Waiver.*]—T., one of the defendants in a division court action, resided out of Toronto, and process was served substitutionally upon him. L., the other defendant, objected that the court had no jurisdiction by reason of T.'s absence from the Province. No written notice of this objection was given before the trial, there was a conflict of evidence as to whether it was taken at the trial, and the suit was defended on a different ground. The trial was on the 15th January, 1888, when judgment went for the plaintiff for more than $100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th May, 1888, moved for prohibition:—Held, that L. having taken his chances at the trial, and not having appealed nor sufficiently accounted for his delay in moving, the discretion of the court should not be exercised in his favour. *Re Soules* v. *Little*, 12 P. R. 533.

Substitutional Service—*Order for.*]—At the time of the issue of the summons in a division court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service. In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge:—Held, that, as the Judge in the division court had jurisdiction under s. 100 of R. S. O. 1887 c. 51, as amended by 51 Vict. c. 10, s. 1, to order substitutional service, if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the high court. *Re Hibbitt* v. *Schilbroth*, 18 O. R. 399.

Time of Service—*Dispute Note—Defendant Entitled to Full Notice—Prohibition.*]—See *Zaritz* v. *Mann*, 16 C. L. J. 144.

See In re McKay v. *Palmer*, 12 P. R. 219, *post*, XIV. 4.

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3. *Trial.*

Adjournment of Trial—*Chambers.*]—A division court Judge may, under s. 86 of the Division Courts Act, adjourn the hearing of a cause from a regular sitting of the court to his chambers within the division, and such adjournment is, if not objected to by the parties, an adjournment of the court to hear that cause. *In re Burrowes*, 18 C. P. 493.

Jury—*Action of Tort.*]—A claim by an insurance company, as indorsed on a division court summons, to recover back from the insured the sum of $30 loss under an insurance effected by him, payment of which is alleged to have been procured by his false and fraudulent representations, is a claim arising ex delicto, and can be required to be tried by a

jury under R. S. O. 1887 c. 51, s. 154. *Re London Mutual Fire Insurance Co.* v. *McFarlane*, 26 O. R. 15.

Jury—*Res Judicata.*]—When an issue arises on the plea res judicata, the identity of the facts in the former case with those in the existing case is matter for the jury when the trial is by a jury in a division court. In a plaint in a division court where the defence of res judicata had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the court. *In re Cowan* v. *Affic*, 24 O. R. 358.

Jury — *Submitting Questions — Acquiescence—Prohibition.*]—In a division court action for the price of goods sold, the Judge, without objection taken, submitted questions to the jury, and on their answers entered a verdict and judgment for the plaintiff after the defendant had, however, put in a written argument in his own favour:—Held, on motion for prohibition, on the ground that the defendant was entitled to a general verdict of the jury, and that the Judge had no right to submit questions and enter a verdict on them, that, however this might be, the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition. *In re Jones* v. *Julian*, 28 O. R. 601.

Jury—*Withdrawal of Case from—Prohibition.*]—In a division court suit a jury was demanded and called, but the presiding Judge withdrew from their consideration everything except the amount of damages to be awarded, saying there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages, and judgment was entered for the plaintiff:—Held, that where the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The Judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition. *Re Lewis* v. *Old*, 17 O. R. 610.

Proof of Claim—*Necessity for—Waiver.*] The plaintiff, residing within the limits of a division court in Wentworth, sued, in that court, two defendants who both resided in St. Catharines, on a cause of action which partly arose in St. Catharines. One defendant put in a notice of defence disputing the claim and the jurisdiction of the court. At the trial neither defendant appeared, and the Judge gave judgment for the plaintiff without requiring any proof of the claim, in accordance, it was said, with the practice in that county:—Held, that proof of the claim should have been given; and a prohibition was ordered with costs. Held, also, that an application for a new trial by the defendant who had given the notice was no waiver of his right to object to the jurisdiction; and that the other defendant could not prejudice such right by having given no notice of defence. *In re Evans* v. *Sutton*, 8 P. R. 367.

Restoration of Case to Docket—*Ex Parte Order.*]—When the action was called for trial the plaintiff and his agent were accidentally absent from the court, and the action was dismissed. The plaintiff afterwards obtained from the Judge an ex parte order for the restoration of the case to the docket for trial at the next sittings. The defendant made a motion to rescind this order, which was refused, and he then applied for prohibition:—Held, that the Judge had power to dispense with notice of motion for the order; and the motion for prohibition was refused. *Re Backhouse* v. *Bright*, 13 P. R. 117.

See Re McGregor v. *Norton*, 13 P. R. 223, *post*, 4.

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4. *Other Cases.*

Amendment of Particulars to Give Jurisdiction.]—See *post* XIV. 3; *ante* XI. 1; *In re Sebert* v. *Hodgson*, 32 O. R. 157, *ante* XI. 10.

Barrister or Attorney.]—No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in division courts. *In re Judge of County Court of York*, 31 U. C. R. 267.

See, also, *Kegina* v. *Erridge*, 3 L. J. 32.

Defence — *Negligence — Cross-action.*]—It is an established rule of English law that negligence or breach of duty cannot be set up as a defence in an action for the recovery of freight, where the defendant has derived a part benefit under the contract, but defendant must bring a cross-action for damages; and such rule must be taken to prevail in division courts, notwithstanding the provisions of the Division Courts Act enabling the Judge to decide according to equity and good conscience. *Brown* v. *Muckle*, 7 L. J. 298.

Defence — *Splitting Cause of Action—Bar.*]—An objection to splitting a cause of action should be taken as a defence or by way of motion for a prohibition and not as a bar to a subsequent action. *Public School Trustees of Section No. 9, Nottawasaga* v. *Township of Nottawasaga*, 15 A. R. 310.

Judgment — *Form of — Abandonment of Excess—Action for Balance of an Account.*]—See *Public School Trustees of Section No. 9, Nottawasaga* v. *Township of Nottawasaga*, 15 A. R. 310.

Judgment—*Motion to Set aside—Fraud.*] See *Re Nilick* v. *Marks*, 31 O. R. 677, *ante*, XI. 10.

Judgment—*Set-off.*]—A judgment in a division court may be set off and allowed against the judgment of a superior court of record. *Robinson* v. *Shields*, 2 C. L. J. 45.

Judgment—*Time for Entry—Execution.*]—Although the defendant has fourteen days to move against a judgment in a division court, it is proper for the plaintiff to enter judgment and issue execution forthwith, unless restrained by the Judge to a future named day. The practice under rule 270, O. J. Act, is not applicable to division courts. *Re Foley* v. *Moran*, 11 P. R. 316.

Judicature Act and Rules.]—The Judicature Act and Rules in relation to procedure do not apply to division courts; and rule 339 of the supreme court of judicature applies only to the courts to which in terms it is made applicable. *Bank of Ottawa* v. *McLaughlin*, 8 A. R. 543.

Judicature Act and Rules—*Examination of Witness before Trial.*]—Division court Judges may, in their discretion, apply the rules of the Judicature Act to the division courts;—Held, also, that a division court Judge had power to make an order for the examination of a witness for the defendants before a special examiner, the examination so taken to be filed according to the practice of the high court, and to be receivable in evidence saving all just exceptions. *Macnee* v. *Ontario Bank*, 3 C. L. T. 369.

Mechanics' Liens.] — Notwithstanding the apparently unlimited provisions of s. 1 of 53 Vict. c. 37 (O.), intituled an "Act to Simplify the Procedure for Enforcing Mechanics' Liens," the intention of the Act is to simplify such procedure in the high court only, leaving the procedure provided for in county courts and division courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Notice of Action.]—A notice of action in trespass under the Division Courts Act, C. S. U. C. c. 19, s. 193:—Held, insufficient for not stating the time and place of the alleged trespass. There is no substantial difference in this respect between the form of notice required under that Act and under C. S. U. C. c. 126. *Moore* v. *Gidley*, 32 U. C. R. 233.

Payment into Court — *Nonsuit—Division Court Rule* 130—*Impounding Money for Defendant's Costs.*]—See *Oakes* v. *Morgan*, 8 C. L. J. 248.

Payment into Court — *Stay of Proceedings—Notice—Trial.*] — The defendant in a division court suit paid a sum of money into court as a full satisfaction of the plaintiff's demand, under R. S. O. 1887 c. 51, s. 125, and the plaintiff was notified thereof. The plaintiff notified the clerk of the court, but not in writing, that he intended to proceed for the remainder of his claim. Section 126 of R. S. O. 1887 c. 51 provides that when payment is made into court under s. 125 the plaintiff is to be notified, "and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the clerk his intention to proceed * * * in which case the action shall proceed as if brought originally for such remainder only:"—Held, that the words of the statute are imperative; and, in the absence of the written notice, all proceedings were stayed. A trial which took place afterwards was therefore a nullity; and prohibition was granted restraining proceedings upon the judgment recovered by the plaintiff at such trial. *Re McGregor* v. *Norton*, 13 P. R. 223.

Payment into Court — *Tort—Continuance of Action—Rights of Parties.*] — In a division court action for a tort, money paid into court by a defendant in alleged satisfaction of the plaintiff's claim, at once becomes the plaintiff's, but if he proceed with the action it must, under rule 170, remain in court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom. Where, therefore, after payment into court by a defendant of a sum of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favour, an order made by the Judge directing the sum so paid in to be paid out to the defendant, was set aside, and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant. *O'Neil* v. *Hobbs*, 29 O. R. 487.

Payment into Court by Garnishees—*Effect of — Judgment — Subsequent Action—Costs of.*]—See *Pickard* v. *Tims*, 19 P. R. 109.

Pleading—*Action Removed into Superior Court.*]—A claim in a division court for $40, for "detention of plaintiff by defendants on a journey from Toronto to Detroit and back (the journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back)," was removed by certiorari into the Queen's bench, where the declaration was in contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar, considering the want of technicality in division court pleadings. *Hunter* v. *Grand Trunk R. W. Co.*, 6 P. R. 67.

Promissory Note — *Default Judgment — Production of Note.*]—In a suit in a division court upon a negotiable instrument, where the summons is specially indorsed, and defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of such instrument. *In re Drinkwater* v. *Clarridge*, 8 P. R. 504.

Promissory Note — *Lost Note — Indemnity.*]—The non-filing of a bond of indemnity for a lost note is a matter of practice, and is not a ground for prohibition. Prohibition to a division court refused. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Promissory Note — *Presentment.*]—Semble, that a recovery should not be allowed in a division court against an indorser of a note, without proving presentment or notice. *Siddall* v. *Gibson*, 17 U. C. R. 98.

Removal into Superior Court — *Stage of Proceedings.*] — Held, that the Imperial statute 43 Eliz. c. 5, as to removal of causes by certiorari, applies to cases in division courts where a jury is empannelled by the Judge, and a verdict rendered before delivery of the writ of certiorari to the Judge. Semble, that the Act in spirit applies to cases where the plaintiff's witnesses are sworn, although no jury is called. *Black* v. *Wesley*, 8 L. J. 277.

Statutes — *Regulating Procedure — Jurisdiction.*]—Statutes regulating the practice and procedure of a court apply only to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question. *Ahrens* v. *McGilligat*, 23 C. P. 171.

Style of Cause — *Firm Name — Amendment.*]—See *Lang* v. *Thompson*, 16 P. R. 516, *post* PARTNERSHIP.

XIV. Prohibition.

1. *Application for.*

(a) *Affidavits and Papers, Intituling.*

Divisions of High Court—*Amendment.*] Where a defendant, upon being sued in a division court, filed a notice disputing the jurisdiction and served a notice of motion for prohibition to the division court, on the ground of want of jurisdiction, but did not intitule his notice of motion, nor the affidavit filed in support of the motion, in any division of the high court of justice:—Held, not a fatal objection, but one which could and should be amended under Rule 474, O. J. Act. *Re Olmstead* v. *Errington*, 11 P. R. 366.

Style of Court and Cause.]—See *Siddall* v. *Gibson*, 17 U. C. R. 98; *In re Miron* v. *McCabe*, 4 P. R. 171; *In re Burrowes*, 18 C. P. 493.

(b) *Costs of Application.*

When Awarded — *Discretion.*] — By R. S. O. 1877 c. 52, s. 2, a successful party on application for a writ of prohibition is entitled to and should be awarded costs, unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case, reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a division court. *Re McLeod* v. *Emigh* (2), 12 P. R. 503.

See, also, *Archibald* v. *Buskey*, 7 P. R. 304; *Robertson* v. *Cornwell*, 7 P. R. 297; *Kinsey* v. *Roche*, 8 P. R. 515; *Friendly* v. *Needler*, 10 P. R. 267; *Re Olmstead* v. *Errington*, 11 P. R. 366.

(c) *Forum.*

Judge in Chambers.]—See *In re Kemp* v. *Owen*, 10 L. J. 269.

(d) *Time for Application.*

Upon proceedings being taken in a division court in an action in which that court has not jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought, and the fact of no notice of statutory defence being given under s. 92 of R. S. O. 1877 c. 47, does not affect the defendant's right to prohibition. *In re Summerfeldt* v. *Worts*, 12 O. R. 48.

If the right to prohibition exists, it is optional with the defendant to apply at the outset of the division court proceedings, or he may wait till the latest stage of appeal so long as there is anything to prohibit. *In re Brazill* v. *Johns*, 24 O. R. 209.

See Re Olmstead v. *Errington*, 11 P. R. 366.

2. *Error in Law.*

Attachment of Debts—*Superseding by Assignment for Creditors.*]—After the recovery of judgment in a division court against the primary debtor and garnishee, but before the payment of the amount recovered, the debtor made an assignment for the benefit of creditors under R.S. O. 1897 c. 147, whereupon an application was made by the assignee to the division court Judge for an order under s. 200 of R. S. O. 1897 c. 60, discharging the debt from the attachment, upon the ground that it had been superseded by the assignment, which was refused:—Held, that the matter being one within the jurisdiction of the Judge, prohibition would not lie. *In re Dyer* v. *Evans*, 30 O. R. 637.

Interpretation of Statute—*Employee.*] —The determination by a division court Judge of the question, depending upon the construction of certain statutes, whether a medical health officer of a city was an employee within the meaning of R. S. O. 1877 c. 47, s. 125, is reviewable on a motion for prohibition. *In re Macfie* v. *Hutchinson*, 12 P. R. 41, 167.

Interpretation of Statute — *Husband and Wife—Magistrate's Order for Payment of Maintenance Money.*]—Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given. And where a wife obtained a magistrate's order under 51 Vict. c. 23, s. 2 (O.), for payment by her husband of a weekly sum for her support:—Held, that her remedies were limited to those given by the statute, and that an action in the division court for arrears of payments under the order could not be maintained against the husband. The facts not being in dispute, prohibition to the division court was granted on the ground that the Judge in that court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a court and that an action upon it would lie. *Re Sims* v. *Kelly*, 20 O. R. 291.

Interpretation of Statute — *Jurisdiction.*]—Prohibition will not lie to a division court merely because the Judge has erred in his construction of a statute, where he does not by this error in construction give himself jurisdiction he does not in law possess. Judgment in 19 O. R. 487 reversed. *In re Long Point Co.* v. *Anderson*, 18 A. R. 401.

See Siddall v. *Gibson*, 17 U. C. R. 98.

3. *Excessive Amount.*

Interest—*Prohibition quousque.*]—Where a division court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Biette*, 21 O. R. 595.

Interest—*Prohibition quousque — Undertaking.*] — Judgment was recovered in a division court for $108.63, being $100 balance due and $8.63 interest on a document signed

by defendants, namely: "To G. T., we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the amount to $2,000:" —Held, that the document, even if a note, under s. 82 of the Bills of Exchange Act, 53 Vict. c. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore, the action being merely for breach of contract, the judgment was in excess of the jurisdiction, which is limited to $100, but that prohibition would only go for the excess. *Trimble* v. *Miller*, 22 O. R. 500.

Interest — *Prohibition quousque — Severable Claim.*] — The summons in a division court plaint stated the plaintiffs' claim to be $109.73, the amount of an account with interest:—Held, that the amount claimed was beyond the jurisdiction of the division court, as defined by s. 70, s.-s. (1), cl. (*b*), of R. S. O. 1887 c. 51; but, as the claim for interest was severable, the prohibition should be limited to the excess over $100. Trimble v. Miller, 22 O. R. 500, followed. *Re Lott* v. *Cameron*, 29 O. R. 70.

Right of Judge to Amend by Striking off Excess.]—Where a claim for an account beyond the jurisdiction of the division court is brought in that court, the Judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction. *Cleveland Press* v. *Fleming*, 24 O. R. 335.

See ante, XI. 1.

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4. *Irregularity in Procedure.*

Effect of.]—Where the Judge has jurisdiction over the subject-matter of the suit, prohibition will not go for irregularities in mere matters of practice. *In re McLean* v. *McLeod*, 5 P. R. 467.

Filing Affidavit.]—The transgression of a rule of practice (requiring the filing of an affidavit within a certain time) forms no ground for a motion for prohibition. *Fee* v. *Mellhargey*, 9 P. R. 329.

Revivor—*Absence of Notice.*]—A motion for prohibition to a division court, on the ground that the action was revived by the administrator of the plaintiff without serving a summons or notice on the defendant, as required by the division court rules, was refused, the irregularity complained of being a mere matter of practice, and therefore not reviewable in prohibition. *Re McKay* v. *Palmer*, 12 P. R. 219.

Summons—*Issue in Blank.*]—The issue by the clerk of a division court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of s. 44 of the Division Courts Act, R. S. O. 1887 c. 51, does not affect the jurisdiction of the division court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the division court. *Re Gerow* v. *Hogle*, 28 O. R. 405.

See Zaritz v. *Mann*, 16 C. L. J. 144.

5. *Questions of Fact.*

Agency.]—On an application for a prohibition to a division court after judgment and execution, where the question of jurisdiction depends upon disputed facts—as in this case, upon whether the person by whom the bargain sued upon was made, acted as plaintiff's or defendant's agent—if the division court Judge has decided this question on evidence, and found in favour of his jurisdiction, the court will not interfere with his finding; but here, there having been no such decision, and the want of jurisdiction being clear upon the affidavits filed, a prohibition was granted. *Stephens* v. *Laplante*, 8 P. R. 52.

Corporation—*Existence of.*]—Motion for prohibition to a division court on the ground that the Western Fair Association did not exist in fact or in law, and could have no title to the grand stand in dispute, and therefore the court had no jurisdiction to enforce the judgment in the suit:—Held, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition. *Re Western Fair Association* v. *Hutchinson*, 12 P. R. 40.

Fixtures or Chattel.]—The plaintiff sued in a division court for the conversion of a mirror, which the defendant contended was annexed to the freehold and had passed to him therewith. The Judge in the division court found that the mirror was a chattel, and gave judgment for the plaintiff:—Held, that, the Judge having found as a fact that the mirror was a chattel, his decision should not be interfered with by way of prohibition. *Re Bushell* v. *Moss*, 11 P. R. 251.

Money Handed by Prisoner to Constable — *Attachment.*] — The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnish this money by division court suits. The Judge in the division court found that the money was handed over voluntarily, and determined that it could be garnished:—Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior court, and that prohibition would not lie. *Re Field* v. *Rice*, *Re Ford* v. *Rice*, 20 O. R. 309.

See In re Jenkins v. *Miller*, 10 P. R. 95 (*ante* XI. 2); *In re Sebert* v. *Hodgson*, 32 O. R. 157 (*ante* XI. 10).

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6. *Reservation of Judgment.*

Day Named—*Judgment not Given till a Later Day—Acquiescence.*]—Where a Judge in an action in a division court has pronounced a judgment otherwise than in accordance with the directions of s. 144 of the Division Courts Act, R. S. O. 1887 c. 51, such judgment can, upon motion for prohibition, be sustained only upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the Judge has actually adopted in delivering his judgment, or that he has subsequently acted in such a manner as to waive his right to complain. And where at the trial of an action in a division court judgment was postponed till a named day, but was not then given, and two

subsequent days were successively named by the Judge, but judgment was not actually given till three days later than the latest day named; and, upon motion for prohibition, it was not shewn that the party moving had ever agreed that the judgment might be given without previously naming a day for its delivery, and had not acted so as to waive his right to complain, an order was made prohibiting the enforcement of the judgment. *Re Wilson* v. *Hutton*, 23 O. R. 29.

Day not Named—*Absence of Notice.*]—Prohibition will lie to restrain proceedings under a judgment delivered without the notice required by s. 144 of the Division Courts Act, R. S. O. 1887 c. 51. In re Tipling v. Cole, 21 O. R. 276, approved. Judgment in 22 O. R. 568 affirmed. *In re Forbes* v. *Michigan Central R. W. Co.*, *In re Murphy* v. *Michigan Central R. W. Co.*, 20 A. R. 584.

Day not Named—*Garnishee Summons.*]—Section 144 of the Division Courts Act, R. S. O. 1887 c. 51, which provides that when a Judge reserves judgment he shall name a subsequent day and hour for the delivery thereof, applies as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case, and must be strictly complied with. Where a division court Judge reserved judgment, indorsing the summons "judgment reserved till," but did not name a subsequent day and hour for the delivery thereof, nor adjourn the trial, prohibition was granted to restrain further proceedings, no acquiescence being shewn on the part of the applicants. *Re Tipling* v. *Cole*, 21 O. R. 276.

Day not Named—*Notice*—*Acquiescence.*]—The division court Judge, all parties being present and not objecting, postponed the delivery of his judgment without naming a day or hour for delivery thereof. On the following day the Judge sent his written judgment to the clerk of the court, who within three days notified the parties. The defendants attended and perused the judgment, and neglected to move for a new trial until after execution had been issued, when they applied to set aside the judgment, and this being refused, an application was made for a prohibition:—Held, that, even if the Judge had exceeded his jurisdiction in making such postponement, defendants were not entitled to a prohibition, as there was no want of jurisdiction apparent on the face of the proceedings, and defendants had acquiesced in the course taken by the Judge. *Re Smart and O'Reilly*, 7 P. R. 364.

Day not Named—*Prejudice*—*Waiver.*]—The fact that a division court Judge has reserved judgment without fixing a day and time for the delivery thereof, is only ground for prohibition when the party applying has been prejudiced thereby, and has not consented to the course adopted, and has not subsequently waived the objection. *Re Bank of Ottawa* v. *Wade*, 21 O. R. 486.

Hour not Named—*Judgment before Day Named*—*Notice.*]—Where a district court Judge, at the close of the hearing of a cause, said he would take time to consider, and deliver judgment at his chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the clerk of the court, who read it in his office to the agents of both parties on that day:—Held, a sufficient delivery of a written judgment within s. 106 of the Division Courts Act. *In re Burrowes*, 18 C. P. 493.

Hour not Named—*Knowledge*—*Acquiescence.*]—Where a division court Judge reserved judgment, but did not adjourn the trial, and indorsed on the summons "judgment in a week," not naming any hour, and on the day named delivered judgment, which was brought to the defendant's knowledge, whereupon he moved on the merits for a new trial, or to set aside the judgment, which was refused, otherwise acquiescing in the judgment, prohibition was refused. *Re McPherson* v. *McPhee*, 21 O. R. 280 (*n.*) Affirmed, 21 O. R. 411.

See In re Moore v. *Farquhar*, 15 C. L. T. Occ. N. 103 (*ante*, XII.)

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7. *Waiver or Acquiescence.*

Defence not Set up Below—*Coverture.*]—Where the defence of coverture is not set up in the division court, a married woman defendant cannot have prohibition on the ground of coverture. *Read* v. *Wedge*, 20 U. C. R. 456.

Motion for New Trial—*Delay.*]—The plaintiff sued defendant in the division court in a county in which he did not reside, and in which the cause of action did not arise. Defendant filed a notice disputing the claim, but he was not represented at the trial, as the agent employed by him was not in court when the case was called on, and judgment was given for the plaintiff. Defendant applied to the Judge of the division court for a new trial, on the grounds (1) that the suit was not entered in the proper court, and (2) that before action he paid the claim. A new trial was granted upon payment of costs by a given day, which were not paid, and defendant applied, after the day appointed for payment, for a prohibition:—Held, that the defendant was entitled to a prohibition; but, as he had applied to the division court Judge for a new trial, and in view of the delay, he was refused his costs of the application. Semble, that when an action is brought in a division court in which neither the cause of action arose nor the defendant resides, and proceeds to judgment with the defendant's acquiescence, his right to move afterwards for a prohibition is gone. *Robertson* v. *Cornwell*, 7 P. R. 297.

Motion for New Trial—*Paying Money into Court.*]—The defendant in an action in the 1st division court in the county of York, brought upon a promissory note dated at Toronto, but actually made at Wiarton, filed a notice disputing the jurisdiction. Judgment, however, was given in the action against him in his absence, and he moved for and obtained a new trial, paying the money into court as a condition, and afterwards applied for an order of transference, which was refused. Before the new trial he applied for a prohibition:—Held, that by moving for a new trial and paying the money into court, the defendant had not waived his right, and the want of jurisdiction being clear, prohibition should be granted. *In re Brazill* v. *Johns*, 24 O. R. 209.

Motion to Set aside Judgment.]—Held, that an application by the defendant to

the inferior court to set aside the judgment was not a bar to the motion for prohibition:—Semble, it was a convenient practice to move in the inferior court. Decision in 13 P. R. 28 reversed. *Re McGregor* v. *Norton*, 13 P. R. 223.

Non-Disclosure of Want of Jurisdiction in Court below.]—Where the court has jurisdiction, except from the existence of undisclosed facts within the knowledge of the defendant, who allows the court to proceed to judgment without disclosing the want of jurisdiction, the interference of the court by prohibition is discretionary. Where in a suit in the division court a new trial was applied for and refused on the merits, no objection being taken to the jurisdiction, and an application was afterwards made for a prohibition, on the ground that the note was not made nor did the defendants reside in the county in which the action was brought:—Held, that defendants were not entitled to a prohibition; but, as the plaintiff knew that defendants did not reside within the jurisdiction, it was refused without costs. *Archibald* v. *Bushey*, 7 P. R. 304.

Prima Facie Jurisdiction—*Defendant not Appearing at Trial—Delay.*]—A defendant entered a notice disputing the plaintiff's claim in a division court suit, and objecting to the jurisdiction of the court, but did not appear at the trial, when the Judge, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary established a primâ facie case of jurisdiction, entered a judgment in favour of the plaintiff for $44.75. On motion for prohibition on the ground of want of jurisdiction:—Held, following Archibald v. Bushey, 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary; that it would be unfair to place upon the Judge trying the case, the burden of cross-examining the witnesses to ascertain jurisdiction; that if a primâ facie case of jurisdiction is made out, the defendant is himself to blame if it is not displaced; and, as neither a good defence on the merits was shewn, nor despatch used in making the application, the motion was refused with costs. *Friendly* v. *Needler*, 10 P. R. 267.

Submitting Questions to Jury without Objection.]—In a division court action for the price of goods sold, the Judge, without objection taken, submitted questions to the jury, and on their answers entered a verdict and judgment for the plaintiff after the defendant had, however, put in a written argument in his own favour:—Held, on motion for prohibition, on the ground that the defendant was entitled to a general verdict of the jury, and that the Judge had no right to submit questions and enter a verdict on them, that, however this might be, the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition. *In re Jones* v. *Julian*, 28 O. R. 601.

Taking Chances at Trial.]—An applicant for prohibition against a Judge of a division court for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the Judge, and taken no exception at the time to the jurisdiction, is precluded by his own act from objecting to the jurisdiction after judgment entered and execution issued in the division court. *In re Burrowes*, 18 C. P. 493.

S. Other Cases.

Appeal from Division Court—*Prohibition pending Appeal.*]—No case exists for prohibition to a division court pending an appeal from that court to the court of appeal under 43 Vict. c. 8 (O.) *Wiltsey* v. *Ward*, 9 P. R. 216.

Appeal to Division Court from Magistrate's Order—*Notice of Appeal—Amendment.*]—By s. 15 of R. S. O. 1887 c. 139, which by s. 11 of 51 Vict. c. 28 (O.), is to regulate appeals to division courts from magistrates' orders for payment of maintenance money by husbands to wives, it is provided that the appellant shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, eight days at least before the holding of the court at which the appeal is to be heard. Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal:—Held, on a motion for prohibition, that the Judge presiding at the division court had no power to allow the notice to be amended. *Re Coe* v. *Coe*, 21 O. R. 409.

Enforcement of Committal Order.]—See *Re Dowler* v. *Duffy*, 29 O. R. 49 (ante, X.)

Nature of Claim—*Summons.*]—The nature of the claim, as appearing on the summons, is the claim recognizable on a motion for prohibition. *Meek* v. *Scobell*, 4 O. R. 553.

Refusal of Evidence.]—The refusal of evidence is not ground for prohibition. An order having been made in a division court upon judgment summons committing a defendant under s. 240, s.-s. 4 (c), of R. S. O. 1887 c. 51, for having made away with his property, it is not ground for prohibition that the Judge has refused to allow the defendant under examination to make explanations as to his dealings with money lent by and repaid to him after judgment. *Re Reid* v. *Graham*, 25 O. R. 573. Reversed on another point, 26 O. R. 126.

Repayment to Garnishee.]—If necessary, the writ of prohibition should go to compel the repayment to the garnishee of money paid by him into the division court. *Re Johnston* v. *Therrien*, 12 P. R. 442.

XV. Transcript of Judgment.

To Another Division Court—*Effect of—Prohibition to Original Court.*]—The defendant filed a notice disputing the claim and the jurisdiction of a division court in Middlesex, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to a division court in Simcoe:—Held, that the judgment did not thereby become a judgment of the Simcoe court, and prohibition to the Middlesex court was granted after such transmission. *Re Elliott* v. *Norris*, 17 O. R. 78.

To County Court—*Effect of—Examination of Judgment Debtor—Ca. Sa.*]—A transcript of judgment in the division court for $83, having been filed in the county court:—Held, that it thereby became a judgment of the county court, so that under C. S. U. C.

c. 24, s. 41, defendant could be examined under it. 2. That under s. 41 a ca. sa. might be issued by the Judge for unsatisfactory answers, though the judgment was for less than $100. This section is to be read as independent of s. 12, and the ca. sa. under it being issued by the Judge, and not by the plaintiff, there is no limit as to the sum. *Kehoe* v. *Brown*, 13 C. P. 549.

To County Court — *Effect of—Form of Transcript—Judgment Summons.*]—A transcript may be validly issued from a division court to the county court notwithstanding the pendency in the division court of proceedings by way of judgment summons, but, as soon as the transcript is issued and filed, the judgment becomes a judgment of the county court, and the judgment summons proceedings cannot be continued. The form of a transcript considered. *Ryan* v. *McCartney*, 19 A. R. 423.

To County Court—*Necessity for Return of Execution.*]—Held, under C. S. U. C. c. 19, s. 142, that a transcript omitting to state the issue and return of a fi. fa. goods was a nullity, and therefore that a fi. fa. lands could not issue thereon. *Farr* v. *Robins*, 12 C. P. 55.

To County Court — *Necessity to State Proceedings in Division Court.*]—Upon ejectment for land which had been sold and conveyed by the sheriff under a ven. ex. issued upon a county court judgment, based upon a division court judgment, the sale was held void, inasmuch as the transcript of the judgment from the division court did not conform to the requirement of s. 142 of the Division Courts Act, by stating the proceedings in the cause in the court below. *Jacomb* v. *Henry*, 13 C. P. 377.

To County Court—*Necessity to State Proceedings in Division Court — Attachment.*]—Ejectment having been brought for land sold and conveyed by the sheriff to the plaintiff under a writ of ven. ex. issued upon a county court judgment, based upon a division court judgment, recovered on proceedings commenced by attachment and summons issued the same day:—Held, that the sale under the ven. ex. was void, by reason of the transcript of the judgment from the division court not having shewn that the proceedings in that court were commenced by attachment. *Hope* v. *Graves*, 14 C. P. 393.

To County Court—*Necessity for Return of Execution.*]—Under the Division Courts Act, C. S. U. C. c. 19, ss. 142, 143, 145, an execution against goods and chattels must first issue out of the division court in which judgment was originally recovered, and be returned nulla bona, before a transcript of the judgment can be transmitted and filed in a county court. Where, therefore, without the issue of such execution and its return nulla bona, a transcript was filed in the county court, under which plaintiff's lands were seized by the sheriff and sold:—Held, that the sale was void. *Burgess* v. *Tully*, 24 C. P. 549.

To County Court—*Necessity for Return of Execution.—Nullity.*]—Where a judgment was obtained in a division court in one county, and, without execution being issued theron, a transcript was issued to a division court in another county and an execution issued thereon and returned nulla bona, and a transcript then obtained to the county court of the latter county:—Held, that the so-called judgment of the county court upon the transcript was a nullity, since the transcript did not shew the return to the writ in the original division court, as required by R. S. O. 1887 c. 51, s. 223. *Jones* v. *Paxton*, 27 C. L. J. 596.

See the next case.

To County Court—*Previous Transcript to Another Division Court — Proceeding.*] — Under the Division Courts Act, R. S. O. 1887 c. 51, and rules, the issue of execution and return of nulla bona in a foreign division court, to which a transcript has previously been sent, is a sufficient foundation for a transcript from the home court to the county court under s. 223 et seq. of that Act. Burgess v. Tully, 24 C. P. 549, distinguished. A transcript to a county court is not a proceeding within the purview of s. 24 of 52 Vict. c. 12 (O.), providing that no further proceedings shall be had in a division court after a transcript to another divisjon court, without an order or affidavit. *Jones* v. *Paxton*, 19 A. R. 163.

To District Court — *Fi. Fa. Goods—Fi. Fa. Lands—Sale under.*]—Upon a transcript from a division court to a district court, it is not necessary to issue a fi. fa. goods from such district court before a valid sale can take place under a fi. fa. lands issued therefrom. Kehoe v. Brown, 13 C. P. 549, observed upon. *Daby* v. *Gehl*, 18 O. R. 152.

XVI. Miscellaneous.

Bonds Made before 1st July, 1869.]—See *Re Franklin*, 8 P. R. 470.

Injunction.]—Quære, whether the court of chancery will in any case grant an injunction to restrain an action in the division court. *Heward* v. *Harris*, 5 Gr. 226.

Pleading — *Removal of Action into Superior Court—Departure.*]—A claim in a division court for $40 for "detention of plaintiff by defendants on a journey from Toronto to Detroit and back (journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back,)" was removed by certiorari into the Queen's bench, where the declaration was on contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar considering the want of technicality in division court pleadings. *Hunter* v. *Grand Trunk R. W. Co.*, 6 P. R. 67.

Promissory Note — *Seizure under Division Court Execution—Action on, in Superior Court—Real Plaintiff.*]—In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, C. S. U. C. c. 19, s. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute, but that

defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but semble, that it is not essential. The real plaintiff need not shew upon the trial that security for costs has been given as required by s. 154. If not given, defendants may move to stay proceedings, or perhaps may plead it in bar of the action. Quære, as to the meaning of that clause in the statute. *McDonald* v. *McDonald*, 21 U. C. R. 52.

See CERTIORARI, I. 4—MANDAMUS, II. 1—NOTICE OF ACTION, I.

DIVISIONS OF HIGH COURT.

See PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, VII.

DIVISIONAL COURTS.

See HIGH COURT OF JUSTICE, II.—PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, VI.

DIVORCE.

See FOREIGN LAW—HUSBAND AND WIFE, V.

DOCTOR.

See MEDICINE AND SURGERY.

DOCUMENTS, PRODUCTION AND INSPECTION OF.

See EVIDENCE, XII.

DOG.

See ANIMALS, III.

DOMICILE.

Arrest—*Domicile of Debtor.*]—See *Cartwright* v. *Hinds*, 3 O. R. 384, *ante* ARREST, II. 1.

Arrest—*Foreign Domicile of Debtor—Change of Residence to Avoid Arrest.*]—See *Kerstetman* v. *McLellan*, 10 P. R. 122, *ante* ARREST, II. 1.

Assessment—*Change of Domicile—Intention.*]—By the St. John City Assessment Act (59 Vict. c. 61), s. 2, "for the purposes of assessment, any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the city of St. John, shall be deemed * * an inhabitant and resident of the said city." J. carried on business in St. John as a brewer up to 1883, when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York, where he carried on the business of buying and selling stocks and securities, having offices for such business, and living at a hotel, paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John, visiting his children and taking recreation. He had no business interests there, but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York, and took no part in municipal matters there. Being assessed in 1887 on personal property in St. John, he appealed against the assessment unsuccessfully, and then applied for a writ of certiorari with a view to having it quashed:—Held, that, as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his bonâ fide intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile, and that in St. John had been abandoned within the meaning of the Act. *Jones* v. *City of St. John*, 30 S. C. R. 122.

Divorce—*Validity of.*]—The validity of a divorce depends upon the domicile of the parties. *Guest* v. *Guest*, 3 O. R. 344, 570; *Magurn* v. *Magurn*, 11 A. R. 178.

Husband and Wife—*Alimony.*] — The writ of ne exeat granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife. *McDonald* v. *McDonald*, 5 L. J. 66.

Husband and Wife — *Alimony.*] — A woman left her husband in consequence of disagreements, without any threats of personal violence, or any well founded apprehension on her part of violence; and the husband expressed his readiness and willingness to take her back. The wife failed to return, however, and the husband left this Province and went to reside permanently in the United States. The wife, without any communication with her husband, or any intimation of a desire on her part to renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion:—Held, that, in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence. *Edwards* v. *Edwards*, 20 Gr. 392.

Intestate's Domicile—*Administration—Foreigner—Surrogate Court.*]—The law of England as to granting probate or committing letters of administration, is the law to be

administered by our probate and surrogate courts. Where a person domiciled in the state of New York died suddenly in itinere, in the county of Wentworth, in this Province, having trifling personal effects about him of less value than £5:—Held, that the surrogate court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted by the surrogate court only to an inhabitant of the Province. *Grant* v. *Great Western R. W. Co.*, 7 C. P. 438. Affirmed, 5 L. J. 210.

Matrimonial Domicile—*Quebec Law.*]—See *Wadsworth* v. *McCord*, 12 S. C. R. 466; *McMullen* v. *Wadsworth*, 14 App. Cas. 631.

Parents' Domicile—*Custody of Child.*]—The parents of a child were foreigners. They lived apart, and had brought cross-actions for divorce in the United States courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her, on the ground that by the law of the state of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit, in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners, and the domicile of the child not having, under the circumstances, been changed, the law of the state of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive (23 Vict. c. 24), it was competent to consider the "cause assigned" by the father; and so it was held (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother, having voluntarily given up the custody of the child to the father, could not, under the present facts, have it re-delivered to her. In *re Kinney*, 6 P. R. 245.

Property and Civil Rights—*Will—Personal Estate—Rights of Legatees out of Province.*]—A will having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the Province of Ontario could not be affected by any Act of the Legislature of this Province, the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and therefore the contingent interest of the grandchildren was not "property or a civil right" within the Province. *In re Goodhue*, 19 Gr. 366.

Property and Civil Rights—*Debts Domiciled out of Province—Powers of Provincial Legislature.*]—The local Legislatures are not restricted by the words "Property and Civil Rights in the Province" to legislation respecting bonds held therein; and where debts or other obligations are authorized to be contracted under a local Act passed in relation to a matter within the power of the Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province. *Jones* v. *Canada Central R. W. Co.*, 46 U. C. R. 250.

Service of Process—*Domicile of Defendant—Without the Province.*]—See *Wanzer Lamp Co.* v. *Woods*, 13 P. R. 511, *post* (PRACTICE.)

Testator's Domicile—*Change of.*]—Held, upon the facts, that, although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U. S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 18 O. R. 36.

See Jessup v. Simpson, 14 U. C. R. 213; *Bloomfield* v. *Brooks*, 16 C. L. J. 145; *Swaizie* v. *Swaizie*, 31 O. R. 324.

See FOREIGN LAW.

DOMINION LANDS ACT.

See CROWN, II. 2.

DOMINION LICENSE ACT.

See INTOXICATING LIQUORS, III.

DONATIO MORTIS CAUSA.

See GIFT, III.

DORMANT EQUITIES ACT.

(18 Vict. c. 124, C. S. U. C. c. 12, ss. 59, 60.)

Application of.]—This Act applies only to cases where the cause of suit arose before the passing of the Chancery Act, 1837. *Silcox* v. *Sells*, 6 Gr. 237.

See Beckitt v. *Wragg*, 6 Gr. 454, 7 Gr. 220; *Caldwell* v. *Hall*, 6 L. J. 141, 7 L. J. 42; *Attorney-General* v. *Grasett*, 6 Gr. 485, 8 Gr. 130; *Tiffany* v. *Thompson*, 9 Gr. 244; *Malloch* v. *Pinhey*, 9 Gr. 550; *McDonald* v. *McDonell*, 2 E. & A. 393; *Arner* v. *McKenna*, 9 Gr. 226.

DOUBLE VALUE.

See DISTRESS, I. 3 (*b*).

DOWER.

[The Dower Act of Ontario, 32 Vict. c. 7, by which C. S. U. C. c. 28, and 24 Vict. c. 40, were repealed, was retrospective. *Re Tate*, 5 C. L. J. 260.]

I. ACTIONS AND SUITS FOR.

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2. *Damages and Costs.*
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(b) *Of Seisin*, 2092.
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VII. Rights of Purchasers where there is Outstanding Dower, 2138.

VIII. Sale of Right to Dower under Execution, 2139.

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I. Actions and Suits For.

1. *Costs.*

Admission of Title — *Jurisdiction of Court of Chancery—Demand.*]—The plaintiff filed a bill for dower. Defendant admitted her title, but submitted that the proper remedy was at common law under the Dower Act of Ontario, and claimed the same benefit of that objection as if he had demurred:—Held, that the jurisdiction of the court of chancery in cases of dower had not been ousted by that statute; and that the defendant was properly made to pay costs up to and inclusive of the hearing:—Held, also, that under the existing law no demand is necessary before suit. *Grieve* v. *Woodruff*, 1 A. R. 617.

Default Judgment.] — See *Gourlay* v. *Gourlay*, 27 U. C. R. 178.

Default Judgment—*Demand.*]—In dower. *Service.*]—Judgment was signed in default tion, and judgment allowed to go by default, costs may be recovered. *Harris* v. *Morden*, 17 U. C. R. 278; *Street* v. *Rowe*, 8 C. P. 213

Default Judgment — *Demand—Affidavit of Service.*]—Quære, when the tenant does not plead, so that there is no trial, whether the right to costs cannot be shewn by producing the demand and affidavit of service before the master on taxation. *Scratch* v. *Jackson*, 26 U. C. R. 189.

Default Judgment — *Demand—Affidavit of Service.*]—Judgment was signed in default of plea to a declaration which averred a demand of dower one month before action, and that the action was brought in less than one year from such demand; but no affidavit of service of the demand was produced to the master on taxation. An offer to assign dower was made before action brought:—Held, that the defendant was entitled to costs, and that the judgment was regular. *Gilleland* v. *Reid*, 5 P. R. 96.

Security for Costs.]—See *Nolan* v. *Reid*, 1 P. R. 264.

Unsuccessful Claim — *Will—Extrinsic Evidence.*]—Where a widow insisted on her right to dower as well as to the bequests made by the will, the court allowed her her costs, although unsuccessful in such contention; the question having arisen from the terms of the will, and dower not having been in terms excluded, but having been held to be excluded on extrinsic evidence. *Becker* v. *Hammond*, 12 Gr. 485.

Unreasonable Defence.]—If the bill is simply for dower, and the title is admitted, no costs will be given, but when the defendant makes an unreasonable defence and fails, he will be made to pay costs. *Craig* v. *Templeton*, 8 Gr. 483.

See 2.

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2. *Damages and Costs.*

(a) *Amount and Mode of Estimating Damages.*

Detention.] — The mode of estimating damages for the detention of dower is provided for by 32 Vict. c. 7, s. 21 (O.). See *Norton* v. *Smith*, 20 U. C. R. 213 (affirmed, 7 L. J. 236); *Buck* v. *McCallum*, 13 C. P. 163.

Detention — *Set-off — Mitigation.*]—Demandant's residence on the premises, in the family and at the expense of the heir-at-law, for part of the time between the death of her husband and her recovering judgment, is not admissible in evidence as a set-off to her damages for the detention, though proper to go to the jury in mitigation. *Robinet* v. *Lewis*, Dra. 260.

Increase—*Motion—Time.*]—Motion to increase damages refused where not made until the second term after the trial. *Watson* v. *Terwilleger*, 1 U. C. R. 21.

Sale of Land—*Compensation.*]—In case of a sale of land, a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money; the value is to be computed with reference to the nature of the property. *Stewart* v. *Hunter*, 2 Ch. Ch. 336.

Timber — *Removal—Proceeds—Costs.*]—In case of land of which a widow is dowable, but in which her dower has not been set out, if the timber is cut down, she is entitled to the income arising from one-third of the amount produced. In such a case the widow had reason to apprehend that the owner intended to fell the whole of the wood; it was shewn that in fact he had no such intention; but he had an opportunity of undeceiving her, and did not avail himself of it:—Held, that proof that he had not the intention imputed to him did not exempt him from liability to the costs. *Farley* v. *Starling*, 18 Gr. 378.

Time for Commencement of Damages—*Death—Demand.*]—Quære, whether if a demand and refusal be pleaded and proved, damages can be computed against such a tenant from the death of the husband or only from the date of the plaintiff's demand for dower. *Ryan* v. *Fish*, 4 O. R. 335.

(b) *Right to Recover—In General.*

Arrears—*Residence on Land—Waiver.*]—Where the annual value of a widow's dower was not large, and she made no demand for it, but resided on the property with her son, the heir, during his life, having no intention of claiming dower, a claim for arrears against his estate after his death was refused. *Phillips* v. *Zimmerman*, 18 Gr. 224

Claim — *Absence of—Judgment—Execution.*]—A writ of execution for damages and costs was set aside, damages being neither claimed on the record nor awarded in the judgment. *Davis* v. *M'Nab*, 6 O. S. 157.

Detention — *Arrears — Dower Act.*]—Quære, whether damages for detention of dower, or for arrears of dower, can be recovered under the Dower Act. *Giles* v. *Morrow*, 1 O. R. 527.

Detention — *Demand — Refusal.*] — R. brought an action for dower against F., the tenant of the freehold, who claimed title through the devisee of her husband, and indorsed her writ with a claim for damages for detention of dower. F. appeared and admitted his tenancy, and R.'s right to dower:—Held, that R. might, nevertheless, go on and recover damages for the detention from and after demand for dower made by her on F. Held, also, that R. S. O. 1877 c. 55 has not taken away or diminished the right of a dowress to damages as well as mesne profits, as for detention, against all persons and in all cases where they were recoverable before 10th August, 1859. Held, further, that, at all events since the O. J. Act, s. 17, s.-s. 10, a tenant of the freehold claiming as in this case, may plead that he has at all times since he became such tenant, been ready and willing to render the plaintiff her dower, and if the plaintiff desires to avoid that plea she should reply a demand and refusal. *Ryan* v. *Fish*, 4 O. R. 335.

Husband Dying Seised or not.] — A suggestion might be entered after final judgment that the husband died seised, and an inquiry had concerning the damages since the death, although the tenant was the alienee of the heir. *Robinet* v. *Lewis*, Dra. 228.

In dower neither damages nor costs can be recovered when the husband did not die seised. *Dayton* v. *Auldjo*, 6 O. S. 143; *Lockman* v. *Nesse*, 5 O. S. 505; *Walker* v. *Boulton*, 6 O. S. 553.

The rule is the same in equity. *Losee* v. *Armstrong*, 11 Gr. 517.

Where the husband dies seised, unless the tenant pleads tout temps prist, the demandant may recover damages without setting forth or shewing a demand. *Empey* v. *Loucks*, 8 U. C. R. 374.

Action for dower—no suggestion on the record that the husband died seised. Pleas, 1. that the tenant is, and always has been ready to render dower; 2. tout temps prist, and a tender of dower and refusal before action brought. Replication to first plea, praying judgment of demandant's dower to be assigned to her; to second plea, a demand and refusal by tenant—the rejoinder to which was demurred to:—Held, that upon this record there could be no assessment of damages. *Hawkshaw* v. *Hodgins*, 11 U. C. R. 71.

Plea, tout temps prist. There was no averment that the husband died seised and no damages claimed, but the jury found for the plaintiff and 1s. damages:—Held, that the damages must be struck out. *Humphries* v. *Barnett*, 16 U. C. R. 463.

Held, that a widow cannot recover damages for detention of dower when her husband did not die seised, even though she made demand for dower. *Morgan* v. *Morgan*, 15 O. R. 194.

Improvements — *Rentable Value.*]—The mere fact that at the death of or alienation by the husband his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages, if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or vendee; as in such a case a portion of the rent is attributable to the land. *Wallace* v. *Moore*, 18 Gr. 560.

Judgment for Seisin — *Effect of.*]—A judgment for seisin of dower, under s. 16 of 32 Vict. c. 7 (O.), is final, and there is no provision in such a case entitling a demandant to any damages, nor any proceeding provided for ascertaining any such damages. The Statute of Merton remarked upon and distinguished. *Linfoot* v. *Duncombe*, 21 C. P. 484.

Judgment for Seisin—*Effect of—Proceeding for Damages against one Defendant.*]—Held, following, but not assenting to, Linfoot v. Duncombe, 21 C. P. 484, that under 32 Vict. c. 7 s. 16 (O.), judgment for seisin of dower is final and conclusive; and in such a case a defendant cannot be proceeded against for damages. Where such judgment had been

signed against two only of three defendants, a declaration against the third for damages was held not irregular. *Cameron* v. *Gilchrist*, 7 P. R. 184.

Judgment for Seisin — *No Demand—Costs—Damages for Detention.*]—Held, in this case, that as no demand was made, although the plaintiff was entitled to judgment of seisin, it should be without costs; and, as defendants were always ready and willing to assign dower, plaintiff was not entitled to damages for detention. *Malone* v. *Malone*, 17 O. R. 101.

(c) Demand and Offer to Assign under 13 & 14 Vict. c. 58 and C. S. U. C. c. 28.

The tenant pleaded tout temps prist. The demandant replied, denying the tenant's readiness to assign, and averring a demand under 13 & 14 Vict. c. 58, and a refusal. The tenant traversed the refusal. It appeared that after receiving the demand the tenant gave a written notice to demandant that he was willing to assign her dower. In pursuance of this notice, the tenant and the demandant's second husband met on the ground, and the tenant then offered what he considered a third, and put up tickets to mark the boundary. The husband, however, refused this, and would not say what particular portion the demandant wanted or would take. The parties then separated, and the action was brought:—Held, that the offer proved was sufficient, and that a verdict was rightly found for the tenant. Draper, J., considered that 13 & 14 Vict. c. 58 was not intended to interfere with any right to costs existing under the old practice, or to require a demand where demandant would before have been entitled to costs without it: that the plea of tout temps prist admitted a right to damages from the commencement of the suit to the issuing, if not to the execution, of the writ of inquiry, without any suggestion that the husband died seised; and that on the pleadings, therefore, in the sale, the demandant might strictly have recovered such damage and consequently the costs; but as this was not insisted on at the trial, and the verdict was just, he concurred in refusing to interfere. *Bishoprick* v. *Pearce*, 12 U. C. R. 306. See *White* v. *Grimshawe*, 23 U. C. R. 75.

There was no suggestion in the declaration that the husband died seised, and no claim for damages. The tenant pleaded tout temps prist. Replication, a demand and refusal. Rejoinder, taking issue on the refusal. It was proved that after demand served on the tenant, under 13 & 14 Vict. c. 58, s. 5, he went to demandant's attorney, and said that he was ready and willing to assign dower whenever she would come for it, to which the attorney replied that the tenant must take his own course. The jury found for demandant and 1s. damages, and a rule having been obtained for a new trial:—Held, per Draper, J., and Burns, J., that such rule should be discharged. Per Draper J., that by pleading tout temps prist the tenant had admitted a right to damages, at least from bringing the action, which would carry costs. Per Burns, J., that the offer proved was insufficient, and in effect amounted to a refusal, and the demandant should therefore have costs; but that there could be no damages, as the husband was not proved to have died seised. *Quin* v. *McKibbin*, 12 U. C. R. 323.

The tenant having allowed judgment to go by default, demandant entered a suggestion of demand made before action brought, to which the tenant made no answer, and a venire was awarded, on which the jury found that such demand was made:—Held, that this was a trial within s. 5 of 13 & 14 Vict. c. 58, and therefore that demandant was entitled to costs. *Anderson* v. *Marriott*, 14 U. C. R. 161.

Plea, tout temps prist. Replication, a demand and refusal. Rejoinder, denying the refusal. There was no suggestion that the husband died seised. The evidence shewed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined, saying that she could not work the land, and would rather have compensation, and no portion was in fact marked out:—Held, that the issue must be found for the tenant. As the husband did in fact die seised:—Semble, that that should have been suggested on the record, and the tenant would then have been entitled to damages from the suing out of the writ, and consequently to costs. *Ryckman* v. *Ryckman*, 15 U. C. R. 266.

Where nothing appears on the record to shew that a demand of dower was served:—Semble, that the master cannot tax costs; and quære as to the proper mode of shewing that a service of demand was "made appear on the trial" so as to entitle demandant to costs under 13 & 14 Vict. c. 58, s. 5. *Humphries* v. *Barnett*, 16 U. C. R. 463.

To an action of dower, alleging a demand made pursuant to the statute, C. S. U. C. c. 28, the tenants pleaded tout temps prist. Demandant replied that she requested her dower more than one month and less than one year before action, but that the tenants did not endow her; and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenants said demandant might have her dower, but did nothing:—Held, that an issue was sufficiently formed upon the record, and that upon the evidence demandant was entitled to a verdict, and to costs. *Reid* v. *Foster*, 19 U. C. R. 298.

Demandant sued for dower as widow of J., alleging in her declaration that J. died seised, claiming damages from his death, and averring service of a demand of dower. There was no plea, and the demandant went down to assess damages:—Held, that the tenant had clearly a right to shew that J. had parted with his estate, and therefore did not die seised, though he could not dispute his seisin during coverture. The tenant proved a deed made in 1831, of the land in question, by J. to the tenant; and in reply the demandant proved another deed made in 1834, by J. to his father, to which the tenant was a subscribing witness; —Held, that, as either deed shewed the estate out of J. during his lifetime, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event, as J. could not set up the second deed to avoid the first, having made both, neither could the demandant, who claimed through him. As J., therefore, did not die seised, it was held that demandant could have

only nominal damages from the time of the demand; but that she was entitled to such damages, and the tenant was not entitled to the costs of the assessment. Semble, that a demandant failing in the action is liable to costs. *Scratch* v. *Jackson*, 26 U. C. R. 189.

Demandant averred that her husband did not die seised, and a demand pursuant to the Act, and that the tenant had been during six years next before the action in occupation and receipt of the rents and profits, of the yearly value of £15; and she claimed her dower, with the profits accrued since her husband's death, and damages for the detention. The tenant pleaded that he had always been ready and willing to render dower, and before this suit, and within a month after the demand, offered it to demandant, which she refused; to which the demandant replied that he had not always been ready and willing, &c., for he did not render to demandant her dower as alleged, but refused so to do. At the trial it appeared that the tenant served a written notice, naming a day and hour to meet demandant on the land and assign her dower, and attended accordingly, but demandant having mistaken the day appointed did not attend, and the tenant in consequence refused to do anything more:—Held, that on this evidence the tenant was clearly not entitled to succeed on the issue, and a verdict having been found in his favour a new trial was granted. Semble, that the demandant, having treated the plea as offered in bar of damages and costs only, should have signed judgment at once to recover seisin. Quære, as to the propriety and effect of an averment that the husband did not die seised, added to a claim of damages, the right to which, since C. S. U. C. c. 28, as well as before, depends on such seisin. *Cook* v. *Philips*, 23 U. C. R. 69.

Dower. Plea, tout temps prist, on which demandant signed judgment for her dower. She then entered a suggestion of demand and refusal, praying damages for the detention, on which she signed judgment by default, and assessed damages at the assizes:—Held, that such assessment was irregular, for there being no averment that the husband died seised, no damages could be recovered, notwithstanding the plea. Bishoprick v. Pearce, 12 U. C. R. 516, commented upon. *White* v. *Grimshawe*, 23 U. C. R. 75.

The offer to assign dower required by C. S. U. C. c. 28, s. 7, to deprive demandant of costs, is proved by a bonâ fide offer, shewing a concession of demandant's right, and a readiness to do what is requisite to render it; it is not necessary that the land should be staked out or assigned. The issue being upon such offer, it appeared that a demand having been made under the statute, the tenant served a notice on demandant admitting her right, and appointing a day on which he would be upon the land to assign her dower. On that day no one appeared, but on the next day demandant's son and another person sent by her came, and the tenant pointed out to them a cleared field, which he said he would give, with one-third of the bush land. This was not accepted, nor did they tell the tenant what they required:—Held, that the evidence was sufficient to go to the jury, and the court refused to disturb a verdict for tenant. Remarks upon the uncertainty of the law as to dower. *Bigger* v. *Howie*, 23 U. C. R. 399.

3. *Evidence.*

(a) *Of Marriage.*

Evidence of cohabitation and reputation of marriage will be sufficient in dower; it is not necessary to prove the marriage by persons who were present at the ceremony. *Stoner* v. *Walton*, 6 O. S. 190; *Phipps* v. *Moore*, 5 U. C. R. 16; *Graham* v. *Law*, 6 C. P. 319; *Beatty* v. *Beatty*, 17 C. P. 484; *Loscc* v. *Murray*, 24 U. C. R. 586.

But where the demandant relied upon such evidence of a marriage said to have taken place in the United States, and failed, the court, under the circumstances of this case, refused a new trial. *Street* v. *Dalsen*, 14 U. C. R. 537.

And where the demandant relied upon such evidence of an alleged marriage in Ireland many years previous, and there was a second verdict for the defendant, the court refused to interfere. *Lynch* v. *O'Hara*, 6 C. P. 259, 268-9.

In this case, irrespective of general reputation, there was evidence that defendant had told a third party he was to give demandant's husband (his brother) $100 to bring out his wife and children from Scotland, and that the husband was to execute to the defendant in return a deed of the land in question. Defendant afterwards said he had received the deed, and that the wife would bar her dower on her arrival here. On her arrival, defendant received her into his house as his brother's wife, and recognized her as such until his brother's death:—Held, good primâ facie evidence of marriage. Semble, that the recognition of demandant as his brother's wife would alone have been sufficient primâ facie evidence of their marriage, as against defendant in this action. *Beatty* v. *Beatty*, 17 C. P. 484.

A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of registry of marriage from the parish registry in Ireland:—Held, sufficient evidence of marriage against infant defendants; the adult infants by their answer admitting the marriage. *Craig* v. *Templeton*, 8 Gr. 483.

(b) *Of Seisin.*

Under the plea of ne unques seizie, possession by the husband is primâ facie evidence of a seisin in fee. *Lockman* v. *Nesse*, 5 O. S. 505.

But in this case it was held that merely giving evidence that the husband had been in possession of the estate, without proving his title, was insufficient. *Johnson* v. *McGill*, 6 U. C. R. 194.

Held, that the evidence stated in this case was insufficient to establish the husband's seisin; but on the affidavit filed the court granted a new trial on payment of costs. *Wannacott* v. *Fillater*, 11 U. C. R. 49.

It was proved that the tenant held under a conveyance made to the husband, and by the husband to another person. He admitted that

he had both these deeds in his possession, and declined to produce them on notice:—Held, ample evidence of seisin. *Matheson* v. *Mallock*, 13 U. C. R. 354.

In dower, by the widow of M., it appeared that a patent for the land issued to one K., and a witness proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents given. It was proved, however, that R., from whom defendants purchased, derived title through P., who had held a bond for a deed from the patentee, and that P., before he sold to R., took a quit claim from M. of all his interest in the land, executed by M. only, in which it was stated that the land was devised by will to the said M. by K., the original grantee of the Crown:—Held, that no estoppel arose upon this deed, and that there was no proof of seisin in M. *Minaker* v. *Hawkins*, *Minaker* v. *Ashe*, 20 U. C. R. 20.

Dower. Pleas: 1. Ne unques seizie. 2. Ne unques accouple. 3. That demandant and her husband were both aliens born, and not naturalized before he sold. The loss of most of the deeds affecting the title was proved (or rather presumed) from the burning of the house of the owner in fee, and a deed was proved to the demandant's husband and brother as joint tenants by production of a memorial from the registry office and the death of the demandant's husband before his brother, and co-joint tenant, was also proved. Upon a motion to enter a nonsuit:—Held, that the demandant could not, without specially replying it, rely upon the tenant being estopped, by taking a conveyance from her husband after marriage, from shewing that the seisin of the demandant's husband was as joint tenant with his brother, and that he died first. 2. That secondary evidence of the loss of the deeds was admissible. *Haskill* v. *Fraser*, 12 C. P. 383.

In an action for dower in the west half of a lot, the husband's seisin being denied, it was proved that upwards of sixty years ago his father, whose title was not shewn, died in possession, leaving the husband, his eldest son and heir-at-law. He married demandant forty-five years ago, and moved on to the east half about 1814. His brother, who had always lived with him and the mother on the west half, remained there, but knew that the husband claimed it until his death, eight years before the trial:—Held, sufficient to support a verdict for demandant, for the husband's seisin by descent from his father was in full force when he married, and if afterwards his brother had obtained a title by possession, that could not affect demandant's right. *McDonald* v. *McMillan*, 23 U. C. R. 302.

The evidence of seisin was defendant's declaration to a third party that the husband was to convey the land in question to him, and his subsequent declaration that he had conveyed to him in fee, together with a memorial of this conveyance executed by the defendant. The husband had been also on and off the land before the conveyance: — Held, sufficient. *Beatty* v. *Beatty*, 17 C. P. 484.

(c) Other Cases.

Assignment of Dower—*Title.*]—Semble, that where the evidence shews that the tenants in an action of dower could have assigned dower, which would be binding upon themselves, the demandants are entitled to succeed upon the issue of non tenuerunt, without any reference to the comparative goodness of their title. *McClellan* v. *Meggott*, 6 U. C. R. 551.

Contents of Title Deeds.]—A tenant in dower is not compellable to give evidence of the contents of the title deeds, &c., under which he claims. *Lynch* v. *O'Hara*, 6 C. P. 259.

Crown Patent — *Registrar's Abstract — Proof by.*]—Held, in an action of dower, that the production of an abstract of the registries upon a lot, shewing the granting by the Crown of a patent, was not sufficient evidence of the patent without the production of an exemplification. Quære: Is an abstract receivable in evidence at all if objected to? But under the facts stated in the case, the court refused to set aside a verdict for demandant. *Reed* v. *Ranks*, 10 C. P. 202.

Discovery of New Evidence — *New Trial.*]—The defendant in an action of dower pleaded ne unques seizie que dower, and after trial and verdict against him remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party, and had not been produced at the trial. The court granted a new trial on payment of costs, with leave to add a plea. *Germain* v. *Shuart*, 7 C. P. 86.

Husband and Wife—*Evidence of Wife.*] In an action for dower by husband and wife, the wife is a competent witness. *Cadman* v. *Strong*, 10 U. C. R. 591.

Presumption of Death of Husband.]—Held, that the presumption of death arising from continued absence of the defendant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living. *Giles* v. *Morrow*, 1 O. R. 527.

Proof of Defendant's Tenancy.] — In an action for dower in three lots of land, to prove that defendant was tenant of the freehold, a witness stated that he had occupied one of the lots as tenant to defendant, and about ten years ago conveyed all three lots to one H., who swore that he conveyed to defendant after having occupied as owner, and built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to defendant:—Held, sufficient evidence to go to the jury. *Fisher* v. *Harty*, 23 U. C. R. 408.

Release—*Proof of Signature.*]—In an action of dower, the tenant relied upon a release by the demandant and her husband to C., from whom the tenant had afterwards purchased the land. This release was executed by the demandant by mark, her name being written by some one else, and the tenant was the only subscribing witness:—Held, that proof of the tenant's signature was not rendered admissible to prove the deed by the fact of his being a party to the record; and that, as he could not be examined on his own behalf, and offered no other evidence that the demandant executed the release, the demandant must succeed. *Clark* v. *Stevenson*, 23 U. C. R. 525.

4. Parties, Defendants.

13 & 14 Vict. c. 58.]—By this Act no change was made in the persons liable to an action of dower. *Harris* v. *Stratton*, 17 U. C. R. 520.

Devisees.]—M. M. made his will on the 13th April, 1888, devising his farm to his two sons, appointed the defendants his executors, and died on the 21st May, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of the freehold, and should be made parties, it was:—Held, that since the Devolution of Estates Act, R. S. O. 1887 c. 108, s. 4, devisees are not necessary parties to an action for dower. *Malone* v. *Malone*, 17 O. R. 101.

Executors.]—Held, that the defendants, executors under the will of N. S., devising "all and every the messuages and tenements whatsoever whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent," &c., took such an estate as to make them liable in an action for dower. *Low* v. *Sparks*, 14 C. P. 25.

Mortgagee.]—W. C. died seised in fee of the land in question, having devised the same to his wife for life, and after her death, to his son, the demandant's husband, in fee. The testator's widow, the devisee for life, died before the demandant's husband, and during her life his interest was sold under a fi. fa. against lands, and conveyed to one J., who having recovered possession, sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shewn whether all the mortgage money had been paid or not; but the time for payment of several of the instalments had not arrived:—Held, that the demandant could not succeed, for the tenant was not tenant of the freehold, but the mortgagee. *Cumming* v. *Alguire*, 12 U. C. R. 230.

Tenant in Actual Possession.]—To a bill for equitable dower, the tenant in actual possession of the premises may be a proper though not a necessary party. *McIntosh* v. *Wood*, 15 Gr. 92.

Tenant of Freehold—*Assignment of Dower—Title.*]—Semble, that where the evidence shews that the tenants in an action of dower could have assigned dower, which would be binding upon themselves, the demandants are entitled to succeed upon the issue of non tenuerunt, without any reference to the comparative goodness of the tenants' title. *McClellan* v. *Meggott*, 6 U. C. R. 551.

Tenant of Freehold out of the Jurisdiction.]—Semble, that under C. S. U. C. c. 28, the tenant of the freehold can be sued only when within the jurisdiction; if out of it, then a mere occupier may be sued, but a recovery against him will not bind the right of the tenant of the freehold. *Gourlay* v. *Gourlay*, 27 U. C. R. 178.

Tenant of Receiver—*Leave of Court.*]—A widow entitled to dower commenced an action therefor against a tenant to whom, without express authority, the property had been leased by a receiver in a suit in this court:—Held, that she was not at liberty to proceed in such action without the leave of the court. *Coleman* v. *Glanville*, 18 Gr. 42.

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5. Pleading.

(a) Bill of Complaint.

Seisin of Husband—*Contract of Sale.*]—In a bill for dower, the plaintiff alleged that her husband was in his lifetime, at the time of his death, and also at the time of making his last will, seised or entitled in fee in possession; and in another part of the bill, that the husband had in his lifetime contracted for the sale of the premises, out of which the dower was sought:—Held, bad, on demurrer, it nowhere appearing that the husband had been seised during coverture, or that the contract of sale had not been entered into before marriage. *Gordon* v. *Gordon*, 10 Gr. 466.

Statute of Limitations—*Pleading.*]—In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. B. (the widow) is not entitled to dower:"—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Banks* v. *Bellamy*, 27 Gr. 342.

(b) Declaration.

Demand—*Allegation of Service.*]—Semble, under C. S. U. C. c. 28, that averments of the service of demand, and that the husband died seised, should not be inserted in the declaration, but suggested afterwards; and being irrevelant to the right of action, if so alleged, they are not admitted by not being traversed. *Scratch* v. *Jackson*, 26 U. C. R. 189.

Semble, that the declaration is a proper, though perhaps not the necessary place, for averring the necessary demand of dower, under C. S. U. C. c. 28, and where it does contain it the averment is admitted by a judgment by default. *Gilleland* v. *Reid*, 5 P. R. 96.

Detention of Dower—*Several Defendants—Irregularity—Seisin of Husband.*]—To a declaration in dower against three defendants, suggesting that while one defendant had not, another had appeared and acknowledged the tenancy of the freehold and consented to demandant having judgment, and going on to declare against the third defendant, claiming damages for detention of dower, the third defendant demurred, on the ground that, as the action was against three defendants, the plaintiff could not recover damages for detention of dower against him alone:—Held, that the declaration was good, and that the objection was not the subject of demurrer, but, if a good objection, only a ground for moving to set aside the declaration for irregularity. Held, also, that it was not necessary to allege that demandant's husband had died seised. *Cameron* v. *Gilchrist*, 43 U. C. R. 512.

Right to Dower Admitted—*Declaration for Dower and Damages for Detention.*]—To a summons under the Dower Procedure Act, R. S. O. 1877 c. 55, with the statutory notice indorsed under s. 10, claiming damages, the defendant entered an appearance under s. 20, with an acknowledgment that he was tenant of the freehold, and consent that plaintiff might have judgment for her dower, and take the necessary proceedings to have the same assigned to her. The plaintiff then served a declaration claiming dower as well as damages for its detention:—Held, that the declaration was bad, in claiming dower when the plaintiff's right to it was admitted. Quære, whether such damages might not be recovered on a record properly framed. Linfoot v. Duncombe, 21 C. P. 484, remarked upon. *Harvey* v. *Pearsall*, 31 C. P. 239.

Service of Declaration — *Tenants in Possession.*]—See *Gourlay* v. *Gourlay*, 27 U. C. R. 178, *post*, 6.

(c) *Pleas.*

Alien Ne.]—See *Robinet* v. *Lewis*, Dra. 44.

Assignment of Right—*Denial of Seisin and Marriage.*]—A denial of the seisin and marriage were allowed together, but a third plea, that demandant had assigned her right, was struck out. *Street* v. *Dolson*, 2 P. R. 306.

Denial of Coverture — *Admission of Seisin.*]—Plea, that demandant never was accoupled to the husband during the time he was seised of the said land:—Held, that the plea admitted the seisin, and denied the coverture only. *Losee* v. *Murray*, 24 U. C. R. 586.

Devise in Satisfaction of Dower.]—Where a plea states that the husband devised certain lands to the demandant in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient without setting out the words of the devise. Aliter, where the devise is not in express terms in bar of dower. *Breakenridge* v. *King*, 4 O. S. 180.

Duplicity.]—The provisions of the C. L. P. Act as to pleading double, applies to actions of dower. *Street* v. *Dolson*, 2 L. J. 208.

Election—*Exchange of Lands.*] — A wife cannot be endowed of land given and taken in exchange, but she has her election to take one or the other. *McLellan* v. *Meggatt*, 7 U. C. R. 554; *White* v. *Laing*, 2 C. P. 186.

And such election must be pleaded by a party defending in an action for dower. *White* v. *Laing*, 2 C. P. 186.

As to the form of such a plea. See *Leach* v. *Dennis*, 24 U. C. R. 129.

Election—*Other Cases.*] — See *Cooper* v. *Watson*, 23 U. C. R. 345; *Baker* v. *Baker*, 25 U. C. R. 448; *Walmsley* v. *Walmsley*, 26 U. C. R. 392; *Reynolds* v. *Reynolds*, 29 U. C. R. 225.

Infant Defendants — *Default of Plea — Procedure.*]—Where in dower, after declaration filed and notice to plead served upon infant tenants, the latter neglect to plead, an order nisi may be made that unless the infants plead within a given time the demandant may assign John Doe for their guardian; which order nisi afterwards, upon an affidavit of service and affidavit that no plea filed, will be made absolute. *Robinson* v. *Blandshard*, 9 L. J. 23.

Notice of Action — *Want of.*] — See *White* v. *Grimshawe*, 23 U. C. R. 75.

Non Tenure.]—A plea of non tenure is not necessarily a plea in abatement, and it may be pleaded either to part or the whole of the lands demanded; but non tenure to the whole cannot be pleaded with other pleas in bar. *Breakenridge* v. *King*, 4 O. S. 180; *Nolan* v. *Reid*, 1 P. R. 266.

Partnership Lands.]—Dower. Plea, on equitable grounds, that the land was part of the partnership property and stock-in-trade of the husband and S., trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership moneys, and used in the said partnership business, and that the husband was never seised thereof, otherwise than as such partner:—Held, that the plea sufficiently shewed the land to have been purchased for partnership purposes, and formed a good defence. *Conger* v. *Platt*, 25 U. C. R. 277.

Reference to Arbitrators—*Assignment of Dower.*]—The tenant pleaded a reference to arbitrators and an assignment by them of certain specified land, of which demandant had notice, and averred that he had always been and still was ready to abide by such assignment:—Held, on demurrer, plea bad, for not shewing that the assignment had been actually made. *McLean* v. *Horton*, 9 U. C. R. 685.

Release—*Denial of Seisin at Death.*]—Defendant having allowed judgment to go by default, the court, under the circumstances of this case, refused to allow him to plead a release by demandant, or a denial that the husband died seised as alleged in the plaint:—Held, however, that such allegation was not admitted by defendant not pleading, for it was an averment not material to the right of action, and must be proved if required to establish a claim to damages. *Scratch* v. *Jackson*, 25 U. C. R. 598.

Release—*Purchaser.*]—Plea, that demandant during her husband's lifetime joined with him in a conveyance by deed of the lands to a purchaser, in which deed a release of dower was contained:—Held, good, though the purchaser was not named or shewn to have taken a freehold estate. *Miller* v. *Wiley*, 16 C. P. 529.

Statute of Limitations.]—See *Leach* v. *Dennis*, 24 U. C. R. 129, *post*, III. 5.

(d) *Replication*

Form of Replication to Plea of Alien Ne.]—See *Robinet* v. *Lewis*, Dra. 44.

Form of Replication to Other Pleas.]—Replication to a plea of ne unques accouple, that the demandant, on the 1st May, 1790, and before suit, was accoupled to A. B., deceased, in lawful matrimony:—Held, good, without alleging when, or by whom, or by what form

of religious rite the demandant was married. As to the form of replication to a plea of the Statute of Limitations, and to a plea of ne unques seizie, and the proper conclusion of such pleas, *Williams* v. *Lee*, *Williams* v. *Vansittart*, 2 C. P. 175.

See, also, *Healy* v. *St. Patrick's Literary Assn. of Ottawa*, 23 U. C. R. 395, *post*, III. 5.

(e) *Statement of Claim.*

Judicature Act—*Statement of Facts.*]—The statement of claim in an action of dower alleged that the plaintiff was the widow of L., who died seised of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein:—Held, that the pleadings in dower are governed by the O. J. Act; that the right of dower is a legal conclusion from certain facts; and these facts should be stated in the pleading. The statement of claim was therefore held insufficient, and was struck out, leave being given to amend. *Lauder* v. *Carrier*, 10 P. R. 612.

Judicature Act—*Dower Act.*]—The writ of summons was indorsed under the O. J. Act with a claim for dower and arrears of dower. The defendant entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. 1877 c. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears:—Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. Act, be compelled to take any steps under the Dower Act. *Moore* v. *Moore*, 11 P. R. 324.

(f) *Statement of Defence.*

Striking Out Portions.]—In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set-off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, etc. On a motion in chambers, after issue joined, for an order directing a reference as to the damages under s. 47, O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan* v. *Fish*, 10 P. R. 187. See, also, *Ryan* v. *Fish*, 4 O. R. 335.

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6. *Practice.*

Affidavits—*Intituling—Style of Parties.*]—See *Ferguson* v. *Malone*, 1 U. C. R. 519.

Consent—*Decree Not Drawn up—Plaintiff Bound by.*]—The plaintiff claimed dower. A decree was made less extensive than she claimed. The master made his report in pursuance of the decree. The solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent. These terms were in accordance with the decree and report. They provided, also, that in lieu of dower the plaintiff should be paid a certain annual sum named. The decree was not drawn up, but the agreement which it embodied was acted on for eight years:—Held, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her. *Sills* v. *Lang*, 17 Gr. 691.

Death of Defendant—*Scire Facias—Revivor.*]—A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant:—Held, that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis* v. *Dennison*, 8 P. R. 7.

Infant—*Demurrer.*]—An infant demandant may sue for dower. If an infant be tenant, the parol is not allowed to demur. *Phelan* v. *Phelan*, Dra. 386.

Judgment—*Default—Notice of Action.*]—Quære, as to the right to sign judgment by default on a suggestion of demand and refusal of dower. Under 24 Vict. c. 40, s. 18, a notice of action is necessary in all cases, but the want of it must be specially pleaded. *White* v. *Grimshawe*, 23 U. C. R. 75.

Judgment—*Default—Service of Declaration—Costs—Reference.*]—The plaintiff in dower, having served a demand on defendant, the tenant of the freehold residing in Scotland, served the declaration and notice to plead on the tenants in possession of the land, and on this entered judgment by nil dicit against the defendant for seisin and costs, and issued execution. The sheriff delivered possession according to the report of the commissioners appointed, under 24 Vict. c. 40; and their fees, including the charge of the surveyor employed by them, amounted to $266. An order was afterwards made to refer this charge to taxation, on a summons calling on the sheriff and the commissioners and surveyor, but not on the plaintiff:—Held, that the judgment was irregular, and must be set aside; for service of the declaration on the tenants of the land could not enure as a service on the defendant, the tenant of the freehold. Quære, as to the defendant's right to sign judgment by default for the costs; but, assuming such judgment to be valid:—Held, that the costs of the commissioners, under 24 Vict. c. 40, would be recoverable against defendant. Held, also, that the order to refer such costs could not be sustained, for defendant should have been a party to the summons. *Gourlay* v. *Gourlay*, 27 U. C. R. 178.

Judgment—*Entry—Time.*]—In an action of dower judgment was given in favour of the tenant in June, 1856. In August the tenant died, and the entry of judgment was delayed by the difficulty in procuring the affidavit of disbursements, &c. The demandant brought another action against the heirs of the tenant for dower in the same land, and in April, 1857,

an application was made to allow the judgment given in June to be entered nunc pro tunc:—Held, too late. *Stafford* v. *Trueman*, 2 P. R. 154, 3 L. J. 114.

Judgment—*Vacating—Mistake of Solicitor.*]—In an action for dower and damages for detention of dower, defendants appeared under R. S. O. 1877 c. 55, s. 29, and filed acknowledgment of tenancy, consent to dower, &c. Plaintiff's solicitor thereupon entered judgment of seisin, issued writ of assignment of dower, and proceeded for damages. The judgment of seisin was held at the hearing to be final, and to preclude any proceeding for damages, but leave was given to plaintiff to move in chambers to vacate it. The master in chambers made an order vacating the judgment:—Held, on appeal, that the order was one in the discretion of the master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor. *Ryan* v. *Fish*, 9 P. R. 458.

Leave to Proceed—*Tenant of Receiver.*]—A widow entitled to dower commenced an action therefor against a tenant, to whom, without express authority, the property had been leased by a receiver in a suit in chancery:—Held, that she was not at liberty to proceed in such action without the leave of the court. *Coleman* v. *Glanville*, 18 Gr. 42.

Particulars.]—Particulars of the premises cannot be obtained by the tenant. *Nolan* v. *Cherry*, 1 P. R. 277.

Report—*Motion Against—Time—Filing.*]—See *Giles* v. *Morrow*, 4 O. R. 649.

Writ of Assignment of Dower—*Teste.*]—A writ of assignment of dower is a writ of execution, within s. 249 of the C. L. P. Act, and may therefore be tested when issued. *Fisher* v. *Grace*, 28 U. C. R. 312.

Writ of Summons.]—The form of writ of summons to commence an action of dower, is provided for by con. rules 120 et seq. For decisions as to the writ and proceedings connected therewith, under the old practice, see *Phelan* v. *Phelan*, Dra. 386; *Frazer* v. *Richardson*, 4 O. S. 391; *Bissonet* v. *Radenhurst*, M. T. 1 Vict., R. & H. Dig. 170; *Fullmer* v. *Dougan*, 1 U. C. R. 402.

Writ of Summons—*Service.*]—In dower, the summons, if served on the tenant, need not be served on the premises. *Honsburgh* v. *Fritz*, 5 O. S. 73.

For cases under the practice before 13 & 14 Vict. c. 58, see *Robinet* v. *Lewis*, Dra. 44; *Henderson* v. *Stephens*, 2 U. C. R. 64; *Amiot* v. *Woodcock*, 2 U. C. R. 119; *Cox* v. *Hand*, 4 U. C. R. 281.

As to the practice and pleadings in dower, under 13 & 14 Vict. c. 58, see *Bishoprick* v. *Pearce*, 12 U. C. R. 306; *Williams* v. *Rider*, 1 P. R. 41.

II. Assignment of Dower.

Agreement in Lieu of—*Statute of Frauds.*]—A widow having married, she and her husband verbally agreed with the devisees of her first husband, that she and her husband should enjoy a certain portion of the estate during her life, in respect of her interest therein:—Held, that this was binding on all parties interested, as being an agreement not within the Statute of Frauds; and the court restrained a purchaser of portions of the estate from disturbing the dowress and her husband during her lifetime. *Leach* v. *Shaw*, 8 Gr. 494.

Assignment before Action—*Jury—Evidence.*]—Held, that, upon the evidence, the jury were justified in finding that the tenant had assigned dower before action. *Humphries* v. *Burton*, 16 U. C. R. 511.

Description of Land Assigned—*Metes and Bounds—Acquiescence.*]—An assignment of dower by the sheriff must be by metes and bounds. Where two lots fronted on a river, and were therefore irregular in shape, and the sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient. But neither livery of seisin nor writing are necessary to an assignment; and where the tenant of the freehold, after such assignment, gave notice to demandant to make her share of the fence between those portions which had been assigned by the sheriff as her dower in the said lots and the defendant's portion:—Held, that this was evidence of an assent by him to the assignment as made, which was therefore sufficient. *Fisher* v. *Grace*, 28 U. C. R. 312.

Improvements—*Clearing Land—Report of Commissioners.*]—The husband of demandant, being possessed of the land in question, a 100 acre lot, conveyed it to S., 20 acres being at the time cleared. After alienation some 70 acres more were cleared. Defendant having admitted demandant's claim, the sheriff appointed commissioners, who awarded demandant seven acres of the cleared and four of the uncleared land. The land in question, as well as that in the neighbourhood, had greatly increased in value, and, besides the clearing, had been improved by fencing and buildings; but no part of the buildings was awarded to demandant. It appeared that the commissioners had considered the clearing of land a permanent improvement under s. 55, s.-s. 2, R. S. O. 1877 c. 55, but that they did not award any portion of the land cleared by the purchaser to the demandant:—Held, that the report should not be disturbed unless upon the clearest evidence of its injustice, and no case was made in the present instance to induce the court to interfere. *Robinet* v. *Pickering*, 44 U. C. R. 337.

Judgment—*Action to Establish Will—Decree Establishing "Subject to Dower."*]—In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff, the widow of the testator, was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land of which the action also sought to deprive her, and a decree was made declaring that the devisee, one of the defendants hereto, was entitled to the land in fee simple, subject to the dower of the plaintiff herein:—Held, not such a judgment as entitled the dowress to sue out a writ of assignment of dower under s. 7 of R. S. O. 1887 c. 56:—Held, also, that the decree did not prevent the running of s. 25 of the Real Property Limitation Act, R. S. O. 1887 c. 111, so as to bar the remedy of the plaintiff. *Cope* v. *Cope*, 26 O. R. 441.

Sum in Lieu of Dower—"*Peculiar Circumstances*"—*Dwelling-house Partly on Dowable Land.*]—Where dower was claimed in land upon a portion of which stood two-thirds of a dwelling-house, the remaining third being upon the adjoining land, which was not dowable:—Held, that this was not a case within s.-s. 3 of s. 12 of the Dower Procedure Act, R. S. O. 1887 c. 56, in which the commissioners had power to assess a yearly sum in lieu of assigning dower by metes and bounds. The commissioners were not bound necessarily to assign a portion of the building upon the property, but might give an equivalent. They were bound, however, to assign one-third of the whole property, having regard to value as well as to quantity. *McIntyre* v. *Crocker*, 23 O. R. 369.

Transfer of Right before Assignment.]—A widow's title to dower before assignment, although not transferable at common law, may be the subject of sale and conveyance in equity. *Rose* v. *Simmerman*, 3 Gr. 598.

Transfer of Right before Assignment.]—A right to dower, although not an estate, is an interest in land within C. S. U. C. c. 90; and therefore, semble, that under that statute a woman may before assignment of dower convey her right to any person. *Miller* v. *Wilcy*, 16 C. P. 529. But see *McAnnany* v. *Turnbull*, 10 Gr. 298.

III. Bar, Conveyance, and Forfeiture.

1. *Adultery.*

A wife abandoned by her husband, and subsequently guilty of adultery:—Held, not barred from dower. *Graham* v. *Law*, 6 C. P. 310.

It is the voluntary living apart in adultery that deprives a wife of dower, whether leaving the husband's roof was suâ sponte, or in consequence of his violence, or whether he abandoned her without provision. *Woolsey* v. *Finch*, 20 C. P. 132. Approved in *Neff* v. *Thompson*, 20 C. P. 211.

See 3.

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2. *By Marriage Settlement.*

Dower. Equitable plea, that by deed, before and in consideration of demandant's intended marriage, it was agreed between her and her intended husband that certain lands should be conveyed by him after marriage to trustees, to his use for life, then to her use for life, then to the use of the issue of the marriage, and in default of such issue to his heirs; that after the marriage the lands were accordingly so conveyed, and demandant after her husband's death became seised and entered into possession of such lands under the settlement in lieu and satisfaction of her dower in all his lands, according to said settlement:—Held, a bad plea, for there was no provision, express or implied, that such settlement was to be in lieu of dower; and the allegation of entry in lieu, the land being her own, could make no difference. *Gilkison* v. *Elliott*, 27 U. C. R. 95.

By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "customary, prefix, or stipulated," no mention being made of lands in Upper Canada:—Held, affirming the judgment in 12 C. P. 601, that this did not preclude her from claiming dower out of lands in Upper Canada, held by her husband during the coverture; and this notwithstanding the contract so entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. *Jamieson* v. *Fisher*, 2 E. & A. 242.

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3. *Order to Convey Free from Dower.*

[See 40 Vict. c. 8, s. 35 (O.); R. S. O. 1877 c. 126, s. 10; 41 Vict. c. 8, s. 13 (O.); R. S. O. 1887 c. 133, ss. 9-12; R. S. O. 1897 c. 164, ss. 11-17.]

Alimony—*Right to.*]—An order will not be made under 40 Vict. c. 8, s. 35 (O.), allowing a husband to convey his lands free from the dower of his wife, unless it clearly appears that she is not entitled to alimony. *Re Eagles*, 7 P. R. 241.

Application—*Notice of—Service—Affidavit—Advertisement.*]—The affidavit of service of notice of an application to convey land free from dower under 40 Vict. c. 8, s. 35, must identify the person served as the wife of the applicant. Where, upon such an application, the husband filed an affidavit stating that he did not know where his wife was, and another affidavit alleged that she lived at St. Catharines for some time with one M., as Mrs. M., notice of the application was directed to be advertised twice a week for three weeks in a newspaper at St. Catharines. *In re McGuin*, 7 P. R. 310.

Application—*Notice of—Service—Intention not to Return.*]—The court of chancery will not, acting under R. S. O. 1877 c. 126, s. 10, order a conveyance free from dower of a wife living apart from her husband, unless it is shewn that the party moving is unable to serve notice of the intended application upon the wife, or that she has left her husband and has expressed her determination never to return to reside with him. *Re Campbell*, 25 Gr. 187.

Application—*Notice of—Service—Advertisement—Right to Alimony.*]—An order under s. 12 of the Dower Act, R. S. O. 1897 c. 164, dispensing with the concurrence of a land owner's wife for the purpose of barring her dower, where he is desirous of selling free from dower, is made by the Judge as persona designata, and is not subject to appeal. Great care should, therefore, be taken to ascertain that the case made by an applicant comes clearly within its provisions, and an order should not be made ex parte unless under very exceptional, if under any, circumstances. The words "where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony," do not require more to be shewn than that the wife has been living apart from her husband for two years, and that the circumstances under which she has been living apart from him are such that she is not entitled to claim alimony. Leave given to

serve notice on a missing wife by advertisement in a newspaper if further search for her should not prove successful. *Re King*, 18 P. R. 365.

Evidence of Adultery—*Decree.*]—Upon such an application, alleging that the wife had been living apart from her husband (the petitioner) for two years in consequence of her adulterous conduct, the respondent denied the adultery and other misconduct charged. The petitioner produced as evidence the decree in a suit for alimony, in which he had set up her adultery as a defence. The decree dismissed the bill, and did not state the ground of dismissal:—Held, that such decree was not sufficient, and the application was refused. *In re Campbell*, 25 Gr. 480.

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4. *Release.*

(a) *Certificate of Bar of Dower.*

[By 37 Geo. III. c. 7 (C. S. U. C. c. 84, ss. 5, 6), a person entitled to dower might release her right by deed, executed either alone or jointly with other persons; but to make such deed effectual, it must be acknowledged before the Chief Justice or one of the Judges of the Queen's bench, or before the quarter sessions, and a certificate of such examination was required to be indorsed on the deed. By 2 Vict. c. 6, this acknowledgment was dispensed with whenever the married woman should join with her husband in any deed containing a release of dower. By the Dower Act, 32 Vict. c. 7, s. 23 (O.), embodied in R. S. O. 1897 c. 164, s. 22, the absence of or any informality in the acknowledgment is rendered immaterial.]

Held, that on the pleadings it could not be taken, from the state of the record, that the defendant had given her consent before a Judge to be barred of her dower. *Huffman v. Askin*, 2 C. P. 423.

A certificate of bar of dower indorsed on a deed, in 1830, stating that the wife "being duly examined," &c., did appear, &c., but not stating that she was "privately" examined, &c.:—Held, sufficient. *Buck* v. *McCallum*, 13 C. P. 163.

The husband, who died before 24 Vict. c. 40, having conveyed land in 1849, in the following year his wife by deed, with his concurrence, testified by his execution thereof, released her right of dower to T., through whom the tenant claimed. There was no certificate of acknowledgment before magistrates, &c.:—Held, that such release was effectual, being within the letter of 2 Vict. c. 6, s. 5, which is not confined to deeds by which the husband is conveying lands; and that were this otherwise, the action would be barred by s. 19 of 24 Vict. c. 40, which is not limited in its application by s. 16. *Hill* v. *Greenwood*, 23 U. C. R. 404.

A certificate on a deed executed in 1816, to which the wife of the grantor was not a party, stated that "on the 30th May, 1829, personally came before me, A. F., Judge of the Midland district court, Mary, wife of the within named Robert McNally," and being examined, &c., consented to be barred of her dower. The grantor was described in the deed as of the town of Kingston, county of Frontenac. It was objected that the wife did not appear to have been resident in the county when the certificate was given; but held, otherwise, for the presumption was that she resided with her husband, and that his residence continued the same. Held, that 2 Vict. c. 6, s. 4, clearly removed any objection on the ground that she was not a party to the deed. Hunter v. Johnson, 14 C. P. 128, remarked upon. *McNally* v. *Church*, 27 U. C. R. 103.

Where the right to dower is released by an instrument separate from the conveyance by the husband, an examination and certificate is still necessary, as before the late statute. *Bogart* v. *Patterson*, 14 Gr. 624.

Where after a husband's estate had been vested by order of the court in A., a purchaser, his wife executed a deed to A., in which the husband joined, containing a release of dower by her, but no word of release or conveyance by the husband:—Held, sufficient, without examination or certificate. *Heward* v. *Scott*, 2 Ch. Ch. 274.

(b) *After Second Marriage.*

A woman under a second coverture cannot, without her husband's concurrence, release her right to dower in lands of her first husband; and quære, whether she could release this right by a conveyance in accordance with the statutes for enabling married women to alienate their real estate. An action was brought in the names of the husband and wife for dower in lands of her first husband. After action the wife executed a release to the defendant of her right, and obtained a certificate of her examination and consent, according to 59 Geo. III. c. 10:—Held, that such release was no bar, being without the concurrence of the husband, and not being a conveyance for any purpose contemplated by the different statutes for barring dower. *Howard* v. *Wilson*, 10 U. C. 186. Approved in *McGill* v. *Squire*, 13 U. C. R. 550.

Action for dower by S., and M., his wife, in land of M.'s former husband. Plea, a release under seal by S. of all his interest in the land:—Held, bad, as being no bar to the action. *Lawson* v. *Montgomery*, 10 U. C. R. 528.

Dower. Defendant pleaded that by deed of 21st August, 1837, the husband conveyed the land to T. C., and that on the 23rd April, 1850, the demandant, by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd April was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and, the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: Clark v. Stevenson, 22 U. C. R. 575. The defendant therefore proved the execution of the deed of the 21st August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was indorsed, dated 2nd March, 1850, that the demandant had appeared before them, and duly barred her dower; and one of them

proved that she was examined, executed the deed, and received $10. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but, finding that the proceeding before them was ineffectual, he had the release of the 23rd April, 1850, prepared, and sent it to her by defendant, with a note for $40, which he held against her husband, to be kept if the release was executed, otherwise returned; and that T. C. brought back to him the release apparently executed, but not the note. This evidence was received (though objected to) as tending to strengthen the probability that the release was really executed; it being also sworn in confirmation that the demandant's name to the release was written by her husband; that in May following the demandant told witness that defendant had been to her to sign a paper for T. C., which she had signed; and that the next day she told defendant she had no rights there. The jury found for defendant:—Held, that defendant, being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside. *Clark* v. *Stevenson*, 24 U. C. R. 200.

(c) *Other Cases.*

Agent—*Power of Attorney—Avoidance of Release.*]—The demandant on the 6th March, 1863, executed a power of attorney to one M. to demand her dower in all lands of her late husband, to compound for her claim, and to accept such sum in lieu thereof, either by annual payments or in one sum, as he should think fit, and to execute releases of such dower. On the 22nd May he released, in her name, to defendants her dower in the lands in question, for a consideration expressed of $400, but M. swore that he agreed to take $300, and that this was not paid until July. The power was revoked on the 23rd May, and the jury found that the release had been previously executed:—Held, that the power to release was not conditional upon receiving a cash payment or an arrangement for an annuity; that the difference between the sum mentioned in the release and that received by M. could not avoid the release; and that the tenants therefore were entitled to succeed. *Williams* v. *Commissioners of Cobourg Town Trust*, 23 U. C. R. 330.

Conveyance—*Release in—Pleading—Purchaser not Named.*]—See *Miller* v. *Wiley*, 16 C. P. 529.

Conveyance — *Inoperative—Release in—Transfer of Right.*]—After recovery in ejectment against the husband by the purchaser at sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him to release her dower in a conveyance in fee of the land, by way of bargain and sale, to a third party. No money consideration passed, the grantee executing a mortgage back for the whole purchase money mentioned in the deed to him, and the husband remained in possession until dispossessed by the sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at sheriff's sale:—Held, that the demandant was entitled to her dower in the land in question; for that the husband not having at the time the estate he professed to grant, nothing passed by his deed, and the release of the wife, as incident to, fell with it, as there was nothing upon which it could attach; that it was not a case within 24 Vict. c. 40, s. 19; that, though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants, being no parties to the deed, but claiming adversely to it, could not conclude the demandant from saying she had not released her dower to a purchaser. Quære, whether husband and wife can at law convey the right of dower as a distinct subject of bargain and property; or whether she herself can do so after his death, and before the assignment of it. If so, semble, that the remedy should be pursued by the assignee in his own name. *Miller* v. *Wiley*, 17 C. P. 368.

Conveyance — *Release in — Short Forms Act — Variation.*] — A variation from the short form of bar of dower in R. S. O. 1887 c. 102 by the substitution of the words "the said party of the second part" for "the said A. B., wife of the said grantor," is not a material variation. *In re Manufacturers' Life Ins. Co. and McLean*, 10 C. L. T. Occ. N. 295.

Conveyance—*Setting Aside for Fraud—Effect on Release.*] — In setting aside a deed for fraud, at the instance of a judgment creditor, by a decree of the court of chancery, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property. The court will not simply set aside the deed and allow the judgment creditor to proceed and enforce his claim at law; and where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate and interest of the grantor, the creditor not being entitled to the benefit of such release of dower. Quære, in such a case, what is properly the effect following from the release of dower and to whose benefit it will enure. *Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502.

Conveyance — *Wife Executing — Absence of Release Clause.*]—Where a married woman had signed a deed which, however, contained no bar of dower, the secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred. Such relief would be properly the subject of a bill. *Thompson* v. *Thompson*, 2 Ch. Ch. 211.

Conveyance—*Wife not Named as Party.*] —A husband by deed aliens land, and the wife, though not named in the commencement as a formal party, in the body of it releases her dower, and both execute it:—Held, a sufficient bar. *Bonter* v. *Northcote*, 20 C. P. 76.

See, also, *Bellamy* v. *Badgerow*, 24 O. R. 278, *post*, VI. 1 (*b*).

Covenant to Release—*Separation—Revival.*]—Semble, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and separation, at his instance, the deed is thereby revived. *McArthur* v. *Webb*, 21 C. P. 358.

Mortgage — *Release in.*]—Where a wife joins in a mortgage of her husband's estate as a security only to the mortgagee, she parts with her dower so far only as may be necessary for that purpose, and she is a necessary party to a subsequent sale by the husband free from dower. *Forrest* v. *Laycock*, 18 Gr. 611.

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5. Statute of Limitations.

[By 32 Vict. c. 7, s. 22 (O.), no action of dower shall be brought but within twenty years from the death of the husband of the demandant. The same provision was contained in 24 Vict. c. 40, s. 18, and the law was the same under 4 Wm. IV. c. 1: *German* v. *Grooms*, 6 U. C. R. 444; *McClelland* v. *Megatt*, 7 U. C. R. 31; *McDonald* v. *McIntosh*, 8 U. C. R. 388. See now R. S. O. 1897 c. 133, s. 25, by which the action must be brought within ten years from the husband's death.]

Continuance of Possession.] — Though the widow has been allowed to remain in possession for nearly twenty years from the husband's death, she must still sue for her dower within the twenty years after his death. *McDonald* v. *McIntosh*, 8 U. C. R. 388.

Continuance of Possession.] — The owner of land died intestate in 1858, leaving his widow and two infant daughters in possession, all of whom continued to occupy and cultivate the farm until 1883, when the daughter left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession thereof, the mother claimed to be entitled to retain possession of the premises in respect of her dower, but:—Held, that the right to dower was barred by 38 Vict. c. 16, s. 14 (O.), which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband. *McDonald* v. *McRae*, 13 A. R. 121.

Death of Husband — *Commencement of Statutory Period.*]—Plea, that the seisin of the husband was a seisin in law, and that he was seised upwards of forty years before this suit, and for upwards of that time before this suit the tenant, and those under whom he claimed, were in actual possession of the lands, claiming title adversely to the husband:—Held, no defence, for, though a dowress in one sense claims through her husband, yet the right claimed is one that first accrues, not to him, but to her on his death. *Leach* v. *Dennis*, 24 U. C. R. 129.

Exceptions to Operation of Statute.]—In dower, defendant pleaded that the right accrued more than twenty years before the action, to which the plaintiff replied that the husband while seised, and during his marriage, conveyed to H. M. Geo. IV., his heirs and successors, certain lands, including those in the declaration, of which he and his successors continued tenants in fee until twenty years before this suit: that forty years had not elapsed since the husband's death; and that H. M. Queen Victoria and her predecessors had at all times been out of the jurisdiction:—Held, replication no answer, for the exceptions to the operation of the statute (C. S. U. C. c. 88, s. 1,) arise only out of the plaintiff's position, not defendant's. Quære, as to the operation of 24 Vict. c. 40, s. 18, and the effect upon it of s. 16. *Begly* v. *St. Patrick's Literary Association of Ottawa*, 23 U. C. R. 395.

Set-off of Dower against Rent.]—Although a widow is bound to bring her action for dower within twenty years from the death of her husband, the statute limiting that time does not apply where the widow is brought unwillingly before the court, and she only seeks to reduce the amount of rents charged against her by setting off what she is entitled to as dowress. *Laidlaw* v. *Jackes*, 25 Gr. 263.

But see *S. C.*, in part reversed on rehearing, 27 Gr. 101.

Taking Case out of Statute—*Agreement as to Rents.*]—The widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term:—Held, that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower. *Fraser* v. *Gunn*, 27 Gr. 63.

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6. Other Cases.

Agreement—*Life Lease—Absence of Release—Forfeiture.*]—Where a father had conveyed a house and premises to his son in fee, and the son afterwards leased to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son, that he should occupy the house, except certain rooms, and take the rents and profits, upon certain conditions, on breach of any of which he was to go out of possession, but his mother did not release her right under the statute:—Semble, that the mother could not, after the father's death, on the ground that she had not barred her dower under the life lease, maintain ejectment for the whole of the premises, without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe d. Peck* v. *Peck*, 1 U. C. R. 42.

Bond—*Recitals—Estoppel— Satisfaction.*] The demandant had accepted for her claim a bond from the tenant, securing to her, as part of a family arrangement, a maintenance which, after enjoying for some time, she relinquished. She had also executed the bond:—Held, that, even though the recitals in the bond did not operate by way of estoppel, a jury were warranted in finding that it amounted to a satisfaction of her claim to dower. *Germain* v. *Shuert*, 7 C. P. 316.

Conveyance to Crown — *Extinguishment.*] — A plea setting up a conveyance by the husband to the king; and that the land afterwards, under 7 Vict. c. 11, became vested in the principal officers of ordnance, who conveyed to the tenant:—Held, bad, on demurrer, for that demandant's right was not

extinguished by the conveyance to the Crown, nor by the provisions of the statute. *Begley v. Gibson*, 19 U. C. R. 458.

Instrument not under Seal—*Effect of, as Bar.*]—Plea, that demandant from the 2nd November, 1858, had been tenant of the premises to defendant under a demise, at the rent of £15 a year, one-third of which she was to retain, and still does retain, for her dower, and the demandant accepted the same in lieu of her dower; and so the tenant averred that she assigned to demandant, and demandant accepted her said dower. To support this plea, the following instrument was put in, signed by the demandant only, not under seal: "I do hereby attorn to C. S. for (describing the land), and I agree to become her tenant therefor at the yearly rental of £15 a year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to C. S. during her life. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months' notice previous to the end of any quarter:"—Held, that the plea was not proved, for the instrument passed no interest in the land to demandant, and could not bar the right to dower, or be treated as a satisfaction of it. *Sarsfield v. Sarsfield*, 22 U. C. R. 59.

Possession of Widow—*Continuance.*]—A plea that demandant had been in possession of the land in which dower was claimed since her husband's death:—Held, no bar, for this could not deprive her of her right to have dower assigned. *Gilkison v. Elliott*, 27 U. C. R. 95.

Rights of Creditors—*Equitable Dower.*]—A widow having by her conduct parted with her right to equitable dower in favour of her son, a subsequent creditor of hers was not entitled to have her dower set out and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it. *Cottle v. McHardy*, 17 Gr. 342.

Wife Concealing Relation to Husband—*Estoppel.*]—Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighborhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Hoig v. Gordon*, 17 Gr. 599.

IV. Election.

1. *Under Devolution of Estates Act.*

[49 Vict. c. 22 (O.); R. S. O. 1887 c. 108; R. S. O. 1897 c. 127].

Effect of.]—R. died intestate entitled to real and personal property leaving a widow and children:—Held, that the widow having elected to take her interest under s. 4 of the Devolution of Estates Act, 1886, 49 Vict. c. 22 (O.), was entitled to one-third of the real estate absolutely. *Re Reddan*, 12 O. R. 781.

Release by Marriage Settlement.]—Section 4 of the Devolution of Estates Act, R. S. O. 1887 c. 108, which gives the widow a right of election between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands. *Toronto General Trusts Co. v. Quin*, 25 O. R. 250.

Time for Electing—*Administration—Money in Court.*]—Where in the administration by the court of the estate of an intestate lands have been sold and the purchase money paid into court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act. Judgment in 29 O. R. 388 affirmed. *Baker v. Stuart*, 25 A. R. 445.

Will—*Construction—Action for.*]—Held, that by bringing an action for the construction of her deceased husband's will, the widow had made her election, and it was too late for her to elect to take her interest in her husband's undisposed real estate under the Devolution of Estates Act, R. S. O. 1887 c. 108, s. 4, s-s. 2. *Rudd v. Harper*, 16 O. R. 422.

Will—*Election by.*]—An election by a widow to take her distributive share in lieu of her dower under s. 4, s-s. 2, of the Devolution of Estates Act, may be made by will, which as to such election speaks from the time of its execution, and not from the time of her death. *Re Ingolsby*, 19 O. R. 283.

See, also, Devolution of Estates Act.

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2. *Whether Widow Bound to Elect.*

Terms of Will—*Circumstances.*]—Held, that the widow, under the devises mentioned in the will in this case, was put to elect whether she would take under the will, or claim her dower. *Kerr v. Leishman*, 8 Gr. 435.

A testator by his will gave to his wife a life interest in certain portions of his real estate, and certain annual allowances, both in money and kind, such as to exclude the probability that she would require any other means for her support. The rents and profits of the real estate after payment of such annual allowance being insufficient to satisfy the widow's claim for dower:—Held, that she was bound to elect. *Becker v. Hammond*, 12 Gr. 485.

Quære, whether a provision for the maintenance of testator's widow, charged on the real estate, is by implication in lieu of dower.

A testator devised his farm to his eldest son in tail, upon condition, amongst other things, that he should support the testator's widow during her life: that she should be mistress and have the control of the dwelling-house on the farm, and should have the proceeds of one-half the cows and sheep kept on the premises; and that the farm should be a home for the testator's son J., so long as it might be necessary for him to remain, and for another son,

D., should any misfortune happen to him:—Held, that the widow was not entitled to dower in addition to this provision made for her. *McLennan* v. *Grant*, 15 Gr. 65.

Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of shewing that he intended it to be in lieu of dower was held inadmissible. The testator, after providing for his widow, directed certain of his real estate to be sold at the expiration of a lease thereof then existing, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them:—Held, that this latter expression was not inconsistent with her claim to dower. An intending purchaser of devised lands, doubting whether a provision made by testator was in lieu of dower, asked the widow whether she had or claimed dower:—Held, that, even if her answer was in the negative, it afforded no ground for the purchaser applying to the court to restrain her action for dower, brought on her being advised that under the will she was not put to her election. *Fairweather* v. *Archibald*, 15 Gr. 255.

Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other persons, and the will contained other evidence shewing an intention that such last mentioned devises should be free from dower:—Held, that on the widow electing to take dower she forfeited both parcels of land. *Stewart* v. *Hunter*, 2 Ch. Ch. 336.

A testator devised to his daughter for life a house and four acres of land, and the will shewed that he contemplated that the devisee should reside on this property:—Held, that the testator had thereby sufficiently indicated his intention to devise free from the widow's dower; and that therefore the widow could not have dower in either this land or the other lands devised, without foregoing the provisions in her favour in the will. *Hutchinson* v. *Sargent*, 16 Gr. 78.

A testator by his will made certain gifts to his widow, not saying that they were in lieu of dower. It was suggested that the estate was not sufficient to answer these gifts in addition to the dower:—Held, that the other devisees were entitled to an inquiry as to this, and the weight to be attached to the circumstance would be considered after the result of the inquiry was ascertained. *Lapp* v. *Lapp*, 16 Gr. 159.

A testator at the time of making his will and of his death had real estate to the value of $7,000, and personal estate to the value of $395, which realty to the amount of about $3,805 he disposed of by his will during his wife's life; and he left legacies to the amount of $1,000. The other real estate he directed to be sold. The residue he divided; but there would be no residue if the widow was to have her dower:—Held, that the widow must elect between the provision made for her by the will and her dower. *Lapp* v. *Lapp*, 19 Gr. 608.

A testator devised his farm to his widow for life, determinable upon her marrying again, and gave her a certain portion of the dwelling house thereon; and subject to this the will

shewed an intention that the rest of the house and the farm should be kept in entirety, and be personally occupied by his sons until the youngest should attain twenty-one:—Held, that the widow must elect. Held, also, that a second marriage, after an election to take under the will, would not resuscitate the right to dower. *Coleman* v. *Glanville*, 18 Gr. 42.

A testator bequeathed a sum of money to his wife in lieu of all dower, &c., and revoked "all gifts or deeds or deed of gift of any real estate made by me at any time heretofore:"—Held, that the widow was put to her election whether she would accept the bequest or retain an estate conveyed to her by a deed of gift. *Lee* v. *McKinly*, 18 Gr. 527.

A testator devised land to his children in tail, with cross-remainders, and in the event of their dying without issue, to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying she was to receive one-half thereof for life:—Held, that the contingency of the widow surviving all the children was too remote to put her to elect. *Travers* v. *Gustin*, 20 Gr. 106.

A testator by his will gave to his widow 100 acres of land, which he expressed should "be my wife's portion during her natural life," and the balance of his real estate, fifty acres, he directed to be sold, and until sold that the same should be rented, "and the rent shall be given to my wife to assist her in keeping and supporting of herself and the children that may choose to reside with her:"—Held, that the widow was not entitled to her dower in the fifty acres and also to the provision made for her by the will; but that she was bound to elect. *Armstrong* v. *Armstrong*, 21 Gr. 351.

A testator directed, first, that all his debts, funeral and testamentary expenses, should be paid; and then, that all his real and personal estate, of every nature and description, should be equally divided between his wife and mother, share and share alike:—Held, that the widow was not entitled to dower and to the provision made for her by the will; but that she was put to her election. *McGregor* v. *McGregor*, 20 Gr. 450.

A testator devised all his real and personal estate to trustees, with full power of leasing, incumbering, and selling the same, as in their opinion might be advisable, and at a certain period to convey the same to his children or child then surviving. By a codicil he directed all his personal property to be equally divided between his three daughters and his widow:—Held, that the widow was, under the terms of the will, bound to elect between the provision for her by the will and her dower. *Patrick* v. *Shaver*, 21 Gr. 123.

The testator devised as follows: "To my beloved wife A. M. I give and devise a full and sufficient support for her natural life; or, in case of any disagreement between her and other members of the family, I give and bequeath the north part of my house, with an annuity of $80 in cash, to be paid half-yearly. I give and bequeath to her also the use of the well, to which she must have free access without any hindrance whatever. I give and bequeath also to my beloved wife all the furniture in the north part of the house:"—Held, that this had not the effect of putting the

widow to elect between her dower and the provision made for her by the will; and that she was entitled to an inquiry as to the sufficiency of the estate to allow her the bequests in her favour, as also her dower; as in Lapp v. Lapp, 16 Gr. 159. *Murphy* v. *Murphy*, 25 Gr. 81.

Testator bequeathed to his widow the annual income from the real and personal estate during her widowhood and until the eldest son attained his majority, for the support of herself and the maintenance, education, and support of all the children during their minority; and after the eldest attained twenty-one, and as each reached that age, the income to be paid to them proportionately, after making ample provision for the support of the widow during her widowhood:—Held, not to indicate an intention on the part of the testator to give her this in lieu of dower. *Laidlaw* v. *Jackes*, 25 Gr. 293, 27 Gr. 101.

The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received by the widow, and a partition of descended lands:—Held, on rehearing (in this affirming the decree in 25 Gr. 293), that the widow was not bound to elect between the provision made for her by the will and her dower, and that, notwithstanding the lapse of time, she was entitled, out of the devised land, to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against the claim made by the plaintiff, the amount which she was entitled to have received thereout as dowress. *Laidlaw* v. *Jackes*, 27 Gr. 101.

A testator devised and bequeathed to his wife, during widowhood, all his household goods, furniture, &c., together with an annuity of $20, and also the free use, during the same time, of the homestead lot, together with the several buildings thereon. Two parcels of his real estate he devised to his two sons, upon which he placed certain fixed valuations—found by the master to be the full values—and directed one of the sons to pay three-fifths of the interest computed on the valuation of his lot to the three daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead and the other portions of his real, as also his personal estate, the testator directed to be sold and the proceeds divided at the death or marriage of the widow:—Held, that she was not forced to elect, and that the direction to sell the lands was not sufficient to put her to her election. *Beilstein* v. *Beilstein*, 27 Gr. 41.

The testator bequeathed to his widow for life an annuity of $60, payable by his son J., his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and, in case of sickness while there, this son was to see that she had proper medical attendance and nursing. This annuity, as well as the other bequests, the testator charged upon the lands in question, and devised the same so burthened to his said son, the defendant. The widow filed her bill for payment of the annuity alone, not claiming any lien on the land in respect of the charges created in her favour by the will or for dower. The usual decree for payment or in default sale was made. The land was sold under the decree, without any reference to dower or the other charges, and the purchase money was paid into court. In the master's office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the bequests above set out, and prayed that a sum in gross out of the money in court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits:—Held, following Murphy v. Murphy, 25 Gr. 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in court; but that by her acquiescing in the sale of the land, and by her laches, she had waived her right to any compensation for the loss of the benefits bequeathed to her. *Ripley* v. *Ripley*, 28 Gr. 610.

A testator devised to his widow his "house and orchard for a home for herself and children as long as she may live," and to his son Duncan all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her board and maintenance, he, my son Duncan, holding possession of the land from the time of my decease, subject to the proviso aforesaid:"—Held, that the widow was put to her election between her dower and the provision made for her by the will; the latter forming a charge upon the lands devised. *McLellan* v. *McLellan*, 29 Gr. 1.

A testator devised all his real and personal estate to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names, upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them the

share or respective shares only, which the deceased parent or parents would if living have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose. *McGarry* v. *Thompson*, 29 Gr. 287.

A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one:—Held, that, under these circumstances, the widow was bound to elect between her dower and the benefits given by the will. *Rody* v. *Rody*, 29 Gr. 324.

In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan* v. *Besserer*, 5 O. R. 624.

A testator, by his will and codicils, devising his real estate, &c., to G. H. M. and B. M., trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity, and provided that when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject however to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the statute of distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty, unmarried and without issue:—Held, that the widow was entitled to her annuity as well as her share under the statute of distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby, Quimby* v. *Quimby*, 5 O. R. 738.

J. C. by his will devised as follows: "First, I will and bequeath unto my beloved wife, E. C., one-half undivided of the place where I now live being * * * so long as she shall live and no longer. I also will and bequeath unto my said wife one-half of all the goods and chattels I may own at the time of my demise * * * Third, I will and bequeath unto my grandson, D. C., and to his heirs and assigns forever, the place or homestead where I now live, it being * * * with all that appertains thereto: subject, nevertheless, to the following conditions, that is to say: my wife E. C. shall have quiet and peaceable possession of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live * * * I also will and bequeath unto my said grandson, D. C., one-half of all the goods and chattels I may own at the time of my demise." In an action by the wife, E. C., claiming both the legacy and her dower:——Held, that she must elect; the testator having treated the homestead as one whole thing, the half of which he specifically bequeathed to his wife. *Card* v. *Cooley*, 6 O. R. 229.

A testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies and also with an annuity of $100 to his widow, to whom he also bequeathed his furniture, apartments in his dwelling house, and sundry other things. The estate was sufficient to answer all legacies, and also the widow's dower:—Held, that the widow was not put to her election as between the will and her dower. *Wilson* v. *Wilson*, 7 O. R. 177.

A will bequeathing to a wife the dwelling-house for her natural life, the household goods, and an annuity of $300 secured to her out of the estate:—Held, not to put the widow to her election. *In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372.

A testator by his will left all his real and personal property to J. K., "subject to the following bequest, viz.: to my wife E. K., a one-third interest in all my real and personal estate, so long as she shall remain unmarried:"—Held, that E. K. was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz.: a division of the entire property of each kind, which would be defeated if dower were first subtracted from the realty. Re Quimby, Quimby v. Quimby, 5 O. R. 738, followed. *Amsden* v. *Kyle*, 9 O. R. 439.

A testator provided by his will "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be equally divided between all my children, and my wife. * * My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death:—Held, that the widow was intended to be included in the word family, and that the widow was put to her election as to dower, since owing to the direction to lease the farm, all the provisions of the will could not be carried into effect consistently with the dower being set apart. *Dawson* v. *Fraser*, 18 O. R. 496.

A testator, having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the corpus until after the death of his wife:—Held, that the wife was not bound to elect between her dower and the testamentary bestowments. Re Quimby, Quimby v. Quimby, 5 O. R. 744, distinguished. The testator also gave a house for the residence of his wife during her life, and also another house for the use of certain nephews and nieces until the youngest attained twenty-one, or until they married:—Held, that this right of personal occupation of the nephews and nieces was, while it lasted, inconsistent with a claim of the widow to have one-third of the

house set apart for her use as dowress, but that the deprivation of dower for a time in part of the real estate was not sufficient to put her to her election as to the residue of the estate. Cowan v. Besserer, 5 O. R. 624, followed. The widow was held put to her election as to both houses. The judgment in Amsden v. Kyle, 9 O. R. at p. 441, corrected. *Leys* v. *Toronto General Trusts Co.*, 22 O. R. 605.

A testator bequeathed his personal estate to his widow absolutely, and devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested, and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed; and he gave the rents, until the real estate was sold, to his widow:—Held, that the widow was put to her election, and that she could not claim dower and to be tenant of the freehold at the same time. *Marriott* v. *McKay*, 22 O. R. 320.

By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, etc., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother predeceased the testator. The widow now brought this action for the construction of the will:—Held, that the widow was not put to her election as to dower, there being no such intention to be gathered from the will. *Rudd* v. *Harper*, 16 O. R. 422.

A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity, provision being made for the early conversion into money and distribution of the estate:—Held, that the widow was not put to her election, but was entitled both to her legacy and to dower. The will further provided that the widow for her legacy might have the first selection of such securities or real estate as she might think desirable. Without making any claim to dower, she joined with her co-executors in sales and conveyances of parts of the real estate, and selected the remainder of it in part satisfaction of her legacy, and, although not transferred to her, subsequently dealt with such remainder as her own. It was not until after the sales and selection referred to, that her right to dower was in any way considered, when she immediately claimed it:—Held, that, under these circumstances, the residuary legatees not having been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower; but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the court of the lands free of her dower, and so much of the sum at which the lands selected by her was valued at as was equal to the value of her dower in those lands, ascertained in the same way. Bingham v. Bingham, 1 Ves. Sen. 126, applied. *Elliott* v. *Morris*, 27 O. R. 485.

An estate consisting of realty and personalty and amounting to over $10,000, was, after a direction to pay the debts and funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors, in trust to sell and convert into money, and out of the proceeds to pay to his widow $3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces:—Held, that the widow was not put to her election, but was entitled to her dower in addition to the bequest. Amsden v. Kyle, 9 O. R. 439, distinguished. *Re Shunk*, 31 O. R. 175.

A husband in a separation deed covenanted to pay his wife an annuity of $200 as follows: $100 on the 1st June and December in every year: and charged it on certain land, the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband by his will, subsequently executed, directed his executors to pay his wife $400 annually; $200 on the 1st June and December in each year during her life: and added, "which provision in favour of my said wife is made in lieu of dower;"—Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 32 O. R. 114.

See, also, *McMylor* v. *Lynch*, 24 O. R. 632; *Brabant* v. *Lalonde*, 26 O. R. 379; *Cowan* v. *Allen*, 23 A. R. 457; *Reynolds* v. *Palmer*, 32 O. R. 431, *post*, 3.

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3. *Whether Widow Has Elected.*

Facts and Circumstances in Particular Cases.]—Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, and the widow accepts it, she is as much bound by her election in a court of law as in equity. A widow cannot so far elect to take under a devise as to enter into possession of the whole property out of which she claims dower, and yet sue for her dower, when that was part of the property expressly devised to her in lieu of dower. *Walton* v. *Hill*, 8 U. C. R. 562.

Held, that a plea of election by demandant to take under her husband's will was not sustained upon the evidence set out in this case. *Palker* v. *Evans*, 13 U. C. R. 546.

Dower. Plea, on equitable grounds, that the husband devised to demandant half an acre of land, after the decease of the husband's parents, for her life, and all the rest of his real and personal estate to defendants in trust to support demandant and testator's children, and $12 for her mourning, and $10 annually for clothing if she should continue to live in the homestead, and if not, then $30 a year in lieu of her dower; that another previous will was revoked and this will made on the express agreement by demandant that she would accept these provisions in lieu of dower; that after the death of the husband demandant

received from defendants, executors under the will, the said sum of $12 for mourning, and continued to live on the land under the will for six months, when she left of her own accord; that defendants have been and are ready to carry out the provisions of the will in her favour; and so defendants say that the demandant ought not in equity to have dower, and duly elected to accept the provisions of the said will in lieu thereof:—Held, on demurrer, no defence, for the acceptance of the $12 and continuing on the land for six months was not a sufficient election: that the words, "in lieu of dower" in the will applied rather to the $30; and the averment of election was stated only as a conclusion from the previous facts. *Cooper* v. *Watson*, 23 U. C. R. 345.

Plea, on equitable grounds, that the husband devised the land to defendant, in trust to maintain the demandant during her life in everything necessary for her comfort, and allow her two rooms in the house, and all the furniture, and provide her with a horse, two cows, and a servant girl; or if she preferred it should give her £50 a year, payable quarterly; that such allowance and maintenance was intended by testator to be in lieu of dower; and the demandant, since his death hitherto, in lieu of her dower hath elected to occupy the rooms, &c., and defendant hath provided her with all things required by the will, which she elected to take and did take in lieu of her dower:—Held, plea bad, as not shewing a case in which equity would put the widow to her election. *Baker* v. *Baker*, 25 U. C. R. 448.

Dower. First plea, that demandant's husband by his will gave her an annuity of £25, chargeable on his estate, and a life estate in certain lands, and thereby declared that such annuity should be in lieu of dower: that demandant entered into possession of such property, and received the annuity, and elected to take and did take the same in lieu and satisfaction of her dower. Second plea, on equitable grounds, that by said will the husband gave demandant an annuity of £25, which was declared to be in lieu of dower, and was to be paid out of his estate by his executor, and by the same will he devised certain land to her for life: that he afterwards died, leaving, besides land, personal estate sufficient to pay the annuity: that demandant entered on said land, and elected to receive said annuity and devises in lieu of her dower; but before any payment of such annuity had fallen due, she, against the will of the executor, possessed herself of the personal estate, and converted the same to her own use; and the executor having no other property out of which he could pay such annuity, was thereby prevented from paying the same, as he would otherwise have done pursuant to the will:—Held, on demurrer, both pleas good: that the first was clearly a good defence at law; and as to the second, though the demandant's wrongful act alone would not defeat her claim, yet there was, besides, an express averment that she elected to take the annuity and devises in lieu of dower, which was sufficient without shewing the receipt of any portion of the annuity. *Walmsley* v. *Walmsley*, 26 U. C. R. 392.

It appeared on the trial that demandant's husband, who was a potter, devised to each of his children certain real estate, and gave to his wife an annuity of £25, to be paid half yearly by his executor, and to be in lieu of dower, and devised to her certain town lots for life. The pottery he directed to be rented until his son J. should come of age, when all his estate not otherwise devised was to be divided amongst his children, subject to the annuity. She was to have firewood off the premises in question; and his executors were to sell all his stock and farming utensils, &c. After the testator's death, in 1846, the executor, who consented to act at the demandant's urgent request, sold the stock, &c., and handed the whole proceeds to her. She kept the pottery until her son came of age, collected the debts, and having married six months after the testator's death, she and her second husband managed all the real estate and received the rents. The annuity was never specifically paid to her, but the rents exceeded it:—Held, that there was sufficient evidence to warrant a verdict for the tenant on a plea of election. *Walmsley* v. *Walmsley*, 29 U. C. R. 214.

To an action of dower defendant pleaded, on equitable grounds, that before the husband was seised his father owned the land, and conveyed it to the husband in consideration of natural affection, and that the grantor and his wife should enjoy it for their lives and that of the survivor: that the husband leased it to his father and mother during their joint lives and the life of the survivor, which was intended for their support, and the mother, the survivor and one of the tenants, has no other means of support: that afterwards the husband devised his personal property and all his real estate to demandant until his two sons should come of age, on which event he devised a portion to each, subject to certain charges in favour of his wife, which devise he intended and by his will declared to be in lieu of dower: that neither of the sons attained twenty-one: that after the death of her husband the demandant took possession of, and had since enjoyed, all her husband's real estate, and took also the personal estate, and had used and disposed of the same for her own use:—Held, on demurrer, a bad plea, for not alleging expressly an election by the widow, but leaving it to be inferred from the other statements. The evidence shewed that the testator died in debt: that the executor declined to prove the will, there being no money to pay probate or funeral expenses: that the widow sold some of the stock, horses and cows, to support the family, and others because there was no fodder to keep them; and the furniture, &c., was sold by the sheriff under execution. The real estate consisted of forty-five acres, without a house on it, leased on shares, and worth about $80 a year; and on her claiming dower five years before, the person working it had agreed to pay her $50 a year, which had been paid for one year:—Held, no evidence of an election to take under the will in lieu of dower. *Reynolds* v. *Reynolds*, 29 U. C. R. 225.

A testator devised to his wife all his real and personal property during widowhood, under which she entered upon the real estate, and took and applied to her own use the personal property. The court restrained an action for dower brought by her and her second husband, holding that she had elected to take under the will. *Westacott* v. *Cockerline*, 13 Gr. 79.

Where the question as to whether the widow had elected to take an annuity in lieu of dower, arose in connection with a claim of the

defendant for past maintenance and education of the plaintiff, and was a mere matter of inference, depending to a certain extent on the amount of moneys the widow had received, the point was reserved until after the master had made his report. *Walmsley* v. *Bull*, 15 Gr. 210.

The widow remained on the farm, and received some small sums of money for her own use, but had never had set apart for her exclusive enjoyment the portion of the house devised to her:—Held, that these acts did not amount to that deliberate and well considered choice, made with a knowledge of rights and in full view of consequence, which is necessary to constitute an election. *Coleman* v. *Glanville*, 18 Gr. 42.

The testator made a provision in favour of his widow, much more advantageous to her than her interest as dowress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and now sought to have dower assigned her:—Held, that the rule "ignorantia juris neminem excusat" applied, and the bill was dismissed with costs. *Gillam* v. *Gillam*, 29 Gr. 376.

Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the benefits of the will as well, a much slighter dealing with the property left to her will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision:—Held, in this case, that, there being such provision, the evidence set out in the report of the case was sufficient to establish an election to take under the will, though otherwise it would not have been. *Nixon* v. *Ashenhurst*, 7 O. R. 664.

The testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue "then in that case" it should be equally divided between his "nearest of kin;" and the daughter died while still an infant and unmarried. The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. 1887 c. 137, permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant:—Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple. *Brabant* v. *Lalonde*, 26 O. R. 379.

A testator left his wife all his personal estate absolutely, and all his real estate for life or widowhood, subject to which he devised "my said real estate" in specific parcels to his sons, and died in 1889. After his death his widow, who knew the will, remained in possession of the house, to which she built an addition, and sold some of the timber, rented the land on shares for two seasons, supporting the children, and married again in 1891. In 1893 she and her husband took a lease of the property from the executors to expire in 1899, when the eldest son came of age. His parcel was conveyed to him by the executors, who then granted a new lease, still current, of the rest of the land to the second husband:—Held, that the widow was put by the will to her election. Held, also, that, though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle ignorantia juris neminem excusat she must be held to have elected in favour of the will. *Reynolds* v. *Palmer*, 32 O. R. 431.

On the 24th July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees "that the said (wife) will, whenever called upon, release her dower in any lands of which he, the said (husband), may hereinafter (sic) acquire a title." The husband died in January, 1898, having acquired, and being at the time of his death seized of, other lands, and in August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868:—Held, that the deed of 1868 provided a jointure for the wife within the provisions of s. 7 of 27 Hen. VIII. c. 10; that the acceptance of the deed and of the benefits thereby conferred was an election by her within that Act to accept the jointure; and that, therefore, she was not entitled to dower in the after acquired lands. Judgment in 30 O. R. 689 affirmed. *Eves* v. *Booth*, 27 A. R. 420.

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4. *Other Cases.*

Effect of Election—*Undevised Lands.*]—A testator by his will gave to his widow an annuity of $4,000 in lieu of dower. His will contained certain devises, and gave other legacies and annuities which the testator charged on the whole of his estate not before devised, and he empowered his executors to sell any of his property which they should think necessary. The widow elected to take the annuity:—Held, that she was entitled to dower out of any of the testator's lands, whether devised or not. Held, also, that the legacies and annuities were payable primarily out of the personal estate. *Davidson* v. *Boomer*, 18 Gr. 475.

Effect of Election where Several Parcels of Land.]—See *Stewart* v. *Hunter*, 2 Ch. Ch. 336; *Cowan* v. *Besserer*, 5 O. R. 624; *Leys* v. *Toronto General Trusts Co.*, 22 O. R. 603.

Exchange of Lands.]—See next sub-title.

Legacy to Widow in Lieu of Dower—*Right to Annual Specific Sum.*]—A testator by his will bequeathed to his wife $150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on $2,500 at 6 per cent., or the $150. On the sale, $2,500 was to be left on mortgage or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of testator's twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter's legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of testator's children died before receiving their full shares and leaving issue, the deceased's child's share was to be equally divided between his or her children; if such deceased child died without issue his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children "and their issue as aforesaid provided for" to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the $2,500 was less than $150:—Held, that there was a gift to the widow of $150 a year, and not merely of the annual interest derivable from the investment of the $2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees. *Koch* v. *Heisey*, 26 O. R. 87.

See Reynolds v. *Reynolds*, 29 U. C. R. 225, *post*, VI. 2.

V. Exchange of Lands.

A wife cannot be endowed of land given and taken in exchange, but has her election to have one or the other. *McLellan* v. *Meggatt*, 7 U. C. R. 554; *White* v. *Laing*, 2 C. P. 186.

Dower. Plea, that the husband exchanged other lands with one F. for the lands in question, and that the demandant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain and sale of the other lands was produced, executed by demandant's husband, for an expressed consideration of £600; and it was shewn clearly by parol evidence that the transaction between F. and the husband was in fact an exchange:—Held, that such evidence could not avail; that the exchange must be proved in proper technical form, and by deed; and that the demandant was therefore entitled to succeed. *Towsley* v. *Smith*, 12 U. C. R. 555.

Where the defence in dower rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defence consisted of parol statements that the husband had "traded" certain lands:—Held, not sufficient evidence to warrant a verdict for defendant. *Stafford* v. *Trueman*, 7 C. P. 41.

Plea, that during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof, they by deeds "conveyed" the lands to each other, D.'s wife barring her dower: that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C.:—Held, plea bad, as not shewing strictly an "exchange" of the lands, for the word "convey" has not the same effect; and semble, no other word can be substituted. *Leach* v. *Dennis*, 24 U. C. R. 129.

VI. Right to Dower.

1. *In Mortgaged Lands.*

(*See*, also, Mortgage.)

(a) *Wife or Widow of Mortgagee.*

Not entitled to dower. *Ham* v. *Ham*, 14 U. C. R. 497.

Reconveyance to Mortgagor—*Joining in.*]—A final order for foreclosure having been obtained, some time afterwards the mortgagor filed a bill to redeem, and the court had opened the foreclosure and granted redemption, it appearing that no change had taken place in the relative positions of the parties:—Held, on a motion by the mortgagee for payment out of court of the mortgage money that it was unnecessary for the wife of the mortgagee to join in the conveyance to the mortgagor to bar dower. *Simpson* v. *Simpson*, 1 Ch. Ch. 265.

(b) *Wife or Widow of Mortgagor or of Owner of Equity.*

Assignee of Mortgage for Term—*Possession—Sale under Execution.*]—D. S., seised in fee of lands, mortgaged them for 999 years to one S., who took possession. D. S. afterwards conveyed in fee to C., and after C.'s death the premises were sold to defendant at sheriff's sale under judgment against C. His widow then sued for dower:—Held, that she should have judgment for dower, with a cesset executio during the term; but semble, that to authorize a cesset executio, the facts respecting the term should have appeared on record. And quære as to plaintiff's right if defendant had satisfied the mortgage, and had not taken an assignment of it, or kept it alive. *Chisholm* v. *Tiffany*, 11 U. C. R. 338.

Ejectment against—*Equitable Defence.*]—Held, that the equitable defence in ejectment in this cause, filed under the Administration of Justice Act of 1873, ss. 3 and 4, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, fully set out in the report of this case, though probably not affording a good equitable defence, should be allowed:—Held, also, that a plaintiff may reply

and demur to such an equitable defence. 36 Vict. c. 22, as to improvements on land made in mistake before notice, and the lien therefor, discussed. *Carrick* v. *Smith*, 34 U. C. R. 389.

Equitable Estate — *Seisin.*] — A person equitably entitled to lands (one who had not paid up his purchase money or obtained a conveyance) mortgaged them with a power of sale. The power was not exercised until after the death of the mortgagor; afterwards his widow filed a bill against the purchaser under the power for dower. A demurrer for want of equity was allowed; dower attaching only to such equitable estates as the husband dies seised of, and the sale when made having relation to the time of creating the power, and thereby overreaching the title to dower, which had in the meantime attached. *Smith* v. *Smith*, 3 Gr. 451.

Immediate Mortgage to Vendor to Secure Purchase Money—*Seisin.*]—Where an estate was conveyed to a vendee, and immediately mortgaged back again to the seller to secure payment of the purchase money:—Held, that the widow of the mortgagor was entitled to dower. *Potts* v. *Meyers*, 14 U. C. R. 499.

A. conveyed land to B. in 1833, and on the same day took a mortgage for the whole purchase money. B. paid nothing for either principal or interest, and in 1840 re-conveyed absolutely to A., the land being then vacant. B.'s wife did not join in either mortgage or reconveyance, and eighteen years after B.'s death, brought an action against C., who had purchased from A. soon after the reconveyance, and had erected valuable buildings:—Held, in appeal, affirming the judgment in 20 U. C. R. 213, and, approving Potts v. Meyers, 14 U. C. R. 499, that the seisin of the husband, B., was complete, and that the widow was entitled to dower. *Smith* v. *Norton*, 7 L. J. 263.

The seisin of a husband when he takes an estate in fee, and immediately mortgages it to secure a portion of the purchase money, is sufficient for the wife's right of dower to attach to it. *Lynch* v. *O'Hara*, 6 C. P. 259.

L. purchased from S., who conveyed to him, and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another person. L. having died, his widow sued at law for dower. A bill was filed, praying an injunction to stay the action, and for a declaration that the widow was, under the circumstances, not entitled to dower:—Held, that the mortgage was not extinguished as a charge on the purchase of the equity of redemption by S. from H., or merged in his legal estate; but the court refused to restrain the action at law, and declared that the dower to be allotted should be charged with the payment of one-third of the interest of the mortgage money unless defendant chose to pay off one-third of the mortgage debt. Equity will assist a dowress by removing out of her way a satisfied mortgage, and will allow her to redeem an unsatisfied mortgage. *Heney* v. *Low*, 9 Gr. 265.

Joining in Mortgage — *Effect of — Whether Dower Based on Surplus or Whole Value.*]—A vendor took from a purchaser a mortgage for the whole purchase money, in which his wife joined to bar dower:—Held, the husband having died, and the property having been sold, that the widow was entitled to dower in the excess, after payment of mortgage money and interest, but no more. *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334.

A wife joined in a mortgage made by her husband for the purpose of barring her dower, and he subsequently mortgaged the equity of redemption, to which deed she was not a party:—Held, that she was entitled to dower as against the second mortgagee. Held, also, that under G. O. 220, the master, in his subsequent report in a suit by the first mortgagee for the sale of the mortgaged premises had power to report the widow's claim to dower against the second mortgagee as a "special circumstance." Leave to appeal from the master's report, after an unexplained delay of six months, was refused. Dawson v. Bank of Whitehaven, 37 L. T. N. S. 64, distinguished. *Rowe* v. *Wert*, 7 P. R. 252.

Where a woman joins with her husband to bar her dower in creating a mortgage for securing a debt to her husband, and after his death the lands are sold during the widow's lifetime, she is entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage debt. *Doan* v. *Davis*, 23 Gr. 207.

Where in a suit for partition, a sale is ordered of an estate, subject to a mortgage, securing a debt of the ancestor, and in which his wife had joined to bar her dower, the master, before estimating the dower of the widow, should not deduct the costs of the suit; the widow's right in such a case being to have her dower out of the gross value of the estate. The interest of the purchase money of the estate so sold commenced to run on the 31st March, 1875, and the report of the master bore date the 3rd February, 1876. An appeal, on the ground that the master should have computed interest on the sum allowed for dower from the former date, was dismissed with costs, the court assuming that the value of the dower was ascertained at the date of the report. Doan v. Davis, 23 Gr. 207, approved and followed. *Lindsay* v. *Lindsay*, 23 Gr. 210.

Held, on rehearing (affirming the judgment in 25 Gr. 276), that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee. Dawson v. Bank of Whitehaven, 6 Ch. D. 218, observed upon and distinguished. *Robertson* v. *Robertson*, 25 Gr. 486. See also *Re Robertson*, 24 Gr. 442 (*post* MORTGAGE, VIII. 15.)

The statute 42 Vict. c. 22 (O.), "An Act to amend the law of dower," does not apply to mortgages made before it was passed. *Martindale* v. *Clarkson*, 6 A. R. 1.

H., being possessed of some lands, executed mortgages of them, some of which were given to secure unpaid purchase money, and others to secure the repayment of money lent to H. The wife of the mortgagor had joined in the

mortgages to bar dower. H. having died intestate:—Held, on sale of the lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money, but not of the other mortgages. *Re Hopkins, Barnes* v. *Hopkins*, 8 P. R. 160.

The defendant, a judgment debtor, being the owner of lands subject to mortgages in which his wife had joined, sold the same, and allowed her to receive a part of the purchase money for her dower. On an application for a ca. sa.:—Held, that she was not entitled to anything for dower, and that 42 Vict. c. 22, s. 2 (O.), does not apply to a case of voluntary sale by a husband. *Calvert* v. *Black*, 8 P. R. 255.

W. H. in 1883 made a mortgage of vacant land to a loan company, purporting to be a security for an advance of $6,000, but with an agreement of even date that—the purpose of the loan being to enable W. H. to erect a house on the land—the mortgage money should be advanced only on architect's certificates of the progress of the building. M. A. H., wife of W. H., joined in this mortgage for the purpose of barring her dower only. The house was built and the mortgage moneys went into the building as agreed. In 1886 W. H. died, and in the course of the administration of his estate real and personal by the court this land was sold:—Held, that M. A. H. was entitled to dower in the full value of the land out of the balance of purchase money remaining after the payment off of the mortgage, and this on the authority of Re Robertson, 24 Gr. 442. Robertson v. Robertson, 25 Gr. 276, 486, and by virtue of 42 Vict. c. 22, s. 1 (O.) Whatever may be the full meaning of 42 Vict. c. 22, s. 1 (O.), it cannot be held to have the effect of making a dowress less than they were held to be in Robertson v. Robertson. *Re Hague, Traders' Bank* v. *Murray*, 14 O. R. 660.

Under ss. 5 and 6 of the Dower Act, R. S. O. 1887 c. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure a part of the purchase money, is entitled to dower notwithstanding a conveyance by him of the equity of redemption without her concurrence. The wife so joining in the mortgage is not merely a surety for her husband; and she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt. Re Hague, 14 O. R. 660, Re Croskery, 16 O. R. 207, and opinion of Patterson, J. A., in Martindale v. Clarkson, 6 A. R. 1, dissented from. *Pratt* v. *Bunnell*, 21 O. R. 1.

Where lands mortgaged to secure a loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land, if unincumbered. Pratt v. Bunnell, 21 O. R. 1, not followed so far as the reasoning and dicta therein are opposed to the above decision. *Gemmill* v. *Xelligan*, 26 O. R. 307.

Joining in Mortgage—*Interest in Equity—Parties.*]—Where the wife joins in a mortgage of her husband's estate as a security to the mortgagee, and for no other purpose, she parts with her dower so far only as may be necessary for the purpose, and she is a necessary party to a subsequent sale by the husband free from dower. A wife joined in a mortgage of her husband's estate to secure a loan of one-fourth or one-fifth of the value of the property, and he subsequently sold the property; his wife claimed to be entitled to dower, and refused to join in the conveyance without a reasonable compensation being made to her; her right to dower being supposed by all parties to exist, her husband had a piece of land conveyed to her, which she accepted, and thereupon she signed the conveyance of the mortgaged estate. The transaction appearing to have been for the interest of creditors, it was held to be valid, independently of the question whether her claim to dower was in such a case well founded in point of law or not. *Forrest* v. *Laycock*, 18 Gr. 611.

In 1881 C. S. mortgaged certain lands to J. A., his wife, M. S., joining and barring dower. In 1884 C. S. sold the lands to C., M. S. again joining in the conveyance. C. gave back a mortgage to secure payment of part of the purchase money, which mortgage was made to M. S. On a judgment creditor of C. S. seeking a declaration that M. S. held this mortgage as trustee for C. S. and for a sale and payment thereout of his judgment debt, M. S. alleged that the mortgage was made to her in consideration of her joining in the sale to C., and thus barring her right to dower:—Held, that M. S. had no such right of dower as alleged, and that there was no consideration for the making of the mortgage to C., and that she held the same as trustee for C. S. Fleury v. Pringle, 26 Gr. 67, and Black v. Fountain, 23 Gr. 174, followed. *Smart* v. *Sorenson*, 9 O. R. 640.

Joining in Mortgage—*Interest in Equity—Equitable Dower.*]—Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his lifetime conveyed away his equity of redemption, and the mortgagees afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into court under R. S. O. 1887 c. 133, s. 7:—Held, that they should be allowed to do so, in view of the conflict of opinion and decision as to ss. 5 and 8 of R. S. O. 1887 c. 133, intituled an Act respecting Dower. There is a sharp distinction made in those sections between the wife's dower in the legal estate which she had barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by s. 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches at the time of the husband's death and not before, and non constat that the widow had no claim to the surplus moneys in this case. Smart v. Sorenson, 9 O. R. 640, considered. *Re Croskery*, 16 O. R. 207.

There can be no dower in land of which the husband had merely acquired the equity of redemption, and which he had parted with. Re Croskery, 16 O. R. 207, followed. *Gardner* v. *Brown*, 19 O. R. 202.

Although, since the passing of 42 Vict. c. 22 (O.), an Act to amend the law of dower, a married woman is entitled to dower

out of an equity of redemption in land, whether her husband dies seised of it or not, where such equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower, she is not entitled to dower out of an equity of redemption purchased and sold by him in his lifetime, the legal estate never having vested in him. Martindale v. Clarkson, 6 A. R. 1, distinguished. And where a purchaser of land subject to a mortgage paid off and procured a discharge in favour of the mortgagor, and on the same day obtained his conveyance from him, giving back a mortgage, with bar of dower, for the balance of the purchase money, all of which instruments were registered in the above order, it was:—Held, that the wife of such purchaser was not entitled to dower out of a surplus arising on a sale under a subsequent incumbrance, her husband never having been even momentarily seised of the legal estate in the land. *Re Luckhardt*, 29 O. R. 111.

Mortgage Paid Off—*Discharge not Registered — Assignment for Creditors — Subsequent Extinguishment of Mortgage.*]—In respect to discharges of mortgages, what the Registry Act makes tantamount to a reconveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. Therefore, where in 1868 R. O'N., in partnership with J. O'N., executed a mortgage on certain real estate, and his wife joined to bar her dower, and the mortgage money was subsequently paid, and a discharge of the mortgage signed but not registered, and afterwards the partnership became insolvent, and the mortgagee's executors conveyed the property to the assignee in insolvency, who had now contracted to sell to a purchaser:—Held, that the wife of R. O'N. could not have dower at law in the land in question, neither could she have dower out of the equitable estate, because that had passed away from her husband to the assignee, and the former could not now die seised of it. In 1868 J. O'N. and R. O'N. executed a mortgage on certain land, which was in full force and unsatisfied at the date of their insolvency. Afterwards, in 1879, it was declared by judgment of the court to have been extinguished by lapse of time. Neither of the wives of J. O'N. and R. O'N. joined in this mortgage:—Held, nevertheless, that, in the face of the assignment in insolvency, the extinguishment of the mortgage did not have the effect of again vesting the estate in J. O'N. and R. O'N., so that the dower of their wives attached. *In re Music Hall Block, Dumble* v. *McIntosh*, 8 O. R. 225.

Mortgage before Marriage—*Dower in Equity or Contribution.*]—D., being owner in fee of certain lands, on 4th March, 1884, mortgaged the same to secure payment five years after date of certain moneys. On 15th March, 1884, he married the plaintiff, and died intestate on 16th August, 1884. He left no other estate:—Held, that the plaintiff could claim dower only in the equity of redemption, unless she contributed ratably to the amount of the mortgage incumbrance. Method of arriving at the amount of dower in such cases pointed out. Reid v. Reid, 29 Gr. 372, commented upon. *Dobbin* v. *Dobbin*, 11 O. R. 534.

Mortgagee — *Arrangement with Heir — Dower notwithstanding.*]—A mortgage was created by an absolute conveyance with a separate defeazance, and the mortgagor having died, his heir effected an arrangement with the mortgagee, who conveyed to the heir, and accepted from him a deed of a portion of the land in discharge of the mortgage debt. The heir afterwards sold to a person who had notice of the several conveyances:—Held, that the widow of the mortgagor was entitled to dower in the portion conveyed by the heir to the purchaser. *McIntosh* v. *Wood*, 15 Gr. 92.

Mortgagee not in Possession — *Action against.*]—Dower may be maintained against a mortgagee in fee, although not in possession, and although the mortgage entitles the mortgagor to hold until default, which has not been made. *Stewart* v. *Kay*, 25 U. C. R. 15. *See*, also, *Walker* v. *Boulton*, 6 O. S. 553.

Omission of Bar of Dower—*Wife Executing Mortgage—Reformation.*]—A voluntary deed will not be reformed against the grantor. And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower. *Bellamy* v. *Badgerow*, 24 O. R. 278.

Party to Mortgage Action.] — See MORTGAGE, IV. 8 (b).

Proceeds of Sale—*Priorities—Creditors.*]—Where a woman bars her dower in a mortgage to secure a debt of her husband, and after his death the property is sold for more than the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband. *Sheppard* v. *Sheppard*, 14 Gr. 174.

A widow who has barred her dower in a mortgage given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the corpus of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers claiming under the husband, and becomes absolutely entitled to her rights as dowress in the balance of the proceeds. Sheppard v. Sheppard, 14 Gr. 174, considered. *Re McMorris*, 8 C. L. J. 284.

A testator while married purchased the equity of redemption in lands to which he afterwards died beneficially entitled. The widow claimed dower out of the whole property, both legal and equitable, and that the surplus money produced by a sale of the premises after paying off the mortgage, being less than one-third of the whole purchase money, should be invested for her benefit, as her dower; but there being creditors, and specific and pecuniary legatees under the will of the testator, whose claims would exceed the surplus:—Held, that the widow was only entitled to dower in the surplus money which represented the value of the equity of redemption. *Thorpe* v. *Richards*, 15 Gr. 403.

Where a wife joins in a mortgage she is not entitled on the death of her husband, insolvent, to have the debt paid in full out of the assets to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Gr. 113.

Proceeds of Sale—*Inchoate Dower—Sum Representing Value of—Payment into Court.*]—Certain lands were subject to a first mortgage, a charge registered in respect to the price of an engine, and a mortgage to the plaintiff registered subsequently to the charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in respect to the surplus after satisfaction of the first mortgage. The engine company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the surplus, in priority to the plaintiff:—Held, that they were entitled to make that claim, and that, having sold the engine without notice to the plaintiff, the latter was entitled to impeach the sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice:—Held, also, that the plaintiff alone was entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dowress; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the engine company. In the absence of arrangement, the value of this interest must be ascertained and retained in court, to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and to the engine company if it did not attach. *Discher* v. *Canada Permanent Loan and Savings Co.*, 18 O .R. 273.

Purchase Subject to Mortgage — *Arrears of Dower—Equity of Redemption.*]—Where one died entitled to an equity of redemption in certain real estate, which he had originally purchased subject to the mortgage still existing thereon, and, the same having been sold in certain administration proceedings, his widow now claimed arrears of dower in respect thereof during the period between the death and sale, when she was in possession by herself or her tenants:—Held, that there being no assignment of dower, and the husband not having died seised in fee so as to give his widow legal dower, she was not entitled to arrears of dower as of right, but only upon the equitable consideration of the court, and the proper mode of exercising the same was to deduct from the rents received by the widow, plus an occupation rent charged against her, so much as she had properly applied in meeting necessary outlay and expenditure in respect of the land and buildings, and allow her one-third of the residue as her arrears of dower. *Re Percy, Stewart* v. *Percy*, 11 O. R. 374.

Sale Under Decree—*Conveyance to Purchaser—Parties.*]—If the wife of the mortgagor join in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser. *Moore* v. *Shinners*, 1 Ch. Ch. 59.

Sale Under Decree — *Neglect to Prove Claim—Bar.*]—The widow of a mortgagor, the defendant in a mortgage suit, did not prove her claim for dower on the reference before the master, as it was not then certain that the rights of the mortgagee would be fully protected, and she was not found an incumbrancer by the report. By consent of all parties a sale was had, and the purchaser paid ten per cent. of the purchase money down, but subsequently applied for and obtained from the referee an order dispensing with the payment of the purchase money into court, and vesting the estate in the purchaser. The widow opposed the granting of this order, claiming to be allowed in to prove her claim for dower, but without avail. An appeal was allowed and the referee's order reversed, but without costs, as the dilatory conduct of the widow had invited discussion. *Hyde* v. *Barton*, 8 P. R. 205.

Several Mortgages—*Bar of Dower in One.*]—Where a mortgagor has executed several mortgages, in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow and devisees of the mortgagor, is one in the usual form against them all, with a declaration that upon payment of the mortgage executed by the widow, she shall, if she choose, be let into her dower. *Thibodo* v. *Collar*, 1 Gr. 147.

(c) Wife or Widow of Mortgagor's Predecessor.

Bar of Dower—*Non-registration—Priority of Subsequent Mortgage.*]—Certain land was devised to the testator's sons charged with an annuity to his widow, who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage was given to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when the mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage; the proceeds of the sale being more than sufficient for that purpose, the surplus was claimed by both the widow and C.;—Held, reversing the judgment in 16 A. R. 224, which had reversed the decision in 16 O. R. 321, sub nom. Maclennan v. Gray, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund, as representing her interest in the land, in priority to C. *Gray* v. *Coughlin*, 18 S. C. R. 553.

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2. *Other Cases.*

Alien's Land.]—The widow of an alien naturalized is entitled to dower. *White* v. *Laing*, 2 C. P. 186.

The widow of an alien is entitled to dower in land of which her husband has been seised during his lifetime. *Davenport* v. *Davenport*, 7 C. P. 401.

Equitable Interest.]—4 Will. IV. c. 1, giving dower out of equitable interests, applies as well where the parties were married after as before the Act. *McIntosh* v. *Wood*, 15 Gr. 92.

Joint Tenancy.]—The death of one of two joint tenants during their joint seisin passes the title to the other joint tenant free from dower of the deceased tenant's widow. *Haskill* v. *Fraser*, 12 C. P. 383.

Lands Conveyed by Impeached Deed —*Absence of Consideration.*]—A. conveys land without consideration to N. W., who remains in possession some years and leaves. A. subsequently conveys to T. W., for value, the same land. In an action for dower by the widow of N. W. against T. W.:—Held, that the first deed, being without consideration, was fraudulent as against the second, and that the claim for dower resting upon the seisin under it was not sustainable. *Wilson* v. *Wilson*, 8 C. P. 525.

Lands Conveyed by Impeached Deed —*Consideration.*]—A. entered into an agreement whereby he conveyed part of his land to his son L., "on account of natural love," the son to give his father one-half of the produce, if demanded:—Held, a valuable consideration. A. afterwards by deed conveyed to others these premises, and their assignee having commenced ejectment, L.'s widow obtained an injunction against the action. L.'s widow having meantime intermarried, the assignee moved to dissolve, urging that the widow's estate had determined, and that it was defeasible, and had been defeated by the testator's subsequent transfer for value, under 27 Eliz. c. 4; but the application was, under the circumstances, refused. *Leech* v. *Leech*, 11 Gr. 572.

Lands Conveyed Subject to Agreement.]—Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion:—Held, that the widow of the grantee had no right to dower out of this portion during the life of the grantor. *Slater* v. *Slater*, 17 Gr. 45.

Lands Conveyed to Person in Possession.]—Property owned by a married woman was in possession of her and her husband: W., their second son, lived with them. The wife died, and the husband afterwards left the premises, but W. continued to reside there. After the death of their father, J., the eldest son of the original owner, conveyed in 1872 to W., who was still in sole possession; J.'s wife did not join in the conveyance:—Held, that there having been no disseisin, and J. having conveyed before the passing of the Real Property Act, his widow was entitled to dower. *Re Higgins*, 19 Gr. 303.

Lands Devised for Maintenance—*Election.*]—Held, that a devise of land by the husband to his widow for her own and her son's support till they should come of age, did not make her tenant of the freehold, so as to prevent her from recovering dower, she not having elected to take under the devise. *Reynolds* v. *Reynolds*, 29 U. C. R. 225.

(See as to Election, *ante*, IV.)

Lands Held in Trust.]—J. W. B., a widower, was locatee of the Crown, and agreed with his son, J. B., to assign his interest in the land on condition of his son's making certain payments, and performing certain services for the father, which were all duly made and performed; and afterwards the patent was issued in the name of J. B., by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son, during all the father's life, continued to occupy the premises, making valuable improvements, without any claim by the father except for his support under the agreement made between the father and son. After the father's death, the widow filed a bill for dower in the premises, but the court held, that, even admitting that the grant of the land was to, and was by the Government meant to be to, the father, he could be treated only as a trustee for the son; and dismissed the bill with costs. *Burns* v. *Burns*, 21 Gr. 7.

Lands Sold for Taxes.]—A sale of land for taxes destroys the right of the widow of the owner to dower. *Tomlinson* v. *Hill*, 5 Gr. 231.

Lands Sold Under Execution.]—The dower of a wife is not barred by the sale in execution of her husband's estate. *Walker* v. *Powers*, M. T. 4 Vict.

C. died seised in fee of land, having devised the same to his wife for life, and after her death to his son, the demandant's husband, in fee. The testator's widow, the devisee for life, died before demandant's husband, and during her life his interest was sold under a fi. fa. against lands, and conveyed to one J., who having recovered possession sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shewn whether all the mortgage money had been paid or not; but the time for payment of several of the instalments had not arrived:—Held, that the demandant could not succeed, for the husband was never so seised as to entitle his widow to dower, his reversionary interest having been sold during his lifetime. *Cumming* v. *Alguire*, 12 U. C. R. 330. Approved in *Pulker v. Evans*, 13 U. C. R. 546.

See, also, *Chisholm* v. *Tiffany*, 11 U. C. R. 338, *ante*, 1 (b.).

Lands Sold Under Partition Decree.]—See *Re Hewish*, 17 O. R. 454.

Partnership Lands.]—Dower. Plea, on equitable grounds, that the land was part of the partnership property and the stock in trade of the husband and S. trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership money, and used in the said partnership business, and that the husband was never seised thereof, otherwise than as such partner:—Held, that the plea sufficiently shewed the land to have been purchased for partnership purposes, and formed a good defence. *Conger* v. *Platt*, 25 U. C. R. 277.

It appearing that certain lands owned by J. O'N. and R. O.N. were part of the assets of the partnership, having been purchased with partnership funds, and the rent afterwards collected and received by the partnership and treated in all respects as partnership moneys:—Held, that the wives of J. O'N. and R. O'N. had no inchoate right of dower in these lands. *In re Music Hall Block, Dumble* v. *McIntosh*, 8 O. R. 225.

Pleading—*Widow a Defendant*.]—Where a widow is made a defendant as being entitled to dower, it is not sufficient for the bill to allege that the husband died leaving her his widow; the bill should further expressly aver that she is entitled to dower, and that she claims to be so entitled. *Martin* v. *McGlashan*, 15 Gr. 485.

Remainder with Surrender of Life Interest.]—A. by will devised a certain lot of land to B. for her natural life, and then to C. during his natural life, and then to his heirs forever. B. subsequently executed a writing by which she agreed to demise the land in question for all her term and interest to C., in consideration of his allowing her the occupation and use of certain portions of the premises, &c.:—Held, that the force of the surrender to C., which was effected by the demise to him of all the term of the interest of B., the tenant for life, passed to him an estate of fee simple in possession, whereof his wife was entitled to dower. *Brass* v. *Hardy*, 9 C. P. 120.

Reversion.]—Where a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein:—Held, that dower could not be claimed therein, for that the husband had never been seised during coverture of an estate of inheritance in possession. The demandant, who was a stranger to the life estate, was held not entitled to set up that there had been a forfeiture thereof by non-payment of rent or other breach of covenant. *Leitch* v. *McLellan*, 2 O. R. 587.

Temporary Contingent Interest.]—A testator, after making specific devises of certain lands, added, "at which time," (i. e., after his youngest son should have arrived at the age of twenty-one years,) "it is my will that the whole of my lands be divided in four equal parts; one part of which I give and bequeath to my two daughters, A. and B., the other three parts to be divided among my three sons, C., D., and E.:"—Semble, that under this devise of the residuary estate the devisees took not a vested estate, but a contingent and future estate, and that for life only; the estate in the meantime vesting in the heir-at-law. Semble, also, that the heir-at-law would then have an estate which would not entitle his widow to her claim for dower, the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will. *McLellan* v. *Meggatt*, 7 U. C. R. 554.

Tenants in Common.]—Where the husband is seised as tenant in common, his wife may be endowed. *Ham* v. *Ham*, 14 U. C. R. 497.

Unpatented Lands.]—Where a nominee of lands before patent issued conveyed them away, being unmarried, and afterwards, having obtained the patent, made a new conveyance to the same party, being then married:—Held, that his wife could not claim dower, as she was estopped by the deed made before the patent issued. *McLean* v. *Laidlaw*, 2 U. C. R. 222.

Unpatented Lands.]—A widow is entitled to dower in lands purchased from the Crown by her husband, and whereof he died possessed, although no patent issued, and the purchase money had not been all paid. She is also entitled to one-third of the rents and profits for six years before the suit. *Craig* v. *Templeton*, 8 Gr. 483.

VII. Rights of Purchasers where there is Outstanding Dower.

Abatement of Purchase Money — *Forum.*]—An application by a purchaser in a suit for specific performance for abatement of purchase money, on the ground of outstanding dower, should be made in court and not in chambers. *Shinners* v. *Graham*, 1 Ch. Ch. 212.

Application to be Relieved from Contract—*Obstacle Created by Applicant.*]—At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be relieved from the contract to purchase on the ground of the outstanding dower. The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application, though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser* v. *Gunn*, 8 P. R. 278.

Conveyance Subject to Dower—*Abatement of Purchase Money.*]—Where a party agrees to convey property, he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money. *Kendrew* v. *Shewan*, 4 Gr. 578.

Lunatic's Dower—*Order Barring.*]—On a sale of land by an infant under R. S. O. 1877 c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5 (O.), barring the dower of the infant's mother, who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.

Partition Decree—*Sale of Lands Under.*]—On a vendor and purchaser application, it appeared that in 1877 a decree was made for partition or sale of the lands in question, to which four married men were parties, whose wives, however, were not made parties, either originally or in the master's office, and the lands were sold pursuant to the decree, and a vesting order granted to the purchaser, under whom the present vendor claimed title:—Held, that, notwithstanding the Conveyancing Act, R. S. O. 1887 c. 44, s. 53, s.-s. 10, the inchoate right of dower of the wives was not affected by the proceedings. Re Hall-Dare's Contract, 21 Ch. D. 41, considered. In the case of two of the wives, their husbands had, prior to the partition proceedings, mortgaged the lands, the wives joining to bar their dower:—Held, that these two no longer had any right of dower. Re Croskery, 16 O. R. 207, 209, referred to. *Re Hewish*, 17 O. R. 454.

Removal of as an Incumbrance—*Refusal to Enforce Contract.*]—The court refused to enforce a contract for the sale of land, which was subject to an outstanding claim for dower, until the title to dower was removed. Chantler v. Ince, 7 Gr. 432, observed upon. Thompson v. Brunskill, ib. 542, approved of. *Gamble* v. *Gummerson*, 9 Gr. 193.

Removal of as an Incumbrance—*Specific Performance—Abatement.*]—Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal, or to have specific performance of the contract, with an abatement in the amount of the purchase money in respect of such incumbrance. *Van Norman* v. *Beaupre*, 5 Gr. 599.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal. Van Norman v. Beaupre, 5 Gr. 599, followed. *Loughead* v. *Stubbs*, 27 Gr. 387.

Setting aside Portion of Purchase Money.]—Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal so set aside on her decease. *Skinner* v. *Ainsworth*, 24 Gr. 148.

VIII. Sale of Right to Dower under Execution.

Before Assignment—*Interest.*]—A right to dower is not saleable under execution against the lands of a dowress. Till dower is assigned she has no estate in the land, nor even a right of entry; neither does her interest come within the meaning of the words (in C. S. U. C. c. 90, s. 5,) "a contingent, or executory, or a future interest, or a possibility coupled with an interest." *McAnnany* v. *Turnbull*, 10 Gr. 298.

Inchoate Right.]—The court of chancery has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower. *Cassey* v. *Cassey*, 15 Gr. 399.

Inchoate Right.]—The inchoate right of a married woman to dower is not saleable under execution against her. *Allen* v. *Edinburgh Life Assurance Co.*, 19 Gr. 248.

Rents.]—The question whether the right of a widow to dower, which is not yet assigned to her, is seizable under common law process, or is only so liable in equity, considered and treated of. In a suit for administration, it was found that the widow of the testator was indebted to the estate in a considerable amount, and the plaintiff, a creditor of the estate, sought to set off her indebtedness against the amount which might be found due to her in respect of past as well as of future dower:—Held, that, whether her right to dower was or was not exigible under common law process, the creditors were entitled to this relief; but, as part of her indebtedness was composed of rents received by her, she was entitled to retain one-third of such rents by way of arrears of dower, and thus reduce the amount of her indebtedness. *Williams* v. *Reynolds*, 25 Gr. 49.

Statute—*Retrospective.*]—Since 40 Vict. c. 8 (O.), which is retrospective in its operation, the right of a woman to dower, as well during the life of her husband as after his death, is such an interest in lands as can be sold under a fi. fa. at law. *Allen* v. *Edinburgh Life Assurance Co.*, 25 Gr. 306. See *S. C.*, 26 Gr. 192.

IX. Miscellaneous Cases.

Administrator—*Power to Compromise.*]—An administrator with the will annexed has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased. *Irwin* v. *Toronto General Trusts Co.*, 24 A. R. 484.

Assessment Before Assignment of Dower.]—The widow of an intestate owner continuing to live on the property with her children, who own the estate and work and manage it, should not till her dower is assigned, be assessed, nor should any interest of hers be deducted from the whole assessed value, she not having the management of the estate. *Brockville Election Petition*, 7 C. L. J. 221.

Charges on Land—*Liability of Dowress—Remainderman—Interest.*]—The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof. *Reid* v. *Reid*, 29 Gr. 372.

Chattel Mortgage—*Security for Bar of Dower.*]—Validity of chattel mortgage executed by a husband to his wife to secure her against loss by reason of her having barred her dower in certain mortgages of land. *Morris* v. *Martin*, 19 O. R. 564.

Counterclaim for Dower—*Decree.*]—In ejectment the defendant was allowed to set up a counterclaim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass* v. *Glass*, 9 P. R. 14.

Dower Act—*Retroactivity.*]—The Dower Act, 32 Vict. c. 7, s. 3 (O.), is retrospective. *Re Tate*, 5 C. L. J. 260.

Dower Act — *Effect on Jurisdiction of Court of Chancery.*]—The jurisdiction of the court of chancery in cases of dower has not

been ousted by the Dower Act of Ontario, 32 Vict. c. 7 (O.) *Grieve* v. *Woodruff*, 1 A. R. 617.

Executors—*Payment to Widow — Release of Dower.*]—The defendants, executors of Z., gave a bank on the 20th April, 1858, a confession of judgment for £217,637 9s., in which sum the estate of Z. was at that time indebted, and judgment thereon was entered on the following day. This action was brought to test the validity of the judgment, the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared that defendants, being trustees of the real estate of Z., as well as his executors, had allowed out of the personalty to the widow of Z. $89,000, to obtain a release of her right to dower in his, Z.'s, lands. The plaintiffs contended that under the plea of plene administravit vel non, they were entitled to judgment to this amount:—Held, that the application of the personalty of the estate to obtain a release of dower in lands was a devastavit and a misapplication of the money, of which the bank, being interested in the estate, had the right to complain. This amount, however, was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts:—Held, that the verdict should be entered for the defendants, the plaintiffs being allowed to take judgment of assets quando. *Commercial Bank* v. *Woodruff*, 13 C. P. 621, 14 C. P. 22.

Liabilities of Debtor—*Value of Right of Dower.*]—Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities. *Rae* v. *McDonald*, 13 O. R. 352.

Release of Dower—*Tenants in Common.*]—Where a widow purported to release "All my dower * * in, to, out of all that certain * * lot" to two or more tenants in common:—Held, (1) that her dower was gone in the whole lot; (2) that there was no accrual in favour of the other tenants in common. *McDearmid* v. *McDearmid*, 15 C. L. J. 112.

Sale of Dower.]—A widow's title to dower before assignment, although not transferable at common law, may be the subject of sale and conveyance in equity. *Rose* v. *Simmerman*, 3 Gr. 598.

Sum in Lieu of Dower—*Payment on Account.*]—In an administration suit, the testator's widow agreed that the real estate should be sold free from her dower, and the master by his report approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price. The widow therefore petitioned for payment of a small sum towards the allowance that might be made in lieu of dower. The creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed. *In re Thompson, Bigger* v. *Dickson*, 1 Ch. Ch. 323.

Sum in Lieu of Dower—*Devolution of Estates Act—Creditors.*]—Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the footing that she was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children:—Held, that, notwithstanding the opposition of creditors, the widow should be allowed a gross sum. *Re Rose*, 17 P. R. 136.

See CROWN, II. 6.

DRAINAGE.

See MUNICIPAL CORPORATIONS, XII.—WATER AND WATERCOURSES, VI.

DRAINAGE TRIALS ACT.

See MUNICIPAL CORPORATIONS, XII. 7.

DRAINS.

See MUNICIPAL CORPORATIONS, XVI. 2—RAILWAY, VII. 3.

DRUNKENNESS.

See FRAUD AND MISREPRESENTATION, V. 3—INTOXICATING LIQUORS, IV. 2, VII.

DUPLICITY.

See PLEADING — PLEADING AT LAW BEFORE THE JUDICATURE ACT, I. 9.

DURESS.

Bond—*Conviction of Child.*]—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of s. 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress. *City of St. Thomas* v. *Yearsley*, 22 A. R. 340.

Deed Obtained by Threats of Legal Proceedings.]—See *Sheard* v. *Laird*, 15 A. R. 339.

Deed—*Undue Pressure—Trust Property.*]—The owner of land having died intestate leaving several children, W. R. received from the others a deed conveying to him the entire title in the land, in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a reconveyance of the land to him and then give a mortgage to B. The reconveyance, not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she

had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land:—Held, affirming the judgment in 30 N. S. Reps. 405, that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure, and should be set aside, and B. should not be allowed to set it up. *Burris* v. *Rhind*, 29 S. C. R. 498.

Intimidation of Workmen.] — See *Hynes* v. *Fisher*, 4 O. R. 69, 78.

Marriage—*Consent to—Threats.*]—Where duress is alleged, it must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment:—Held, on the evidence, that his consent to the marriage was proved. *Lawless* v. *Chamberlain*, 18 O. R. 298.

Mortgage—*Agreement when under Arrest —Subsequent Execution of Deed.*]—A person having been arrested on a charge of obtaining money under false pretences, agreed, in presence of the magistrates who had issued the warrant, to execute a mortgage on his farm to secure the amount, whereupon he was discharged, and he, with the complainant, went and gave instructions for the conveyance, which he subsequently executed. The court, under the circumstances, refused to set aside the mortgage as obtained by duress, but, as the conduct of the defendant had been harsh and oppressive, dismissed the bill without costs. *Boddy* v. *Finley*, 9 Gr. 162.

Mortgage — *Threat of Criminal Prosecution.*]—The plaintiff, a farmer of about sixty years of age, and unacquainted with legal matters, was taken by the defendant to a lawyer's office and when there was charged with having defrauded the defendant, by changing the figures in certain weigh tickets for grain, to an amount of about $500, and was threatened that if he left the office without settling the claim he would be arrested by a detective, who was pointed out to him, in consequence of which the plaintiff executed a mortgage on his farm for the sum of $600. The court found that the mortgage was void as having been obtained by duress and coercion, although the plaintiff, before giving the instrument, had been told that he might leave and go where he pleased, but the person so giving him permission declined to undertake that in case of his leaving he would not be arrested. *Armstrong* v. *Gage*, 25 Gr. 1.

Mortgage — *Wife — Criminal Charge against Husband.*]—Where it was shewn that the wife of a person against whom criminal charges were about to be instituted, executed a mortgage on her lands in order to prevent such charges being proceeded with, the court refused to enforce payment of the security, and dismissed a bill filed by the mortgagees for that purpose. The fact that the friends of the husband and wife were the persons who had urged her to give the security, did not validate the instrument. *Watts* v. *Mitchell*, 26 Gr. 570.

Order for Payment of Money—*Threat of Criminal Prosecution.*]—W. obtained from P. an order for £50 (which was paid), on a statement that he could prosecute him for an alleged felony:—Held, recoverable in an action brought therefor. *Pasco* v. *Wegg*, 6 C. P. 375.

Promissory Note — *Threat of Criminal Prosecution.*]—Quære, as to the effect upon the validity of the note sued on in this case, of the threats to prosecute defendant, by which it was alleged that the note was obtained, if it had been shewn that the plaintiffs were entitled to recover the money for which it was given. *Canada Farmers' Mutual Ins. Co.* v. *Watson*, 25 C. P. 1.

Promissory Note — *Arrest — Imprisonment.*]—See *Knowshaw* v. *Collier*, 30 C. P. 265.

Transfer of Chattel—*Threat of Criminal Prosecution.*]—The plaintiff, being an agent for the defendants, an agricultural manufacturing company, sold to one S. a mowing machine for $52, taking in exchange a horse, notwithstanding his instructions were to sell for cash only. The company, however, adopted the sale by accepting from the plaintiff a chattel mortgage on the horse for their claim. Shortly afterwards, the defendants becoming dissatisfied, C., their general agent, proposed to S. to return the mower and receive back the horse. This being agreed to, C. saw the plaintiff and informed him that he was authorised to take back the horse to S., and urged the plaintiff to do so himself or allow him (C.) to do so. S. at first objected, but, on being threatened "with an action," he consented, and lent C. a horse and buggy, and also a halter so as to lead the horse away. Subsequently, on the same day, the plaintiff, when informed that the horse had been returned to S., told C. that he had no right to take back the horse, alleging that he was worth $95, for which sum he brought this action against the defendants. At the trial the jury found that the horse had been taken away against the will of the plaintiff, and under a threat of criminal proceedings, and judgment was given in favour of the plaintiff for $85, as being the value of the horse:—Held, that there was no evidence of duress by threats, sufficient to avoid the plaintiff's consent to return the horse to S. The law as to duress by threats of imprisonment considered. *Piper* v. *Harris Manufacturing Co.*, 15 A. R. 642.

Transfer of Goods—*Trover.*]—Where in trover it was apparent that the goods for which the action was brought, were transferred by the plaintiff to defendant when under duress, and the jury found a verdict for defendant against the justice of the case, the court granted a new trial. *Stewart* v. *Byrne*, 6 O. S. 146.

Transfer of Property—*Father of Person under Arrest.*]—S., a trader in Yarmouth, N.S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant

to be indorsed by a local magistrate, and had S. brought to Montreal, when the other creditors there issued writs of capias for their respective claims. The father of S. came to Montreal, and, in consideration of the release of S. on both the civil and criminal charges, transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol, having given his own recognizance to appear on the criminal charge. In the settlement to the claims of the creditors was added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution, the evidence shewed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S.:—Held, that the nature of the proceedings and the evidence clearly shewed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void. *Shorey* v. *Jones*, 15 S. C. R. 398.

DYING DECLARATION.

See CRIMINAL LAW, IX. 36.

EASEMENT.

Abandonment—*Sale—Lane not in Use.*]—Abandonment of an easement may be shewn not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was held that the owner of the dominant tenement could not then have the right of way opened. Mykel v. Doyle, 45 U. C. R. 65, considered. A conveyance made in pursuance of the Short Forms Act, of a lot according to a registered plan upon which a lane is laid out does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question. *Bell* v. *Golding*, 23 A. R. 485.

Artificial Stream—*Dominant Tenement—Servient Tenement.*]—The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement: and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement. The owner of a servient tenement taking water under such circumstances is not "a person claiming title thereto" within R. S. O. 1887 c. 111, s. 5. Ennor v. Barwell, 2 Giff. 410, distinguished. *Oliver* v. *Lockie*, 26 O. R. 28.

Chimney and Stovepipe.]—The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the former having a chimney, but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stovepipe through a hole in the partition between his and the south part, and thence into the chimney in that part. The owner subsequently leased the south part to defendant, who at the time he became tenant was aware of the existence of the stovepipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff on coming in put up a pipe of his own, with the consent of, or at least without any objection by, defendant. The defendant having afterwards taken down the pipe and stopped up the hole:—Held, that he was a wrong-doer in so doing, for that he only held the south part subject to the user or easement of the plaintiff of the stovepipe and hole. *Culvercwell* v. *Lockington*, 24 C. P. 611.

Damages—*Interference with Easement.*]—Right to damages against railway company for injury to easement in construction of their road. See *Wells* v. *Northern R. W. Co.*, 14 O. R. 594.

Damages.]—See *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

Drain—*Building Interfering with Access.*]—In 1843 the plaintiffs by deed obtained the right of draining their property by passing a good drain through an alley left open between two houses on another lot in the town of St. John's. In 1880 defendants built a barn covering the alley under which the drain was constructed, and used it to store hay, &c., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs the plaintiffs brought an action confessoria against defendants as proprietors of the servient land, praying that they, the plaintiffs, might be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action:—Held, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when the drain was not covered, and to pay damages, should be affirmed. *Wheeler* v. *Black*, 14 S. C. R. 242.

Duration of Easement.]—An agreement to grant an easement will not necessarily be for an easement in perpetuity. *Craig* v. *Craig*, 2 A. R. 583.

Grant—*Parol.*]—An easement can only be granted by deed, and if given by parol, may be revoked at any time. *Crysler* v. *Creighton*, E. T. 2 Vict.

Interruption.]—As to the application of the Ontario Act, R. S. O. 1877 c. 108, reducing the period of limitation to ten years, to the interruption of an easement. See *Mykel* v. *Doyle*, 45 U. C. R. 65.

Lateral Support—*Damages.*]—The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged:—Held, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose, and they continued to maintain the plaintiff's land in its proper position:—Held, also, that in estimating the plaintiff's damages, no sum should be allowed for damages to arise in future. The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land:—Held, that the plaintiff was entitled to full costs. *Snarr* v. *Granite Curling and Skating Co.*, 1 O. R. 102.

An action against the proprietor of adjoining land for damage done to a building by the removal of the lateral support afforded by such adjoining land, may be maintained by the tenant of the building. *McCann* v. *Chisholm*, 2 O. R. 506.

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated the land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built upon oak planks laid about one foot under the ground, by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that owing to the unity of seisin of S., there had not been twenty years' continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant:—Held, also, that when S. sold H.'s lot, there was no implied reservation of the right of support for the house:—Held, also, reversing 44 U. C. R. 428, that under the circumstances there was no evidence of negligence in fact, and that the plaintiff was therefore not entitled to recover. *Backus* v. *Smith*, 5 A. R. 341.

Measure of Enjoyment.]—The nature of the enjoyment of an easement, at the time of the grant, is the proper measure of enjoyment during the continuance of the grant. *Heward* v. *Jackson*, 21 Gr. 263.

Navigable Stream—*Public Easement therein.*]—The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make use of any of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof. *The Queen* v. *Fowlds*, 4 Ex. C. R. 1.

Notice—*Severance of Tenement by Conveyance—Rights of Drainage and Aqueduct—Registry Laws.*]—Where the owner of two adjoining lots of land conveys one of them, he impliedly grants all those conditions and apparent easements, including rights of drainage and aqueduct, over the other lot which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The grant of such an easement, if implied, is not within the provisions of the Registry Act, and prevails over a subsequent purchaser, without notice, of the adjoining lot; if express, its due registration on the lot conveyed is notice thereof to a subsequent purchaser of the adjacent lot without registration thereof. Dicta in Carter v. Grasett, 14 A. R., at pp. 709, 710, dissented from. *Israel* v. *Leith*, 20 O. R. 361.

Notice—*Equitable Interest.*]—A municipal council who, with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act. *Jarvis* v. *City of Toronto*, 21 A. R. 395, 25 S. C. R. 237.

Nuisance.]—Twenty years' user will legitimate an easement affecting private property, but not a nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

Prescription—*Enjoyment for Twenty Years—Extinguishing Easement—Registry Laws—Notice.*]—The plaintiff claimed through the defendant's predecessor in title the right to use two springs, C and E, under conveyances in 1841 and 1843 of lands north of the springs. One conveyance granted the sole and perpetual right to spring C, together with the right to use a road from the southern boundary of the land granted to the spring; the other granted the sole and perpetual use of and right to the water of spring E, without indicating the manner in which the water was to be approached or its enjoyment had. The defendant was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through the defendant's land to the plaintiff's land, from 1861 to 1882 or 1883, when the defendant tore up the pipes, insisting that the then owner of the plaintiff's land had no right to maintain them, and thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of the defendant's cattle:—Held, that under the conveyances the plaintiff had a right of access to spring C by the road mentioned, and to spring E by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through the defendant's land. The result of the interruption in 1882 or 1883 and the arrangement then made was that since that time the plaintiff must be taken to have maintained the pipes, not as a matter of right, but by the license of the defendant; under ss. 35 and 37 of R. S. O. 1887 c. 111, the fact that twenty years had expired before the interruption was immaterial; and,

therefore, the plaintiff had not acquired a prescriptive right to the easement. The fact that for nearly the first half of the period from 1861 to 1881 or 1883, the land over which the easement was claimed was unoccupied, and its owners out of the country, constituted another objection to the acquisition of a prescriptive right under s. 35. The license of the defendant under which the pipes were maintained since 1882 or 1883, being by parol, was determinable at any time by the defendant; and the defendant in subsequently taking up the pipes, which led to the bringing of this action, was acting within his strict legal right of revoking the license; and the plaintiff was not entitled to damages for their removal, or for disturbing the ground in which they lay whereby the water was rendered impure. The possession by the defendant of the land through which access to the springs was to be had, for upwards of ten years, did not extinguish the plaintiff's right of access. Mykel v. Doyle, 45 U. C. R. 65, followed. Before the conveyances of 1841 and 1843, G., the then owner of all the lands now in question, conveyed them to M. by a deed absolute in form, but really intended as a mortgage, and in 1857, in a redemption suit brought by persons who had acquired the equity of redemption from G., after the registration of the conveyances of 1841 and 1843, it was declared that this conveyance was a mortgage only, and in 1858 a conveyance was made by the representatives of G., pursuant to the decree, reciting the payment of the mortgage moneys and conveying the lands to the plaintiffs in the redemption suit. The defendant claimed the land upon which the springs were situated under the grantees in the conveyance of 1858:—Held, that the defendant was affected under the Registry Acts with notice that M. was a mortgagee only, and that those who redeemed him did so as owners of the equity; and the defendant could not set up the estate of the mortgagee, which upon payment of the mortgage, was a bare legal estate, carrying with it no rights as against the beneficial owners of the land. *McKay* v. *Bruce*, 20 O. R. 709.

Prescription—*Unity of Title.*]—The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner. *Innes* v. *Ferguson*, 21 A. R. 323, 24 S. C. R. 703.

Prescription — *Acquisition of Easement by.*]—For further cases see LIMITATION OF ACTIONS.

Right of Way—*Limited Grant—Colourable User.*]—A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally apart from his ownership and use of the lot. *Robinson* v. *Purdom*, 26 A. R. 95, 30 S. C. R. 64.

Right of Way — *Prescription—Landlord and Tenant—Acknowledgment by Tenant.*]—After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right:—Held, that even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority. *Ker* v. *Little*, 25 A. R. 387.

Roadway—*User.*]—In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance further back, had been tolerated by the plaintiff and his auteurs, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point of the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (negatoire) to prohibit further use of the way:—Held, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. *Riou* v. *Riou*, 28 S. C. R. 53.

Seignorial Grant — *Servitude — Special Reservation.*]—See *Commune de Berthier* v. *Denis*, 27 S. C. R. 147.

Servitudes Established for Public Utility.]—Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. Perrault v. Gauthier, 28 S. C. R. 241, referred to. *Hollester* v. *City of Montreal*, 29 S. C. R. 402.

Severance — *Continuous User.*] — When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. *Hart* v. *McMullen*, 30 S. C. R. 245.

Sewer—*Deed—Absence of Reservation—Easement of Necessity.*]—See *Verney* v. *Guthrie*, 18 C. L. T. Occ. N. 413.

Short Forms Act.]—As to the passing of easements by a deed under the Short Forms

Act. See *Kerr* v. *Coghill*, 25 Gr. 179; *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63.

Surface Water — *Lands of Different Levels.*]—The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level. *Ostrom* v. *Sills*, 24 A. R. 526. See the next case.

Surface Water — *Levels.*]—O. and S. were adjoining proprietors of land in the village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging from the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby:—Held, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain. *Ostrom* v. *Sills*, 28 S. C. R. 485.

Unity of Title — *Subsequent Grants.*]—One piece of land cannot be said to be burdened by an easement in favour of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parts comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact — quasi easements. If the quasi servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent. If the dominant tenement is first granted, all quasi easements which have been enjoyed as appendant to it over a quasi servient tenement retained by the grantor, pass by implication. *Attrill* v. *Platt*, 10 S. C. R. 425.

Walls of House.]—In 1883, M. W. being seized of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. Subsequently M. commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray* v. *Morrison*, 9 O. R. 180.

Watercourse — *Diversion by Railway Company — Equitable Easement—Notice.*]—Where the defendants in 1871, without authority, diverted a watercourse on certain land and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title:—Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a bonâ fide purchaser for value without actual notice; the defendants having shewn no prescriptive right to divert the watercourse; and the diversion being wrongful as against the plaintiff. Knapp v. Great Western R. W. Co., 6 C. P. 187; L'Esperance v. Great Western R. W. Co., 14 U. C. R. 173; Wallace v. Grand Trunk R. W. Co., 16 U. C. R. 551; and Partridge v. Great Western R. W. Co., 8 C. P. 97, distinguished. *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Way — *Appurtenances.*] — Right of way—Severance of tenements—When the right will pass—"Appurtenances."—Pleading. See *Harris* v. *Smith*, 40 U. C. R. 33.

Way — *Grant of "Road."*] — A deed, after granting certain land, describing it by metes and bounds, continued, "also a road forty feet wide," adding to the description thereof "and not included in the above quantity of land:"—Held, that by the conveyance of the road the fee in the freehold therein did not pass to the grantee, but merely an easement of the right of way over the land. Review of the American decisions. *Fisher* v. *Webster*, 27 O. R. 35.

Way — *Implication — Prescription — Interruption—Unity of Possession.*]—A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant, the owner of lot 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood:—Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4. The passage in question was used by the ocupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1894, the owner of No. 13 was also the tenant of No. 9:—Held, that the unity of possession during that period interrupted the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R. S. O. 1887 c. 111, s. 35. Dictum of Hatherley, L. C., in Ladyman v. Grave, L. R. 6 Ch. 763, not followed. But, that at all events the locus in question could not be treated as a way to lot 4; it was rather a way to that portion of lot 5 on which house No. 9 stood; and there being unity of seisin

of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation. Semble, that, but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant." And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant. *Re Cockburn*, 27 O. R. 450.

Way—*Real or Apparent Servitude—Registration—Law of Quebec.*]—See *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

Way of Necessity—*License.*]—Held, reversing 16 A. R. 3, and restoring 15 O. R. 620, that plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well defined road but only a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but—Held, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement, not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *Rogers* v. *Duncan*, 18 S. C. R. 710.

Way of Necessity — *Interruption.*] — K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5th ser. c. 112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same:—Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements. *Knock* v. *Knock*, 27 S. C. R. 664.

Way—*Grant of Right of Way.*]—See *Wright* v. *Jackson*, 10 O. R. 470; *McLean* v. *City of St. Thomas*, 23 O. R. 114; *Hebner* v. *Williamson*, 44 U. C. R. 593, under DEED, III., 2.

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I. By Whom and for What.

Adverse Possession — *Heir-at-Law.*] — Where there is an adverse possession of land, an heir-at-law who has never entered cannot make a conveyance so as to enable his vendee to recover in ejectment. *Doe d. Dixon* v. *Grant*, 3 O. S. 511.

Assignee of Tenant.]—Ejectment cannot be maintained on a written assignment, not under seal, of all the tenant's right, title, and interest in the premises, it not being shewn that he had any, or if so what his interest was. *Doe d. Pringle* v. *Hodgson*, E. T. 3 Vict.

Devisees inter Se—*Legal Estate in One.*] —The testator, in 1864, describing himself as of the north half of lot 27, 5th concession, Nottawasaga, bequeathed "the above mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years; and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said term of 20 years, his son Ronald, the defendant, was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the Crown of the land devised to him, habendum, "subject, nevertheless, to the terms and conditions of the last will and testament" of the testator:—Held, that the words "I bequeath, &c., in the following manner, &c.," to my wife and family," carried the estate direct to them, notwithstanding the direction to the executors. Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him. *McDonald* v. *McDonald*, 34 U. C. R. 369.

Dowress.]—Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son that he should occupy the house, except certain rooms in it, and take the rents and profits upon certain conditions, on breach of any of which he was to go out of possession, but his mother did not release her right under the statute:—Semble, that the mother could not, after the father's death, on the ground that she had not barred her dower under the life lease, maintain ejectment for the whole of the premises, without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe d. Peck* v. *Peck*, 1 U. C. R. 42.

Highways.] — In ejectment it appeared that the land in question had been surveyed by the government, and laid out as streets in 1852, in their plan filed in the registry office; and that the plaintiffs had afterwards been incorporated as a town including these streets within their limits:—Held, that the plaintiffs could not maintain ejectment, the land being a public highway. *Town of Sarnia* v. *Great Western R. W. Co.*, 21 U. C. R. 59.

Joint Tenants and Tenants in Common.]—Tenants in common cannot make a joint demise in an ejectment. *Doe d. McNab* v. *Sicker*, 5 O. S. 323; *Doe d. Shuter* v. *Carter*, H. T. 2 Vict.

Joint tenants, in bringing ejectment, may sever in their demise. *Doe d. Barwick* v. *Clement*, 7 U. C. R. 549.

Under the old practice, in ejectment by one tenant in common against another, where the common consent rule had been entered into, proof of an actual ouster was dispensed with. *Doe d. Clarkson* v. *Haskins*, 2 U. C. R. 75.

One tenant in common under a will conveyed the whole estate, claiming it as heir-at-law. In ejectment by the other tenants in common against his grantee: — Held, that proof of actual ouster was unnecessary. *Scott v. McLeod*, 14 U. C. R. 574.

Several plaintiffs claiming each an undivided interest need not prove a joint title, or any privity, but may maintain a joint action upon separate titles. *Bradley v. Ferry*, 20 U. C. R. 563.

The defendant defended for the whole, giving no notice of defence as tenant in common, under s. 29 of the Ejectment Act, C. S. U. C. c. 27. The evidence shewed that she was entitled to an undivided moiety; but, held, that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech v. Leech*, 24 U. C. R. 321.

The plaintiff was held entitled to recover two undivided third parts. It was urged on the authority of Leech v. Leech, 24 U. C. R. 321, that the plaintiff being held so entitled, the postea should be awarded to him generally; but, held, not, the proceedings on both sides in that and other cases having been directed to try the title to the whole. *Lyster v. Ramage*, 26 U. C. R. 233.

Where the action was against three, and two claimed only under the infant, admitting the plaintiff's right to two undivided thirds, but denying ouster:—Held, that as the infant's right to one third was established, the plaintiff without proof of ouster could not recover against the others. *Gilchrist v. Ramsay*, 27 U. C. R. 500.

A tenant in common, in an action for the possession of land against a person without any title, can recover judgment only for the possession of his share; and the Ontario Judicature Act has made no difference in this respect. *Barnier v. Barnier*, 23 O. R. 280.

Person Entitled to Maintenance.]—A testator seised in fee of land devised the same to his son on condition that he should support the plaintiff during her life, and that she should be mistress, and have control of the dwelling house on the land:—Held, that the son took the land conditioned for the maintenance of the plaintiff during her life, but that no title was conferred upon her under which she could bring ejectment, the control which the testator meant being merely the domestic management, not the ownership of the house. *Grant v. McLennan*, 16 C. P. 395.

Pew.]—Held, that the plaintiff, a member of the church of England, could not maintain ejectment for pews in St. James's church held by him, because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the sheriff. *Ridout v. Harris*, 17 C. P. 88.

Religious Institutions Act.]—Trustees under C. S. U. C. c. 69, may maintain ejectment in their individual names, with the description, "as trustees," &c., stating the name of the congregation or religious body for whom they are trustees, according to the description in the deed of conveyance. *Humphreys v. Hunter*, 20 C. P. 456.

Sheriff's Sale of Road.]—The sale of a road owned by a company under the Road Companies Act, C. S. U. C. c. 49, by a sheriff under a fi. fa. lands, is a valid sale, and a conveyance made by him to the purchaser is sufficient to enable the vendee to bring ejectment. *Totten v. Halligan*, 13 C. P. 567.

Vendor and Purchaser.]—The plaintiff owned part of lot 7, and agreed verbally, in 1859, to buy from one M. two acres more adjoining on the north, of which he went into possession. In 1860 M. gave to defendant a bond to convey to him thirty acres of the lot, more or less, describing it as "all that part of the said lot lying north of the land owned by D.," the plaintiff, "and south of the road through the said lot to Cramahe Hill." He afterwards conveyed the two acres to the plaintiff, who then brought ejectment. M. swore upon the trial that these two acres were not intended to be included in the bond to defendant, but were looked upon as part of the plaintiff's land referred to in it, and that defendant had without them his full thirty acres:—Held, that the plaintiff must recover, for, 1. The bond, under the circumstances, should be construed as referring to all the land in the plaintiff's visible possession as owner, thus excluding the two acres; and, 2. The deed at all events vested the legal title in the plaintiff, and defendant's equitable right under the bond could afford no defence. *Dusenbury v. Palmatier*, 21 U. C. R. 462.

The court will not compel a vendee of land, who has recovered from the vendor the purchase money and interest for defect of title, to stay proceedings on his judgment until he gives up possession. The vendor must proceed by ejectment; and quære, as to his right to recover. *McKinnon v. Burrows*, 4 O. S. 71.

A. is let into possession by B., upon an agreement to purchase, with the understanding that he is to remain until default. A. afterwards, though not in default, lets B. into possession, on the express condition that B. is to restore to him (A.) the possession in a certain event. This event happens, but B. retains the possession:—Held, that A., being entitled to the possession, could maintain ejectment against B., though he had the legal title. *Doe d. Barker v. Crosby*, 7 U. C. R. 202.

II. Damages and Mesne Profits.

Change of Title Before Trial.]—A lessor who had the title at the time of action brought, but not at the trial, is entitled to damages, although he cannot recover his term. *Doe d. Meyers v. Blakier*, E. T. 2 Vict.

Costs.]—In an action for mesne profits, after judgment by default in ejectment, it is not necessary that the costs of the ejectment should be taxed before they can be recovered. *Bank of Upper Canada v. Armstrong*, H. T. 6 Vict.

The plaintiffs having recovered in ejectment against one W. for lands occupied by W. as tenant to defendant, brought an action against defendant for mesne profits, and succeeded, the costs of the ejectment being allowed as

part of the damages. These costs were subsequently reduced on revision in Toronto by £120 15s. 2d.:—Held, that the amount taxed was the amount plaintiffs were entitled to, and the verdict was reduced accordingly. *Neale* v. *Winter*, 10 C. P. 199.

Evidence after Judgment—*Ejectment.*]—Where after a recovery in ejectment an action is brought for the mesne profits, and evidence of title is given, it is not necessary to shew the judgment in ejectment. *Stephenson* v. *McCombs*, M. T. 4 Vict.

Executrix.]—An action for mesne profits may be maintained against an executrix under 7 Will. IV. c. 3; and where the action is founded on the judgment against the casual ejector in ejectment, it is no ground of defence that although the writ of possession is tested in the tenant's lifetime, it was issued and executed after his death without a sci. fa. *Green* v. *Hamilton*, E. T. 3 Vict.

Improvements.]—In an action for mesne profits the jury gave a verdict for nominal damages. Evidence was given that the defendant had made substantial improvements on the lot from which he had been ejected, and evidence of the costs of the ejectment suits:—Held, that the damages were in the discretion of the jury, and that the damages and costs of the ejectment might be considered as paid for by the improvements, and a new trial was refused. *Patterson* v. *Reardon*, 7 U. C. R. 326.

36 Vict. c. 22, as to improvements on land in mistake before notice, and the lien therefor discussed. *Carrick* v. *Smith*, 34 U. C. R. 389.

In trespass for mesne profits defendant may shew in mitigation of damages the value of buildings erected on the premises by him. *Lindsay* v. *McFarling*, Dra. 6.

Mesne Profits—*Occupation Rent.*]—See *Elliott* v. *Elliott*, 20 O. R. 134.

Mesne Profits.] — Quære, as to when mesne profits may now be recovered in ejectment. *McCarthy* v. *Arbuckle*, 31 C. P. 405.

Mortgagee — *Trespassers.*] — Where a mortgagee brought ejectment after foreclosure, and defendants appeared to be mere trespassers having no privity with the mortgagor, the plaintiff was held clearly entitled to mesne profits from the date of the foreclosure. *Mair* v. *Cully*, 11 U. C. R. 308.

Notice.]—A plaintiff in ejectment claiming substantial damages under 14 & 15 Vict. c. 114, must give notice as the Act directs, and proceed for such damages at the trial of the ejectment, otherwise he waived his claim, and could maintain no action afterwards. *Curtis* v. *Jarvis*, 10 U. C. R. 466.

Overholding Tenant.]—A landlord proceeding against an overholding tenant under 4 Will. IV. c. 1, s. 53, cannot, under 14 & 15 Vict. c. 114, s. 12, recover mesne profits, the latter Act applying only to actions of ejectment. *Allan* v. *Rogers*, 13 U. C. R. 166.

Pleading.]—See *Grant* v. *Fanning*, Tay. 470; *Green* v. *Hamilton*, 6 O. S. 79; *McKenzie* v. *Fairman*, 1 C. P. 50.

Subsequent Action.] — Semble, that a plaintiff in ejectment, under 14 & 15 Vict. c. 114, not having proceeded for substantial damages, is precluded from recovering them in a subsequent action. *Hamer* v. *Laing*, 13 U. C. R. 233.

III. Demand of Possession and Notice to Quit.

1. *In General.*

Where defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his title:—Held, that he was neither entitled to a notice to quit nor a demand of possession. *Doe d. Bonter* v. *Frazer*, 4 O. S. 80.

A person holding under a license of occupation from the Crown, is entitled to a demand of possession before ejectment by a grantee of the Crown. *Doe d. Green* v. *Friesman*, 5 O. S. 661.

A demand of possession made by a person who afterwards assigned his interest to the lessor of the plaintiff, cannot be available by the lessor so as to make the tenant's holding tortious as to him. *S. C.*, E. T. 2 Vict.

Where a person has been in possession for many years, and made valuable improvements under the eye of the owner, his consent to the occupation may be presumed, and the possessor cannot be ejected without a demand of possession. *Doe d. Sheriff* v. *McGillivray*, 6 O. S. 189.

An heir need not demand possession from a person claiming the land as the grantee of the ancestor, who was a feme covert, and executed the deed under which defendant claims with her husband without the acknowledgment required by 59 Geo. III. c. 3, such deed being as to her absolutely void. *Doe d. Vansickler* v. *Fairwell*, M. T. 4 Vict.

Though a surviving partner may have an equitable title, yet the heir of the deceased partner suing in ejectment upon his ancestor's legal title, need not demand possession. *Doe d. Atkinson* v. *McLeod*, 8 U. C. R. 344.

The plaintiffs claimed as tenants for life under a will, and defendant did not hold under them, and by his notice denied their title:—Held, that no notice or demand was necessary. *Scouler* v. *Scouler*, 19 U. C. R. 106.

Two persons agree to exchange land; that each shall have possession from a day named, and that they shall exchange deeds in one year; and each gives the other a bond to perform these conditions. The year elapses without either giving a deed. Upon ejectment for the lot which the plaintiff was to convey to the defendant:—Held, that a demand of possession was necessary, and probably also that the plaintiff should offer, if not actually give up, possession of the defendant's lot, which he (plaintiff) occupied under the agreement. *Perritt* v. *Arnold*, 11 C. P. 413.

Defendants being in default under a demise from plaintiff, he and the plaintiff referred all differences, and the arbitrators postponed the date of payment. Quære, whether the reference and postponement would not constitute

defendant a tenant at will, and so entitle him to a demand of possession before action. *Black* v. *Allan*, 17 C. P. 240.

A. having given to B. his bond in £2,500, conditioned, among other things, that C. and D. should reside on a certain lot of land so long as they conducted themselves in a manner agreeable to A.:—Held, that no notice or demand was necessary before bringing ejectment. *Tisdale* v. *Tisdale*, 10 C. P. 106.

A demand of possession by a person whose authority is afterwards recognized by the person having title, is sufficient. *Doe d. Creen* v. *Friesman*, 1 U. C. R. 420.

The plaintiff demanded possession at defendant's dwelling house in his absence, in the presence of several members of the family:—Held, sufficient, as it did not appear that the defendant was not aware that it had been made. *Doe d. Sherwood* v. *Stevens*, 6 O. S. 432.

The demand must be particular in pointing the defendant to the precise parcel of land sued for. *Doe d. Jeffrey* v. *Williams*, 6 U. C. R. 160.

Ejectment for a house and small lot of land adjoining. It appeared that as to the house notice to quit had been given too late, but that the plaintiff was entitled to the land. It was ordered that unless the plaintiff would confine his judgment to the land, defendant should have a new trial. *Conley* v. *Lee*, 12 U. C. R. 456.

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2. *Between Landlord and Tenant.*

See that title.

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3. *Between Mortgagee and Mortgagor.*

See MORTGAGE.

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4. *Between Vendor and Purchaser.*

When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. But where the defendant went to the heir and offered to pay him the money due on the bond, and to take a deed from him as heir: it was held that by such conduct he had waived his right to a demand. *Doe d. Lemoine* v. *Vancott*, 5 O. S. 486.

Where defendant entered under an agreement to purchase, and that he should enjoy until default in payment:—Held, that on default he might be ejected without any notice or demand. *Doe d. Sheriff* v. *McGillveray*, 6 O. S. 294.

Where defendant contracted for the purchase of land, and gave his bond and notes for payment of the money by instalments, but did not pay any of them, and his vendors afterwards sold to the lessor of the plaintiff, who demanded possession at defendant's dwelling house in his absence, in the presence of several members of the family:—Held, that if a demand were necessary, that was sufficient, as it did not appear that defendant was not aware that it had been made. *Doe d. Sherwood* v. *Stevens*, 6 O. S. 432.

The mere fact of a vendor continuing in possession of land after conveying it, without more being shewn, does not entitle him to a demand of possession. *Doe d. Richardson* v. *Dafoe*, 4 U. C. R. 484.

Where a person takes possession of land under an agreement to purchase it, he is a tenant at will to the seller, and at the seller's death his heir-at-law can maintain ejectment without any notice to quit, or demand of possession. *Doe d. Kemp* v. *Garner*, 1 U. C. R. 39.

Where a defendant was in possession under an agreement to purchase and pay by instalments, and after payment of the first instalment failed to pay any of the others, but remained in possession for many years, until the lessor of the plaintiff offered to give him a deed on certain terms, which were not complied with, and told him he might remain for the summer if he would leave in the autumn, which defendant refused:—Held, the jury having found that the lessor of the plaintiff had at this time determined the holding at will, that defendant was not entitled to a demand. *Doe d. Stodders* v. *Trotter*, 1 U. C. R. 310.

A. contracted to sell to B. for a sum to be paid by instalments, and defendant went in under B., upon some understanding not explained. Default was made in the payments to A.:—Held, that A. could eject defendant without notice or demand. *Doe d. Phillpotts* v. *Crouch*, 5 U. C. R. 453.

Held, that under the evidence in this case, the defendant having been in possession as a purchaser, and failed in making the payments, the plaintiff might eject without a demand. *Robertson* v. *Slattery*, 10 U. C. R. 498.

Plaintiff's devisor gave a bond to the defendant conditioned to convey to him upon payment of £175 on the 1st March, 1856, when the obligor was to give the deed, and defendant to secure the balance of the purchase money by mortgage on the premises. Then followed these words: "The said I. A. (the defendant) is to have possession of the said land and premises, with the exception of the house and barn, from the sealing and delivery of these presents:"—Held, that on default in payment of the £175, plaintiff might eject defendant. A demand of possession was made, but, semble, it was unnecessary. *Stringham* v. *Ammerman*, 14 U. C. R. 548.

The defendant had been let into possession under a contract to purchase, payable by instalments, with a stipulation for forfeiture if payment were not made on a particular day, and the vendor had subsequent to such day received payment on account:—Held, that defendant was tenant at will, and not by sufferance, and that a demand of possession was necessary. *Lundy* v. *Dovey*, 7 C. P. 38.

Plaintiff sold to defendant, and gave a bond for a deed, receiving defendant's bond for the purchase money. Nothing was said about possession in either instrument. Defendant having made default in payment, after having been for some time in possession:—Held, that the plaintiff could eject without either notice or demand. *Robinson* v. *Smith*, 17 U. C. R. 218.

Plaintiff being in possession as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for $500: $200 down, and $300 on the 1st April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of $200 defendant was let into possession. He made default in payment of the $300. Plaintiff gave him notice that he was ready to assign the mortgage on payment of the amount due, and that if not paid defendant would be ejected. Defendant refused payment, and said he would stand a suit, and claimed a deed in fee:—Held, that by default in payment the tenancy at will was converted into a tenancy at sufferance, and that therefore, as well as on account of his disclaimer of the plaintiff's title, defendant was not entitled to a demand of possession before action; and also that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant, and the default of the defendant to pay. *Prince* v. *Moore*, 14 C. P. 349.

IV. Effect of Judgment in Ejectment.

Held, that a judgment in ejectment, recovered after twenty years had expired, would not save the statute; aliter, if recovered within twenty years, and the occupant within the twenty years had been dispossessed upon such judgment. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

One F. rented the locus in quo from the plaintiff previous to May, 1851, when he went out and the defendant obtained possession. The plaintiff recovered in ejectment, in which the demise was laid on the 14th June, 1851, and entered his judgment in March, 1852; he then brought trespass q. c. f., alleging the trespass to have been committed on the 5th July, 1851. The trespass proved was in May, 1851, while F. was in possession; but, Held, that the action was maintainable, for the recovery in ejectment entitled the plaintiff to treat the defendant as a trespasser from the day of the demise. *Foster* v. *Foster*, 10 U. C. R. 607.

At the trial of an ejectment, under 14 & 15 Vict. c. 114, recovery was proved in favour of John Doe, on the demise of the now defendant against the now plaintiff; and it appeared that the question there decided, being one of boundary, was precisely the same as that again brought up in this case:—Held, clearly no estoppel, for that judgment was between different parties, and under the old practice. Quære, whether this Act has altered the effect of a recovery in ejectment, as regards estoppel. Semble, that, under s. 8 it has not, when the finding is for the claimants. *Clubine* v. *McMullen*, 11 U. C. R. 250.

Case for libel in publishing a printed notice denying the plaintiff's title to certain land, of which the declaration alleged that he was seised in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in chancery to establish her undoubted right. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee: that the said indenture was given to secure usurious interest; that the said K. died intestate, and his heirs gave the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c. The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious. Semble, that the replication shewed an estoppel. *Mair* v. *Cully*, 12 U. C. R. 71.

First count, debt on the statute for double value, claiming £40; second count, for use and occupation, claiming £20. Pleas: 1, that after the passing of 14 & 15 Vict. c. 114, the plaintiff impleaded the defendant in an action of ejectment for the same premises in the declaration mentioned, &c., in which action the jury were sworn as well to try the issue joined as to assess the damages to which the plaintiff might be entitled for the use and occupation of said premises, and a verdict was rendered for the plaintiff, as and for damages for the use and occupation of said premises, &c.; 2. to the whole declaration, as to £20, parcel, &c., the same plea:—Held, on demurrer, both pleas bad, as being no answer to the first count, and for not shewing that notice of claim to substantial damages was given, or that judgment had been entered, or that the recovery was for the same claim; and that the second plea was bad also, for not shewing to what £20 it was pleaded. *Hamer* v. *Laing*, 13 U. C. R. 233.

Quære as to the effect of the issue in ejectment now being only as to the right of possession. *Robinson* v. *Smith*, 17 U. C. R. 218.

Upon an action by N. against W. for mesne profits:—Held, that judgment in ejectment recovered by N. against a third party, who was proved to have been acknowledged by W. as his tenant, was evidence against W., he being looked upon as landlord of the party against whom the ejectment was brought, with notice of the action, which he might have defended. *Neale* v. *Winter*, 9 C. P. 394.

Declaration, upon a writ issued on the 21st December, 1858, for entering plaintiff's close, and keeping him out of possession thereof for six years. Plea, that the land was not the plaintiff's. Replication, that defendant ought not to be allowed so to plead, because by writ issued on the 11th August, 1858, the plaintiff sued defendant in ejectment to recover possession of the same land, and after trial obtained judgment therein:—Held, on demurrer, replication bad, as being pleaded to the whole plea, and containing no answer to the defence as to any time previous to the 11th August, 1858. *Green* v. *Kain*, 18 U. C. R. 626.

The plaintiff being tenant in common with defendant (her mother) and a sister, lived on the place with them until March, 1859, when she left of her own accord. The mother invited her to return, which she refused to do, and in April, 1860, she brought ejectment as tenant in common against both of her cotenants, in which she obtained judgment for default of appearance in October, but never took possession. In March, 1864, she sued for mesne profits, and defendant pleaded not guilty:—Held, that the judgment in ejectment was not conclusive proof of ouster: that the

plaintiff had never in fact been so kept out of possession as to make defendant liable in trespass; and that she could therefore recover only the costs of the ejectment. *Steen* v. *Steen*, 21 U. C. R. 454.

A judgment in ejectment against the casual ejector does not estop a defendant, in an action for mesne profits, from disputing the title of the plaintiff from the time of the demise laid in the action of ejectment. *Ponton* v. *Daly*, 1 U. C. R. 187.

A judgment in ejectment for part of the premises is an estoppel against defendant's denial of the plaintiff's interest in such portion. *Doe* v. *Langs*, 9 U. C. R. 676.

Held, in ejectment, that a record in ejectment in a former trial substantially between the same parties, was properly admitted as evidence, and that all that could be inferred against the plaintiff's right to recover at that time, and the defendant's right to possession, were proper inferences from the production of the record. *Orser* v. *Vernon*, 14 C. P. 573.

Trespass to plaintiff's land in the township of Saltfleet, digging and making drains, &c., converting same into a road or highway, and expelling plaintiff therefrom. Second plea—land not plaintiff's. Fourth plea—as to the digging and making drains for six years next before action brought, and maintaining the land during that period as a highway, and keeping plaintiff out of exclusive possession—that before and during the period of six years before action brought, there was a highway over the whole of the said land, upon which statute labour had before and since been annually performed; that during said six years defendants, as such municipal corporation, had jurisdiction over said highway; that the soil and freehold of said land, being such highway, were during that period vested in the Crown, or in defendants, under the statute in that behalf, and defendants were thereby bound during said period to keep said highway in repair. The plea went on to deny the reservation of any rights in the soil by any individual, or the exclusive possession during said period by plaintiff, or any other person, but averred that the same had been used as a highway, and that the trespasses complained of were committed for the purpose of repairing the said highway. Replications, to so much of the pleas as related to that portion of the trespasses committed since the commencement of an action of ejectment, brought by plaintiff against defendants for the same land, that defendants were estopped by the recovery of judgment by default in that action and possession taken thereunder, from pleading said pleas:—Held, on demurrer, replications good, the exceptions thereto being sustained neither in fact nor law; in fact, because plaintiff did not bring ejectment for a highway; and in law, because, suing as plaintiff did sue, he rightly brought his action for so much land, though there was a right of way over it for the public, in accordance with the law as laid down in Goodtitle v. Alker, 1 Burr. 133:—Held, also, that the writ in ejectment not having described the property sued for as a highway, the recovery in that action would not have estopped the defendants from setting up, under a proper plea, that the land was a highway, and that they entered upon it for the purpose of repair; for that the recovery was not absolutely irreconcilable with the fact of the land having been all along a highway, the plaintiff, and not the defendants, being the owner of the soil, the public having the right of way over it, and therefore the right to enter and make repairs; but that defendants could not, after the recovery in ejectment, set up the pleas they had pleaded; the second, denying that the land was plaintiff's property, and the fourth not being confined to a mere assertion that the land was a highway, but distinctly alleging the soil and freehold of the land to be in the Crown, or in defendants; besides other averments quite opposed to plaintiff's having any right in the property, and therefore to his right to recover in ejectment, as he had recovered. *Carscallen* v. *Municipality of Saltfleet*, 17 C. P. 219.

Plaintiffs claimed under a deed from E. M. and T. Defendants shewed no title. It appeared that E., on the 26th June, 1856, recovered judgment in ejectment for the land, against defendant, in an action commenced on the 3rd September, 1855, and the hab. fac. was returned executed on the 21st July, 1856, possession having been delivered to the plaintiffs' agent, who held it for two or three years. It also appeared that on the 17th March, 1858, the defendant brought ejectment against E. and the other two plaintiffs herein, and was nonsuited. How he afterwards obtained possession did not appear:—Held, that the defendant could not dispute the plaintiffs' title further back than the 3rd September, 1855, the judgment in ejectment being evidence of their title at that time as against this defendant, who shewed no title in himself. *Thompson* v. *Hall*, 31 U. C. R. 367.

In trespass for mesne profits, &c., defendants justified under a demise from a tenant in common for one year from May, 1871. The plaintiff replied estoppel by a judgment in ejectment, recovered in 1870, against a tenant of defendants then in possession, of which suit defendants had notice. On demurrer to the replication, on the ground of want of privity between the tenant in common and the defendant in ejectment, and because it did not appear that the title under which the plaintiff recovered in ejectment continued up to the demise to defendants:—Held, that the replication was good, the presumption being that the title continued until the contrary was shewn. *Herr* v. *Weston*, 32 U. C. R. 402.

The plaintiff on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff, on the 31st March, 1864, which was the plaintiff's only title to the land; that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction; that the plaintiff by the mortgage covenanted that he was seised in fee, and had good right to convey, and that the eviction complained of was an action of ejectment brought by the heirs of L. on the ground that L. was of unsound mind when he executed the deed on the 31st March, 1864, which was proved at the trial, and the jury thereupon found for the heirs:—Held, that the plea was bad; for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the

estoppel, applicable to the deed, extend to the mortgage; that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 U. C. R. 635.

A judgment in ejectment is evidence of the title of the party in whose favour it was given; but whether it is conclusive, and may be pleaded by way of estoppel, has not been determined. *Wightman* v. *Fields*, 19 Gr. 559.

Where a vendor brought ejectment and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the court for specific performance, and could only do so in order to bind their interest in such a manner as to render the property saleable. *Hawn* v. *Cashion*, 20 Gr. 518.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of res judicata to an action subsequently brought by the defendant to try the same question. *Cochrane* v. *Hamilton Provident and Loan Society*, 15 O. R. 128; *Ball* v. *Cathcart*, 16 O. R. 525.

See ESTOPPEL, II.

V. PLAINTIFF'S TITLE AND EVIDENCE THEREOF.

Admissions of Plaintiff.]—The admissions of the plaintiff in ejectment, being a real person, (the lessor being an infant), are not evidence to prevent the recovery of the premises. *Nicholson d. Spafford* v. *Roe*, 3 O. S. 84.

Agreement to Give up Possession.]—Defendant being in possession under one M., agreed, under seal, to give up peaceable possession to plaintiffs, together with certain furniture specified, within one week from the date, upon receipt of $30. On the following day the plaintiffs tendered to him $30, which he refused, and they then brought ejectment:—Held, that in the absence of any explanation it was properly left to the jury as importing an admission by defendant that the plaintiffs were entitled to possession on paying or tendering the $30. *Stewart* v. *Cameron*, 20 U. C. R. 393.

Claiming by Different Titles.]—Where the lessor of the plaintiff endeavours at the trial to establish his title as devisee, and fails, he is not thereby precluded from insisting on his right as heir-at-law, or as a purchaser from the person last seised in possession. *Doe d. Hussey* v. *Gray*, M. T. 6 Vict.

The lessor of the plaintiff supported his title by a deed, in consideration of love and affection. Defendant proved a subsequent deed from the same party for a valuable consideration, and impeached the first deed as voluntary. The plaintiff then offered to prove a real consideration for the first deed beyond what was expressed in it. This evidence was rejected as going into a new case; but held, that it might have been received, the principle that the plaintiff should go into his whole case at once not admitting of such a strict application in ejectment. *Doe d. Lawrence* v. *Stalker*, 5 U. C. R. 346.

Semble, that a plaintiff in ejectment, relying in the opening of his case upon a primâ facie title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew the possession of defendant that of a tenant to him, the plaintiff, as landlord; he should go into his case fully in the first instance. *Doe d. Osborne* v. *McDougall*, 6 U. C. R. 135.

A plaintiff having opened his case as heir-at-law of the patentee, relying upon the assumed limited effect of his own deed to the defendant, was not allowed to change his ground and shew himself entitled under the statute of limitations. *McKinley* v. *Bowbeer*, 11 U. C. R. 86.

The plaintiff in ejectment claimed title by deed from M., the defendant, by length of possession. At the trial the plaintiff failed to prove his paper title, but shewed that defendant went in under him, and it was then objected that a demand of possession was necessary, on which defendant had leave to move for a nonsuit. In term this point was not urged, but defendant objected that the plaintiff could not rely on a different title from that in his notice:—Held, that as this objection had not been taken at the trial, and defendant's case was not one to be favoured, he should not be allowed to raise it afterwards; and the plaintiff's verdict was upheld. *Kennedy* v. *Freeth*, 23 U. C. R. 92.

Conditional Devise.] — The plaintiffs claimed under a will, by which testator devised to his widow 1,000 acres of land in Walsingham; and if he had less than 1,000 acres there, then that quantity to be made up to her out of his Zorra lands:—Held, that to succeed, the plaintiffs must prove that the testator died seised of 1,000 acres more than the land in question in Walsingham. *Miller* v. *Anger*, 8 C. P. 80.

Corporation — *Lands held beyond Statutory Period.*]—Where a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute. *McDiarmid* v. *Hughes*, 16 O. R. 570.

Effect of Mortgages.] — A. mortgaged lands in fee to B., and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No reconveyance from B. to A. was proved. C. went into possession and held for about 13 years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage:—Held, that D. was not entitled to recover in ejectment, and that if necessary a reconveyance from B. to A. might be presumed. *Doe d. McLean* v. *Whitesides*, 5 O. S. 92.

Ejectment cannot be sustained by a mortgagor against a stranger where the mortgage is overdue and unsatisfied, the fee and right

of possession being in the mortgagee. *Doe d. McBernie* v. *Lundy*, 1 U. C. R. 186.

A satisfied mortgage in fee to a third party cannot be set up by a stranger as a subsisting title to defeat the true owner. *Doe d. McKenny* v. *Johnson*, 4 U. C. R. 508.

Semble, that a widow cannot be allowed to set up a mortgage to a third party against the heir of the husband. *Ib.*

Defendant produced a mortgage in fee given by the plaintiff to one C., to secure the payment of £230 by instalments. By the mortgage the mortgagor was to remain in possession until three months' notice in writing, after default, demanding payment. The mortgage had been discharged by certificate registered a week after the commencement of the action, and it was therefore contended that the plaintiff had no legal title when he began his suit:—Held, that he might nevertheless recover, for no notice was proved to have been given as required by the mortgage, and he was therefore entitled to possession against the mortgage. *Sidey* v. *Hardcastle*, 11 U. C. R. 162.

It was admitted that the plaintiff had mortgaged the premises to a building society, the condition of the mortgage being to pay 10s. on the first day of every month until the objects of the society, as stated in it, should be fulfilled. No default had been made, and it was proved that since action brought the society had released to the plaintiff their claim on the land in question:—Held, that the plaintiff could not recover, for the expiration of the mortgage being uncertain, he was only a tenant at will when the suit was brought, and therefore not entitled to the possession. *Ashford* v. *McNaughton*, 11 U. C. R. 171.

See, also, *Dundas* v. *Arthur*, 14 U. C. R. 521.

Plaintiff purchased at sheriff's sale defendant's interest in certain lands, and, on ejectment brought in 1856, defendant produced a mortgage executed by one B., under whom he had gone into possession, to secure repayment of £28 in October, 1846. This mortgage had been satisfied, as was proved by the mortgagee, but no discharge had been registered:—Held, that the jury should have been directed, as a matter of course, to presume a re-conveyance, and plaintiff should recover. *Collins* v. *Dempsey*, 14 U. C. R. 393.

Upon the trial it appeared that the plaintiff, by a mortgage dated 1st October, 1861, had conveyed the premises to one L. to secure him for indorsing certain notes, the said mortgage to be void on payment of the notes; and it contained a recital that the notes might be renewed, but only three times or for a year, which the mortgagee consented to. It appeared that the notes had been renewed for longer than the period allowed, and were afloat at the commencement of this suit:—Held, that the notes not having been paid within the year, the condition of the mortgage was broken, and the right to possession vested in the mortgagee; and a nonsuit was therefore ordered. *McMahon* v. *McFaul*, 14 C. P. 433.

M., owning land, executed a bond to defendant, reciting that defendant was to reside with him and work the farm for their mutual advantage; that it had been agreed that after M.'s death it should become defendant's, and to secure this, M. had that day made his will leaving it to him;—and the condition was, that if the defendant should work the farm properly, &c., M. would not execute any other will, nor dispose of or incumber the land. Afterwards they disagreed, and M. conveyed to the plaintiff, who brought ejectment after having demanded possession:—Held, that an unsatisfied mortgage executed by M. before the bond, and put in by defendant, was clearly no defence. *McDonald* v. *Murphy*, 20 U. C. R. 355.

One F. mortgaged land in fee to the Trust and Loan Company, with a proviso for possession until default. Upon his death his heirs-at-law brought ejectment to recover possession from a tenant, no default having been made in the mortgage:—Held, that the proviso would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not to the heirs. *Ford* v. *Jones*, 12 C. P. 358.

Estoppel—*Allegations in Defence—Statements in Other Proceedings.*]—Where in an action for recovery of lands by M., who had bought them at a sale under execution against J. K., it was objected that he had failed to prove that J. K. had at the time of such sale any title to the said lands:—Held, that it was no answer to this objection to say that the defendant had in setting up certain facts "by way of a further and separate defence" alleged that J. K. was the patentee of the lands in question, for that such an allegation could not be made use of by the plaintiff to satisfy any defect in his evidence to prove his case, the burden of which rested on him by reason of the said defendant having pleaded possession in herself and her tenants:—Held, also, that the fact that in the course of certain prior proceedings had by M. on an execution against A. K. the wife of J. K., for the purpose of selling the said lands, M. had then asserted that they belonged to her, did not estop M. from now as against J. K. and A. K., alleging that they belonged to J. K. *McGee* v. *Kane*, 14 O. R. 226. Affirmed by the supreme court, *Cassels' Dig.* 247.

Impeaching Crown Grant.]—Evidence will not be received to shew that a grant from the Crown was improperly issued, so as to enable a subsequent grantee to recover in ejectment. *Doe d. McKay* v. *Rykert*, T. T. 3 & 4 Vict.

Jus Tertii.]—Semble, that the wife of an attainted traitor, remaining in possession of her husband's lands, cannot defeat the recovery of a plaintiff in ejectment (the purchaser at sheriff's sale, in an action brought against the traitor upon a bond entered into before his attainder) by setting up under the attainder a title by forfeiture to the Crown, which the Crown had forborne to assert. *Doe d. Gillespie* v. *Wixon*, 5 U. C. R. 132.

Where the estate is in the Crown, and neither party shews any title beyond a short possession, the tenant in possession, if he entered peaceably and under colour of a claiming right, may set up the jus tertii as a defence. *Doe d. Wilkes* v. *Babcock*, 1 C. P. 388.

A party possessed of premises is not estopped from setting up as an outstanding title against a claimant a conveyance to a third party, although that third person could not

set up the conveyance as a bar to a recovery. *Philips* v. *Long*, 9 C. P. 341.

Quære, whether the defendant, a mere stranger, could set up the title in the Crown as against the plaintiffs' possession for forty years, with the privity of the Crown. Semble, that at all events the plaintiffs could have maintained trespass against him. *Jason* v. *Reynolds*, 34 U. C. R. 174.

Letters Probate — *Allegations in Defence.*]—In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office with the affidavit of verification attached:—Held, that this was not proper evidence of the will. The plaintiffs, however, sought to support their case by reference to a certain statement in the defendant's pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleading which suited their purpose and reject the rest; they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber* v. *McKay*, 17 O. R. 562.

Offer by Defendant to Purchase.]—Defendant, being an occupant of land, went to the lessor of the plaintiff of his own accord, made an offer to purchase the land, and made a payment on account:—Held, that he was thereby prevented from maintaining an adverse possession, or putting plaintiff to further proof of title. *Doe d. Boulton* v. *Walker*, 8 U. C. R. 571.

Where defendant, having obtained possession without any privity with M., the plaintiff's assignor, went to him and offered to purchase, but no bargain was made, and he told M. he might sell to whoever he chose:—Held, that the plaintiff could maintain ejectment without further proof of his title. *Drake* v. *North*, 14 U. C. R. 476.

Where the plaintiff proved that he had leased to one B., and that after he had left defendant went in: that defendant offered to purchase at the valuation of a person named, and after the commencement of this action offered $800 for the place:—Held, sufficient evidence to go to the jury, without further proof of plaintiff's title. *Penlington* v. *Brownlee*, 28 U. C. R. 189.

There was some evidence in this case of an offer by defendant to purchase plaintiff's claim, but,—Held, that this could avail only if defendant had no title, not to defeat a good title by possession, which defendant had shewn. *McGregor* v. *La Rush*, 30 U. C. R. 290.

Paramount Title in Defendant.]—Where defendant defended as the landlord of the tenant in possession, and the lessor of the plaintiff proved a mortgage in fee from the tenant himself, but did not further shew defendant's title to the land, and established no privity between defendant and himself, and the defendant shewed title paramount in himself to the land:—Held, that defendant was entitled to recover. *Doe d. Mathewson* v. *Ault*, 2 U. C. R. 31.

Plaintiff's Son in Possession.] — The evidence shewed that the plaintiff's son had for some time been in possession as a tenant under lease, at a yearly rent:—Semble, that this would have been a bar to plaintiff's action. *Johnston* v. *White*, 40 U. C. R. 399.

Plaintiff's Title to Part.]—Held, following Dixon v. Grayfere, 17 Beav. 421, that the defendant not having by himself and his grantor the length of possession to constitute a bar, the plaintiff coming clothed with the rightful title to five-sixths was entitled to succeed, even though the owners of four of those shares, who conveyed to him, had been out of possession for more than ten years. *Ryerse* v. *Teeter*, 44 U. C. R. 8.

Possession.] — Possession from which seisin may be inferred must be actual or visible, not constructive. *Doe d. Morgan* v. *Simpson*, 5 O. S. 555.

A. in 1842 conveyed to B.'s son, then a minor. The deed was never registered. B. swore that he bought the land from A., but being in difficulty had the deed made to his son, and that he had always continued in possession; but on this point the evidence was contradictory. A.'s heir in 1849, made a deed of release to B., and B. conveyed to the lessors of the plaintiff: both these deeds were registered:—Held, that the mere fact of B. being in possession when he conveyed to the lessors of the plaintiff could not be relied on as primâ facie evidence of seisin, after A. had been shewn to have been in possession previously, and to have conveyed to B.'s son. *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

Where a plaintiff in ejectment recovers land of which he has been for twenty years dispossessed, and is put into possession by the sheriff, the defendant is not precluded from trying the right again, and replying in an action brought by him upon his title acquired by the twenty years' possession. *Moran* v. *Jessup*, 15 U. C. R. 612.

In ejectment against two, the plaintiffs proved a mortgage in fee made by one while in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how:—Held, sufficient, primâ facie, to entitle the plaintiffs to a verdict against both. *Eccles* v. *Paterson*, 22 U. C. R. 167.

In ejectment for 100 acres, the east half of lot 23, the plaintiff claimed under a mortgage executed by F. in 1847, and assigned by the executors of the mortgagee to the plaintiff in 1856, and a release of the equity of redemption from F. to the plaintiff in 1863. Neither the land nor the mortgage debt was mentioned in F.'s will. It was proved that in 1847 F. owned 100 acres of lot 22 adjoining, and had cleared four or five acres of the half lot in question, of which he was reputed to be the owner. Defendant had occupied about twelve acres of it for nearly fourteen years:—Quære, whether this was sufficient primâ facie evidence of F. being owner in fee. *Hunter* v. *Farr*, 23 U. C. R. 324.

The plaintiff proved a mortgage to him in fee from one B., and called a witness who swore that he purchased from one P. the east half of the lot, of which this land was part, excepting nine acres: that P. had been in possession of the east half since 1850, and gave

B. possession of the land sued for before witness purchased the remainder from P. and that defendant told him he bought from B. When defendant entered, or under what right, did not appear:—Held, sufficient primâ facie evidence as against defendant. *Covert* v. *Robinson*, 24 U. C. R. 282.

In ejectment for the east half of a lot, the plaintiff proved a deed to him from S. of the whole lot executed in 1865, and that persons claiming under S. had lived from 1837 to 1850 on part of the west half, building a log house and clearing four or five acres. It was not shewn that S. had been dispossessed by any one; and the defendant, with those through whom he claimed, had been in possession since about 1850:—Held, that this evidence was not sufficient to go to the jury. *Shaver* v. *Jamieson*, 25 U. C. R. 156.

Evidence that plaintiff had been in possession and had been intruded upon by defendant:—Held, insufficient, it appearing that the fee was still in the Crown, the plaintiff being in possession as a free grant settler, but without patent or license of occupation. *Henderson* v. *Morrison*, 18 C. P. 221.

Held, upon the facts stated in this case, that, irrespective of the objections raised to the proof of their paper title, the plaintiffs had sufficient title as against the defendants, who had entered upon the peaceable possession of the plaintiffs or their grantors. *Thompson* v. *Bennett*, 22 C. P. 393.

It appeared that the plaintiff's grantor had cut timber on the land, and had the lines run by a surveyor, and then conveyed, claiming as owner; that defendant then entered, the lot being unoccupied and wild; but that there had been a prior occupation by defendant, at least as actual as that of the plaintiff, but no occupation by any one for any period approaching twenty years:—Held, that any presumption in plaintiff's favour from any presumption proved by him, was rebutted. *Wallbridge* v. *Gilmour*, 22 C. P. 135.

In an action for trespass to land, the plaintiff proved a good paper title derived through a sale for taxes, but he had never been in actual possession, and it was shewn that after the plaintiff obtained his deed the defendant had cut timber on the land and built a shanty for the lumbermen, although the plaintiff went there and forbade him; and it appeared that the plaintiff had brought ejectment against him, but had not proceeded with it after defendant appeared. The defendant claimed under a deed from the heirs of the patentee, and it was sworn that before defendant purchased the plaintiff also wished to buy from them, saying that he thought his own title not good:—Held, that the plaintiff was sufficiently in possession to maintain trespass, and that he was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck* v. *Knapp*, 20 U. C. R. 360.

A., purchasing land at sheriff's sale, having reason to believe that he cannot get possession without legal proceedings against the execution debtor, B., to avoid this, contrives, by collusion with C., B.'s tenant, to get into possession without the consent of B.:—Held, in an action of ejectment brought by B. against A., that A. thus acquiring possession collusively through B.'s tenant, cannot set up any title in himself adverse to B.; that before he can do this, however good his title may be, he must abandon the possession obtained through C., and bring an action against B. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79.

Plaintiff brought ejectment against the defendant after he had quitted possession. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial:—Held, that the notice given with the appearance did not oblige the plaintiff to prove at the trial that the defendant was in possession when the writ issued. *Harper* v. *Lowndes*, 15 U. C. R. 430.

The plaintiff was assignee in insolvency of H., who bought from the purchaser at a sheriff's sale. H. leased to T. and put him in possession, and had some small buildings put on the land. Subsequently, the defendant O. made untrue representations to T., which induced him to quit possession, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W. by his answer adopted O.'s possession and claimed under conveyance from the Crown, but failed to prove his title:—Held, following Doe Johnson v. Baytup, 3 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff upon proof of his title. *Nelles* v. *White*, 29 Gr. 328. Affirmed by supreme court, *Cassels' Dig.* 374.

Where the defendant, claiming to be the owner of certain land, procured the plaintiff's tenant to attorn to him and thereby claimed the possession:—Held, in ejectment, that the plaintiff was entitled to recover by reason of the defendant having thus obtained possession from the plaintiff's tenant; but that this was not to estop the defendant from disputing the plaintiff's title and shewing title in himself in any action he might bring to recover possession. *Mulholland* v. *Harman*, 6 O. R. 546.

In an action for the recovery of land, proof of possession is primâ facie evidence of title, and, in the absence of proof of title in another, is evidence of seisin in fee; if, however, it be proved that the title is in another, although the defendant does not claim under or in privity with such other, the plaintiff's action will fail. Where, in such an action, the plaintiff claimed to have acquired a title thereto by possession, originally that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him:—Held, under 27 & 28 Vict. c. 20, s. 1, that in order to bar the right of the patentee forty years' possession at least was necessary; and the action therefore failed as against the defendant in possession though not claiming through or in privity with the patentee. *Donnelly* v. *Ames*, 27 O. R. 271.

Presumption — *Statutory Title.*] — The Provincial statute 1 Wm. IV. c. 26, vesting in a trustee certain lands belonging to the estate of the late St. G., has not the effect of raising a presumption of title in the particular lands enumerated in the schedule so as to relieve his trustee from the necessity of shewing title in the first instance. *Doe d. Baldwin* v. *Stone*, 5 U. C. R. 388.

Production at Trial.]—Where the plaintiff's counsel in opening his case stated it as a question of legitimacy, and that defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary:—Held, that it ought to have been produced. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

Production of Agreement.]—Where in ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shewn in whose custody it was or what its terms were, and it was proved the defendant had written a letter to the plaintiff's agent, stating that he was to give up the premises on a certain day—it was held that the lessor of the plaintiff could not be required to produce the agreement, as it was not sufficiently shewn to be in his custody or power. *Doe d. Mitchell* v. *McLeod*, 6 O. S. 553.

Proof of Patent.]—The plaintiff was entitled to succeed, under the registry law, if a patent had issued for the land, and at the trial no objection was taken for want of proof of that fact:—Held, that such objection could not be taken in term; and, quere, whether a deed from defendant covenanting for title, subject to the reservations, &c., contained in the original patent, was not some evidence against him. *Garrett* v. *Blakely*, 9 C. P. 46.

Several Plaintiffs.] — 36 Vict. c. 135, ss. 10-12 (O.), respecting the property of religious institutions, authorizes only the appointment of successors to trustees dead or legally removed, and does not empower the congregation to remove trustees competent and willing to act. The three plaintiffs in this case claimed title under a conveyance to two of them, and to H., one of the defendants, as a trustee of a congregation named, alleging that H. had been since removed from the office of trustee, and the plaintiff T. appointed in his stead. Defendants denied the plaintiffs' title. The conveyance contained no clause for the removal of trustees or the appointment of new ones, and the congregation, under the statute above mentioned, had assumed to appoint the plaintiff T. in place of H.:—Held, that the plaintiffs must wholly succeed or wholly fail as to the title alleged, and that the appointment of T. being invalid, a nonsuit must be entered. *Lage* v. *Mackenson*, 40 U. C. R. 388.

Statutory Title.]—Where land had been taken by the Great Western R. W. Co. for the purpose of their railway under 9 Vict. c. 81, s. 30, and 16 Vict. c. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *Great Western R. W. Co.* v. *Lutz*, 32 C. P. 166.

Substituted Defendants.] — Ejectment having been brought against A., B. was allowed to defend in his place. The plaintiffs claimed under a mortgage from A., whose title B. denied:—Semble, that upon the evidence set out in the case, the verdict for the plaintiffs could not be supported. *Peebles* v. *Lottridge*, 19 U. C. R. 628.

Void Deed—*Equitable Title.*]—In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession:—Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff if necessary. *Thorne* v. *Williams*, 13 O. R. 577.

VI. Practice and Procedure.

1. *Amendment.*

(a) *Of Notice of Title.*

See Thompson v. *Welch*, 3 L. J. 133; *Morgan* v. *Cook*, 18 U. C. R. 560; *Turley* v. *Williamson*, 30 L. J. 188; *Parsons* v. *Ferriby*, 26 U. C. R. 380; *Chadsey* v. *Ransom*, 17 C. P. 629; *Mitchell* v. *Smellie*, 20 C. P. 389; *Puckett* v. *Boilan*, 23 C. P. 175; *Fields* v. *Livingston*, 17 C. P. 15.

(b) *Of Record.*

See Doe d. Sinclair v. *Arnold*, 1 U. C. R. 42; *Doe d. Anderson* v. *Errington*, 1 U. C. R. 159; *Doe d. Curillier* v. *James*, 4 U. C. R. 490; *Doe d. Ausman* v. *Monro*, 1 U. C. R. 160, 277; *Doe d. Callaghan* v. *Callaghan*, 1 C. P. 348; *Doe d. Springer* v. *Miller*, 10 U. C. R. 57; *Doe d. Sherrard* v. *Lowry*, 2 C. P. 165; *Harrington* v. *Fall*, 15 C. P. 541; *Johnson* v. *McKenna*, 10 U. C. R. 520; *Dewson* v. *St. Clair*, 14 U. C. R. 97; *Ridout* v. *Harris*, 17 C. P. 88; *Coleman* v. *Moore*, 44 U. C. R. 328.

(c) *Other Cases of Amendment.*

See Doe v. *Roe*, Dra. 170; *Doe d. Simpson* v. *Molloy*, 6 U. C. R. 302; *Trust and Loan Co.* v. *Elliott*, 3 L. J. 69; *Truffitt* v. *Lawder*, 4 L. J. 137; *Doe d. Day* v. *Bennett*, 21 U. C. R. 405.

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2. *Appearance and Defence.*

(a) *At What Time.*

The writ of summons under the Ejectment Act reques the defendant to appear "within sixteen days after the service hereof." A summons was served on the 12th, and judgment signed on the 28th:—Held, too soon. *Scott* v. *Dickson*, 1 P. R. 396. Followed in *Montgomery* v. *Brown*, 2 C. L. J. 72.

Summons served on 15th February (not being leap year.) Judgment signed in default of appearance on 4th March, the 3rd March, the last of the sixteen days within which defendant had to appear, being Sunday:—Held, regular. *Cline* v. *Cawley*, 4 P. R. 87.

(b) *By Landlord.*

A landlord may be admitted to defend without an affidavit stating that he is so. *Doe d. Griffin* v. *Lee*, Tay. 235.

Where judgment is obtained against the casual ejector in consequence of the tenant in possession having neglected to give notice to his landlord, the court will set the judgment and writ of possession aside, and compel the tenant to pay costs. *Doe d. Robertson* v. *Metcalf*, Tay. 377.

In ejectment on a vacant possession, after the usual rule had been obtained by the plaintiff, the court set the proceedings aside, on affidavits stating that there was a house on the premises, with several articles of furniture in it, and that the tenant lived near, on condition that the applicant, who claimed as landlord, should appear and defend. *Popplewell d. Capreol* v. *Abbott*, 5 O. S. 61.

A mortgagee will not be admitted to defend as landlord, unless he can shew that the tenant is or holds under his mortgagor. *Doe d. Mallock* v. *Roe*, M. T. 1 Vict.

In ejectment against two tenants, the landlord obtained leave to join in a defence as a third party, but not availing himself of the order the plaintiff made up his record against the two tenants alone. He gave notice of trial, however, in a cause as against the three; and the two not confessing, &c., the plaintiff was nonsuited. On application in term:—Held, that under these circumstances there was no necessity to set aside the nonsuit, but it was set aside on terms. *Doe d. Murphy* v. *McGuire*, 7 U. C. R. 405.

A judgment regularly obtained will not be set aside for the purpose of allowing a third party (landlord) to come in and defend. *Mercer* v. *Bond*, 3 L. J. 150.

The tenant in possession having neglected to notify his landlord, the defendant, of the action, the plaintiff obtained judgment, and having issued execution thereupon, got possession. A Judge in chambers set aside the judgment and writ of possession, and let defendant in to defend on terms. On motion to rescind the order for want of jurisdiction:—Held, that it was in the discretion of the Judge, and he had power to make the order. *Turley* v. *Williamson*, 13 C. P. 581.

Defendant being tenant was served with the writ, which he handed to H., his landlord, and H. took it to his attorney, who, instead of getting leave for H. to defend, entered an appearance in defendant's name without his authority. A verdict having been obtained against defendant, a Judge refused to interfere, but left him to his remedy against his landlord and the attorney. *Moran* v. *Schermerhorn*, 2 P. R. 261.

In ejectment against A. and B., both were served with the summons, and before the time for appearance had expired one L. was allowed to come in and defend as landlord, by Judge's order, which did not express whether he was to defend in place of A. and B. or with them, nor did this appear from his appearance or notice. They did not appear, and judgment was signed against them by default. The issue with L. was carried down and tried, and a verdict rendered for the plaintiff, on which judgment was entered, and costs taxed against L. only, and a writ of possession issued against the three:—Held, that the plaintiff was entitled to enter the judgment against A. and B., and that his proceedings were regular. *Haskins* v. *Cannon*, 2 P. R. 334.

Where leave is given to a landlord to appear and defend, the appearance must be intituled in the cause against the defendants named in the writ. Notice of appearance and notice of title, if so intituled (i. e. in the cause against the original defendants), are correctly intituled. A summons obtained to set aside the appearance and subsequent proceedings for irregularity, styled in the cause against the new defendants, was correctly intituled. *Heron* v. *Elliott*, 1 C. L. J. 156.

In ejectment against A. and B., by consent of the plaintiff's attorney an appearance was entered for S. as landlord, A. and B. not appearing. The notice of trial was intituled as against A. and B., and notice was served on the plaintiff's attorney warning him that this would be objected to. The nisi prius record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, defendant not appearing. On application to set aside the verdict, the plaintiff objected that the affidavits filed by defendant, intituled as against S. alone, were wrongly intituled, and that no Judge's order was shewn allowing S. to defend:—Held, 1. That the plaintiff was precluded from the last objection, for he had consented to S. appearing, and obtained leave to enter his appearance on the record; 2. That the plaintiff's own proceedings warranted S. in assuming that he was to appear alone, and that the affidavits objected to were therefore rightly intituled; 3. That the notice of trial was wrongly intituled. The verdict therefore was set aside, the costs to be paid by plaintiff. *Jones* v. *Seaton*, 26 U. C. R. 166.

Where in ejectment a landlord is allowed to come in and defend, the order not saying whether it is instead of, or in addition to, the original defendant, it is irregular to omit the name of the latter in the style of the cause. *Yeoman* v. *Steiner*, 5 P. R. 466.

One Casselman, claiming under sheriff's sale, recovered possession by ejectment against defendant, who had been his tenant at will since the purchase at sheriff's sale, and on the 20th July, 1866, turned him out of possession; but the premises were left vacant. On the 29th March, 1866, plaintiff commenced this action of ejectment against defendant, and on the 8th June, 1867, was put in possession under a writ in this suit. Casselman then applied to set aside this judgment, and to be let in to defend as landlord, but:—Held, that he must be left to his ordinary remedy by ejectment. *Cameron* v. *Murphy*, 4 P. R. 132.

In an action of ejectment, G., the landlord of the defendant C., intervened and appeared to the writ. C. did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence:—Held, that the appearance of C. was regular. *Goring* v. *Cameron*, 10 P. R. 496.

(c) *By Other Persons not Named in the Writ.*

On an affidavit shewing that the defendant sued in ejectment was merely the agent of one R., an order was made to substitute R.'s name as defendant, and that he be allowed three days to enter an appearance. *Morris* v. *Smythe*, 2 L. J. 112.

A person in possession and not named in the writ will be allowed to appear and defend, even though defendant has confessed judgment, and a writ of hab. fac. has been issued thereon. *Harrington* v. *Harrington*, 3 L. J. 30.

Leave to appear and defend will be granted to a person not named in the writ, pursuant to s. 225 of C. L. P. Act, 1856, upon affidavit of the applicant that he is in possession, and disclosing his title. *Webster* v. *Horsburgh*, 3 L. J. 32.

In general an application for a third party to be allowed to defend, will not be entertained after judgment. *Mercer* v. *Bond*, 3 L. J. 150.

A mortgagee out of possession is entitled, under s. 9 of C. S. U. C. c. 27, to be admitted to defend an action against his mortgagor. *Melbermott* v. *Keeling*, 7 L. J. 150.

Ejectment having been brought against A., B. was by Judge's order allowed to defend in his place, and the issue book and notice of trial were served as against B. alone, but A.'s name was inserted in the record as a co-defendant. A verdict having been found for the plaintiff, on motion in term an affidavit was filed that B.'s attorney was not aware of A.'s name being on the record until after the trial had commenced, and that B. had been prejudiced in his defence by being deprived of A.'s evidence. The court set aside the record and verdict for irregularity. *Peebles* v. *Lottridge*, 19 U. C. R. 628.

(d) *Counterclaim.*

In ejectment the defendant was allowed to set up a counterclaim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass* v. *Glass*, 9 P. R. 14.

In an action for the recovery of land and for mesne profits, a counterclaim for damages for illegal distress against the plaintiff and his bailiff who executed the distress was held good. *Dockstader* v. *Phipps*, 9 P. R. 204.

The defendant C. counterclaimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he C. was in possession, and for an assault, &c., whereby he was compelled to quit the premises:—Held, that the counterclaim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116 O. J. Act:—Held, also, that the counterclaim should not be disallowed or excluded under Rule 127 (b) or 168, O. J. Act, on the ground of inconvenience, it not appearing that there would be any inconvenience, and:—Semble, that the counterclaim was sufficiently connected with the cause of action to make it advisable that they should be tried together. *Goring* v. *Cameron*, 10 P. R. 496.

To an action to recover possession of land it is a good cause of counterclaim that defendant was induced by his solicitor's fraud to make two promissory notes, which were then overdue, and in plaintiff's hands, who took them with knowledge of the fraud; and praying that plaintiff might be restrained from negotiating or parting with them, and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up. *Pritchard* v. *Pritchard*, 17 O. R. 50.

Held, the defendant can counterclaim without leave; but that he cannot in his counterclaim without leave under Con. Rule 341 join another cause of action with a claim for the recovery of land. *Ib.*

(e) *Disclaimer.*

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *Anglo-Canadian Mortgage Co.* v. *Cotter*, 8 P. R. 111.

(f) *Equitable Defences.*

See Muir v. *Kidd*, 13 C. L. J. 298; *Westgate* v. *Westgate*, 28 C. P. 283; *Stevens* v. *Buck*, 43 U. C. R. 1; *Cascanette* v. *Chartrand*, 6 P. R. 211; *Carrick* v. *Smith*, 34 U. C. R. 389; *Farmer* v. *Livingstone*, 5 S. C. R. 221.

(g) *Inconsistent Defences.*

See Doe d. King's College v. *Graham*, 1 U. C. R. 158; *Doe d. Maitland* v. *Dillabough*, 5 U. C. R. 214; *Houghton* v. *Thompson*, 25 U. C. R. 557; *Wilson* v. *Baird*, 19 C. P. 98; *Hartshorn* v. *Earley*, 19 C. P. 139; *Smith* v. *Gibson*, 25 C. P. 248; *Bartels* v. *Bartels*, 42 U. C. R. 22; *Peers* v. *Byron*, 28 C. P. 250.

(h) *Miscellaneous Cases.*

See Doe d. Chancellor, &c., of King's College v. *Roe*, 1 C. L. Ch. 111; *Regina* v. *Adams*, 3 C. P. 404; *Thompson* v. *Welch*, 3 L. J. 133; *Harper* v. *Lowndes*, 15 U. C. R. 430; *Duffill* v. *Lawder*, 4 L. J. 137; *Street* v. *McDonell*, 2 P. R. 65; *VanNorman* v. *McLennan*, 2 C. L. J. 207; *Metropolitan Building and Saving Society* v. *Rodden*, 12 L. J. 50.

3. *Consent Rule.*

As to the form of consent rule, see *Doe d. Canada Co.* v. *Roe*, 2 O. S. 209; *Doe d. Thompson* v. *Putnam*, 3 O. S. 312; *Doe d.*

West v. *Howard*, 4 O. S. 135; *Doe d. Ross* v. *Roe*, M. T. 1 Vict., R. & H. Dig. p. 178; *Doe d. Gilkison* v. *Shorey*, 1 U. C. R. 341.

As to amendment of it, *Doe d. West* v. *Howard*, 4 O. S. 135; *Doe d. McQueen* v. *Vansburgh*, 1 U. C. R. 349; *Doe d. Sheldon* v. *Ramsay*, 7 U. C. R. 446.

As to other points, *Doe d. Lount* v. *Roe*, 1 C. L. Ch. 105; *Doe d. Sutton* v. *Ball*, 1 U. C. R. 279; *Doe d. King's College* v. *Roe*, 1 C. L. Ch. 111; *Doe d. Hall* v. *Shannon*, 8 U. C. R. 528; *Doe d. Kerr* v. *Shoff*, 9 U. C. R. 180; *Doe d. Fulmer* v. *Huffman*, 8 U. C. R. 325.

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4. *Costs.*

(a) *Attachment for Non-payment of Costs.*

See Doe d. Methodist Trustees v. *Carwin*, E. T. 3 Vict. R. & J. Dig. 1207; *Doe d. Impey* v. *Gray*, H. T. 4 Vict. R. & J. Dig. 1207; *Regina* v. *Kelly*, 6 O. S. 152; *Wilson* v. *Dunbaugh*, 6 O. S. 537; *Doe d. Dunmer* v. *Benton*, 1 U. C. R. 157; *Doe d. Cubitt* v. *McLeod*, 1 U. C. R. 394.

(b) *Judgment by Default.*

See White v. *Cochlin*, 2 P. R. 249; *Roots* v. *Furniscott*, 2 P. R. 239; *Hall* v. *Yuill*, 2 P. R. 242; *Bleecker* v. *Campbell*, 4 L. J. 136; *D'Arcy* v. *White*, 24 U. C. R. 570.

(c) *Security for Costs.*

In ejectment, security for costs cannot be obtained before appearance is entered, as in other actions; and the entering an appearance does not put the cause at issue so as to prevent the defendant applying for security for costs. *Crowe* v. *McGuire*, 3 L. J. 205.

The action was commenced 26th February, 1863, and appearance entered 18th March, following. Defendant on 19th of the same month, demanded security for costs, because plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when the plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial:—Held, that an application by defendant for security after service of the notice of trial was too late. *Fogo* v. *Pypher*, 3 P. R. 309.

The mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security if the costs of the first action have been paid, and the second action brought in good faith. *Armstrong* v. *Montgomery*, 5 P. R. 461.

But the fact of the costs of the former unsuccessful actions having been paid, is not necessarily a ground for refusing to make an order. *Chambers* v. *Unger*, 6 P. R. 101.

Where a husband brought ejectment in his own name and that of his wife, upon a covenant for re-entry upon default being made in payment of an annuity reserved to them jointly, an application by the wife for security for costs from her husband, on the ground that he was using her name without her authority, was refused; but leave was given to her to renew the application on the Judge being satisfied that there was not a good cause of action, or that there was a good defence, and that she had separate estate liable to execution. *Junkin* v. *Junkin*, 7 P. R. 362.

The defendants in an action of ejectment, in which the plaintiff claimed title as owner subject to a mortgage to a bank, moved for security for costs, on the ground that the plaintiff was not able to pay costs, and that the action was not really brought by him but by the bank. It was shewn that the plaintiff was financially worthless; that his interest in the land was so doubtful that he did not feel sufficient interest in the question to litigate it; that the bank instructed their own solicitor to look into the title, took the advice of counsel, and were advised to have an action brought in the name of the mortgagor, who was then for the first time consulted about bringing the action; that the ordinary solicitor of the bank was retained to bring the action; and that he admitted he knew the plaintiff was insolvent. It was fairly deducible from the evidence that the bank had really in fact retained the solicitor, and that the solicitor would look to the bank for his costs:—Held, that under these circumstances the action must be regarded as that of the bank, and not of the plaintiff; who was therefore required to give security for costs. Parker v. Great Western R. W. Co., 9 C. B. 706, and Andrews v. Marris, 7 Dowl. P. C. 712, followed. *Delancy* v. *MacLellan*, 13 P. R. 63.

(d) *Staying Proceedings until Costs of Previous Action are Paid.*

See Doe d. Hussey v. *Roe*, E. T. 3 Vict. R. & J. Dig. 1206; *Doe d. Lake* v. *Davis*, 3 O. S. 311; *Doe d. Stewart* v. *Roe*, M. T. 1 Vict. R. & J. Dig. 1206; *Doe d. McKay* v. *Roe*, 1 U. C. R. 400; *Doe d. Flanders* v. *Roe*, 3 U. C. R. 127; *Doe d. McLeod* v. *Johnson*, 1 C. L. Ch. 133; *Ferrier* v. *Moodie*, 1 P. R. 151; *Doe d. Anderson* v. *Anderson*, 1 U. C. R. 275; *Grimshawe* v. *White*, 3 P. R. 320; *Bell* v. *Cuff*, 4 P. R. 155; *Ostrander* v. *Ostrander*, 3 Ch. Ch. 50.

(e) *Miscellaneous Cases.*

Administrator.]—A trustee or executor stands in the same position as any other litigant with respect to costs. And where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the holder of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with moneys of the defendant, and took the conveyance in his own name, and that the defendant was the true owner of the land:—Held, that the fact that there was no declaration of trust in favour of the defendant, and that the evidence in the hands of the administrator tended to shew that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for

costs; which were given to the defendant against both plaintiffs. *Smith* v. *Williamson*, 13 P. R. 126.

Third Party.] — Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard* v. *Credit Valley R. W. Co.*, 9 O. R. 616.

See Howden v. *McIntyre*, 1 P. R. 110; *Doe d. Lick* v. *Ausman*, H. T. 6 Vict. R. & J. Dig. 1208; *Haynes* v. *Gillen*, 21 Gr. 15; *Lutz* v. *Beadle*, 5 P. R. 418.

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5. *Death of Plaintiff or Defendant.*

See Doe d. Hay v. *Hunt*, 12 U. C. R. 625; *McCallum* v. *McCallum*, 2 L. J. 211; *Davy* v. *Cameron*, 14 U. C. R. 483, 15 U. C. R. 175; *Johnston* v. *McKenna*, 3 P. R. 229.

An action of ejectment was brought in 1867 and was entered for trial in that year, but the trial was postponed. The original plaintiff died in 1871, having several years before conveyed the lands to a person who in 1888 conveyed to one M. In 1892 an ex parte order of revivor was obtained in the name of M. as plaintiff:—Held, affirming the judgment in 22 O. R. 316, discharging the order of revivor, that the action was governed by C. S. U. C. c. 27, and that it came to an end as soon as the conveyance to the present plaintiff's predecessor in title was made except perhaps as to costs, for which the original plaintiff might probably have proceeded. *Lemesurier* v. *Macaulay*, 20 A. R. 421. See the next case.

Rules 383, 384, and 385, Ontario Judicature Act, 1881, which relate to the transmission of interest pendente lite, and permit the continuance of an action by or against the person to or upon whom the estate or title has come or devolved, are applicable to an action of ejectment begun before the Act, when the conveyance of the land by the original plaintiff did not take place until after its passing. *Irvine* v. *Macaulay*, 16 P. R. 181.

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6. *Execution.*

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. poss., and the session moved to set aside the proceedings for irregularity, and his rule having been discharged, immediately forcibly dispossessed the lessor of the plaintiff, the court granted a new writ, the first not having been returned by the sheriff, and ordered that the defendant should pay the costs of the application within a month. *Doe d. Peck* v. *Roe*, 2 U. C. R. 27.

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. poss., and the plaintiff afterwards quietly relinquishes that possession in consequence of hearing that an injunction has issued from the court of chancery:—Held, that upon the injunction being dissolved, the court cannot grant the plaintiff an alias writ of possession. *Doe d. Deane* v. *Henderson*, 5 U. C. R. 208.

Upon the facts of this case it was—held that the court had no authority, under the 12th clause of 59 Geo. III. c. 10, to stay proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe d. Short* v. *Bass*, 8 U. C. R. 147.

Where a rule has been taken out and served for the landlord to defend, the lessor of the plaintiff, though he may sign judgment against the casual ejector, has no right to take out a hab. fac. poss. without leave of court. *Doe d. Mathews* v. *Roe*, 1 C. L. Ch. 169.

Where the writ was issued within one year after entry of judgment, an alias writ issued more than six years thereafter is regular without reviving the judgment. *Johnston* v. *McKenna*, 3 P. R. 229.

Where the sheriff returned to the first writ of habeas, that "none came to receive possession," the presumption of release of the judgment did not arise in the same manner as if nothing had been done upon the judgment. *Ib.*

The writ may be executed by the removal from possession of a person who was the widow of a person that claimed under a judgment defendant. *Ib.*

Under the circumstances set out in this case, a new writ of hab. fac. poss. (the first having been executed and returned), was refused. Wilson v. Chanton, 6 L. T. N. S. 275, followed. *Edwards* v. *Bennett*, 5 P. R. 161.

No such relief will be given to a plaintiff when the parties against whom the application is made do not assert title through the defendant, but in some other way, and where no forcible taking possession or expulsion of the plaintiff, or interference with the plaintiff's officer in the execution of the writ, is shewn. *Ib.*

Semble, the writ of execution should, as in other actions, follow the judgment; and where, by reason of a limited defence, the plaintiff is entitled to recover less than he claims in his writ of summons, there should be some entry on the roll to authorize the deviation. *Harold* v. *Stewart*, 3 P. R. 335.

In ejectment an attachment was refused against the original tenant, who resumed possession more than a year after execution executed. *Doe d. Myers* v. *Roe*, T. T. 3 & 4 Vict.

A writ of hab. fac. poss. was completely executed, and possession given to plaintiff. Three weeks after, defendant (claiming to be equitably entitled, and who was informed and found that the premises were vacant, and the door of the house unfastened, and who denied knowledge of who opened it,) retook possession. A rule to redeliver possession to plaintiff or to attach defendant as for contempt, was refused. *McDermott* v. *McDermott*, 4 P. R. 252.

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. poss., and the proceeding could be served, but the plaintiffs in ejectment had been informed of the intention to apply for the injunction, the court,

under the circumstances, granted a mandatory injunction requiring the possession to be redelivered to the defendants in that suit, pending an appeal to the court of error and appeal against a decree dismissing a bill filed by them to redeem. *Campbell* v. *Royal Canadian Bank*, 19 Gr. 477.

The application of R. S. O. 1877 c. 66 is not limited to merely common law actions pending in those courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance in execution of a decree of the court of chancery for the recovery of land, is a writ of execution within the meaning of s. 11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed. *Adamson* v. *Adamson*, 12 P. R. 21.

Judgment in ejectment in 1867 for certain lands in the county of Northumberland, and hab. fac. poss. to the sheriff of that county, who executed the writ. Subsequently the land sold was, by proclamation of the Lieut.-Governor, detached from the county of Northumberland and incorporated with the village of Trenton, in the county of Hastings:—Held, that the plaintiff might enter a suggestion of the facts upon the judgment roll, and issue an original writ of hab. fac. poss. to the sheriff of the county of Hastings. *Le Mesurier* v. *Tierney*, 13 C. L. J. 40.

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7. *Interrogating Plaintiff or Defendant.*

See West v. *Holmes*, 3 L. J. 72; *Phillpotts* v. *Harrison*, 4 L. J. 86; *Horsman* v. *Horsman*, 2 L. J. 211; *Weaver* v. *Burgess*, 5 P. R. 345; *Walker* v. *Fairbairn*, 6 P. R. 251; *Bacon* v. *Campbell*, 6 P. R. 275.

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8. *Joinder of Actions.*

As to joining any other cause of action with an action for the recovery of land. See *Goring* v. *Cameron*, 10 P. R. 496; *White* v. *Ramsay*, 12 P. R. 626. And see PLEADING—PLEADING SINCE THE JUDICATURE ACT, IX. 4.

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9. *Judgment for Default of Appearance or Defence.*

See Doe d. Robinson v. *Roe*, E. T. 3 Vict., R. & H. Dig. 253; *Doe Henderson* v. *Roe*, 4 U. C. R. 366; *Leviscompte* v. *Peucel*, 3 L. J. 185; *Harper* v. *Lowndes*, 15 U. C. R. 430.

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10. *Nonsuit for not Confessing Lease, Entry, and Ouster.*

See Doe d. Clark v. *McQueen*, 3 O. S. 69; *Doe Lake* v. *Davis*, 3 O. S. 311; *Doe d. Lasher* v. *Edgar*, 4 O. S. 339; *Doe d. Leonard* v. *Myers*, 1 U. C. R. 299; *Doe d. Ferguson* v. *McCarthy*, 2 U. C. R. 141; *Doe d. Ketchum* v. *Roe*, 3 C. P. 259; *Doe d. Kerr* v. *Shoff*, 9 U. C. R. 180.

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11. *Notice Limiting Defence.*

Where immediately after appearance, the plaintiff served the issue book, together with notice of trial, and subsequently, within four days after appearance, defendant gave notice limiting his defence, which notice did not appear upon the issue book or record:—Held, that the notice of trial was irregular, as the notice limiting the defence was regular, and should appear on the issue book, and be served with notice of trial. *Grimshaw* v. *White*, 12 C. P. 521.

Where defendant limits his defence under C. S. U. C. c. 27, s. 12, to part of the lands sought to be recovered, he is entitled to the four days allowed him by the statute, even though this may have the effect of throwing the plaintiff over an assize; and an order will not be granted to plaintiff to amend the issue which has been served by him before the four days have elapsed, without prejudice to his notice of trial. *Phillips* v. *Winters*, 3 P. R. 312. Followed in *Buchanan* v. *Betts*, 2 C. L. J. 71. But see next case.

Where a defendant files his appearance, the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may, however, within four days after appearance give notice limiting his defence; and if he do so, he may, under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside. *Casey* v. *McGrath*, 6 P. R. 274.

Defendant filed a notice claiming title to the land "mentioned and described in the writ of ejectment summons herein," and after service of issue book and notice of trial, and within four days after appearance, served a notice limiting her defence to all said land, except a strip on one side thereof, describing it by metes and bounds, two chains in length by one link in width. It being too late to serve a fresh notice of trial, the plaintiff obtained a Judge's order to amend the issue book without prejudice to the notice of trial, by adding the usual statement as to a limited defence, and went on and took a verdict. On motion to set aside this order, &c.:—Held, as it was shewn that there was no question of boundary between the parties, and the notice limiting the defence could not be bonâ fide, that after expressly claiming title to the whole of the premises, the court would not set aside the order, as the effect of the amendment was to permit defendant to set up her defence if it was bonâ fide, and if it was not the court would not assist her. The court declined to decide whether a Judge has power so to amend, where a bonâ fide notice limiting the defence is regularly served after notice of trial. *Frooman* v. *Frooman*, 17 C. P. 523.

In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855, by deed gave to his son James his interest in one half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give his father one half of the produce if demanded. In 1863, L. conveyed to two other sons the east half, the consideration expressed in the deed being £500, and their vendee brought ejectment against the widow and devisee for life of James. She defended for the whole, giving no notice of defence as tenant in common, under s. 29 of the Ejectment Act, C. S. U. C. c. 27:—Held, that the effect of the deed of 1855, was to give

an undivided moiety of the half lot to James, but that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech* v. *Leech*, 24 U. C. R. 321.

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12. *Notice to Appear.*

See Doe d. Crumback v. *Roe*, 1 U. C. R. 518; *Doe d. Mills* v. *Roe*, 2 P. R. 181; *Doe d. Kemp* v. *Roe*, 1 U. C. R. 406; *Doe d. Griffin* v. *Roe*, Tay. 203.

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13. *Notice to Defendant to Shew Title.*

When in ejectment it is necessary to leave the question of adverse possession in the defendant for twenty years as a doubtful point to the jury, it is not a case in which a plaintiff can avail himself of the provisions of 4 Wm. IV. c. 1, s. 52, and give notice to defendant as an intruder. *Doe d. Lyons* v. *Crawford*, 6 O. S. 334.

The plaintiff proved a paper title, but the grant from the Crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence, shewed it to have been an ordinary conveyance in fee, but did not shew what covenants it contained. The plaintiff gave notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title:—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little*, 20 U. C. R. 425.

The plaintiffs in ejectment, executors and trustees of S., claimed title by a sale under execution against C. It appeared that the patent for the land issued to one Y., of the township of Fredericksburgh, in 1810. There was no deed proved from Y., but in 1834, one D., of the same township, conveyed to C. the whole lot, and it was shewn that the patent had been in D.'s possession, and in that of C., whose papers had been burned. No claim had been made by or under Y., but no possession had been taken of the land until 1847, when the lot was sold for taxes and purchased by C., who had paid the taxes and exercised acts of ownership until the defendant entered as a trespasser:—Held, a case within ss. 17 and 18 of the Ejectment Act, C. S. U. C. c. 27: that the plaintiff, under s. 18, was a person entitled in justice to be regarded as the proprietor of the land, but unable to shew a perfect legal title from a cause not within his power to remedy by due diligence; and that the defendant being a mere intruder and stranger to the title, and having received a notice to shew what legal right he had, under s. 17, was not at liberty to take objections to the plaintiff's title. *Davis* v. *VanNorman*, 30 U. C. R. 437.

Held, that under the circumstances of this case, the plaintiffs, by serving a notice under C. S. U. C. c. 27, s. 17, might have compelled the defendant to shew title. *Thompson* v. *Hall*, 31 U. C. R. 367.

Land sold for taxes under C. S. U. C. c. 55, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17 in the 9th concession of Rawdon 75 acres; and in the sheriff's deed by metes and bounds. The plaintiff in ejectment claiming through this sale, and being a bonâ fide purchaser, gave defendant a notice, under s. 17 of the Ejectment Act, C. S. U. C. c. 27, requiring him to prove his title:—Held, that the defendant, upon the evidence set out in this case, was a mere intruder; that the case was within the statute; and that defendant could not take advantage of the defective description. *Booth* v. *Girdwood*, 32 U. C. R. 23.

Semble, that an objection to the absence of proof of an order in chancery, recited in a deed executed under the order, but which order is not otherwise proved, may be met by a notice under s. 17 of the Ejectment Act. *Thompson* v. *Bennett*, 22 C. P. 393.

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14. *Notice of Title.*

(a) *In General.*

In ejectment for breach of covenant in a lease, the notice of claimant's title should set out the particular covenant which had been broken, and the particulars of the breach in general terms. *Kenney* v. *Shaughnessy*, 3 L. J. 29.

It is only necessary to state how the party claims, as by conveyance, descent, &c., and from whom, without exhibiting the whole chain of title. *Coltman* v. *Brown*, 16 U. C. R. 133.

Where a landlord is allowed to appear instead of the persons named in the writ, notice of title need not be served. *Heron* v. *Elliott*, 1 C. L. J. 156.

In ejectment it is not necessary to annex the notices of title on either side to the issue book. *Campbell* v. *Pettit*, 26 U. C. R. 507.

An objection that the title relied on is not the same as that mentioned in the notice, cannot be taken advantage of after the trial. *Penlington* v. *Brownlee*, 28 U. C. R. 189.

(b) *By Plaintiff.*

In ejectment for part of 22 in the 8th concession of Hamilton, described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township (called the 9th), between the 8th (to the north thereof) and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as extending to the bank of Rice Lake, but the deed to himself only stated the lot without giving metes and bounds:—Held, that although the specific description in the patent, and not the general description of the lot, would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, the defendant was entitled to a verdict. *Henderson* v. *Harris*, 10 C. P. 374.

A line run without legal authority between lots 5 and 6 acquiesced in for years, was subsequently found to be erroneous, and a new

line was run according to law, which took away land from the supposed lot 5, and added to 6. Plaintiff sought to recover the land so taken, which was clearly a part of lot 6, claiming right by possession, though his grantor never pretended to have any right thereto, and he did not claim by possession in his notice:—Held, that the plaintiff not having set up a possessory title in his notice, was debarred from doing so at the trial. *Smith* v. *Claxton*, 10 C. P. 538.

The claimant is entitled to set up any number of conveyances from the grantee of the Crown of respective portions of the land claimed, such being but one mode of title set up. *Grimshaw* v. *White*, 12 C. P. 521.

The plaintiff, describing herself as executrix of S., claimed title by virtue of "a mortgage made by the defendant:"—Held, that she was not restricted to proof of a mortgage made to herself, but might shew one to the testator, and her own right as devisee; and that omitting to name the mortgagee was at most only want of "reasonable certainty," for which defendant might have applied under s. 13 of the Ejectment Act, C. S. U. C. c. 27. The addition of "executrix of," &c., to the plaintiff's name:—Held, mere matter of description. *Skeahon* v. *Whelan*, 24 U. C. R. 174.

Quære, whether in this country, owing to the provisions as to notice of title, a plaintiff must give notice of his claim being only for a moiety, before he can insist upon defendant admitting his claim and denying actual ouster. *Lyster* v. *Ramage*, 26 U. C. R. 233.

The plaintiff, by his notice, claimed as devisee of F., defendant, under a sheriff's deed to one M., upon a fi. fa. against F.'s land. Defendant having proved such deed:—Held, that the plaintiff could not in answer, under his notice, rely upon twenty years' possession held by him subsequently; and defendant having been in possession eighteen years, the court refused to allow an amendment of plaintiff's notice. *Fields* v. *Livingston*, 17 C. P. 15.

Held, affirming 17 C. P. 34, that a plaintiff having by his notice claimed under his paper title, could not, in answer to a lease of the premises from him to defendant set up by the latter, rely upon the forfeiture of such lease by reason of condition broken, but that, to entitle him to take advantage of such forfeiture, he should have alleged it in his notice. *Pettigrew* v. *Doyle*, 17 C. P. 459.

The doctrine established in the last case, when the plaintiff claims by reason of forfeiture of a term, applies also to a plaintiff claiming to avoid his lease on the ground of infancy. *Hartshorn* v. *Earley*, 19 C. P. 139.

A. entered into possession under B., who verbally promised him a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died. In ejectment by B. against A.'s heirs:—Held, that B. having entered under M. originally, notice of title "under M., who claimed title from the Crown," was sufficient to enable B. to recover. Pettigrew v. Doyle, 17 C. P. 34, 459, distinguished. *Armstrong* v. *Armstrong*, 21 C. P. 4.

(c) By Defendant.

Defendant will be allowed in the notice required by the C. L. P. Act of 1856, s. 224, to set up a paper title, and also title by possession, upon affidavit that he can establish both titles; and that he wishes to establish his paper title, but lest he should fail in doing so from being unable to procure the necessary witnesses, he desires also to set up title by possession. Leave will be granted ex parte in first instance. *Todd* v. *Cain*, 2 L. J. 232.

Where defendant's notice described the land for which he intended to defend as a part of the lot mentioned in the writ, he was not allowed to contend at the trial that what he defended for was not included in such lot, and therefore not plaintiff's property. *Darling* v. *Wallace*, 9 U. C. R. 611.

A notice of claim under the statute, may at the same time deny the title of the plaintiffs and shew in what respect it is defective. *Commercial Permanent Building Society* v. *Rowell*, 5 L. J. 230.

Where defendant in his notice claimed the whole premises under a conveyance from B., he was not allowed at the trial to set up that he was tenant in common with the plaintiff, and insist upon proof of ouster. *McCallum* v. *Boswell*, 15 U. C. R. 343.

Quære, whether, if defendant appears, but omits to give notice of the nature of his title, the plaintiff may sign judgment as for want of appearance. *Harper* v. *Lowndes*, 15 U. C. R. 430.

Where defendant, by his notice, besides denying the plaintiff's title, claimed to hold under a lease:—Semble, that he was entitled to shew an adverse possession by himself for twenty years in order to defeat the plaintiff's claim, although the effect might be to establish a title in himself of which he had given no notice. *Hill* v. *McKinnon*, 16 U. C. R. 216.

Where defendant, in his notice of title, claimed as purchaser through one M., and the plaintiff, in proving his title, put in a lease from one M. to himself:—Held, that it was unnecessary for the plaintiff to shew M.'s title. *Brandon* v. *Cruathorne*, 19 U. C. R. 368.

See, also, *Cartwright* v. *McPherson*, 20 U. C. R. 251.

The notice of title confines the claimant to proof of the title therein stated, but allows him to defeat by any means the title set up by the defendant; and in like manner the defendant is confined to proof of the title claimed by his notice, but may equally defeat (and that without going into his own title) the title set up by plaintiff. When, therefore, the plaintiffs, claiming by their notice under a grant from the Crown, had put in such grant, it was competent for defendant, though his notice claimed title in himself, as derived from one A., under a lease from the plaintiffs, to rely upon proof of such lease alone as defeating the plaintiffs' title, without proving an assignment to himself. *Canada Company* v. *Weir*, 7 C. P. 341.

Ejectment for lots 15, 13 and N. half 12, in 2nd concession of Sandwich. The defendant in his notice of title, besides denying the plaintiffs' title, claimed title in himself as their

tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to 31st March, 1861. The defendant in reply proved his tenancy:—Held, that the case of Cartwright v. McPherson, 20 U. C. R. 251, upon which the plaintiffs relied, did not relieve the plaintiffs from the proof of the determination of defendant's tenancy, although the notice was evidence to estop defendant from denying that he was plaintiffs' tenant. *Colby* v. *Wall*, 12 C. P. 95.

Held, that the omission of the words, "besides denying the title of the plaintiff" in the defendant's notice of defence, did not entitle the plaintiff to recover without proving the title stated in his notice:—Held, also, that the appearing of defendant at the trial, he having filed an appearance without any notice of defence, would equally put the plaintiff on proof of his title; but having proved his title, defendant would be debarred from giving rebuttal evidence. *Shore* v. *McCabe*, 10 C. P. 26.

Defendant entered an appearance without filing any notice of title:—Held, that he could not at the trial set up a title in himself by possession, the effect of his appearance being merely to deny the title of the claimant, and allow him to make any answer to it which did not assert title in himself or in any one under whom he claimed. In such a case, the plaintiff must prove a strict title, and defendant may shew that this title has not been perfectly proved, or, being proved, he may shew a better title in some one else, but not in himself, or in any one under whom he claims. *Burke* v. *Battle*, 17 C. P. 478.

Where the plaintiff claimed as assignee of a mortgage made by defendant, and defendant by his notice claimed under a deed from the mortgagee:—Held, that defendant might shew that he was an infant when he executed the mortgage. *Grace* v. *Whitehead*, 16 U. C. R. 59.

The defendant, in his notice of defence, besides denying the claimants' title, claimed title as tenant or by permission of the tenants in fee of the land. On the trial the plaintiffs, having proved their title, objected to the defendant being permitted to go into his defence because he had denied and put the plaintiffs to proof of their title. The learned Judge, under the authority of Cartwright v. McPherson, 20 U. C. R. 251, refused to receive the evidence. A new trial was granted without costs, the court adhering to their opinions in Canada Company v. Weir, and Shore v. McCabe, both of which were delivered before the case of Cartwright v. McPherson came before the Queen's bench. *Thompson* v. *Falconer*, 13 C. P. 78. See next case.

Where defendant, besides denying the plaintiff's title, claimed title under deed from the plaintiff to M., and under M.:—Held, that such notice did not relieve the plaintiff from proof of title. Brandon v. Cawthorne, 19 U. C. R. 368, and Cartwright v. McPherson, 20 U. C. R. 251, overruled. Canada Company v. Weir, 7 C. P. 342, Shore v. McCabe, 10 C. P. 26, Colby v. Wall, 12 C. P. 95, and Thompson v. Falconer, 13 C. P. 78, followed. *McGee* v. *McLaughlin*, 23 U. C. R. 90.

A defendant appearing cannot be compelled to file a notice of his title; but if he does not, he is precluded from setting up title in himself, and the plaintiff will recover on proving his own title. *Fairman* v. *White*, 24 U. C. R. 123.

Ejectment on mortgage. Defendant appeared; but on examination under A. J. Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time:—Held, that the appearance and defence could not be struck out on the authority of McMaster v. Beattie, 10 C. L. J. 163, as defendant was entitled to possession until plaintiff should prove his case. *Metropolitan Building and Saving Society* v. *Rodden*, 12 L. J. 50.

Quære, whether a defendant in ejectment can set up title in himself by estoppel without asserting it in his notice. *Chambers* v. *Unger*, 25 C. P. 180.

(d) *Particulars of Title.*

Defendant is entitled to particulars of a plaintiff's claim in ejectment after appearance, or at any other stage if it appear proper to a Judge that he should have them. *Watson* v. *Brewer*, 4 P. R. 202.

Held, that an order for better particulars of plaintiff's title may, in ejectment, be made before appearance is entered. *Fralick* v. *Dormyn*, 6 P. R. 101.

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15. *Parties.*

(a) *In General.*

Quære, as to the effect of a misjoinder of plaintiffs in ejectment under 14 & 15 Vict. c. 114. *Young* v. *Scobie*, 10 U. C. R. 372.

Where several tenants occupied different apartments in one house as several tenements:—Held, that a single action might be brought for the premises, serving each tenant with a copy and notice. *Doe d. Bell* v. *Roe*, 3 O. S. 64.

Under the old practice, the fact of defendant being tenant in possession in an action of ejectment, could not be contested by affidavits on a motion to set aside the service of the declaration and notice. Semble, that all the tenant could do was to ask the court to excuse him from confessing possession, and to require the plaintiff to prove it. *Doe d. Vancott* v. *Roe*, 5 U. C. R. 272.

A writ of ejectment was issued against defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land. The possession was vacant, and it was not shewn that defendant was last in possession:—Held, that defendant was entitled to have the writ set aside without disclaiming title. *Wallace* v. *Acre*, 5 P. R. 142.

The Ejectment Act, C. S. U. C. c. 27, changed the procedure rather than the law for the recovery of land: and therefore the right, under the old practice, to make all persons found in possession of land defendants, without reference to whether their possession was joint or several, still exists. *Bannerman* v. *Dewson*, 17 C. P. 257.

The disclosure by one defendant that he occupies a part of the land claimed not jointly with another defendant, does not entitle him to have his name struck out of the writ, and oblige the plaintiff to proceed against the other alone; but the Act provides a mode by which every one may defend, by limiting his defence to the particular part claimed. *Ib.*

Under the Married Woman's Act, 1872, a wife may be the sole defendant in ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province. *Warren* v. *Cotterell*, 8 C. L. J. 245.

Where a wife, living apart from her husband, is in possession of land, under such circumstances as precludes the presumption of her being agent of her husband, she must be made a defendant in ejectment for the land. *Woodward* v. *Cummings*, 6 P. R. 110.

Quære, whether when A. is in possession as a hired servant of B., a writ of ejectment should not be directed to the latter. *Parsons* v. *Ferriby*, 26 U. C. R. 380.

(b) *Adding and Striking Out.*

One defendant in ejectment is not entitled to have his name struck out at the trial, on disclaiming all right to possession, in order to be called as a witness for his co-defendants. *Grogan* v. *Adair*, 14 U. C. R. 479.

Where a person made defendant is not in possession, and claims no right to the land, he is entitled to have his name struck out. *Hall* v. *Yuill*, 2 P. R. 242.

The name of a defendant who disclaimed all interest in the land except as dowress, struck out. *Weaver* v. *Burgess*, 5 P. R. 307.

A Judge's order was obtained to amend the proceedings after the consent rule and plea had been filed (by adding three new demises), and no proceedings had been taken under the order until the commission day of the assizes —some months after the granting of the order —when the nisi prius record was passed with additional demises. The record was entered for trial, and after the jury had been sworn, and the plaintiffs had given evidence, defendants objected to the amendment, and refused to confess lease, entry and ouster, except to the original demises, and a verdict was entered for the plaintiffs on the original demises only: —Held, on an application to set aside the verdict on the original demises, that the new demises added to the nisi prius record did not violate the nisi prius record or verdict; and that the lessors of the plaintiff could abandon the order to amend. *Doe d. Duff* v. *Dougall*, 2 C. P. 169.

Held, also, that after defendants appearing and confessing the lease, &c., it was too late to object to the regularity of the notice of trial. *Ib.*

Application to add to a declaration in ejectment a demise by A. B., after issue joined, was refused under the circumstances of the case. *Doe d. Nichols* v. *Heron*, 1 C. L. Ch. 99.

Held, that the C. L. P. Act does not authorize the striking out of all the plaintiffs' names in a summons in ejectment, and substituting a new set therefor, after the entry of the record for trial. *Robinson* v. *Bell*, *Vasbinder* v. *Bell*, 9 C. P. 21.

Held, on the authority of Blake v. Done, 7 H. & N. 465, that a Judge at nisi prius has power, under s. 222 of C. L. P. Act, to amend by adding parties, where such amendment is necessary for the purpose of determining the real question in controversy:—Held, also, that the guardian of an infant, appointed under C. S. U. C. c. 74, can under s. 5 consent to the name of the infant being so added as plaintiff in an action of ejectment which seems to be for the latter's benefit. *Ogilvie* v. *McRory*, 15 C. P. 557.

Quære, whether such consent should be in writing; but the point not having been raised at the trial, the court refused to entertain the objection. *Ib.*

On the argument in term, it was objected that as F., who had been joined as a plaintiff at the trial, was not present when the amendment was made, his consent in writing should have been filed:—Held, that though this objection was raised at the time the amendment was made, yet as F. afterwards appeared and was examined as a witness, and no question was then raised as to his assenting or non-assenting, and the Judge reported that there really was no question about it, the court would not entertain the objection. *Henderson* v. *White*, 23 C. P. 78.

The plaintiffs claimed under a deed from B., and defendants under a lease from T. and his wife, trustees of the plaintiffs. The plaintiffs proved a deed under which the Judge held that T. and his wife took the legal estate as trustees for the plaintiffs. The plaintiffs then applied to make T. and his wife plaintiffs, and to add a claim by them for an alleged forfeiture of their lease to defendant under which defendant claimed:—Held, that such application was properly refused. *Mitchell* v. *Smellie*, 20 C. P. 389.

An ejectment summons having been served on A. and B., A. only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict, and issued a hab. fac. and fi. fa. for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings:—Held, that the plaintiff was right, for as to the hab. fac. if B. claimed no interest in the land, and was not in possession, he should have applied on receiving the summons to have his name struck out. *D'Arcy* v. *White*, 24 U. C. R. 570.

In an action against a landlord and his tenant, the latter being in actual possession:—Held, though with much doubt, that the name of the tenant might be struck out of the proceedings. *Kerr* v. *Waldie*, 4 P. R. 138.

Doubts as to the propriety of the practice laid down in D'Arcy v. White, 24 U. C. R. 570. *Ib.*

In ejectment the plaintiff claimed as grantee of one S., but the conveyance was not executed until after the commencement of the suit. A verdict having been entered for the plaintiff, the plaintiff, on shewing cause to a rule for a new trial, filed the consent of S., who at the commencement of the suit was a bare trustee for the plaintiff, to be added as a plaintiff,

and the court allowed the amendment. *White* v. *McKay*, 43 U. C. R. 226.

In ejectment plaintiff claimed as assignee of M. of a mortgage made by C., and the substantial defence was that the mortgage had been paid, or, if not, that the defendant should be allowed to redeem. At the trial the cause, by consent, was referred to an arbitrator with the powers of a Judge at nisi prius, as to adding parties, &c. After the reference had been entered upon it was discovered that there had been a previous assignment to E. W. and J. W., whom, although their title was adverse to the plaintiff, on their consenting thereto, and after notice to defendants, the arbitrator ordered to be added as co-plaintiffs. On motion by defendant to set aside the order, but without shewing that he was in any way prejudiced thereby: — Held, that under the A. J. Act, 36 Vict. c. 8 (O.), the arbitrator had power to make the amendment, and that it was properly made, as it caused complete and final justice to be done in the action Held, also, that even if, under the circumstances, the amendment was improper, the motion should have been to revoke the submission. *Wright* v. *Creighton*, 30 C. P. 5.

In ejectment the plaintiff obtained a verdict, but as the defendant had made improvements on the land under a bonâ fide belief that the land was his own he was held entitled to the relief given by R. S. O. 1877 c. 95, s. 4, and the master in chancery at Ottawa was directed to ascertain the value of such improvements and report thereon which he did. A rule nisi having been obtained to refer back the report for the reasons stated, it appeared that after the report the defendant died intestate, and that no personal representative had been appointed, leaving a widow who was residing on the land in question and a son by a former wife but no children by the second wife, and also that defendant had assigned to a loan society all his interest in the sum to be found due for improvements. The court permitted the plaintiff to amend his rule nisi by calling on the widow or son of the deceased and on the loan society to shew cause why they should not be made parties to the suit and why the former should not be appointed under A. J. Act, s. 9, to represent the estate of the defendant for the purposes of this motion and all subsequent proceedings in the reference, and why in that event the relief asked by the rule should not be granted. The rule to be returnable on 14 days' notice before a single Judge. *McCarthy* v. *Arbuckle*, 31 C. P. 48.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *Anglo-Canadian Mortgage Co.* v. *Cotter*, 8 P. R. 111.

In an action of ejectment and for mesne profits, the defendant O. was tenant in possession, and had, two months after the service of the writ upon him, paid rent to his co-defendant, his landlord. An application by O. to have his name struck out as a party to the suit, he having gone out of possession on the expiration of his lease, was refused with costs. *Johnston* v. *Oliver*, 9 P. R. 353.

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16. *Pleading.*

(a) *Declaration and Service Thereof.*

Service upon one of several tenants in common in possession of the same parcel, is sufficient. *Doe d. Davidson* v. *Roe*, Tay. 491.

Where several tenants occupied different apartments in one house, as several tenements: —Held, that a single action might be brought for the premises, serving each tenant with a copy and notice. *Doe d. Bell* v. *Roe*, 3 O. S. 64.

The declaration cannot be served by the lessor of the plaintiff. *Doe d. Armstrong* v. *Roe*, 4 O. S. 302.

Service on a person (not shewn to be a servant of the tenant) on the premises claimed, explaining the meaning and intent thereof:— Held, insufficient, without shewing that the tenant had received it. *Doe d. Smith* v. *Roe*, 5 O. S. 306.

A declaration designating the property by the lot and concession, without mentioning the quality or description of land, is sufficient. *Doe d. O'Reilly* v. *Pickle*, 1 U. C. R. 282.

Service upon any person but the tenant or his wife is insufficient, unless it can be shewn that the declaration came to the tenant's knowledge before the first day of the term. *Doe d. Gray* v. *Roe*, 5 O. S. 483; *Doe d. Hunter* v. *Roe*, 3 U. C.R. 127.

The declaration in ejectment is not included in the proviso to s. 26 of 12 Vict. c. 63, but may be served between the 1st July and 21st August. *Doe d. Shortts* v. *Roe*, 2 C. L. Ch. 106.

Where service upon the tenant in possession was sworn to, the court refused to set it aside upon an affidavit stating it to have been served upon a stranger or servant on the premises. *Doe d. Dunlop* v. *Roe*, Tay. 350.

Where the affidavit stated a service on the tenant in possession of part of the premises, a rule for judgment against the casual ejector was granted as to such part. *Doe d. Davidson* v. *Roe*, M. T. 1 Vict.

Service on a person stated in the affidavit to have admitted himself to be tenant in possession, is not sufficient; he must be sworn to be tenant in possession. *Doe d. Dunn* v. *Roe*, E. T. 2 Vict.

An affidavit of service on a person who represented herself to be the wife of the tenant is insufficient, unless it state deponent's belief that she is so. *Doe d. Sanderson* v. *Roe*, T. T. 2 & 3 Vict.

An affidavit of service cannot be sworn before the attorney in the cause. *Doe d. Walker*, v. *Roe*, T. T. 2 & 3 Vict.

The affidavit must shew the time of service. *Doe d. Sherwood* v. *Roe*, 5 U. C. R. 319.

(b) *Statement of Claim.*

A writ in ejectment was served on 15th August, 1881, and an appearance entered after the 22nd of the same month:—Held, that plaintiff need not file a statement of claim, under the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw* v. *Ashbaugh*, 9 P. R. 6.

The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargey* v. *McGinnis*, 9 P. R. 157.

Held, that the mention of the date of issue of a writ of ejectment in the statement of claim was essential. But leave was given to amend on payment of costs. *Scott* v. *Creighton*, 9 P. R. 253.

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17. *Rule for Judgment.*

See Doe d. Harley v. *Roe*, 2 O. S. 113; *Doe d. McFarlane* v. *Roe*, H. T. 7 Wm. IV., R. & H. Dig. p. 177; *Goodtitle d. Garten* v. *Roe*, M. T. 1 Vict., R. & H. Dig. p. 176; *Doe d. Bond* v. *Roe*, H. T. 1 Vict., R. & H. Dig. p. 176; *Doe McDonald* v. *Roe*, H. T. 2 Vict., R. & H. Dig. p. 176; *Doe d. Street* v. *Roy*, M. T. 2 Vict., R. & H. Dig. p. 176; *Doe d. Yeigh* v. *Roe*, 3 U. C. R. 377.

As to the rule for judgment nisi under 13 & 14 Vict. c. 57, see *Elliott* v. *Roe*, 1 P. R. 11.

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18. *Trial, Verdict, and Judgment.*

(a) *In General.*

When the term in the declaration has expired, the plaintiff is entitled to recover nominal damages and costs, although he cannot recover possession. *Doe d. Lick* v. *Ausman*, H. T. 6 Vict.

A Judge at chambers has power to set aside a judgment in ejectment, and the hab. fac. poss. issued thereon. *Popplewell d. Capreol* v. *Abbott*, 5 O. S. 245.

Where a tenant moved to set aside a judgment against the casual ejector, on the ground of collusion between the lessor of the plaintiff and the tenant's wife, in accepting service of the declaration—the court refused to interfere, more than a year having elapsed since the execution of the writ of possession. *Doe d. Gray* v. *Roe*, H. T. 4 Vict.

Where a verdict was rendered for the plaintiff in ejectment, subject to points reserved, and without any argument of the points, the plaintiff entered and took possession, the court refused to interpose and set the judgment aside after a lapse of more than two years. *Doe d. Myers* v. *Tolman*, 1 U. C. R. 520.

Where the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff, the court will set aside the judgment against the casual ejector. *Doe d. Henderson* v. *Roe*, 4 U. C. R. 366.

The court, though they will set aside a judgment obtained by collusion between the lessor of the plaintiff and the tenant in possession, will not order the tenant in possession to pay the costs, but will leave the landlord to his remedy under the statute 11 Geo. II. *Ib.*

Where defendant was a few minutes too late in entering his appearance, and afterwards promptly applied to set aside the judgment upon an affidavit of merits, shewing the merits in detail, the application was allowed, upon the terms of entry of appearance, and payment of costs within a month, otherwise summons to be discharged. *Watts* v. *Little*, *Watts* v. *Loney*, 6 L. J. 233.

Held, that the action of ejectment is within s. 18 of the Law Reform Act, 1868; and semble, that such action must be tried without the intervention of a jury, subject only to the Judge's discretion to direct one. *Humphreys* v. *Hunter*, 20 C. P. 456.

Where the plaintiff declared generally, stating neither the concession nor lot, and defendant defended for lot 23, and at the trial the plaintiff proved title to lot 22, which in the description appeared to include lot 23:—Held, that the plaintiff was entitled to a general judgment, and that he must take possession of the right land at his peril. *Doe d. Owen* v. *Curtis*, M. T. 4 Vict.

In ejectment, where the plaintiff proves his title to possession of any part of the premises sued for, he must obtain a verdict. *Doe d. Sheldon* v. *Ramsay*, 7 U. C. R. 446.

The jury having found a general verdict for the plaintiff, though the defendant was in fact entitled to a part of the land:—Held, not ground for a new trial, but for an application to restrain the plaintiff from taking possession of such part. *Ferrier* v. *Moodie*, 12 U. C. R. 379.

In ejectment under 14 & 15 Vict. c. 114, one or more of several plaintiffs might recover. Draper, J., suggested, that under s. 5 there might be a distinction between the claim and the title, so as to render it incumbent on claimants, when there is more than one, to point out in the writ on what or whose title they rely as giving them a right to the possession, and to prove such title, which may be either in one of themselves, or possibly in a third party. *Butler* v. *Donaldson*, 10 U. C. R. 643.

Where several plaintiffs claim jointly, but title is not proved in all of them, there will be a verdict for those who prove title, and for defendant against the others. *Wilson* v. *Baird*, 19 C. P. 98.

Ejectment upon mortgage. Defendant appeared, and notice of trial was served on the 18th of September for the 30th of October. On the evening of the 29th defendant served a notice of confession on the plaintiff at his residence, thirty miles from the assize town, where his attorney had gone; and on the 30th a verdict was taken, defendant not appearing, and the plaintiff's attorney being ignorant of

the confession. The court refused to set aside the verdict. *Rose* v. *Quinlan*, 21 U. C. R. 452.

In ejectment it appeared that the plaintiff had recovered judgment in dower against defendant's landlord, who had submitted to the claim, and defendant after this action had attorned to the plaintiff and paid rent to her attorney. There had been also a demand of possession:—Held, that the plaintiff was entitled to a verdict and judgment for costs, but not to a writ of possession, for she had accepted defendant as her tenant. *Fisher* v. *Johnston*, 25 U. C. R. 616.

The court has power to grant a new trial as to half of a lot of land, allowing the verdict to stand as to the other half, when the granting of such new trial is in the discretion of the court; and this in an action of ejectment. Where the new trial is ordered ex debito justitiæ, the whole record is thrown open; and this will be done in ejectment, unless the defendant consent to a verdict standing for such portion of the land as the plaintiff has failed to prove title to. The statute governing the action of ejectment makes it divisible both as to the lands and the parties claiming them. *McNab* v. *Stewart*, 15 C. P. 189.

The old practice of allowing a plaintiff, who succeeded as to part of the land, to take a verdict for the whole, and to proceed thereon at his peril, has long since ceased to be the rule and the action of ejectment, as held in the last case, is divisible, under C. S. U. C. c. 27, both as to land and parties:—Held, therefore, that an order made by the Judge who tried the cause amending the postea, by confining the verdict of the plaintiff to that portion for which he had succeeded, and recording a verdict for defendant as to the residue, thus entitling the latter to the costs of defence for that residue, and directing the nisi prius record to be delivered to defendant for the purpose of such amendment, had been properly made. *McBride* v. *Lee*, 16 C. P. 315.

The defendant defended for the whole, giving no notice of defence as tenant in common, under s. 29 of the Ejectment Act, C. S. U. C. c. 27. The evidence shewed that she was entitled to an undivided moiety; but, held, that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech* v. *Leech*, 24 U. C. R. 321.

The plaintiff was held entitled to recover two undivided third parts. It was urged, on the authority of the last case, that the plaintiff being held so entitled, the postea should be awarded to him generally; but, held, not, the proceedings on both sides in that and other cases having been directed to try the title to the whole. *Lyster* v. *Ramage*, 26 U. C. R. 233.

Plaintiff brought ejectment against the defendant after he had quitted possession of the premises in question. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff, nevertheless, took the record down to trial:—Held, that upon such notice the plaintiff could not have signed judgment. *Harper* v. *Lowndes*, 15 U. C. R. 430.

Quære, whether, if defendant appear, but omit to give notice of the nature of his title, the plaintiff may sign judgment as for want of an appearance. *Ib.*

Where there is a limited defence, it is irregular for the plaintiff to enter judgment without first obtaining a Judge's order, or a rule of court, authorizing the signing of judgment, which rule or order, or a duplicate thereof, must, under rule 92, be filed together with the writ. *Harold* v. *Stewart*, 3 P. R. 335.

Held, that a notice to proceed to trial within twenty days, under s. 44 of the Ejectment Act, (C. S. U. C. c. 27), did not operate as a waiver of an order previously obtained by defendant staying proceedings until particulars of the land claimed were delivered. *Gilmour* v. *Strong*, 7 P. R. 154.

Semble, that the notice for jury which, by 35 Vict. c. 19, s. 1, must be annexed to the issue books in ejectment, may now be served at any time when the issue book could have been served under the old practice. *Harris* v. *Peck*, 12 L. J. 279.

In ejectment where equitable issues are raised under R. S. O. 1877 c. 50, s. 257, the issues must be tried without a jury. *Bryan* v. *Mitchell*, 8 P. R. 302.

Application for order to sign final judgment under Con. Rule 756. See *Trust and Loan Co.* v. *Hill*, 9 P. R. 8; *Cook* v. *Lemieux*, 10 P. R. 577.

Where a statement of claim in an action for the recovery of land was held good on demurrer, and upon the case going down to trial, the plaintiff proved all the material allegations in it:—Held, that he was thereupon entitled to judgment, and that O. J. Act, 1881, s. 44, did not apply, and an objection that the plaintiff had not sufficiently proved his title could not be entertained. Johnasson v. Bonhote, 2 Ch. D. 298, distinguished. *McGee* v. *Kane*, 14 O. R. 226.

The action, to recover possession of land, was tried without a jury before the consolidated rules came into force, and the trial Judge ordered that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly, and the plaintiff put in possession by the sheriff under a writ of possession:—Held, that under the practice, and having regard to rules 273, 274, 275, 341, and 379, of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule, and the entry of judgment and subsequent proceedings were regular. Section 34 of R. S. O. 1877 c. 51, was repealed by rule 273 of the Ontario Judicature Act, 1881. *Rudd* v. *Frank*, 17 O. R. 758.

(b) *Questions of Boundary.*

In ejectment to try disputed boundaries, the plaintiff has to shew, beyond any reasonable doubt, that he is entitled to some land at least of which defendant is in possession. Where the point is a doubtful one he must

shew a survey carefully made, and the proper steps taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or established by evidence, in order that the court and jury may see whether the two lots in question are, by the survey which the plaintiff is seeking to establish, made to occupy their proper position on the concession line. *Doe d. Strong* v. *Jones*, 7 U. C. R. 385; *Babaun* v. *Lauson*, 27 U. C. R. 399.

In ejectment, where the plaintiff proves his title to possession of any part of the premises sued for, he must obtain a verdict, and the court will not go into the question of boundary, in order to determine the precise quantity of land he is entitled to recover. *Doe d. Sheldon* v. *Ramsay*, 7 U. C. R. 446.

In ejectment the plaintiff claimed the land in his writ as part of lot six, and defendant defended for it as part of five. No notices of title were attached to the record:—Held, that the plaintiff was not bound to prove his title to lot six. *Cascaden* v. *Conway*, 17 U. C. R. 598.

The court will discourage (except when bound by well established rule), the practice of trying questions of boundary by actions of ejectment, the legitimate object of which is to try titles. *Peters* v. *Nixon*, 6 C. P. 451.

A question of boundary may be tried in an action of ejectment. *Irwin* v. *Sager*, 21 U. C. R. 373; *S. C.*, 22 U. C. R. 22.

The court of common pleas in the same term came to a different decision. *Lund* v. *Savage*, *Lund* v. *Nesbitt*, 12 C. P. 143.

The plaintiff described the land claimed as part of lot 10, "commencing at a post planted by Y., Provincial land surveyor, at the north-west angle of the said lot, then S. 16° E. 35 chains, more or less, to the centre of the concession; then N. 70° E. 2 chains 35 links, to a certain blazed line; thence along the said line N. 13° W. 35 chains, more or less, to the rear of the concession; then S. 75° W. 2 chains 6 links, to the place of beginning." Defendant claimed it all as part of lot 9:—Held, that the plaintiff's land being clearly described in the writ so as to be discoverable on the ground, the question of boundary should have been tried, to ascertain whether it formed part of lot 9 or 10. *Sexton* v. *Paxton*, 21 U. C. R. 389. Followed in *Boules* v. *Taughney*, 21 U. C. R. 391.

In ejectment the question of boundary may be tried, to ascertain whether the land in question forms part of the lot claimed by the plaintiff. *Sexton* v. *Paxton*, 2 E. & A. 219. Followed in *Hunter* v. *Baptie*, 23 U. C. R. 43, and in *Mozier* v. *Keegan*, 13 C. P. 547.

The plaintiff in ejectment described the land claimed by him as that part of lot 24 comprised within these limits; commencing at the south westerly corner of lot 24; then north, parallel with town line, 20 feet; then easterly parallel with the southerly limit of said lot to town line; then southerly along said line to the southerly limit of said lot 24; then westerly along said southerly limit to the place of beginning. Defendant appeared and limited his defence to the land described as commencing at the north-easterly corner of lot 25; thence southerly along the easterly boundary of said lot, 20 feet, to a point; thence westerly, at right angles to said boundary, to a point on the western boundary of said lot 25; thence northerly along said boundary, 20 feet, to a point on the boundary line between lots 24 and 25; thence easterly along said last mentioned boundary line to the place of beginning; "and which is sought to be recovered in this action as being part of lot 24." Lot 24 adjoined and lay to the north of lot 25. It was admitted at the trial that the plaintiff was entitled to the south half of 24, and defendant to the north half of 25, and the learned Judge thereupon held that there was nothing to try, and entered a verdict for the plaintiff; but—held, that the question of the true position of the boundary line between the lots was substantially raised, and should have been tried. *Archer* v. *Kilton*, 24 C. P. 195.

In ejectment to try a question of boundary, the plaintiff claimed the north half of lot 31. Defendants limited their defence to a piece described by metes and bounds, giving notice that they claimed it as part of lot 32:—Held, that the plaintiff was not entitled to succeed on proving his title to lot 31; but that it was for him, seeking to change the possession, to shew that the piece in dispute was part of that lot. *Palmer* v. *Thornbeck*, 27 C. P. 291.

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19. *Venue.*

See McKindsey v. *Johnston*, 14 U. C. R. 209; *Doe d. Crooks* v. *Cumming*, 3 U. C. R. 65; *Passmore* v. *Smith*, 1 P. R. 318; *Patton* v. *Cameron*, 21 U. C. R. 364; *Anderson* v. *Brown*, 2 C. L. J. 161; *Anon.*, 4 P. R. 310; *Canadian Pacific R. W. Co.* v. *Manion*, 11 P. R. 247; *Seymour* v. *DeMarsh*, 11 P. R. 472; *Kendell* v. *Ernst*, 16 P. R. 167.

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20. *Writ of Summons and Service of.*

See Cottle v. *Morris*, 7 L. J. 19; *Popplewell d. Caprcol* v. *Abbott*, 5 O. S. 61; *Hooper* v. *Burley*, 1 C. L. J. 273; *Burnham* v. *Jones*, 32 U. C. R. 83; *Riddell* v. *Briar*, 2 C. L. Ch. 198; *Regina* v. *Benson*, 1 P. R. 221; *Martin* v. *McCharles*, 25 U. C. R. 279; *Leeson* v. *Higgins*, 4 P. R. 340; *Trust and Loan Company* v. *Stevens*, 2 P. R. 60; *Riddell* v. *Brian*, 2 C. L. Ch. 198; *Grimshawe* v. *White*, 3 P. R. 320; *Cotton* v. *McCulley*, 7 L. J. 272; *Webster* v. *Gore*, 4 P. R. 169; *Fitch* v. *Walker*, 7 P. R. 8; *Trust and Loan Co.* v. *Jones*, 8 P. R. 65; *Canada Permanent Loan and Savings Co.* v. *Foley*, 9 P. R. 273.

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21. *Miscellaneous Cases.*

Effect of Ejectment Act, C. S. U. C. c. 27.]—See *Leeson* v. *Higgins*, 4 P. R. 340.

Issue Book.]—See *Casey* v. *McGrath*, 11 L. J. 330.

New Trial as to Part.]—See *McNab* v. *Stewart*, 15 C. P. 189.

Notice of Intention to Proceed.]—See *Bishop of Toronto* v. *Cantwell*, 11 C. P. 371.

Record in Ejectment.] — See *Doe d. Burnham* v. *Simmonds*, 7 U. C. R. 598; *Doe d. Mills* v. *Kelly*, 2 C. P. 1; *Doe d. Connors* v. *Roe*, 9 U. C. R. 82; *Doe d. Springer* v. *Miller*, 10 U. C. R. 57.

Release by Lessor.]—See *Doe d. Boyer* v. *Claus*, 3 O. S. 146.

Rules Nisi.]—See *Doe d. Clarke* v. *Roe*, Tay. 247.

Several Demises.]—See *Doe d. Street* v. *Roy*, E. T. 3 Vict. R. & J. Dig. 1203.

Unnecessary Action.]—Plaintiff brought ejectment against defendant after he had quitted possession. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial:—Held, that the bringing an action under the circumstances was unnecessary, but that defendant should have applied to the court to set aside the writ, instead of appearing to it; and, both parties being wrong, the proceedings were set aside without costs. *Harper* v. *Lowndes*, 15 U. C. R. 430.

VII. Staying Proceedings.

1. *In General.*

See Doe d. Short v. *Bass*, 8 U. C. R. 147; *Hemmingway* v. *Hemmingway*, 11 U. C. R. 317; *Ferrier* v. *Moodie*, 12 U. C. R. 379; *Johnston* v. *McKenna*, 3 P. R. 229; *Helm* v. *Crosson*, 17 C. P. 156.

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2. *In Ejectment by Mortgagees under 7 Geo. II. c. 20.*

See Mortgage.

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3. *Injunction.*

Injunction to Restrain Ejectment Proceedings.]—See *Robins* v. *Porter*, 2 L. J. 230; *Bell* v. *White*, 3 L. J. 107; *Fraser* v. *Robins*, 2 P. R. 162, 3 L. J. 112; *Land* v. *Gilkinson*, 7 L. J. 151; *Kidd* v. *Clatworth*, R. & J. Dig. col. 1203; *Cook* v. *Smith*, 4 Gr. 441; *Winters* v. *Sutton*, 12 Gr. 113; *Doe d. Deane* v. *Henderson*, 5 U. C. R. 208; *Arner* v. *McKenna*, 9 Gr. 226; *Fick* v. *McMichael*, 5 Gr. 646; *Harris* v. *Meyers*, 7 L. J. 243; *Bartels* v. *Benson*, 9 Gr. 486; *Bamberger* v. *McKay*, 15 Gr. 328; *Howes* v. *Lee*, 17 Gr. 459; *French* v. *Taylor*, 23 Gr. 436.

See Church, I. 3—Crown, II. 6 (c)—Execution, IX. 2 (b)—Mortgage, XII. 9 (b)—New Trial, IX. 2.

ELECTION.

Attacking Assignment — *Right to Rank.*—*Kloepfer* v. *Gardner*, 14 A. R. 60, 15 S. C. R. 390.

Attacking By-law and Award.] — Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder:—Held, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. *Harding* v. *Township of Cardiff*, 2 O. R. 329.

Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—Held, he could not afterwards complain of having been forced to elect at the hearing. *Ib.*

Concurrent Proceedings in Insolvency and at Law.]—Held, under the facts stated in the report of this case, that the defendant, although the attaching creditor in insolvency, was not put to his election, but might proceed in insolvency as well as upon his fi. fa. *Thorne* v. *Torrance*, 16 C. P. 445; 18 C. P. 29.

Dower—*Provisions under Will in Lieu of.*] —See Dower.

Inconsistent Remedies.] — See *Beemer* v. *Oliver*, 10 A. R. 656; *Wood* v. *Recsor*, 22 A. R. 57.

Insolvency—*Retaining Security.*] — Election by assignee to allow creditor to retain, at a valuation, property held by him as security. See *Bell* v. *Ross*, 11 A. R. 458.

Insurance — *Right to Require Assignment.*]—It was provided by an insurance policy, that whenever defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants if requested:—Semble, that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute. *Recsor* v. *Provincial Ins. Co.*, 33 U. C. R. 357.

Insurance—*Right to Terminate.*]—A condition indorsed on an insurance policy provided that if for any cause the company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the company should refund a ratable proportion of the premium:—Held, not essential that the notice should precede the termination of the insurance, but that they might be contemporaneous, and that the company could terminate the risk by giving notice that they did so, and refunding the unearned premium. Held, also, that in this case, on the facts set out in the report, there was evidence for the jury to shew a termination of the risk under the condition. *Cain* v. *Lancashire Ins. Co.*, 27 U. C. R. 453.

Judgment—*Several Defendants.*]—*Election* to proceed against one or more of several defendants, under C. L. P. Act, 1856, s. 66, by signing judgment against such only as have not appeared, and issuing execution thereon. See *Kerr* v. *Hereford*, 17 U. C. R. 158.

Lease—*Renewal.*]—Covenant by lessor to renew or pay for buildings—Waiver of right to elect. See *Roaf* v. *Garden*, 23 C. P. 59.

Mortgage — *Application of Insurance Money.*]—Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which by virtue of an acceleration clause in the mortgage, had become due:—Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. 1887 c. 102, s. 4, s.-s. 2, upon arrears of principal and interest. Corham v. Kingston, 17 O. R. 432, approved and followed. *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677. Reversed in appeal, 18 A. R. 347.

Mortgage—*Calling in Principal.*]—In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. Drummond v. Guickard, cited in Green v. Adams, 2 Ch. Ch. 124, overruled. *Cruso* v. *Bond*, 1 O. R. 384; reversing *S. C.*, 9 P. R. 111.

Covenant in mortgage to pay by instalments, the whole to become due on default—Evidence of election by plaintiffs to waive their right to claim the whole. See *Trust and Loan Co.* v. *Drennan*, 16 C. P. 321.

Partnership — *Persons Liable.*]—J. E. Dunham carried on business at Montreal from February, 1886, to 1st September, 1886, under the style of J. E. Dunham & Co. The same J. E. Dunham with W. W. Park carried on business at Toronto from 1st May, 1886, to 1st August, 1886, under the same style, J. E. Dunham & Co. By the articles of partnership between Dunham and Park it was agreed that Dunham should not sign the firm name to bills or notes. The dissolution of the partnership between Dunham and Park was not advertised until the 20th August, 1886. Dunham for purposes of his own, and without the knowledge of Park, upon the 11th of August, 1886, signed a series of notes amounting to $21,000 with the firm name of J. E. Dunham & Co., and gave them to one Isaacs. The note in question in this action was one of that series, but antedated upon the 30th July. The plaintiffs who had no knowledge of Park being a member of J. E. Dunham & Co., took this note without notice of any infirmity, and to secure a pre-existing debt which was overdue. The Judge at the trial charged the jury that the plaintiffs had a right to resort to either firm for payment. Held, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors. *Standard Bank* v. *Dunham*, 14 O. R. 67.

Person Instead of Firm.]—Election by suing one person instead of the members of the firm. See *Mail Printing Co.* v. *Devlin*, 17 O. R. 15.

Promissory Note — *Persons Liable.*] — Election to waive personal liability on a note and accept the liability of the company by proving against the company on the note, and accepting a dividend thereon. See *Brown* v. *Howland*, 9 O. R. 48; 15 A. R. 750.

Refusal to Call Witnesses.]—Application to remit action to the court to take evidence after refusal to call witnesses. See *Macdonald* v. *Worthington*, 7 A. R. 531.

Sale of Land—*Abatement.*]—Where lands were advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession by his son of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek abatement after the purchase was complete, and a subsequent incumbrancer offered to give the same price for them as the purchaser:—Held, that the petitioner should be put to his election, either to take the land without abatement of the purchase money, or let it go to the subsequent incumbrancer. *Carmichael* v. *Ferris*, 8 P. R. 289.

Sale of Land—*Forfeiture.*]—Plaintiff, on 20th January, 1866, agreed under seal with defendants to sell to them certain land for $5,000; $2,500 to be paid on 1st April, 1866, and $2,500 on the 1st May, 1866, with interest, and to convey on these payments being made. Defendants covenanted to pay, and that if they made default, "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff," and that time should be of the essence of the contract. To an action on this covenant, alleging nonpayment by defendants, and their neglect to complete the purchase, defendants pleaded on equitable grounds, that defendants went into possession and paid $1,000, but having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void. At the trial it appeared that the whole purchase money was $6,000, of which $1,000 was paid down, and $1,000 more on the 7th April, 1866, when, by an indorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease in May, 1865, and expended about $4,000 boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their

payments, and that the property was his, and they were trespassers. He brought several men with him who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea:—Held, 1. That under the agreement defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff; 2. that there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged; and the verdict was upheld. *Marcus v. Smith*, 17 C. P. 416.

Sale of Land—*Rescission.*]—Election by plaintiff to put an end to agreement for sale of land, so as to form a defence to action for purchase money. See *McCord v. Harper*, 26 C. P. 96.

See DEVOLUTION OF ESTATES ACT—DOWER, IV.

ELECTIONS.

See CHURCH, I. 2—COMPANY, III.—CONSTITUTIONAL LAW, II. 11—INTOXICATING LIQUORS, V. 1—MANDAMUS, II. 4 (c)—MUNICIPAL CORPORATIONS, XIX.—PARLIAMENT, I.—SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 8 (d).

ELECTION ACT.

See CRIMINAL LAW, IX. 12—PENALTIES AND PENAL ACTIONS, II. 3 (a).

ELECTION CASES.

See PARLIAMENT—SUPREME COURT OF CANADA, II. 6.

ELECTORS.

See INTOXICATING LIQUORS, IV. 2—MUNICIPAL CORPORATIONS—PARLIAMENT.

ELEGIT.

See EXECUTION.

EMBEZZLEMENT.

See CRIMINAL LAW, IX. 13.

EMBLEMENTS.

See LANDLORD AND TENANT.

EMINENT DOMAIN.

See CROWN — MUNICIPAL CORPORATIONS — RAILWAY.

EMPLOYER AND WORKMAN.

See MASTER AND SERVANT.

ENFORCEMENT OF PROVINCIAL LAWS.

See CONSTITUTIONAL LAW, II. 9.

ENGINEER, CERTIFICATE OF.

See CONTRACT, III. 2.

ENLISTMENT.

See CRIMINAL LAW, IX. 20.

ENTRY, RIGHT OF.

See LIMITATION OF ACTIONS, II. 13.

EQUALIZATION OF RATES.

See ASSESSMENT AND TAXES, VI.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION.

EQUITABLE ESTATE.

See ESTATE, I.

EQUITABLE EXECUTION.

See EXECUTION, III.

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I. EQUITABLE ESTATE.

Agreement to Convey.]—Where defendant in November, 1858, conveyed the real estate, which formed his qualification, to his father, for a consideration of £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes; though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment, "an equitable estate" within the meaning of s. 70 of the Municipal Institutions Act. *Regina ex rel. Tilt* v. *Cheyne*, 7 L. J. 99.

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

Covenants.]—Defendant being seised in fee of certain land in trust for his son, at the request of the son mortgaged it to B. and V. for $400, the son receiving the money and agreeing to pay it off. Afterwards the defendant conveyed to his son, the consideration stated being $4,000, but in reality it was a gift, and the deed by inadvertence and mistake contained a covenant for the right to convey, notwithstanding defendant's acts, and that he had done no act to incumber the land. On the 21st October, 1896, the son mortgaged the land to the plaintiff for $400, and this mortgage was foreclosed by the plaintiff, who was compelled to pay off the mortgage to B. and V. It did not appear that the plaintiff had any knowledge of the trust between the father and son, or of the arrangement between them as to the mortgage to B. and V., or that he knew of this mortgage until after the foreclosure, but it appeared that it, together with the other conveyances, had been duly registered, and that the land was worth both the mortgages. The plaintiff having sued the defendant on the covenant contained in defendant's deed to the son, to recover the amount paid to B. and V.:—Held, that the plaintiff could not recover, for that the facts would constitute a good defence on equitable grounds to an action brought against defendant by the son; and the title of the covenantor and

covenantee being equitable only, the plaintiff as assignee of the covenant, could stand in no better position than his assignor. *Claxton v. Gilbert*, 24 C. P. 500.

Joint Trust to Convey.]—On the 19th January, 1824, the Crown granted to O. S., G. M., and J. M., in fee, certain lands which had formerly been set apart for a rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and his successors forever, upon the same trusts thereinbefore expressed. On the 21st of January, 1836, letters patent issued erecting a rectory in Kingston. Before the 10th May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day by deed poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust conveyed the land to the said O. S., as rector and incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them. To this was appended another deed poll of the same date, executed by O. S., and declaring, for himself and his heirs, that as one of the trustees named in the patent of 1824 he agreed to this assignment, and held the same in his capacity of rector and incumbent of Kingston, and not otherwise. In 1842, O. S. leased the land for twenty-one years, with certain covenants for building and renewal. In this lease he was described as rector, and it recited the two patents of 1824 and 1836. The successor of O. S. brought ejectment against defendants, claiming under this lease:—Held, on the authority of Denne d. Bowyer v. Judge, 11 East 288, that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that; for, semble, in a court of law the ground that the trust to convey being joint was incapable of severance could not arise, the legal estate only being in question. *Lyster* v. *Kirkpatrick*, 26 U. C. R. 217.

But for that decision, semble, that if the appointment of O. S. as rector rendered him ipso facto incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate vested in him in trust in his natural capacity, to himself as a rector and corporation sole; that whether the grantees in the patent were to be treated as taking a power or as trustees owning the fee, the conveyance by two only of the three was inoperative; and, semble, that they were trustees. *Ib.*

Shelley's Case.]—By ante-nuptial settlement, reciting that F. intended to make provision for his future wife, F. agreed with her and K. to transfer and convey to K. certain property he expected to acquire, to hold unto K. for the joint use and benefit of him, F., and his intended wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her natural life, and after the decease of the survivor, to the use of the heirs of F. as he might by will direct; and it was further agreed that articles of settlement should be executed in pursuance of this document. After the marriage, F., pursuant to the said ante-nuptial settlement, conveyed, in 1879, certain land to K. and his heirs, upon trust, with the consent of F. and his wife, or the survivor, to sell, lease or otherwise convey the same, and to hold the moneys thereon arising upon the trusts and subject to the powers contained in the ante-nuptial settlement. F.'s wife having died:—Held, that, though there were children of the marriage still surviving, F. was entitled to a conveyance of the lands from K. to himself in fee simple, for that the trusts in the ante-nuptial settlement were executed and not executory, and under them F. had an equitable estate in fee simple under the rule in Shelley's Case. *Ferris* v. *Ferris*, 9 O. R. 324.

Surviving Partner.]—Though a surviving partner may have an equitable title, yet the heir of the deceased partner suing in ejectment upon his ancestor's legal title need not demand possession. *Doe d. Atkinson* v. *McLeod*, 8 U. C. R. 344.

Trespass.]—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee. *Adamson* v. *Adamson*, 7 A. R. 592.

See, also, *S. C.*, 28 Gr. 221, 12 S. C. R. 563.

Wife's Conveyance.]—A wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance. *Adams* v. *Loomis*, 22 Gr. 99.

II. ESTATE AT WILL.

Agreement for Lease.]—A. and B. being partners, A. alone verbally leased certain premises for a place of business, for a term of five years, at a given rent, and both went into possession. A memorandum for a lease was prepared by A. but never signed by the lessor:—Held, that A. was a tenant at will. *Brougham* v. *Balfour*, 3 C. P. 72.

Agreement to Purchase.] — Where a person enters into possession of land under an agreement to purchase, he is tenant at will to the seller, and at the seller's death his heir-at-law can maintain ejectment against him without any notice to quit or demand of possession. *Doe d. Kemp* v. *Garner*, 1 U. C. R. 39.

The defendant had been let into possession under a contract to purchase payable by instalments, with a stipulation for forfeiture if payment not made on a particular day, and the vendor had, subsequent to such day, received payment on account:—Held, that defendant was tenant at will and not by sufferance, and that a demand of possession was necessary. *Lundy* v. *Dovey*, 7 C. P. 38.

Death—*Entry by Heir.*]—If on the death of a tenant at will his heir enter, such entry is tortious; and, if the heir die, and his heir enter, the original owner or his heir will be put to his action. *Doe d. Moak* v. *Empey*, 3 O. S. 488.

Encroachment on Land.]—House encroaching on plaintiff's land—Occupation by permission of plaintiff—Effect of as creating a tenancy at will. See *Keys* v. *Guy*, 36 U. C. R. 356.

Lease without Date for Termination.]—The plaintiff, by indenture dated 6th April, 1854, did "lease let and to farm let," the land in question to defendant upon the terms that he should pay all rates, levies, and assessments upon the said property, inclose the same with a good fence, and farm the same in a husband-like manner, and not transfer without the lessor's consent; and the plaintiff for himself, his heirs and assigns, did thereby rent unto the defendant (the premises) at the rate of sixpence per acre per annum, payable half-yearly in advance. There was no livery of seisin, nor any time mentioned, but the defendant entered into possession:—Held, that an estate at will only passed. *Widmot* v. *Larabee*, 7 C. P. 407.

Mortgagor's Lessee.]—By a mortgage in fee to secure the payment of $1,490.42, by monthly instalments of $12.42, it was provided that the mortgagor should become tenant to the mortgagees thenceforth, during their will, at the rent of one pepper corn monthly until default, and after default at the yearly rent of $149.04, payable monthly. There was also a proviso that in case of default the mortgagees without any previous demand of possession might enter and sell. On ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit or demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees at their option either to distrain, or at any time to eject the mortgagor himself without demand; but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply a tenant at will, semble, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent Building and Savings Society* v. *Byers*, 19 C. P. 473.

Occupant—*Deed by Owner.*]—On the 26th October, 1852, a railway company took a deed from the plaintiff's father, by which, in consideration of the benefits which would result to him from the construction of the road, and of 427 10s., he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title to the land, but had merely been allowed by his father to occupy it; that he had admitted in presence of his father that it was with his father, and not with him, that the company must settle; and that he had worked under the defendant, a contractor with the company, in making the fence along the line through this land. After the deed, the plaintiff and his father forbade the defendant from entering. The defendant entered in December, 1852, for the purpose of making the railway, and the fences along the line being insufficient, the plaintiff's wheat was injured by cattle getting in. For these injuries, he sued in this action trespass q. c. f.:—Held, that the plaintiff could not maintain trespass against any one claiming under the company:; for he was not at any time more than a tenant at will, and the deed determined the will and left him tenant at sufferance only, with a right to enter and remove the crop. *Nelson* v. *Cook*, 12 U. C. R. 22.

Possession under Mortgagee.]—Plaintiff being in possession as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for $500; $200 down, and $300 on the 1st April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of $200 defendant was let into possession. He made default in payment of $300. Plaintiff gave him notice that he was ready to assign the mortgage on payment of the amount due, and if not paid, defendant would be ejected:—Held, that by default in payment, the tenancy at will was converted into a tenancy at sufferance; and, also, that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant, and the default of the defendant to pay. *Price* v. *Moore*, 14 C. P. 349.

Postponement of Payment of Rent.]—Defendant being in default under a demise from plaintiff, he and the plaintiff referred all differences, and the arbitrators postponed the date of payment. Quære, whether the reference and postponement would not constitute defendant a tenant at will. *Black* v. *Allen*, 17 C. P. 240.

III. Estate for Life or Years.

Assignment of Rent.]—In an action for distraining when no rent was due, it appeared that one of the defendants assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:—Held, that such an assignment conferred an estate, and that under 4 Anne c. 16, ss. 9 and 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not. *Hope* v. *White*, 17 C. P. 52.

Cutting Timber.]—A tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but he cannot cut down timber even for the same purpose, and sell it. Drake v. Wigle, 22 C. P. 405, followed. *Saunders* v. *Breakie*, 5 O. R. 603.

Death of Life Tenant—*Representative.*]—The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns." The lessor died before the expiration of the ten years, and this action was brought by the executrix of her will to recover (inter alia) the instalments of rent

which became payable, as it was alleged, upon the lease after her death:—Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant:—Held, also, that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death. *Thatcher* v. *Bowman*, 18 O. R. 265.

Death of Tenant for Years.]—In ejectment, it appeared that C. died in 1851, seised of an unexpired term of years in the land, intestate, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle J. D. for life, and thence to the plaintiff, testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards in 1860, J. D. administered to C.'s estate, and as such administrator, assigned his interest to F., under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff, and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamy*, 21 U. C. R. 246.

Demise — *Livery of Seisin.*]—The word "demise" is an effective word to convey an estate of freehold, and is of like import with and equivalent to the word "grant." An estate for life was therefore held to be validly created by the words "demise and lease" to E. M. for life; and livery of seisin was held unnecessary. *Spears* v. *Miller*, 32 C. P. 661.

Effect of Covenants.]—One C., a lawyer, mortgaged certain property to the plaintiffs. When searching the title the plaintiffs' solicitor found that a deed, made in 1848 between C. and his mother, after reciting that C. was his father's executor, and that all the property was devised to him in trust for his mother for life, and after her decease in trust for his sisters, the defendants, and that he was indebted to the said trust fund in the sum of £1,200, and was "desirous of securing the same in accordance with the provisions of the said will," proceeded to grant the property in question "unto the said party of the second part," his mother "forever." Upon enquiry by the plaintiffs' solicitor, C. informed him that the deed was only intended to convey a life estate to his mother, who was then dead. The plaintiffs having contracted to sell this property after C.'s death, an objection to the title was raised on account of the deed of 1848. Proceedings were thereupon taken to quiet the title, and the sisters were made claimants. No evidence was given to shew what the real agreement between the parties to the deed was. One of the claimants swore that certain payments were made to her by C. after her mother's death, but her evidence failed to establish that the rents as such were paid to her:—Held, that under the operative words of the deed a life estate merely passed, and that their effect could not be enlarged by the covenants, which were in the short form:—Held, also, that although equity has ample power to supply words of inheritance, no case was established for the reformation of the deed:—Held, also, that even if the claimant's evidence had been satisfactory, being that of one of the litigants and uncorroborated, it could not be made the foundation of a decree after C.'s death; and, moreover, the claimants were volunteers, being no parties to the agreement, if any, between C. and his mother, and having done nothing on the faith of it. Semble, also, that the statute of limitations would not be a bar, the trust, if any, declared by the deed, being an implied, and not an express trust. *Trust and Loan Co.* v. *Clarke*, 3 A. R. 429.

Encroachment—*Statute of Limitations.*]—Mrs. H., the owner of lot 13, built a house thereon, but which on a survey made by a surveyor, R., was found to have encroached on lot 12, owned by R., seven and a half inches, whereupon the following agreement was entered into: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street, by Mr. R. is correct, but that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H., said R. may claim the whole of his said lot: and that in the meantime said R. shall occupy his said lot up to the said line in the rear of the said house." The defendant had purchased from M. to whom Mrs. H. had sold some twelve years prior to the trial, which took place in the spring of 1886, M. at the time being aware of the agreement, but of which defendant when he bought had no notice. The defendant moved a fence, which plaintiff had erected in rear of the house in accordance with R.'s survey, in a line with the house, and also veneered the house with brick so as to cause it to encroach one and a half inches further on plaintiff's lot. Mrs. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by defendant:—Held, that the plaintiff was entitled to recover, for that the agreement must be construed as a demise to Mrs. H. for life of that portion of lot 12 covered by the house, and not merely a license to occupy the same, so that the right of entry of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death, was not barred by the statute of limitations. It was objected that the plaintiff must fail under the registry laws, because the grant to Mrs. H., it appeared, had not been registered, and defendant bought in ignorance of plaintiff's rights: but:—Held, that the registry laws did not affect the matter, for as defendant bought lot 13 and not 12, the instrument relating to lot 12 would not properly be registered on lot 13:—Held, also, that the agreement signed by Mrs. H. recognizing the line run by R. as the true boundary between the lots, relieved the plaintiff from doing more than shewing where that line ran, and imposed on defendant, who claimed by mesne conveyance from Mrs. H., the burden of shewing that such line was incorrect. *Roan* v. *Kronsbein*, 12 O. R. 197.

Grant to Person and Her Children.]—Under a conveyance to "B. and her children for ever," there being no children at the time

of the deed:—Held, that the grantee took only a life estate. *Shank* v. *Cates*, 11 U. C. R. 297.

Husband's Possession of Wife's Life Estate.]—Though a man has been in possession for 20 years of land granted to his wife for life, he does not thereby acquire an absolute title to the land; for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, if his wife should so long live, and if he predecease her, the right to possession will revert to her, and entitle her to maintain ejectment against his grantee. *Nolan* v. *Fox*, 15 C. P. 565.

Under a deed of land to a married woman, dated 27th March, 1824, to hold from the 30th day of the same month until her decease, and after that to her husband for his life:—Held, that though it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; but, semble, that the jury might properly have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

A grant to a married woman of a life estate in land does not require the assent of her husband to pass the title to her; and unless he repudiate it in some way, both will be seised in her right. *Ib.*

Incumbrance.]—A testator devised certain lands to his wife for life, remainder to such of his children as she should appoint, and, failing issue, to such child or children of J. C. as she should appoint. The property, it was alleged, was incumbered to its full value, which incumbrance the widow directed to be paid out of her own funds, and appointed the estate to the defendant M. C. Upon a bill filed to have the sums so paid by the widow declared a charge on the estate, evidence was directed to be given as to whether the estate was of considerably greater value than the claims so paid off, in which case it would be declared that the widow had a lien thereon for the amount advanced by her; but if otherwise, it would be intended that the appointment of the estate had been made freed and discharged of such claim. *Macklem* v. *Cummings*, 7 Gr. 318.

Interest on Charge.]—The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. *Reid* v. *Reid*, 29 Gr. 372.

Lease for Life.] — A. died leaving a widow, the plaintiff, and defendant, his heir-at-law. The plaintiff being in possession of part of the property, defendant executed the following instrument under seal: "Know ye, all men, that I, J. G. H., do bind myself, my heirs, executors, and assigns, in the sum of £500 to let my mother, L. H., retain quiet and peaceable possession of the lot of land now in her possession, the same being fifty acres, more or less, for the term of her natural life."—Held, a lease for life, and that the plaintiff might maintain ejectment. Semble, that the writing might also be supported as a release. *Hall* v. *Hall*, 15 U. C. R. 637.

Lease for Life or Years.]—Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants, the lease and the term thereby granted should cease and be utterly null and void. The lessee entered, and on the 1st April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant; and the sheriff afterwards, under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it as a term with fifteen years yet to run, at a rent of $100 a year. The plaintiff became the purchaser, and brought ejectment against defendant on the sheriff's deed:—Held, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the fi. fa. against goods. *Dalye* v. *Robertson*, 19 U. C. R. 411.

Lease for Life—*Reservation of Right to Possession*.] — The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant reentered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment:—Held, reversing 31 C. P. 417, that the defendant had, according to the terms of the lease, the right to possession, and that the plaintiff must therefore fail in his action. *Turley* v. *Benedict*, 7 A. R. 300.

Life Estate and Remainder.]—A deed made by C. G. (mother) to J. H. G. (daughter) just after the latter's marriage, contained the following provision: "It being hereby declared and agreed that it is intended by this deed to vest in the said J. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said J. H. G., and to be held by them, their heirs and assigns, in equal shares," and was executed by both grantor and grantee. No issue were in existence at the date of the deed. Subsequently J. H. G. and her children, with the exception of two, executed a mortgage in fee of the property; of these two, one died in the lifetime of J. H. G. leaving infant children. In an application under the Vendor and Purchaser Act, R. S. O. 1877 c. 109, on a sale by the mortgagee, it was:—Held, that the real design of the grantor and J. H. G. the grantee, appearing on the face of the deed, was that only a beneficial life estate should be given to the grantee, and that the beneficial remainder in fee should go to her children; that each child born while the grantee lived would have

a vested right to share in the property, and that such share would descend to those who died before the grantee; and that such a title could not be forced on a purchaser. *Re Morice and Rishridger*, 13 O. R. 640.

Taxes.]—Semble, a tenant for life of the whole estate of the testator, consisting of an improved farm, and of wild lands, is bound to keep down the taxes on the whole. *Biscoe* v. *VanBearle*, 6 Gr. 438.

The devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, and they form a first charge on the testator's interest. *Gray* v. *Hatch*, 18 Gr. 72.

Trustees — *Temperance Society.*]—See *Armstrong* v. *Harrison*, 29 O. R. 174.

IV. Estate in Fee.

Assign.]—"Assign" is a good operative word to pass the fee. *Fraser* v. *Fraser*, 14 C. P. 70.

Deed by Mortgagees.]—Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns for ever, all and singular, "the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same:"—Held, sufficient to pass the fee to the grantees. *Bright* v. *McMurray*, 1 O. R. 172.

Foreign Deed.] — A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties "and their successors," which words it was proved would convey the fee simple according to the law of Lower Canada, and it was shewn that the grantor's intention was to convey the lands absolutely. The court ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada. *Allan* v. *Thorne*, 3 U. C. R. 645.

Habendum for Years.]—A., by indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let to M., his heirs and assigns," certain land, habendum, "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of 21 years," yielding and paying yearly during said term to M., his heirs and assigns, 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A.:—Held, that without livery of seisin the fee simple granted in the premises could not take effect, and the habendum for 21 years would stand; but a new trial was granted to determine the fact of livery. *McDonald* v. *McGillis*, 26 U. C. R. 458.

Semble, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership. *Ib.*

Habendum in Trust.]—Land was granted by letters patent to A. G., her heirs and assigns for ever, "to have and to hold the said parcel or tract of land hereby given and granted to her the said A. G., in trust for herself and her children, M. G. and F. G.:"—Held, that A. G. took the fee, and that no legal estate passed to the children. *Goldie* v. *Taylor*, 13 U. C. R. 603.

Habendum with Special Limitations.]—See *Langlois* v. *Lesperance*, 22 O. R. 682.

Quit Claim of all Right and Title.]—The plaintiff in ejectment claimed under a deed from one S., who was proved to be the owner in fee, expressed to be made in pursuance of the Act to facilitate the conveyance of real property, by which S., in consideration of £75, did quit claim to one G., his heirs and assigns for ever, all his right and title to the land in question. It was added that G. might take possession, that S. would execute such further assurances as might be requisite, that he had done no act to incumber; and he released and quitted claim to G. all his claim upon said lands:—Held, sufficient to pass the title in fee. *Nicholson* v. *Dillabough*, 21 U. C. R. 591.

Repugnant Limitations.]—See *Doe d. Meyers* v. *Marsh*, 9 U. C. R. 242; *Owston* v. *Williams* 16 U. C. R. 405.

Reservation of Life Estate.]—A deed conveying land in fee simple, "reserving, nevertheless, to my" the grantor's "own use, benefit, and behoof, the occupation, rents, issues, and profits of the said above granted premises, for and during the term of my natural life:"—Held, a conveyance of the fee simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. Quære, whether the reservation was void, or whether only the reversion passed subject to the life estate. *Simpson* v. *Hartman*, 27 U. C. R. 460.

Shelley's Case.]—Under a conveyance of land to M., to hold "during her natural life, then to go to her heirs equally alike, and their heirs and assigns for ever:"—Held, that the rule in Shelley's case applied, and that M. took a fee. *Brown* v. *O'Dwyer*, 35 U. C. R. 554.

Statute of Uses.]—A husband and wife were the parties of the third part in a conveyance, whereby the wife's father did "grant unto the said party of the third part his heirs and assigns for ever," &c., habendum "unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use for ever:—" Held, that by the operation of the Statute of Uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.

A. by deed sold and assigned certain lands to B. his heirs, executors, administrators, and assigns, "to have and to hold the same unto B. his heirs, executors, administrators, and assigns in trust, for the sole and separate use of A. for life, and after A.'s decease, in trust for C. for her life; and after C.'s decease, in trust for the heirs of A., and in the event of A. surviving C., then in trust to convey and revest the said premises in A., his heirs, executors, administrators, and assigns, for their own proper use and benefit for ever. But should C. survive A., then and in that event, and in the further event of the decease of C.,

in trust to convey the said premises to such persons and in such manner as A. shall by his last will and testament order, designate, and appoint. But in the event of A. dying intestate, then in trust to sell and convey the said premises for A.'s heirs, executors, administrators, and assigns:"—Held, that A. took an estate in fee simple, subject to the intervening life estate of C.; for no such special trust was created as took the case out of the Statute of Uses. *Re Bingham and Wrigglesworth*, 5 O. R. 611.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto and to the use of B., his heirs and assigns." This was dated 17th July, 1875, and registered 21st July, 1875:—Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

V. Estate Tail.

Barring.]—A testator seised in fee of land, having devised to one of three sons, "to be by him entailed to any of his issue he may think proper," with the further provision that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment," died before the 6th March, 1834. In November, 1851, two of the sons, D. and R., by deed conveyed their estates in the land to the third son, C. This deed was never registered. C. had a child who predeceased him. By several deeds, executed respectively in February and March, 1865, D. and his assignee in insolvency conveyed to plaintiff. Both these conveyances were duly registered:—Held, that the three sons took estates tail in the land: that D. and R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as heir-at-law of the testator, had the reversion in fee. *Bumble* v. *Johnson*, 17 C. P. 9.

Held, also, that although the deed of November, 1851, might not for want of registration, under C. S. U. C. c. 83, s. 31, have barred the entail as against their issue, it did pass the individual rights of the grantors during their lives; and that as D., under whom alone the plaintiff claimed, was still alive and could not impeach this deed, no more could the plaintiff, who took no higher interest than D. had it then in his power to transfer. *Ib.*

Held, also, that if the title had been registered before 1851, of which there was no evidence, and if the plaintiff had relied on the non-registration of this deed under the general Registry Act, he would, upon proof that he was a purchaser for valuable consideration, (as to which, however, the evidence was otherwise,) have been entitled to succeed as to that portion of the land which D. himself could have claimed, just as if the deed of 1851 had never been executed. *Ib.*

Quære, whether a mortgage in the short form under 27 & 28 Vict. c. 31, executed by the tenant in tail, has the effect of barring the entail. *Re Dolsen*, 4 Ch. Ch. 36.

A mortgage in fee simple by a tenant in tail bars the entail. *Re Lawlor*, 7 P. R. 242.

Held, reversing 6 A. R. 312, that the execution and registration in accordance with R. S. O. 1877 c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail. *Lawlor* v. *Lawlor*, 10 S. C. R. 194.

The express consent of the protector to the settlement is not necessary to bar an estate tail. The tenants in tail and the mother, who was protector to the settlement, having an estate during widowhood in the land, joined in a mortgage in fee, purporting to be made under the Act respecting Short Forms of Mortgages, and containing the usual covenants, for the purpose of securing moneys borrowed to pay off legacies charged on the whole estate, including the mother's interest therein:—Held, that her consent sufficiently appeared, and that the estate tail was barred. *Ostrom* v. *Palmer*, 3 A. R. 61.

By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—Held, per Maclennan, and Lister, JJ.A., that under this will the son took an estate tail; but held, also, per curiam, that even if the son did take an estate tail, that estate had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages. Lawlor v. Lawlor, 10 S. C. R. 194, applied, and Plomley v. Felton, 14 App. Cas. 61, distinguished. *Culbertson* v. *McCullough*, 27 A. R. 459.

Deed in Fee—*Statute of Limitations.*]—Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee and gave up possession to the purchaser:—Held, that the statute of limitations did not begin to run against the heir of the tenant in tail until the death of the grantor. *Re Shaver*, 3 Ch. Ch. 379.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting the assurance of estates tail; the purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. *Ib.*

In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief. *Ib.*

Infant.]—On an application for a ruling as to whether the estate of an infant being an estate tail in possession could be sold under R. S. O. 1877 c. 137:—Held, that the Act applies to an estate tail. *In re Gray*, 26 O. R. 355.

Separate Estate—*Tenant by the Curtesy.*]—A father conveyed lands to his daughter by deed with habendum "to have and to hold the same unto * * * and the heirs of her body lawfully begotten to and for their sole and only use for ever * * * to and for the sole and separate use and benefit of (grantee) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for (grantee) to direct and appoint either by deed or her last will and testament which or in what manner her said heirs shall have the lands and premises hereby granted should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son with instructions to dispose of the same between her husband and children in the proportions mentioned in her will:—Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy:—Held, also, that the provisions of the will were not a valid exercise of the power. *Archer* v. *Urquhart*, 23 O. R. 214.

Specific Performance.]—A decree for specific performance will be made against a tenant in tail. *Graham* v. *Graham*, 6 Gr. 372.

Wife's Conveyance.]—Section 44 of C. S. U. C. c. 83, "An Act respecting the assurance of estates tail," applies only to cases arising under that statute, and does not authorize the court, in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her. *In re McElroy*, 32 U. C. R. 95.

VI. Exchange of Land.

Agreement not Carried out—*Ejectment.*]—Two persons, each possessed of a lot of land, agreed to exchange lots; that each should have possession of the other's lot from a day named, and that they should exchange good and sufficient deeds in one year from the date of the bond, and each gave the other a bond with a penalty conditioned to perform the conditions above. The year elapsed without either giving a deed. Upon ejectment brought for the lot which the plaintiff was to convey to the defendant:—Held, that a demand of possession of the premises was necessary, and probably also that the plaintiff should offer, if not actually give up, possession of defendant's lot, which he (plaintiff) occupied under the agreement. *Perritt* v. *Arnold*, 11 C. P. 413.

Infant.]—An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation. Where, therefore, a party said to have been under age and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered such a confirmation as barred those claiming under him from impeaching the transaction. *Miller* v. *Ostrander*, 12 Gr. 349.

Mortgage.]—J. and S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage, which he agreed to pay off, but did not; and J. was compelled to redeem the same:—Held, that J. was entitled to a lien on the land conveyed by him to S., as for unpaid purchase money, for the amount paid to redeem the mortgage. *Seney* v. *Porter*, 12 Gr. 546.

Pleading.]—Dower. Second plea, that during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof they by deeds conveyed the lands to each other, D.'s wife barring her dower; that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C.:—Held, plea bad, as not shewing strictly an exchange of the lands, for the word convey has not the same effect; and, semble, no other word can be substituted. *Leach* v. *Dennis*, 24 U. C. R. 129.

Presumption of Advancement.]—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction, or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. A testator devised to his grandson, A., an infant, 30 acres, part of his farm, and the remainder thereof he devised to his eldest son, the father of A. By the evidence of the father it was shewn that on A. coming of age, by agreement between them, his father conveyed to him 50 acres of equally valuable land in lieu of the portion devised to him, the father at the time saying that he would charge him with the difference in value as an advance; and that it was supposed by the parties that no conveyance from A. to his father was necessary, as, he being the heir-at-law of the testator, all that was necessary was to destroy the will, which was done. Up to the time of his death A. never made any claim to the 30 acres; on the contrary, it was proved that on several occasions he had admitted the fact of the exchange:—Held, under the circumstances stated, sufficient appeared to shew that the conveyance to A. had been by way of an exchange of lands, and not as an advancement by the father to his son. *Birdsell* v. *Johnson*, 24 Gr. 202.

Proof of Exchange.]—Dower. Plea, that the husband exchanged other lands with one F. for the lands in question, and that the demandant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain and sale of the other lands was produced, executed by demandant's husband, for an expressed consideration of £900; and it was shewn clearly by parol evidence

that the transaction between F. and the husband was in fact an exchange:—Held, that such evidence could not avail: that the exchange must be proved in proper technical form, and by deed, and that the demandant was therefore entitled to succeed. *Towsley* v. *Smith*, 12 U. C. R. 555.

Where in dower the defence rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defence consisted of parol statements that the husband had "traded" certain lands:—Held, there was not evidence to warrant a jury in finding for the defendant. *Stafford* v. *Trueman*, 7 C. P. 41.

Settled Estates.]—The Settled Estates Acts do not authorize the court to sanction an exchange of the lands of an infant cestui que trust; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the court may order the same to be carried out under the provisions of s. 50 of c. 12, C. S. U. C. *Re Bishoprick*, 21 Gr. 589.

Title Completed after Action to Enforce Exchange.]—The plaintiff and defendant agreed to an exchange of lands, the plaintiff conveying 100 acres in B., upon which there was a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots—one in T. the other in S.—he should select; in the event of his selecting the latter, it was to be assigned to him, subject to the payment of $150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant had not yet obtained a title thereto, although he was in a position to call for a patent from the Crown on making certain payments, and this he procured the day the cause was heard. The court, as the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement, and submitted to do so, directed that the contract should be completed by conveyance of the lot in S., and that the time for payment of the $150 should date from the hearing, from which time also the interest should be computed, but refused to give to either party the costs of the litigation. *Gray* v. *Recsor*, 15 Gr. 205; 16 Gr. 614.

Want of Title.]—Where two owners of land effect an exchange, and mutual conveyances are executed between the parties, and one of them loses the estate conveyed to him in consequence of the want of title in his grantor, he is not obliged to resort to an action on the covenants in the deed conveying the property to him; but may claim a rescission of the bargain, and a restoration of the lands conveyed by him. *Rose* v. *Auger*, 22 Gr. 525.

VII. Heirship and Descent.

Agreement to Purchase.]—The eldest son and heir-at-law of a person who had in his lifetime agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company, it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers without requiring any administration of the estate of the heir-at-law, the Canada Company not objecting thereto. *Burns* v. *Canada Company*, 7 Gr. 587.

Assets.]—Declaration, against defendants as heirs-at-law of J. A., who died seised of lands, on a covenant of J. A. to pay money, averring that there is no personal representative of J. A. The defendants pleaded riens per descent. The plaintiffs replied that the equity of redemption in fee of the said lands, subject to a certain mortgage to A. B., descended on defendants. On demurrer:—Held, insufficient, for not shewing legal assets in defendants. *Rymal* v. *Ashberry*, 12 C. P. 339.

Breach of Covenant.]—Held, that an heir could not sue on a covenant entered into with the ancestor, to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's lifetime. *Goodall* v. *Elmsley*, E. T. 4 Vict. 8.

Damages.]—In this Province, though not in England, the heir is only liable for the debts of his ancestor on descent of lands. He is not liable for unliquidated damages—as, for instance, upon his ancestor's covenant for good title. *Vankoughnet* v. *Ross*, 7 U. C. R. 248.

Debts.]—The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. He, or his heir or devisee after his death, may sell or convey to a bonâ fide purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it; and such purchaser will have a good title as against creditors. Leviscomte v. Dorland, 17 U. C. R. 457, remarked upon. *Reid* v. *Miller*, 24 U. C. R. 610.

Entry.]—Where there is an adverse possession of land, an heir-at-law who has never entered, cannot make a conveyance so as to enable his vendee to recover in ejectment. *Doe d. Dixon* v. *Grant*, 3 O. S. 511.

The heir-at-law can convey land descended to him, before he enters. *Doe d. Spafford* v. *Breakenridge*, 1 C. P. 492.

Execution.]—For the purposes of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issues tried over again, still it is open to them to shew not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Gr. 280.

Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his

partner, were held precluded from objecting to payment by the estate of the losses incurred in continuing the business. *Ib.*

Lease—*Right to Purchase.*]—Simpson v. McArthur, 8 Gr. 72, remarked upon, and overruled so far as the same decided that the right to purchase contained in a lease was personalty. Such right goes to the heir-at-law, not to the personal representative, on the death of the lessee. *Henrihan* v. *Gallagher*, 2 E. & A. 338.

New Trial to Have Date of Death Proved.]—See *Beckett* v. *Foy*, 12 U. C. R. 361.

Onus of Proof.]—Where a party claims as one of the heirs of the half-blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from his ancestor; or if he did so obtain it, the claimant must shew that he is of the blood of such ancestor. *Tryon* v. *Peer*, 13 Gr. 311.

Simple Contract Debt.]—An action does not lie against an heir on the simple contract debt of his ancestor. *Forsyth* v. *Hall*, Dra. 394.

Surplus after Sheriff's Sale.] — The heir-at-law is entitled to recover from a sheriff the surplus of moneys arising from a sale of his ancestor's land, on a fi. fa. against those lands in the hands of the executors. *Ruggles* v. *Beikie*, 3 O. S. 276, 347.

Void Patent.]—A patent was issued purporting to grant land to B. as daughter of a U. E. Loyalist, but B. had died six months previously:—Held, the patent being absolutely void, that the heir could not file a bill to set aside a conveyance executed under a power of attorney from B. alleged to have been forged. *Brouse* v. *Cram*, 14 Gr. 677.

VIII. JOINT TENANTS AND TENANTS IN COMMON.

1. *Joint Tenants.*

Conveyance inter se.]—A conveyance in fee to A. by B., the survivor of two joint tenants, "of his undivided half of the lot," puts an end to the joint tenancy and makes the joint tenant B. till he die a tenant in common with A.; and B. by his will may devise the moiety he has not by his deed conveyed to A. *Doe d. Eberts* v. *Montreuil*, 6 U. C. R. 515.

Conveyance of Two Lots to Two Persons.]—By a settlement certain lands were conveyed to trustees, upon trust to hold the said land * * situated * * being lot No. 2 * * to G. A.; and also lot No. 1, situated * * to A. A., sons of (the settlor) * * to the use of them, their heirs and assigns, as joint tenants, and not as tenants in common * * and, lastly, upon trust, that the said trustees * * shall well and sufficiently convey and assure, absolutely in fee to the said parties respectively, &c.":—Held, that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the final trust directing the trustees to make the conveyances of the legal estate, made any difference; and that the words must receive the same construction as if they were found in a common law conveyance:—Held, also, that an estate in fee in lot 2, passed to G. A., and that the words, "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. c. 1, s. 48, and that they were needlessly used:—Held, also, that as G. A. died intestate and unmarried, after January 1st, 1852, the defendants, as the children of a deceased brother of the plaintiff, took an equal share in the lands as co-tenants in common with the plaintiff A. A.; that they were as much entitled to the possession of the lands as the plaintiff, and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common:—Held, also, that there being no proof of ouster of the plaintiff he could not recover from the defendants any mesne profits in this action. *Adamson* v. *Adamson*, 17 O. R. 407.

Two several lots were conveyed, by the deed in trust set out in the report, to C. and A. respectively to the use of G. and A., their heirs and assigns, as joint tenants, and not as tenants in common:—Held, that under the provisions of such deed, the grantees took the respective lots in severalty. *Adamson* v. *Adamson*, 7 A. R. 592, 12 S. C. R. 563.

Division of Property.]—Joint tenants in tail executed articles of agreement for a division of the property; and each went into possession, and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement:—Held, that the defendant could not set up as a defence to such bill that the plaintiff had by possession acquired a perfect title at law. *Graham* v. *Graham*, 6 Gr. 372.

Dower.]—The death of one joint tenant during their joint seisin, passes the title to the co-joint tenant free from dower of the deceased joint tenant's widow. *Haskill* v. *Fraser*, 12 C. P. 385.

Mortgagees.]—Mortgagees are not trustees under 4 Wm. IV. c. 1, s. 48, so as to take jointly when the deed is silent as to the tenancy created. *Doe d. Shuter* v. *Carter*, H. T. 2 Vict.

Release by One.]—Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke* v. *Union Fire Ins. Co., McPhee's Claim*, 6 O. R. 635.

Release inter se.]—A release by one joint tenant to another conveys a fee, without words of inheritance. *Ruttan* v. *Ruttan*, M. T. 4 Vict.

Service of Notice.]—Semble, that service of notice to determine a lease upon one of two joint tenants is sufficient. *Barrett* v. *Merchants Bank*, 26 Gr. 409.

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2. *Tenants in Common.*

Accounting.]—At common law there can be no action of account by one tenant in common or joint tenant, unless there has been

an appointment of one by the other as bailiff. *Gregory* v. *Connolly*, 7 U. C. R. 500.

Under the statute 5 Anne c. 16, however, one tenant in common, or joint tenant, may be sued as bailiff in an action of account, whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not. *Ib.*

Semble, that co-parceners, not coming within that statute, cannot sue each other in an action of account. The point, however, was not expressly decided, as the court held that in this case the facts shewed that the defendant entered into possession of the land not as a co-parcener, claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff without his consent; and that on that ground the action of account would not lie. *Ib.*

Where one of several tenants in common, of a plaster bed, was in sole possession of the property, and had sold portions of the plaster, an account of his receipts therefrom was ordered in favour of his co-tenants. *Curtis* v. *Coleman*, 22 Gr. 561.

Chattel—*Removal to Foreign Country.*]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights. In this case the removal of a brick-making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the courts of this Province being thus interfered with. *McIntosh* v. *Port Huron Petrified Brick Company*, 27 A. R. 262.

Costs Incurred for Common Benefit.]—Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining the committing of waste on the joint property by a stranger, it was held, that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit. *Gage* v. *Mulholland*, 16 Gr. 145.

Crops.]—H., by agreement with defendant, planted sixteen and a half acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work, and defendant to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder. Subsequently, H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own, and harvested it:—Held, that H. and defendant were tenants in common of the crop of Indian corn: that one tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping and harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it; and that under the circumstances of the case the court might assume, after verdict for the plaintiff, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion. *Brady* v. *Arnold*, 19 C. P. 42.

See, also, *Culver* v. *Macklem*, 11 U. C. R. 513.

Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property; still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years, although as to such previous years the mother might have been accountable to her infant children as trustee for them. *Bates* v. *Martin*, 12 Gr. 490.

Dower.]—Where a husband is seised as tenant in common, his wife may be endowed. *Ham* v. *Ham*, 14 U. C. R. 497.

Effect of Statute.]—The effect of C. S. U. C. c. 82, s. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy. *In re Shaver and Hart*, 31 U. C. R. 603.

Farming in Partnership.]—A., of whom the plaintiff was administratrix, and defendant having worked and stocked a farm in partnership:—Held, that on the death of one, the survivor did not take the whole of the chattels, but that the maxim "Jus accrescendi inter mercatores locum non habet," applied. *Rathwell* v. *Rathwell*, 26 U. C. R. 179.

Joint Demise in Ejectment.]—Tenants in common cannot make a joint demise in ejectment. *Doe d. McNab* v. *Sicker*, 5 O. S. 323.

Making Bricks.]—One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property. *Dougall* v. *Foster*, 4 Gr. 319.

Mortgage—*Insurance.*]—One of several devisees claimed to be solely entitled, and mortgaged the property; and the mortgagees entered into the receipt of the rents:—Held, that they must account to the other devisees for their shares of the rents. *McIntosh* v. *Ontario Bank*, 19 Gr. 155.

One of several tenants in common, being in sole possession of the premises and claiming to be solely entitled, insured the buildings on the property; the buildings having been destroyed by fire the insurance moneys were paid to the party insuring, and new buildings were erected by a person to whom he had contracted to sell the property:—Held, varying 19 Gr. 155, that the party insuring was entitled to appropriate the insurance money to his own benefit. *McIntosh* v. *Ontario Bank*, 20 Gr. 24.

Held, also, varying the original decree, that he was not entitled to any allowance in respect of the new buildings. *Ib.*

Occupation Rent—*Improvements.*]—A tenant in common being in actual occupation of the joint estate forms no ground for charging him with rent. It would be otherwise, however, if he had been in the actual receipt of rent from third parties. *Rice* v. *George*, 20 Gr. 221.

One of several tenants in common, or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor, unless, on the other hand, he consents to be charged with occupation rent. Semble, that one tenant in common selling timber off the joint property is not chargeable with sums realized therefrom. *Ib.*

Purchase by Husband of One Co-tenant in Common.]—The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The court, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs. *Kennedy* v. *Bateman*, 27 Gr. 380.

Quarry.]—One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. On a bill filed by the co-tenant against the lessor and lessee, alleging that the lessee had quarried stone outside the limits as well as within the limits of the lands demised, the lessee by his answer insisted on his right to quarry where he had, the limits of the acre really agreed to be demised being different from those mentioned in the lease, but did not submit to account for the stone quarried. At the hearing the court made a decree for an account with costs against the lessee. *Goodenow* v. *Farquhar*, 19 Gr. 614.

Release of Dower.]—Where a widow purported to release "all my dower * * * in, to, or out of all that certain * * * lot," to two out of more tenants in common:—Held, 1. That her dower was gone in the whole lot. 2. There was no accrual in favour of the other tenants in common. *McDearmid* v. *McDearmid*, 15 C. L. J. 112.

Rents and Profits.]—One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee, 19 C. L. J. 95. Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rents and profits of:—Held, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenant's just share or proportion. 2. That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property where there was no exclusion or ouster. 3. That the six years' bar of the statute of limitations applied to such claim. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

Sale of Common Property without Authority.]—The plaintiff and L. were tenants in common of an oil well. They filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,000 belonged to the plaintiff and 800 to defendant, and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L., without authority, contracted for the sale of all the oil in the tank at $4.25 a barrel:—Held, on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil, and that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction; and that his only remedy was an action at law. *Mason* v. *Norris*, 18 Gr. 500.

Special Agreement.]—In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855, executed an agreement under seal, whereby he gave to his son J. his right, title, and interest of one half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give the father one-half of the produce, if demanded:—Held, that the effect of the deed was to give an undivided moiety of the half lot to J. *Leech* v. *Leech*, 24 U. C. R. 321.

Timber.]—A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupation. *Munsie* v. *Lindsay*, 10 P. R. 173.

Trespass.]—One tenant in common may commit trespass by expelling his co-tenant and taking the whole enjoyment of the estate wrongfully to himself. *Petrie* v. *Taylor*, 3 U. C. R. 457.

Working Farms Together.]—Where the plaintiff and defendant, being each possessed of a farm, agreed to work them together and divide the profits arising from them at the end of the season; and before the harvest defendant was dispossessed of his farm by ejectment, and the plaintiff thereupon gave him notice that he would not divide his crops with him, notwithstanding which the defendant entered the plaintiff's farm and took away his share of the crop:—Held, that the plaintiff could not maintain trespass against him. *Wemp* v. *Mormon*, 2 U. C. R. 146.

IX. Miscellaneous Cases.

Charge on Land—*Right of Occupation.*]—In January, 1841, B. devised to his daughter, the wife of defendant, the land in question in fee. In July following B. and the defendant and his wife executed a deed, reciting the will, and stating that the parties had mutually agreed that the defendant and his wife should come upon the land and possess and enjoy it without the interruption of said B., his heirs or assigns, as long as defendant and his wife should support the said B. and his wife in the manner described. The deed then set out, that in consideration of the will, and that B. did put defendant and his wife in possession, they had agreed to maintain the said B. and

his wife during their natural lives; and that if defendant and his wife should keep their agreement, then the land was to become the property of the said defendant and his wife, their heirs and assigns for ever. B. lived with and was supported by defendant and his wife until his wife died in 1847. He afterwards married again, and in July, 1850, a few days before his death, made another will revoking all former wills, and directing his executors to sell all his land, and divide the proceeds equally among his four daughters. Defendant had made considerable improvements on the farm during his occupation:—Held, in ejectment brought by one of the four daughters, that the deed passed no estate of inheritance, and that nothing contained in it could operate as an estoppel on the devisees under the second will; that it gave only a right to occupy until testator's death, with the assurance that if the agreement were kept by defendant and his wife, he would make no alteration in his first will. *Throop* v. *Edmonds*, 12 U. C. R. 33.

Quære, whether defendant, having kept the condition on his part, would have any remedy against B.'s representative for breach of the agreement. *Ib.*

Charge on Land—*Right of Occupation.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bedroom and bedding, in the dwelling house on the farm, and to his board so long as the plaintiff should remain a resident on the farm:—Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bedroom and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 G. R. 213.

Charge.]—In an instrument under seal the words, "and for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land," &c., pass no interest; they only shew an intention to create a charge or lien. *Doe d. Ross* v. *Papst*, 8 U. C. R. 574.

Covenant to Stand Seised.]—In ejectment, the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure the plaintiff for future services of the same kind, and of the sum of £25 already paid and advanced by plaintiff to him, &c., he, M., covenanted, granted, and agreed that he would stand seised and possessed of the land in question to the use of the plaintiff, his heirs and assigns, by way of charge, security, and mortgage on the land for said moneys and costs; and when the plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a charge, mortgage, and security upon the land for the amount so to be ascertained, or M. would; and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c.:—Held, that the instrument could only operate under the Statute of Uses, as being granted on a money consideration, which appeared from the express recitals contained in it; and, semble, that full effect would be given to the whole instrument, and the real intent of the parties carried out by holding that it was to operate as a charge, security, and mortgage in equity on the land, until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge unless the plaintiff desired a legal mortgage, which in that case M. covenanted to execute. Quære, whether the plaintiff took the legal estate so as to enable him to maintain ejectment. *Miller* v. *Stitt*, 17 C. P. 559.

Deed by Reversioner.]—Held, that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest in such reversioner. *Wilkinson* v. *Conklin*, 10 C. P. 211.

Effect of Livery of Seisin.]—Possession is evidence of livery of seisin of land; and where there is evidence of possession accompanying and following a deed for upwards of thirty years, seisin may well be presumed. *Nolan* v. *Fox*, 15 C. P. 565.

By a deed dated 27th March, 1824, one J. S. leased land to H. S., to hold from the 30th day of the same month, until her decease:—Held, that though under the authorities, it might, if executed and livery of seisin given on the day it bore date, be void; yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; and semble, the jury might properly have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

A., by indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let to M., his heirs and assigns," certain land, habendum, "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of 21 years," yielding and paying yearly during said term to M., his heirs and assigns, 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A.:—Held, that without livery of seisin, the fee simple granted in the premises could not take effect, and the habendum for twenty-one years would stand; but a new trial was granted to determine the fact of livery. *McDonald* v. *McGillis*, 26 U. C. R. 458.

Semble, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership. *Ib.*

Entireties—*Husband and Wife.*]—Quære, whether the effect of the Married Woman's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common. *Griffin* v. *Patterson*, 45 U. C. R. 536.

Where a deed in a chain of title had been made to husband and wife as joint tenants:—Held, following In re Shaver and Hart, 31 U. C. R. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And where the husband made a conveyance of the same land in the lifetime

of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.

Held, that a lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor. *Leitch* v. *McLellan*, 2 O. R. 587.

Estate by the Curtesy.]—See HUSBAND AND WIFE.

Future Estate.]—See *Thurcsson* v. *Thurcsson*, 30 O. R. 504.

Growing Crops.]—By deed of conveyance of all and singular that certain parcel of land, &c., together with the houses and easements, profits, privileges, hereditaments, &c., to said parcel of land belonging to or in anywise appertaining, and all the rents, issues and profits thereof, &c., growing crops in the ground at the time of the execution of the deed will pass to the grantee. *Wood* v. *Lang*, 5 C. P. 204.

Interest not Passing.]—A. received from B. a power of attorney to sell lands. Under this power A. delivered to C. a deed professing to be made as follows: "Between A., by and under power of attorney, bearing date, &c., by and from one B., &c., yeoman, of the first part, and C. of the other part." Throughout the deed, A., the said party of the first part, was made the grantor, and the deed was thus executed: "By power of attorney bearing date 14th April, 1849. (Signed) A. [L.S.]. (Signed) C. [L.S.]."—Held, that A. being the granting party in the deed, and not B., B.'s interest did not pass by the deed. *Dackstedor* v. *Baird*, 5 U. C. R. 591.

Semble, that even if B. had been made the granting party, the deed would have been inoperative from the informal mode of execution. *Ib.*

Interest Wrongly Described.]—If a party convey land and all his estate therein as heir-at-law of another person deceased, though he claim as devisee and not as heir-at-law, still the land passes. *Doe d. Clark* v. *McInnis*, 6 U. C. R. 28.

Mortgagee of Term Cutting Timber.]—The mortgagee of a term of years, being in possession of the mortgaged estate, will at the suit of the mortgagor be restrained by injunction from felling timber on the mortgaged premises; although the mortgagee may have obtained the consent of the reversioner to what he is doing. *Chisholm* v. *Sheldon*, 1 Gr. 318.

Quære, whether the doctrine applicable in England between termor and reversioner in respect to felling timber, can prevail as to an estate in this country; the beneficial enjoyment of which is ordinarily attained, and can be generally obtained only through the destruction of the growing timber; and whether the doctrines of the common law as to growing timber can be applied in all their extent to forest land in this country. *Ib.*

Power of Attorney to Receive Share of Estate.]—One of the devisees of an estate sold her interest therein to her brother, and executed with her husband an instrument in the form of a power of attorney, authorizing the assignee for his own benefit to demand and receive of and from the executor, &c., all moneys which might become due and payable to her and her husband, or either of them, by virtue of all devises and bequests under the last will and testament of her father. In fact she was then entitled to a share of another brother's portion of the estate by assignment from him:—Held, that the instrument had not the effect of transferring the share of the wife in the portion of the brother so assigned. *Pherrill* v. *Pherrill*, 10 Gr. 580.

Pretended Title.]—A., the owner of certain lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds; the defendant A.'s son and heir-at-law, subsequently released to S., and the release was also recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff sued defendant for the penalty under 32 Hen. VIII. c. 9, for selling a pretended right:—Held, that 14 & 15 Vict. c. 7, would not apply in defendant's favour, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right. *Baby* q. t. v. *Watson*, 13 U. C. R. 531.

In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889. In an action of ejectment begun in October, 1889, by the heirs-at-law of the wife against persons claiming through the husband:—Held, that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 Hen. VIII. c. 9, then in force. *Marsh* v. *Webb*, 21 O. R. 281, 19 A. R. 564, 22 S. C. R. 437.

Sale of Reversion.]—Although the number of persons in this country in the position of expectant heirs and reversioners is but small, still the same rule applies here as in England, the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men. *Morey* v. *Totten*, 6 Gr. 176.

Where the tenant for life was the father of the reversioner, but the son was not dependent upon him, and had no expectation from him, and both were illiterate persons:—Held, that the father's knowledge of the sale of the reversion by the son did not render such sale unimpeachable. *Ib.*

Special Words.]—Held, that the words "all my right, interest, and estate of, in and to the estate of G. M. and M. M." in a conveyance, passed all the estate of the grantor in G. M.'s estate. *O'Neil* v. *Carey*, 8 C. P. 339.

Statutory Conversion of Lunatic's Estate.]—One of several heirs of an intestate being lunatic, an Act of Parliament was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share in Government securities or mortgages for the benefit of the lunatic "and his representatives." The lunatic afterwards died; and in a proceeding to distribute his share, it was

held, that this share, for the purpose of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Gr. 254.

Timber Limits.]—A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof:—Held, that the suit ought to be by the personal representative, and a demurrer to the bill, on the ground that it was not so constituted, was allowed. *Bennet* v. *O'Meara*, 15 Gr. 396.

Vesting.]—By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:—Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance. *Stewart* v. *Glasgow*, 15 Gr. 655.

See DEED, III. 6, 7—INFANT, II.—WILL.

ESTATE AT WILL.

See ESTATE, II.—LIMITATION OF ACTIONS, II. 22.

ESTATE IN FEE.

See ESTATE, IV.—WILL, IV. 8.

ESTATE FOR LIFE OR YEARS.

See ESTATE, III.—LIMITATION OF ACTIONS, II. 23—WILL, IV. 7.

ESTATE TAIL.

See ESTATE, V.—LIMITATION OF ACTIONS, II. 25—WILL, IV. 9.

ESTOPPEL.

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I. BY INSTRUMENT UNDER SEAL.

1. *In General.*

Acceptance of Deed from Reversioner.]—Held, that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest in such reversioner. *Wilkinson* v. *Conklin*, 10 C. P. 211.

Acceptance of Life Lease—*Dowress.*]—Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son that he should occupy the house, except certain rooms in it, and take the rents and profits of the land upon certain conditions, on breach of any of which he was to go out of possession, but the mother did not release her right under the statute:—Semble, that the mother could not, after the father's death, on the ground that she had not barred her freehold interest under the life lease, maintain ejectment for the whole of the premises without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe d. Peck* v. *Peck*, 1 U. C. R. 42.

Accepting in Part and Attacking in Part.]—Where a party succeeds in establishing the illegality of an instrument, he will not be allowed to enforce any stipulation that may be contained therein for his benefit. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 490.

Agreement to Make Will—*Maintenance.*]—In January, 1841, B. made his will, devising to his daughter, the wife of the defendant, the land in question in fee. In July following, B. and the defendant and his wife, executed a deed reciting the will, and stating that the parties had mutually agreed that the defendant and his wife should come upon the land, and hold, and enjoy it, without the interruption or denial of him the said B., his heirs or assigns, as long as the defendant and his wife should support the said B. and his wife in the manner described. The deed then set out, that in consideration of the will, and that the said B. did put the defendant and his wife in possession, they had agreed to maintain the said B. and his wife during their natural lives; and that if the defendant and his wife should keep their agreement, then the land was to become the property of the said defendant and his wife, their heirs and assigns for ever. B. lived with and was supported by the defendant and his wife until his wife died in 1847. He afterwards married again, and in July, 1850, a few days before his death, made another will, revoking all former wills, and directing his executors to

sell all his land, and divide the proceeds equally among his four daughters. Defendant had made considerable improvements on the farm during his occupation:—Held, in ejectment brought by one of the four daughters, that the deed passed no estate of inheritance, and that nothing contained in it could operate as an estoppel on the devisees under the second will: that it gave only a right to occupy until the testator's death, with the assurance that if the agreement were kept by defendant and his wife, he would make no alteration in his first will. *Throop* v. *Edmonds*, 12 U. C. R. 33.

Alteration of Bond.]—A person who has executed a deed cannot be bound by an alteration made in his absence by his verbal direction. Quære, whether, upon the evidence stated in the report of this case, defendant could be held estopped by his acts from disputing the bond so altered. *Martin* v. *Hanning*, 26 U. C. R. 80.

Assignment—*Conversion.*]—Held, under the special facts of this case, that the plaintiff was not estopped by his assignment to the Bank of Upper Canada, from treating these defendants as guilty of a conversion of his property. *Cayley* v. *McDonell*, 8 U. C. R. 454.

Boundary—*Grant Defining it—Grantee's Acquiescence Therein—Subsequent Attempt to Alter.*]—See *McArthur* v. *Brown*, 17 S. C. R. 61.

Company—*Amalgamation—Disputing Validity of Incorporation.*]—Declaration, that before 16 Vict. c. 43, the plaintiffs, with others, promoters of the Grand Junction R. W. Co., incorporated thereby, had caused certain preliminary plans and surveys of the said railway to be prepared: that the line of said railway passed through plaintiffs' territory, and the plaintiffs under that Act defrayed their fair proportion of the expense of such plans, &c., which sum the said company, by force of said statute, s. 5, became liable to refund to the plaintiffs: that while so liable, the said company and the defendants were, under 16 Vict. c. 76, and a certain deed of amalgamation, formed into one company, and became amalgamated; and the Grand Junction R. W. Co. did intersect the main line, and said surveys have been appropriated by defendants to their own use, and by force of said acts defendants have become liable to pay to plaintiffs the said proportion so paid by them as aforesaid. Plea, that the capital stock in said Grand Junction R. W. Co. was not taken by the persons in said Act named, or any others, nor was any money ever paid upon it, and defendants never became stockholders in said company. Replication, that defendants should not be allowed so to plead, because, by the deed of amalgamation mentioned in the declaration, they united themselves with the Grand Junction R. W. Co., and recognized it as an existing company, and the same thereby became and has since existed as part of defendants. Rejoinder, that defendants should not be precluded from their plea, because said deed was only made by authority of the provisional directors in 16 Vict. c. 43 named, but there never were any shareholders in said company, nor was said deed ever duly ratified by them, as required by the statute:—Held, on demurrer, rejoinder good: and that there was no such estoppel as relied on by the plaintiffs. *United Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220.

Court Sale—*Party to Proceedings afterwards Attacking Title.*—The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to plaintiff $16,578.66, for his share, as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth. The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti company was a nullity, because the Act incorporating the company was ultra vires the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti company, was not valid. The Anticosti company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by the appellant prior to judgment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent:—Held, that as Dame C. Langan had herself recognized the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution, raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration. *Forsyth* v. *Bury*, 15 S. C. R. 543.

Demise of Tolls—*Covenant.*]—A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorized by law to be received upon a certain turnpike road, for the term of one year: that defendants covenanted to pay a certain rent therefor: and that, by virtue of said demise, the defendants entered and were possessed for said term. Breach, non-payment of the rent:—Held, on demurrer, that defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent; and that the non-execution by the lessors was no defence. *Municipal Council of Frontenac, Lennox, and Addington* v. *Chestnut*, 9 U. C. R. 365.

Denying Grantor's Title.]—The grantee, by taking a title from the grantor, does not estop himself from denying that his grantor was legally seised. *Dittrick* v. *O'Connor*, 7 U. C. R. 448.

Derogating from Grant.]—On the 15th December, 1848, O. conveyed to P. part of lot 33, and he conveyed by the same deed "as appurtenant to the land, a full, free and unrestricted right of way in, over, upon and along, and to use as a public highway or street, a certain strip of land of twenty feet in breadth adjoining the westerly side of the said parcel of land, extending from the highway aforesaid to the water's edge of the river St. Lawrence, at all times and seasons for ever hereafter." In an action for obstructing the right of way by a boat-house:—Held, that it would be no defence that the boat-house was below high-water mark, though O.'s right only extended so far, for O. and the defendant claiming under him were estopped by O.'s deed to P.,

which granted to the water's edge. *Plumb* v. *McGannon*, 32 U. C. R. 8.

Derogating from Grant.]—In trespass q. c. f., it appeared that defendant conveyed to the plaintiff 19 acres of lot 2, described by metes and bounds, commencing at the N. E. angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to the boundary between lots 1 and 2. *Crosswaite* v. *Gage*, 32 U. C. R. 196.

Dower.]—In dower, by the widow of M., it appeared that a patent for the land issued to one K., and a witness proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents was given. It was proved, however, that B., from whom defendants purchased, derived title through P., who held a bond for a deed from the patentee, and that P., before he sold to B., took a quit claim from M. of all his interest in the land, executed by M. only, in which it was stated that the land was devised by will to the said M. by K., the original grantee of the Crown:—Held, that no estoppel arose upon this deed, and that there was no proof of seisin in M. *Minaker* v. *Hawkins*, *Minaker* v. *Ashe*, 20 U. C. R. 20.

Dower—*Grantee of Claimant's Husband Disputing his Title.*]—After the British North America Act came into force the Government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot through the C. B. Coal Co. to the S. and L. Coal Co. S. having died, his widow brought an action for dower in said lot, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government:—Held, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective. *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152.

Execution Creditor—*Purchase of Mortgage—Denial of Mortgagor's Title.*]—An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgagor, that the said grantor was not the owner of the property in question and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter. *Gordon* v. *Proctor*, 20 O. R. 53.

Fixtures—*Assignee of Mortgagor.*]—A firm being indebted to the plaintiffs, mortgaged to them in fee certain land and premises, on which was erected an iron foundry with the machinery and fittings used in the business. Previous to this mortgage a prior owner of the land had already mortgaged it in fee, which mortgage was still outstanding. The defendant, assignee of the firm, removed certain portions of the machinery, and a dispute arose with the plaintiff as to what part of the property so removed consisted of fixtures:—Held, that the defendant being assignee of the firm, could not set up the prior

mortgage as disabling them from mortgaging to the plaintiffs what they assumed to mortgage, and that the only question therefore was what portion of the articles mentioned formed part of the land. *Gooderham* v. *Denholm*, 18 U. C. R. 203.

Grantor Disputing his own Title.]—A., the patentee of lot 12 in the second concession of Reach, died intestate before 1843, leaving defendant B. his heir-at-law. By indenture bearing date 12th September, 1843, defendant B. without having entered on said lot, in consideration that the lessor of the plaintiff had sworn that the intestate (the original locatee of the lot) had bargained and sold to him the said lot, and also in consideration of 5s., conveyed to the said lessor of the plaintiff the said lot in fee. This indenture was registered on the 3rd June, 1850. By indenture, made 21st January, 1850, between the defendant B. and one Brown, then in possession of the north half of the said lot, the said Brown, for the considerations mentioned, had surrendered and assigned the said north half to defendant B. This indenture was registered on the 26th February, 1850. Also, by two several indentures bearing date 21st January, 1850, between defendant B. and defendants C. and D. respectively, it was witnessed, that the defendant B. conveyed to defendants C. and D., respectively, the south half of the lot, viz., 50 acres of the said south half to each of the said defendants C. and D.; and said defendants C. and D. severally mortgaged the property conveyed to them severally by said defendant B. These indentures were registered on the 16th February, 1850. It appeared that twelve years since, a man named W. was in possession of this lot, claiming under one Gideon Bullis; that a deed of bargain and sale of the lot existed (but was not produced or proved), as from the patentee to Bullis; that on the 11th October, 1838, Bullis executed a conveyance in fee of the lot to W., which was registered on the 24th February, 1850; that on the 18th March, 1841, W. executed a conveyance to G. Brown, which was registered the same day; that Brown continued in possession of the north half ever since, and that defendants C. and D. entered into possession of the south half under him:—Held, that defendant B. was estopped from disputing the title of his own bargainee against his own deed; and as to the south half, the defendants C. and D. being estopped from disputing his title as mortgagee, were also estopped from disputing the title of the lessor of the plaintiff claiming under a deed from him. *Doe d. Spafford* v. *Breakenridge*, 1 C. P. 492.

Joint Covenant—*Execution by One.*]—A covenant in a deed professing to be made jointly by husband and wife, but executed only by the husband, is not sufficient to work an estoppel. *Doe d. Tiffany* v. *McCreen*, M. T. 1 Vict.

Lease with Option to Purchase—*Disputing Title.*]—On the 9th January, 1844, one J. W. took possession of the land in question under an indenture of lease for four years executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument and the balance in four instalments of £50 each, on the 9th January in each year, the first payment to be made on the

9th January, 1845, and if the purchase was carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second, but the person in whom the legal estate was vested having died it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared that he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since:—Held, that as the entry of J. W., under whom the son and the defendants claimed, was under C., defendants could not object to C.'s title at the time of J. W.'s entry. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

Lease—*Statutable Objection to Title.*]—Quære, whether a tenant or licensee of land is estopped from disputing his landlord's or licensor's title as being void on a statutable objection. *Hallock* v. *Wilson*, 7 C. P. 28.

Lease by Life Tenant—*Lessee Entitled to Reversion.*]—A lease by a life tenant for a term certain to the reversioner containing a covenant by the lessee to pay rent to the lessor, "her heirs and assigns," does not estop the lessee from shewing that he has become owner on the lessor's death. *Thatcher* v. *Bowman*, 18 O. R. 265.

Lessee Acquiring Term.]—Where the assignee of a term, subject to a mortgage, becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shews. *Building and Loan Association* v. *McKenzie*, 28 O. R. 316, 24 A. R. 599, 28 S. C. R. 407.

Married Woman—*Covenant.*]—A married woman may shew in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken merely as trustee for her husband, and not for her benefit; and this although the mortgagee or those claiming under him had no knowledge of her position. *Gordon* v. *Warren*, 24 A. R. 44.

Mortgagee—*Merger.*]—The plaintiff brought ejectment on the 6th September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McI. assigned to him. The mortgage to McI. was given on the 9th November, 1861, and that to the plaintiff on the 21st March, 1864. On the 21st September, 1865, McI. by deed reciting an interlocutory decree in chancery in respect to the foreclosure of W.'s mortgage to him conveyed to M. as W.'s appointee, and on the 9th November, 1865, by a decree in the same suit, this mortgage was foreclosed. It was contended that the mortgage to McI. had merged in the inheritance, and could not be set up against the plaintiff, but—held, that if it were so, the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards. It was proved that the defendant, in April or May, 1865, asserted that he had got a deed of the equity of redemption from W.:—Held, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864. *McKay* v. *McKay*, 25 U. C. R. 133.

Mortgage—*Possession.*]—D. mortgaged to a loan company, and afterwards to A., who assigned to the plaintiff. D. then conveyed to the defendant, who took possession, and was recognized by the loan company as holding under them. The plaintiff brought ejectment, there having been no default under the mortgage to the loan company, which contained a proviso for possession by D. until default:—Held, that the plaintiff was entitled to recover, for D. could not in the face of his mortgage deny A.'s right to possession (though A. might be ejected by the loan company), or that of the plaintiff as his assignee. *Reid* v. *McBean*, 8 C. P. 246.

Mortgage—*Redemise—Estoppel on Estoppel.*]—Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff; and on ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default:—Held, that the plaintiff was not estopped; for, 1. the second mortgage might take effect by passing an interest; 2. if the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but, 3. semble, that the re-demise in a mortgage cannot operate, by estoppel or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. *James* v. *McGibney*, 24 U. C. R. 155.

Mortgage of Ship—*Disputing Title of Assignee.*]—Defendant owning a vessel mortgaged her to C., and C. assigned the mortgage, with his other property, to the plaintiff in trust for creditors. The plaintiff having brought replevin to obtain possession:—Held, that defendant could not dispute the plaintiff's title, or set up that he was trustee for a foreign corporation, who by law could not hold ships. *Paton* v. *Browne*, 19 U. C. R. 337.

Partnership—*Agreement in Firm Name.*]—Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, and the partner not executing afterwards acted under and received the benefit of it, such agreement was sustained as his deed; and it was held that he could not be allowed to dispute the authority by which it was executed in his name. *Bloomley* v. *Grinton*, 9 U. C. R. 455.

Purchase of Land—*Subsequent Sale by Sheriff—Disputing Validity after Agreement to Buy.*]—In ejectment the plaintiff claimed

through a deed from J. M. to J.; defendant claimed through a purchase at sheriff's sale under execution against J. M. After the sheriff's sale, J. entered into an agreement with D., the purchaser at such sale, by which D. covenanted to convey the land to J. on payment of $743 within five weeks; the agreement to be void on non-payment. The money was not paid. D. conveyed to M., with whom J. made an agreement, that on his paying M. $1,200 within a year M. would convey to him; that J. might sell within the year, and should have all he could get above $1,200; and that M. should have possession, which J. accordingly gave to him. After this J. conveyed to the plaintiff:—Held, that neither agreement estopped the plaintiff from objecting to the title derived under the sheriff's sale or from setting up his legal title. *Morrison* v. *Steer*, 32 U. C. R. 182.

Purchaser from Sheriff Disputing Validity.]—A debtor being a vendee of the Crown of land, and in default in paying the purchase money, a creditor obtained execution against his lands, and purchased his debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly:—Held, that he could not afterwards repudiate the purchase and claim his debt, on the ground that the debtor's interest was not saleable by the sheriff. *Ferguson* v. *Ferguson*, 16 Gr. 309.

Sale of Land—*Removal of House.*]—Declaration, for entering plaintiff's land, and also plaintiff's dwelling-house thereon, and removing the house therefrom, and converting it to defendant's use. Plea to so much of the count as refers to the dwelling-house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling-house thereon, so that it might thereafter be removed by them, not affixing it to the land; and defendants afterwards, and while the land was unenclosed and used as a common, and the house open and unoccupied, in the day time, peacefully entered the lot and removed the dwelling-house, the same being their property, and placed it on their own land, which are part of the trespasses complained of. Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land, and built the house on the land, and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiffs:—Held, replication good, by way of estoppel. *Cameron* v. *Hunter*, 34 U. C. R. 121.

Sale—*Subsequent Deed to Grantor's Administrator.*]—Where A., having only a bond for a deed, and not having paid all the purchase money, conveyed in fee to B. and died, and B. went into possession and continued for several years, when A.'s administrator obtained a conveyance in fee to himself from the obligor:—Held, that the administrator by making use of the deed was guilty of a fraud, and that his title under it could not prevail against B. *Doe d. Dobie* v. *Vandertip*, 5 O. S. 85.

Sheriff's Deed—*Land not Sold Included.*]—A sheriff's deed, being but a completion of the sale, is only good for land actually sold; a party therefore is not estopped by such a deed from proving by parol that portions of the land therein described as sold were not in fact included in the sale. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79.

Special Deed.]—Construction of a deed in peculiar terms, set out in this case, as to its operation by estoppel. *Doe d. Piquotte* v. *Piquotte*, 4 U. C. R. 101.

Taking Benefit of Grant.]—By an arrangement made within ten years before this action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyances, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability:—Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party. *McDiarmid* v. *Hughes*, 16 O. R. 570.

Taking Benefit under Conveyance.]—In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889. In an action of ejectment begun in October, 1889, by the heir-at-law of the wife against persons claiming through the husband:—Held, that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 Hen. VIII. c. 9, then in force. The conveyance to the wife was made by the procurement of the husband, and he took an estate under it, and having no other right or title to the land, was estopped from denying the validity of G.'s title. Held, also, upon the evidence, that the plaintiffs were not estopped by the dealings of their ancestress with the land, and that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage she had joined as a granting party, but which had been paid off and discharged. *Marsh* v. *Webb*, 21 O. R. 281. See this case in appeal, 19 A. R. 564, 22 S. C. R. 437.

Ultra Vires Deed.]—The Act of incorporation of a railway company, the predecessors in title of the plaintiffs, which was incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company in respect of the disposition of lands acquired by them, "powers of letting, conveying and otherwise departing therewith for the benefit and on account of the company from time to time as they should deem necessary." Nearly forty years before the commencement of this action the predecessors in title of the defendants laid pipes for conveying water along the railway track of the plaintiffs' predecessors, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who a few years subsequently passed another resolution, and in pursuance thereof executed a deed granting, releasing and confirming such right and privilege which at the time this action was brought had become

vested in the defendants. The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action desiring to alter the position of their track, gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes. The plaintiffs now sought to have the resolution and deed mentioned declared ultra vires, and also claimed an injunction restraining the user of the water pipes, and if necessary an order for their removal:—Held, that the resolutions and deed were ultra vires as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom. Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants'. Held, lastly, that the defendants not having used and enjoyed their easement for forty years had not acquired a title thereto by prescription under R. S. O. 1887 c. 111, s. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

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2. *Estate by Estoppel.*

Conveyance before Issue of Patent.]—Where a nominee of the Crown before the issuing of letters patent, conveys in fee to one person, either by indenture or deed poll, and he afterwards obtains the patent to himself, and then conveys to another, who again conveys, the patentee of the Crown, and his assigns, as privies in estate, are estopped by the first conveyance, and the patent feeds the estoppel and makes it a vested interest and estate. *Doe d. Hennesy* v. *Myers*, 2 O. S. 424, approved in *Doe d. Tiffany* v. *McEwan*, 5 O. S. 598; *Doe d. Irvine* v. *Webster*, 2 U. C. R. 224; *Boulter* v. *Hamilton*, 15 C. P. 125; *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. at p. 235.

Where a nominee of land before patent issued conveyed it away, being unmarried, and afterwards, having obtained the patent, made a new conveyance to the same party, being then married:—Held, that his wife could not claim dower, as she was estopped by the deed made before the patent issued. *McLean* v. *Laidlaw*, 2 U. C. R. 222.

Where the nominee of the Crown gave a bond for a deed of the land to be made when the patent should issue, and in the same bond conveyed and covenanted to guarantee the title:—Held, on ejectment by a grantee of the nominee under a deed executed after the patent issued, that this bond gave to the obligee no title by estoppel. *Doe d. McGill* v. *Shea*, 2 U. C. R. 483. Followed in *Todd* v. *Cain*, 16 U. C. R. 516.

The plaintiff in ejectment proved a paper title, but the grant from the Crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence shewed it to be an ordinary conveyance in fee, but did not shew what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendant shewed no title:—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel. *Armstrong* v. *Little*, 20 U. C. R. 425.

T., to whom the patent of the land in question issued, by deed poll made prior thereto, bargained, sold, aliened, and confirmed the land to L., habendum to L. and his heirs; with a covenant of warranty:—Held, that on obtaining the patent T. was estopped by the deed from setting up title in himself under the patent. *Robertson* v. *Daley*, 11 O. R. 352.

Declarations Contrary to Title.]—G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P. of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F., conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land:—Held, that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.; that this land was subject to the trusts of the previous conveyance to them; that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover. *Foott* v. *Rice*, 4 O. R. 94. Approved in *Foott* v. *McGeorge*, 12 A. R. 351.

Grant without Covenants—*Title Subsequently Acquired.*]—Held, that the deed in question in this case, which granted the land and not merely defendant's interest therein, though without covenants, operated by way of estoppel, and that the title subsequently acquired by defendant passed at once to the plaintiff. Todd v. Cain, 16 U. C. R. 516, and Doe d. McGill v. Shea, 2 U. C. R. 483, distinguished. *Featherston* v. *McDonell*, 15 C. P. 162.

Infant's Deed.]—Quære, whether the deed of an infant, unless legally avoided, would operate by estoppel to pass the title to the land as soon as the fee vested in him on obtaining his majority. *McCoppin* v. *McGuire*, 34 U. C. R. 157.

Lease after Mortgage—*Reversion.*]—S. having mortgaged certain land in fee, afterwards leased it for 21 years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree

in chancery, the land was sold expressly subject to the lease to J., who received a conveyance from S. and P. and the plaintiff, each using apt words (bargain, sell, and release) to convey a legal estate in fee. On the same day, J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action by certificate duly registered, and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage:—Held, that though S., when he leased, had only an equity of redemption, yet as this fact did not appear in the lease, he had a legal reversion by estoppel as against the tenant. *Cameron* v. *Todd*, 22 U. C. R. 390, 2 E. & A. 434.

Mortgage—*Subsequent Deed to Mortgagor.*]—See *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 564.

Mortgage before Title.] — McM., in building a house, by mistake built part of it on the land of the adjoining owner B. On discovering this he applied to B. with a view of purchasing a portion of B.'s lot, and B. on 29th July, 1880, wrote: "I hereby offer to sell you twenty-five feet frontage for the sum of $250, to be paid six months from this date, otherwise this offer to be null" * * and B. accepted such offer at the foot in the words, "I hereby accept the above offer." McM. seven days after registered a plan as No. 327, alleged to be of his own property, but which included the twenty-five feet as part of lot M., and the next day executed a mortgage on lot M. with a description, which included the twenty-five feet, and which was assigned to the defendants the O. S. Co. B.'s offer to sell to McM. was not acted on within the six months limited, and B. afterwards, in January, 1883, sold and conveyed the twenty-five feet (which was called lot 40 on his (B.'s) plan No. 396, registered 26th January, 1883) to McM. for $400, payable $100 cash and mortgage for $300, which mortgage was at the instance of B. taken to his daughter N., the plaintiff. The O. S. Co. subsequently sold under the power of sale in their mortgage to the defendant W. In an action by N. to realize her mortgage, it was:—Held, that the original dealing between B. and McM. created no binding contract on the latter, it being merely an option given him; and he not having completed the purchase within six months the subsequent sale and conveyance by B. to McM. was upon a new and distinct contract. No interest in the twenty-five feet (lot 40) passed to the O. S. Co. under McM.'s mortgage, and the subsequent conveyance to him "fed the estoppel" created by his prior mortgage to the extent only of McM.'s interest which was that of owner of the equity of redemption, or owner of the twenty-five feet (lot 40) charged with $300, and it made no difference that the $300 mortgage was taken to the plaintiff instead of to B., the effect of the whole transaction being that W. was the owner of lot 40 subject to a first mortgage of $300 in favour of the plaintiff and to a second mortgage of the O. S. Co. B. having by his dealing with McM. created in him the status of owner, and in the plaintiff that of mortgagee, was not, nor was the plaintiff, in a position to complain of the registration of plan 327. Doe Irvine v. Webster, 2 U. C. R. 234; Doe Hennessey v. Meyers, 2 O. S. 424, observed upon. *Acrill* v. *McMurray*, 14 A. R. 126.

Mortgage for Balance of Purchase Money.]—The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser, the mortgage being delivered to the vendor's agent to be registered. The purchaser had obtained a loan of the cash payment from the defendant upon the security of a first mortgage to be given upon the land in question, and this mortgage was prepared, executed and delivered before the execution and delivery of the deed and was registered before the deed to the purchaser and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith and each without knowledge or notice of the other's mortgage:—Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the right of the plaintiff to have a legal mortgage for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority. Nevitt v. McMurray, 14 A. R. 126, applied. *McMillan* v. *Munro*, 25 A. R. 288.

Quit Claim without Covenants.]—M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to P. There were no recitals or covenants for title in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and for ever quit claim" to L. C., his heirs and assigns, all his estate in the land. Subsequently B. sold and conveyed the land to M. C.:—Held, that the deed from M. C. to L. C. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L. C., for (1) there was no recital or covenants for title; (2) it did not purport to grant any estate in the land, but merely to assign or release and quit claim to L. C., M. C.'s interest therein; (3) it never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift. *Casselman* v. *Casselman*, 9 O. R. 442.

It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Ib.*

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3. *Parties and Privies.*

Alienage.]—The defendant in ejectment, under the facts stated in the report, was held not estopped from setting up the alienage of S., for he claimed under H., whose title he supported against that of S. *Iler* v. *Elliott*, 32 U. C. R. 434.

Assigns of Patentee.]—A nominee of the Crown before the issuing of letters patent made a conveyance in fee to one person, after which the patent was issued to him, and he

then conveyed to another, who again conveyed;—Held, that the patentee of the Crown, and his assigns as privies in estate, were estopped by the first conveyance, and that the patent fed the estoppel and made it a vested interest. Doe d. Hennesy v. Myers, 2 O. S. 424, approved. *Doe d. Tiffany* v. *McEwen*, 5 O. S. 598.

Dower—*Release.*]—In dower, it appeared that after recovery in ejectment against the husband by the purchaser at sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him to release her dower in a conveyance in fee of the land, by way of bargain and sale, to a third party. No money consideration passed, the grantee executing a mortgage back for the whole purchase money mentioned in the deed to him, and the husband remained in possession until dispossessed by the sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at sheriff's sale:—Held, that the demandant was entitled to her dower: that though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants, being no parties to the deed, but claiming adversely to it, could not conclude the demandant from saying she had not released her dower to a purchaser. *Miller* v. *Wiley*, 17 C. P. 368.

Dower—*Two Deeds.*]—In dower the tenant proved a deed made in 1831 of the land in question by J., the deceased husband, to the tenant; and in reply the demandant proved another deed made in 1834 by J. to his father, to which the tenant was a subscribing witness:—Held, that as either deed shewed the estate out of J. during his lifetime, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event as J. could not set up the second deed to avoid the first, having made both, neither could the demandant who claimed through him. *Scratch* v. *Jackson*, 26 U. C. R. 189.

Interpleader—*Claimant Denying Debtor's Title after Purchase from Him.*]—Where in an interpleader issue (the execution creditor being defendant) it appeared that the plaintiff had taken a bill of sale of the goods in question from the execution debtor while the fi. fa. was in the sheriff's hands:—Held, that he was not thereby estopped from denying the debtor's title, this action not being upon the deed, and between other parties. *Macaulay* v. *Marshall*, 20 U. C. R. 273.

Mortgage and Deed.]—To a declaration on a covenant, for quiet enjoyment in a mortgage to the plaintiffs executed by T., the defendants' grantee, one defendant pleaded that T. did not after the making of the deed convey to the plaintiff. The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendant to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August:—Held, that if the mortgage had been delivered before the deed (which the facts did not shew), the defendants would not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants. *Trust and Loan Co.* v. *Covert*, 32 U. C. R. 222.

Purchase—*Descent.*]—Where A. made a mortgage of his property to two persons at different times, and died after the time for payment in the first mortgage, without having redeemed either, and the first mortgagee having taken possession sold to A.'s heir for a valuable consideration, who entered into possession and died, leaving B. his heir, who was also A.'s heir:—Held, that the second mortgagee, having a mortgage of the equity of redemption only, could not bring ejectment against B., who was in by purchase, and not by descent, and was therefore not estopped by A.'s deed. *Doe d. Gillespie* v. *Macaulay*, H. T. 7 Wm. IV.

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4. *Receipts.*

Assignment of Lease.] — Plaintiff assigned to defendant his interest in a certain lease by deed, containing a receipt for the consideration money, $350. This deed was placed in K.'s hands to hold till defendant deposited this sum. K. delivered it to defendant on his promise that he would pay, and defendant afterwards paid him $75, saying he would hand him the balance as soon as he obtained it. On being asked again he said he had the money, but that the plaintiff should pay part of the expense of a bond which he had to give respecting the title. Plaintiff then sued upon the common counts, for the purchase money of land and on an account stated:—Held, that he was estopped by the receipt under seal, and could not recover on either count. Cocking v. Ward, 1 C. B. 858, distinguished, as to the account stated. *Sparling* v. *Savage*, 25 U. C. R. 259.

Bill of Sale—*Action against Third Person.*]—The sheriff, in an action for the purchase money of goods sold, was held not estopped, under the facts stated in this case, from denying the payment by the acknowledgment under seal, in the bill of sale, of receipt from G., the trustee and agent of the defendants, the purchasers; for it was not specially pleaded, the action was not upon the deed nor against a party to it, and there was nothing on the face of it to connect G. with defendants. *Carrall* v. *Bank of Montreal*, 21 U. C. R. 18.

Consideration Expressed.] — Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying £125 for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family; and the father then for a nominal consideration, conveyed to the son the land received in exchange:—Held, that the executors of the father might maintain an action against the son for the £125 as money paid to his use; and that they were not estopped by the consideration stated in the deed. *McBride* v. *Parnell*, 4 O. S. 152.

Grant—*Purchase Money.*]—In an action for the purchase money of land conveyed, a

receipt under seal in the conveyance is conclusive evidence under the plea of payment; and it is unnecessary to plead the estoppel specially. *Ketchum* v. *Smith*, 20 U. C. R. 313.

Plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money, $800, with a receipt for the purchase money also indorsed. Plaintiff then sued defendant upon the common counts for the purchase money of the land, on an account stated. The defendant pleaded, among other pleas, payment. After the sale defendant told one M. that he had only paid plaintiff $41, and offered to pay him (M.), whatever plaintiff was willing he should. It also appeared, though not very clearly, that the plaintiff was present at this conversation:—Held, following the two last cases, that the plaintiff was concluded by the receipt in the deed and that he could not recover on either count. *Casey* v. *McCall*, 19 C. P. 90.

Plaintiff in August, 1867, conveyed to defendant certain land, by deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question being raised as to plaintiff's title, the defendant retained $100 of the purchase money, and in October following, gave the plaintiff the following agreement: "Harriston, 1st October, 1867. Fifteen months after date, I promise to pay to the order of W. H., or bearer, the sum of $100, providing that the title is good, on lots known as town hall, court house, and fair ground, situated on the north side of Elora street, for value received," these being the lots conveyed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded payment:—Held, that the plaintiff was estopped by the receipt in the deed, which included this $100, and that he could not recover. *Harrison* v. *Preston*, 22 C. P. 576.

Sale of Ship—*Executory Agreement.*]—Action on the common counts, and on an agreement between plaintiff and defendant, dated 8th of April, 1873, by which, in consideration that the plaintiff would deliver to defendant at Port Maitland, when requested, that portion of the rigging of the vessel R. D. then on board the said vessel, the defendant would pay the plaintiff $400. The defendant pleaded payment before action, and release by deed. At the trial this agreement was proved, and one of even date, under the plaintiff's hand and seal, by which the plaintiff sold to the defendant for $800, the receipt whereof was acknowledged, the body and hull of the R. D., and also his rights in a contract for stripping said vessel, and any payments due from the T. Insurance company for stripping said vessel, or from defendant for any work done under the contract to strip the vessel. It also appeared that the vessel having run upon a reef in lake Erie, the plaintiff had been employed by the T. Insurance company to strip her and put the outfit in a place of safety, for which he was to receive $250 and the hull. Defendant bought the outfit from the insurance company for $930, and the hull and rights under the stripping contract from the plaintiff for $800. The defendant only paid the plaintiff $400 on the agreement signed by the plaintiff, and gave him the agreement now sued on:—Held, that the plaintiff was not estopped by the receipt in the deed from shewing that the agreement sued on was part of the consideration for said deed, and that the $400 mentioned in said agreement was unpaid. *Smith* v. *McCallum*, 34 U. C. R. 479.

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5. *Recitals.*

Agreement between Others.]—B., a married woman, in order to carry out an agreement between her husband and his creditor, consented to convey to the creditor, a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on, and of indemnity against her personal liability on a mortgage against, said farm. The conveyance, agreement, and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was the owner of the said chattels, but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor:—Held, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife; and that the court of appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage. *Boulton* v. *Boulton*, 28 S. C. R. 592.

Bond to Indemnify Sheriff—*Expired Writ.*]—Action on a bond reciting that the plaintiff as sheriff had seized goods under a fi. fa. at the suit of G. v. C., and conditioned to be void if the obligor should deliver the same to the sheriff at such time and place as he should appoint. Plea, that at the time pointed out for delivery the sheriff had no writ at the suit of G. under which he could have sold said goods. At the trial the only writ produced was one tested the 21st May, 1859, and spent. Issue having been taken, and a verdict rendered for defendant on this plea:—Held, that there must be judgment non obstante, for as the bond expressly admitted a levy under this writ, defendant could not object to the plaintiff's right to sell, and the plea therefore formed no defence. *Fortune* v. *Cockburn*, 22 U. C. R. 359.

Bond to Indemnify Sheriff—*Recital of Ownership.*]—The sheriff, holding executions against defendant at the suit of different parties, took from him a bond reciting that he had seized his goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, the wrongful execution, or non-execution of the said writ." The sheriff afterwards sold the goods contrary to defendant's wish, who informed him that they belonged to one G. G. brought trover against the sheriff, proved a bonâ fide bill of sale, recovered the value of the goods and registered his judgment. The sheriff then sued defendant on his bond:—Held, 1. That the defendant was not estopped by the recital from denying his property in the goods. 2. That although the damage accruing to the sheriff came literally within the condition of the bond, yet that the defendant, having expressly objected to the sale, would not be liable. *Corbett* v. *Hopkirk*, 9 U. C. R. 479.

Conveyance Reciting Indebtedness.]—Defendant being indebted to plaintiff by an indenture reciting his indebtedness, and that he had agreed with plaintiff for the repayment of the said sum due within six months from date, with interest, conveyed to plaintiff certain lands, habendum in fee: Proviso, that the plaintiff, if the debt was duly paid, would re-convey. In an action to recover the money:—Held, that defendant could not deny that he was at the date of said indenture indebted to the plaintiff. *Allnutt* v. *Ryland*, 11 C. P. 300.

Deed Poll.]—Held, that the recitals in the deed poll in this case, were not binding on the grantee, they being entirely the language of the grantor; and consequently that the grantee was not estopped from setting up the contrary in an action not founded on the instrument and wholly collateral to it. *Minaker* v. *Ash*, 10 C. P. 363.

Dower—*Bond for Maintenance.*]—The demandant in dower had accepted for her claim as dower, a bond from the tenant of the land for the purpose of securing to her, as part of a family arrangement, a maintenance, which, after enjoying for some time, she relinquished. She had also added her own hand and seal to the bond:—Held, that even though the recitals in the bond did not operate by way of estoppel, a jury was warranted in finding that it amounted to a satisfaction of the plaintiff's claim to dower. *Germain* v. *Shuert*, 7 C. P. 316.

Lease—*Alleged Title Recited.*]—Held, that defendants were not estopped by the lease under which they claimed from denying the power of the lessor to lease, for the recitals professed to shew what title he had. *Lyster* v. *Kirkpatrick*, 26 U. C. R. 217.

Release by Beneficiaries—*Estoppel inter se.*]—A testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the 10th concession of B." In the early part of the will he had used the words "wishing to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the 10th concession of B. was a part of lot 29. The will contained no residuary devise:—Held, that the part of lot 29 owned by the testator did not pass by the will to the son. After the death of the testator, all his children executed a deed of release to the executors of his will, containing a recital that the part of lot 29 owned by the testator was devised to the son G., and that he was then in possession:—Held, that there was no estoppel as among the members of the family, who together constituted one party to the deed. Held, however, upon the evidence, that G. had acquired a good title to the lands in question by virtue of the statute of limitations. *Re Bain and Leslie*, 25 O. R. 136.

Title—*Sub-Grantee not Bound by Recital of Grantee's Seisin.*]—A. conveyed to B., covenanting that at the time of making the conveyance, he was seised in fee simple. B. afterwards conveyed to C., reciting that he was then possessed in his own right of the land in question:—Held, in an action by C., the assignee of B., against A., upon the covenant, that C. was not estopped by B.'s recital. *Gamble* v. *Rees*, 6 U. C. R. 396.

II. By Record.

General Rule.]—"Where the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such a former recovery a bar however, it must be shewn that the plaintiff had an opportunity of recovery, and but for his own fault might have recovered in the former suit that which he seeks to recover in the second action." Per Wilde, J., in Nelson v. Couch, 15 C. B. N. S. 108, quoted in *Davidson* v. *Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

Allegation of Legal Effect.]—Where a party alleges the legal effect and operation of an instrument, he is bound by such allegation. *Foster* v. *Beall*, 15 Gr. 244.

Assault — *Bar of Civil Remedy.*] — See Criminal Law, IX. 3.

Assignee in Insolvency — *Status.*] — Declaration by plaintiff, as assignee in insolvency of McM., on the common counts. Plea, that McM. was not a trader within the meaning of the Insolvent Act of 1869. Replication by way of estoppel, setting out in full the proceedings and adjudication in the insolvent court, shewing that an attachment in insolvency issued against McM., that he petitioned the Judge to set it aside on the ground, among others, that he was not a trader within the Act, that the Judge decided that he was a trader, and that such decision was affirmed on appeal by one of the Judges of the common pleas: — Held, on demurrer, replication bad, as such adjudication and proceedings were not conclusive, at all events as against a debtor of McM., but were subject to question in this court. *Grove* v. *McArdle*, 33 U. C. R. 252.

Assignee for Creditors—*Previous Action by Creditors.*]—To a bill filed by the assignee in insolvency of P. D., for the creditors other than D. and J. S., to impeach a sale of real estate to defendant, the answer set up that before the proceedings in insolvency a bill was filed by D. and J. S., as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question as a fraud upon creditors, and that the bill was dismissed upon the merits. It was further alleged, that the case made by the two bills was substantially the same, and that defendant believed that the evidence in this suit would be similar in effect to that upon which the decree refusing relief was founded:—Held, that the decree was not a bar to this suit. *Smith* v. *Doyle*, 4 A. R. 471.

Assignment for Creditors—*Subsequent Judgment against Assignor.*]—S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E. for money lent, and as holder of certain notes. After the assignment S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G.

set up the statute of limitations:—Held, that the judgment recovered against E. H. E., after his assignment in an action to which G. was not a party was not even primâ facie evidence against G. Eccles v. Lowry, 23 Gr. 167, considered. *Stewart* v. *Gage*, 13 O. R. 458.

Assignee.]—On proceeding with the reference under the decree pronounced on the hearing, as reported 28 Gr. 356, the master by his report found that there was due to the plaintiff $1,104.99, which included a sum of $171.32 costs incurred in the suit brought by him to redeem:—Held, (1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of C., through whom the appellant claimed; and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as Jarvis under whom they claimed would have been, the proceeding not being in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied. *Pierce* v. *Canavan*, 29 Gr. 32.

Bailiff—*Surctics.*]—Declaration against a bailiff of a division court and his sureties on their covenant, under C. S. U. C. c. 19, s. 25, alleging that the bailiff under an execution against B., wrongfully seized and sold the plaintiff's goods, and received the proceeds; that the plaintiff having sued the bailiff in the county court, the bailiff issued an interpleader summons, on which the Judge of the division court determined that the plaintiff owned the goods and was entitled to the money received by defendant, with the costs; that the bailiff still refused to pay the money to the plaintiff, whereupon the plaintiff proceeded with his suit in the county court, and issued execution thereon, which was returned nulla bona. And so the plaintiff alleged that the bailiff had neglected to pay said money so received by him as such bailiff to the plaintiff, being the party entitled thereto, and had misconducted himself in his office to the plaintiff's damage. Plea, by the sureties, that the said bailiff did pay to the plaintiff all the money he had received by virtue of his office, to which the plaintiff was entitled, and had not misconducted himself, &c.:—Held, that no cause of action upon the covenant was shewn; that the wrongful act of the bailiff, in seizing by mistake the goods of a stranger, was not misconduct or neglect of duty for which his sureties were liable; that the money received by him, though not received for the plaintiff at first, became the plaintiff's by virtue of the interpleader order, but that the plaintiff had lost his right to sue for it upon the covenant by proceeding with the county court action, and obtaining judgment there. *McArthur* v. *Cool*, *Nixon* v. *Stafford*, 19 U. C. R. 476.

An action against the sureties of a division court clerk for moneys received by him for the plaintiff having been referred to arbitration, the arbitrator submitted a special case, stating that in 1858, the plaintiff sued the clerk for goods sold to him; that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the division court, which shewed a sum of £30 0s. 8d. due to the clerk; and that the Judge thereupon, against the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off and deducted it from the plaintiff's claim. The sureties, defendants in the suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff:—Held, that what had been done in the former suit could not be thus reviewed, and that as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin* v. *Gream*, 20 U. C. R. 84.

The plaintiff sued C., a division court bailiff, and his sureties, on their covenant, alleging a judgment recovered by himself against C., for selling his goods under execution, contrary to the orders of the plaintiff in the suit:—Held, declaration bad; for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause. *Sloan* v. *Creasor*, 22 U. C. R. 127.

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

Boundaries.]—In an action en bornage between M. and B., a surveyor was appointed by the superior court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the court of review claiming that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The court of review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the court of review, but that his measurements shewed that the line indicated was not in the line of the old fence and his report was rejected by the superior court:—Held, that the judgment of the court of review in which the parties acquiesced was chose jugée between them not only that the division line between the properties must be located on the line of the old fence but that such line was one starting

at the point indicated in the plan and report of the first surveyor. *Mercier* v. *Barrette*, 25 S. C. R. 94.

Bridge—*Prior Recovery of Damages.*]—Held, that after 18 Vict. c. 176, the plaintiff could not maintain an action against defendants for unlawfully and wrongfully erecting a bridge across the Twenty Mile Creek, and impeding the navigation, for the statute expressly authorizes such erection, and gives only a right to compensation for damages sustained. A prior recovery for injury sustained by the erection of the bridge was a bar to this action. *Wismer* v. *Great Western R. W. Co.*, 17 U. C. R. 510.

Common Carriers—*Bailees.*]—In a case against the defendants as common carriers defendants pleaded that plaintiff sued defendants in the Queen's bench for the same identical causes of action and obtained a verdict, which verdict remains unreversed, to which plaintiff replied denying that the verdict was for the same identical causes of action. The first two counts in this action charged defendants as common carriers, the third charged them as bailees, and the fourth was in trover. The declaration in the former case contained only counts against them as common carriers and a count in trover:—Held, that the plea was not sustained, for the evidence necessary to sustain counts against defendants as common carriers would be different from that required to charge them as bailees; and moreover, the identity of the goods in question in this and the former action was not proved. *Beacon* v. *Great Western R. W. Co.*, 6 C. P. 241.

Company—*Ultra Vires Contract — Consent Judgment.*]—If a company enters into a transaction which is ultra vires and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding on parties as one obtained after a contest and will not be set aside because the transaction was beyond the power of the company. *Charlebois* v. *Delap*, 26 S. C. R. 221. But see this case in the judicial committee, [1899] A. C. 114.

Contention Argued but not Pleaded.]—It was contended by the plaintiffs before a divisional court that the defendants were members of a de facto corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amount remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial. The court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised. *Flatt* v. *Waddell*, *Townsend* v. *Waddell*, 18 O. R. 539.

Court Equally Divided.]—When the supreme court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the supreme court affects the actual parties to the litigation only, and the court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case*, 20 S. C. R. 12.

Court Equally Divided.]—Effect of judgment in appellate court where the Judges were equally divided. See *In re Hall*, 32 C. P. 498, 8 A. R. 135; *Clarkson* v. *Attorney-General of Canada*, 16 A. R. 202; *Booth v. Ratté*, 21 S. C. R. 637.

Covenant—*Previous Assessment.*]—Covenant against the executors of a lessor for not rebuilding after loss by fire. Second plea, that after said fire defendants, as executors, were sued in a former action by the plaintiff on the covenant, who then claimed to recover prospective damages for the whole term; that defendants, not intending to rebuild, assented; that the jury were therefore directed to give and did give damages accordingly; and that defendants, in consequence of the understanding at the trial, made no attempt to disturb the verdict, but allowed judgment to be entered, and considering that full damages had been given, did not rebuild; that the damages then given far exceeded all damages sustained up to the time of that action; and that, in consequence of the matters above mentioned, this action is prosecuted fraudulently and wrongfully against defendants:—Held, bad, at least in point of form. *Proudfoot* v. *Trotter*, 12 U. C. R. 226.

Covenant—*Single Breach.*]—A covenant to erect a crossing over a railway for the use of the plaintiff will not sustain several successive actions, the breach being entire and perfect in the first instance, and a recovery for such breach being a bar to a future action. *Smith* v. *Great Western R. W. Co.*, 6 C. P. 151.

Criminal Code—*Confiscation of Gaming Instruments, Moneys, &c.*]—In an action to revendicate moneys seized and confiscated under the provisions of s. 575 of the Criminal Code:—Held, that a judgment declaring the forfeiture of moneys so seized cannot be collaterally impeached in an action of revendication. *O'Neil* v. *Attorney-General of Canada*, 26 S. C. R. 122.

Criminal Prosecution—*Civil Remedy.*]—Held, that the acquittal of a locomotive driver on a train upon a charge of manslaughter for the death of a party, on account of whose death the action for damages was brought by his administratrix, did not constitute any answer to the action. *Ham* v. *Grand Trunk R. W. Co.*, 11 C. P. 86.

Crown.]—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the attorney-general, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca* v. *Attorney-General of Canada*, 17 S. C. R. 612.

Crown.]—The doctrine of res judicata may be invoked against the Crown. *The Queen* v. *St. Louis*, 5 Ex. C. R. 330.

Deed—*Rectification.*]—In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein. Held, that

the subject matter of the second action was not res judicata by the previous judgment. *Carroll* v. *Erie County Natural Gas and Fuel Co.*, 29 S. C. R. 591.

Deed and Mortgage.]—The plaintiff, on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st March, 1864, which was the plaintiff's only title to the land; that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction; that the plaintiff by the mortgage covenanted that he was seised in fee, and had good right to convey, and that the eviction complained of was an action of ejectment brought by the heirs of L. on the ground that L. was of unsound mind when he executed the deed on the 31st March, 1864, which was proved at the trial, and the jury thereupon found for the heirs:—Held, that the plea was bad; for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the estoppel, applicable to the deed, extend to the mortgage; that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 U. C. R. 665.

Defect in Pleading.]—A judgment recovered for a defect in pleading, and not on the merits, is no bar to another action. *Baker* v. *Booth*, 2 O. S. 373.

Defect in Pleading.]—A defendant held precluded from taking advantage of defects in his own pleading. *Kilroy* v. *Simpkins*, 26 C. P. 281.

Demurrer.]—Debt on bond. Defendant pleaded that the plaintiff had sued him in a county court for the same cause of action as in this suit; and set out the proceedings there, which shewed that a plea in substance the same as the plea in this case was pleaded, and another precisely the same; that the plaintiff replied to the first of these pleas and demurred to the second; and that the defendant demurred to the plaintiff's replication, and had judgment on both demurrers. To this plea the plaintiff replied, that the judgment recovered in the county court was upon points of form, and not on the merits, and offered to verify this by the record. The defendant demurred to this replication, and it was held bad; the effect of the judgment against the plaintiff's demurrer being to shew that the plea was a good defence. *Stinson* v. *Branigan*, 10 U. C. R. 210.

Debt on bond. Plea, a former action on the same bond in a county court, in which defendant obtained judgment. Replication, that the breaches in this action and the damages claimed are different from those in the former action. In the first suit, as appeared from this plea, no breach was assigned but the nonpayment of the penalty:—Held, on demurrer, replication bad; for the plaintiff, having had judgment against him that he should be barred in his action on the bond, was precluded from suing again on it. *Stinson* v. *Branigan*, 10 U. C. R. 402.

A condition of a contract for the carriage of goods provided that no claim for damage for loss or detention of goods should be allowed unless notice in writing with particulars was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made:—Held, that a plea setting up non-compliance with this condition having been demurred to and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was res judicata. *Grand Trunk R. W. Co. of Canada* v. *McMillan*, 16 S. C. R. 543.

Denial of Identity.] — When a former recovery is pleaded, and the action is such that it cannot be discovered from the record whether the same demand was in question, the plaintiff need not new assign, but may deny the identity of the cause of action. *Beasley* v. *Beasley*, 10 U. C. R. 367.

Different Causes of Action—*Statute of Frauds.*]—S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest in his, M.'s, interest in a gold mine, but failed to recover, as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds:—Held, that S. was not estopped by the first judgment against him from bringing another action. Held, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Dismissal of Action to Enforce Mortgage—*Subsequent Action by Mortgagor to Cancel.*]—S. being the holder of two mortgages, brought ejectment thereon, when the genuineness of the signatures to the instruments was disputed, notwithstanding which he recovered judgment in that action, and subsequently instituted proceedings in this court seeking to obtain a sale of the mortgaged premises and the usual order for payment of any deficiency. Owing to the extremely contradictory evidence adduced at the hearing, the court refused to make the decree as asked, holding the evidence insufficient to establish the execution of the mortgages, as the plaintiff was bound to do, and dismissed the bill, with costs, but without prejudice to S. filing another bill if so advised, within twelve months from the date of that decree. After the lapse of more than twelve months the mortgagor filed a bill seeking to have the mortgages delivered up to be cancelled:—Held, that if the strict construction of such decree was that the point was res judicata it was erroneous, and the court refusing to enforce it in this proceeding by making a decree in favour of the plaintiff, dismissed the bill with costs. *Mitchell* v. *Strathy*, 28 Gr. 80.

Division Court—*Res Judicata—Question for Jury.*]—When an issue arises on the plea

of res judicata the identity of the facts in the former case with those in the existing case is matter for the jury when the trial is by a jury in a division court. In a case in a division court where the defence of res judicata had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the court. *In re Cowan v. Affie*, 24 O. R. 358.

Division Court Clerk.] — Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the division court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use:—Held, that he could not recover, for the money was not received by defendant in his official capacity as the plaintiff's, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quære, whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston v. Widmot*, 23 U. C. R. 348.

Division Court Interpleader.] — The plaintiff, a division court bailiff, having seized a quantity of wheat under a warrant of execution against one P. which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the Judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons:—Held, that the minute so made by the Judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter v. Vanstone*, 7 A. R. 750.

Division Court Interpleader.] — The defendant, a bailiff of a division court, under an execution against plaintiff's father, seized two horses, waggon, &c., which, on an interpleader proceeding were decided to be the goods of the plaintiff, who at the end of three weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury under the direction of the Judge, found a verdict for the plaintiff and $80 damages, which verdict the Judge subsequently refused to set aside:—Held, that the finding of the Judge on the interpleader proceedings formed no ground of defence to the suit for damages for the alleged injury to the property. *Farrow v. Tobin*, 10 A. R. 69.

Division Court Judgment.]—In an action in the division court against the now plaintiff, on notes given by him for the price of a machine, the question of the warranty was tried, and decided against the now plaintiff:—Held, that the matter was res judicata, and the judgment in the division court was therefore a good defence, by way of estoppel, to the present action. *Radford v. Merchants' Bank*, 3 O. R. 529.

Dual Capacity.] — Plaintiff as assignee for the benefit of creditors under 48 Vict. c. 26 (O.), brought this action on behalf of certain creditors under s. 7, s.-s. 2, of that Act to set aside as fraudulent a mortgage made by his assignor, while insolvent, to the defendants. The defendants set up as a defence, inter alia, a judgment for foreclosure on the said mortgage to which the plaintiff as assignee was a party defendant. On demurrer to this it was:—Held, that the judgment of foreclosure was no bar to this action. The plaintiff acted in a dual capacity as assignee of the mortgagor's equity of redemption, and also as a trustee for creditors. It was in the former capacity he was made defendant in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counterclaimed for his present cause of action; while in this action he was suing as trustee for creditors, and in another right. *Glass v. Grant*, 16 O. R. 235.

Effect of Pleading.] — A defendant having pleaded to the declaration as containing two separate counts, cannot afterwards object that there was but one. *May v. Howland*, 19 U. C. R. 66.

Held, that defendants were clearly not estopped from denying that the instrument sued on was a note by having, in addition to the plea of non fecerunt, pleaded other pleas in which they denied their liability to pay "the said promissory note." *Boulton v. Jones*, 19 U. C. R. 517.

Action on a judgment recovered against an executor. The declaration set out the judgment, alleging the issuing of a fi. fa. and a return of nulla bona, and suggested a devastavit. Plea, that in the action on which this action is founded, the defendant pleaded plene administravit, and that the plaintiff replied lands, on which judgment was given; that the lands were assets in the hands of the defendant as executor:—Held, that the replication of lands was a full admission of the truth of the plea of plene administravit; and that the plaintiff by his replication in the former action being estopped from setting up a devastavit now, the defendant was at liberty to shew the true state of the case to save himself from personal liability. *Hogan v. Morrissy*, 14 C. P. 441.

Held, under the facts appearing on the pleadings, that the denial by defendants, in their answer in chancery, that the agreement sued on in this action was illegal, could not estop them from asserting such illegality here. *Carr v. Tannahill*, 30 U. C. R. 217; 31 U. C. R. 201.

Ejectment.] — In ejectment, it appeared that the defendant had sued D. and B. for trespass to the same land; that they had defended

under a lease made by said defendant to the present plaintiff; that the replication was, that such lease had not been surrendered, and the jury found that it had not been:—Held, that the judgment in that case was not conclusive nor even admissible evidence for the plaintiff in ejectment. *Doe d. Burr* v. *Denison*, 8 U. C. R. 610.

An award upon a question respecting real property, expressly referred, is binding upon the parties so far as respects the rights of either to bring or defend an ejectment against the other. *Doe d. McDonald* v. *Long*, 4 U. C. R. 146.

The lessor of the plaintiff having previously recovered judgment against defendant, in an action on the covenants for the payment of money contained in two several mortgages on which this action of ejectment was brought, in which prior action the defendant had pleaded usury, and the issue thereon having been found for the plaintiff, an execution issued against the lands of the defendant, and the premises contained in the mortgage were, under 12 Vict. c. 73, sold to defendant, who at the time of the trial of this action was in possession, claiming to hold under a deed from the sheriff:—Held, that there was a sufficient privity of estate between the purchaser at the sheriff's sale, (the defendant in this suit) under the execution against the judgment debtor, to enable the lessor of the plaintiff to estop the defendants from setting up the same defence of usury unsuccessfully set up by the judgment debtor, under whom the defendant claimed. *Doe d. Mills* v. *Kelly*, 2 C. P. 1.

Held, that the recovery of a judgment in an action of covenant upon a mortgage, on pleas of "non est factum," and that the defendant was not indebted as alleged, and payment before action, did not estop defendant from impeaching the same mortgage in ejectment subsequently brought thereon, on the ground of usury. *Edinburgh Life Assurance Co.* v. *Clark*, 10 C. P. 351.

In ejectment, where the defendant claimed through a purchase at sheriff's sale, it appeared that the purchaser had sued the present plaintiff in trespass, and obtained a verdict and judgment on a plea that the land was not his, the purchaser's:—Held, the court being left to draw inferences of fact, that though the freehold on such plea was not necessarily in issue, yet in the absence of proof to the contrary it might be assumed to have been, and the plaintiff in this suit was therefore estopped by the judgment. *Chambers* v. *Dollar*, 29 U. C. R. 599.

In ejectment the plaintiff claimed under a mortgage made by defendant, and defendant under a deed from the plaintiff, the mortgage having been given to secure part of the purchase money. Defendant proved a judgment in an action of covenant brought by the plaintiff against defendant on this mortgage to recover the money secured thereby, in which defendant pleaded that the mortgage had been obtained by fraud, and judgment was given in his favour on that issue:—Held, that the defendant could not set up the judgment as a defence to this action, not having placed the plaintiff in statu quo by restoring to him possession of the premises. *Puertell* v. *Boilau*, 23 C. P. 175.

In ejectment, where defendant claimed under a sheriff's deed to S. made upon a sale under an execution against lands, it appeared that the purchaser from S. had sued the present plaintiff in trespass, to which the present plaintiff pleaded not guilty, and that the land was not his (the plaintiff's), and had in 1862 obtained a verdict and judgment on the issue joined on these pleas:—Held, that the plaintiff was not estopped by the judgment, for the record alone would not shew that the title set up by the plaintiff here was set up and determined upon there, which it was for the defendant, relying upon the estoppel, to prove; and the plaintiff's evidence in this action shewed that in that case he did not attempt to dispute this defendant's right to possession, because the title was then in another person. Chambers v. Dollar, 29 U. C. R. 599, distinguished, because the inference drawn there from the evidence had been displaced by the evidence here. *Chambers* v. *Unger*, 25 C. P. 180.

In ejectment, against two defendants, where the plaintiff claimed under a conveyance from H., the defendants put in an exemplification of a judgment recovered by one defendant, in an action against two sons of H. for trespass to the same land, in which defendants pleaded that it was the freehold of H., under whom they entered; but there was no evidence to connect H. with the trespass or the suit:—Held, that the plaintiff was not estopped by such judgment. *Cassidy* v. *Ingoldsby*, 36 U. C. R. 339.

It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences and for mesne profits for a period of five or six months prior to the date of the ejectment, and the admission of title did not go further back than the ejectment:—Held, that the judgment against the tenants was evidence against the defendant, at the date of the writ of ejectment, but that title was really in question, and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment. *Seabrook* v. *Young*, 14 A. R. 97.

Action for breach of an agreement made between plaintiff as mortgagor and defendants as mortgagees, whereby in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage, &c., one year from 1st April, 1882. The defence was that on 17th June, 1882, the now defendants brought ejectment against the now plaintiff, setting up that by such mortgage on default of payment of the mortgage moneys the now defendants should be entitled to take possession of said lands alleging default and by reason thereof the now defendants claimed possession; that the now plaintiff did not plead any defence to the action; and for default of any defence on 30th September, judgment for possession was recovered:—Held, that the judgment so recovered estopped the now plaintiff from maintaining the present action. *Cochrane* v. *Hamilton Provident Loan Society*, 15 O. R. 128.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by

default of appearance will sustain a defence of res judicata to an action subsequently brought by the defendant to try the same question. Cochrane v. Hamilton Provident Loan Society, 15 O. R. 128, followed. *Ball* v. *Cathcart*, 16 O. R. 525.

See, also, EJECTMENT, IV.

Ejectment—*Mesne Profits.*]—In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them:—Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term. *Elliott* v. *Elliott*, 20 O. R. 134.

Execution Sale—*Allegations in Defence—Statements in Other Proceedings.*]—Where in an action for recovery of lands by M., who had bought them at a sale under execution against J. K., it was objected that he had failed to prove that J. K. had at the time of such sale any title to the said lands:—Held, that it was no answer to this objection to say that the defendant had in setting up certain facts "by way of a further and separate defence" alleged that J. K. was the patentee of the lands in question, for that such an allegation could not be made use of by the plaintiff to satisfy any defect in his evidence to prove his case, the burden of which rested on him by reason of the said defendant having pleaded possession in herself and her tenants:—Held, also, that the fact that in the course of certain prior proceedings had by M. on an execution against A. K. the wife of J. K., for the purpose of selling the said lands, M. had then asserted that they belonged to her, did not estop M. from now as against J. K. and A. K., alleging that they belonged to J. K. *McGee* v. *Kane*, 14 O. R. 226, affirmed by the supreme court, *Cassels' Dig.* 247.

Foreign Action—*Putting in Bail.*]—To prove a judgment recovered in Lower Canada, an instrument was produced headed "Province of Quebec, District of Montreal, superior court of Lower Canada," and setting out the judgment of the court, and certified to be a true copy under the hand of the prothonotary and the seal of the court. It was objected that the judgment was not sufficient, as the defendant had not been personally served with process in the action in the foreign court, but—Held, that as defendant had procured bail to be put in, and so obtained his freight, which had been attached, the objection could not be raised. *Tilton* v. *McKay*, 24 C. P. 94.

Foreign Divorce.]—In an action for alimony, held, that a foreign decree of divorce obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony. *Maguru* v. *Maguru*, 11 A. R. 178.

Foreign Judgment.]—A judgment of a foreign court having the force of res judicata in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. The Delta, 1 P. D. 393, distinguished. *Law* v. *Hansen*, 25 S. C. R. 69.

See, also, *Hughes* v. *Rees*, 9 O. R. 198.

Former Action at Law.]—An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but having adduced no evidence to establish this fact, was held precluded, in a suit afterwards instituted in the court of chancery to enforce the charge of the judgment against lands, from shewing any payments prior to the time of plea pleaded. *Carpenter* v. *Commercial Bank of Canada*, 8 L. J. 268.

A defendant at law pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in equity to enforce payment of the judgment at law. *Ib.*

Fraudulent Assignment.]—In a suit by a creditor, A., and his assignee, B., to enforce payment of a debt due by C., out of the proceeds of certain property assigned by C. to D., it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:—Held, in another suit by B. and his assignee against D. and C.'s representatives in respect of another debt due by C. to B., that, notwithstanding the difference of parties, the decree in the first suit was binding in the second on the question of fraud. *Gillies* v. *Hoar*, 19 Gr. 32.

Fraudulent Judgment.]—D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes when D. bought it and obtained the usual deed to himself. D. having made default in payment of the mortgage, proceedings at law were instituted thereon, pending which D. conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of D. and his wife, and the plaintiff, after recovering judgment, filed a bill impeaching the transaction for fraud:—Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that although ordinarily the production of the exemplification of a judgment at law is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the statute of Elizabeth, yet that the judgment so recovered by the plaintiff against D. was not evidence against the sons, being res inter alios judicata. *Allan* v. *McTavish*, 28 Gr. 539. See *S. C.*, 8 A. R. 440.

Goods Sold—*Damages.*]—The first count was for non-delivery of a certain quantity of oats sold by defendant to the plaintiff. The second count alleged an agreement between plaintiff and defendant, that plaintiff should buy of defendant a certain quantity of Canada oats, and that defendant should deliver the same to plaintiff at a certain place, yet defendant delivered to plaintiff as and for the said Canada oats the same quantity of a heterogeneous mixture of burnt wheat and oats, greatly inferior in value to Canada oats, and the defendant never delivered the plaintiff the

Canada oats, and that the mixture so delivered was wholly valueless to and unsaleable by plaintiff, &c. The defendant pleaded, that the oats mentioned in the first and second counts were one and the same lot of oats, and that theretofore, on the 18th August, 1864, in an action brought against the plaintiff for the recovery of the price of the same oats, in which the now plaintiff pleaded that the debt thereby claimed from him was contracted by and through the fraud of the now defendant, upon issue joined in said action, which involved the identical facts alleged as breaches of contract in the plaintiff's declaration in this action, a verdict was rendered for the now defendant:—Held, on demurrer, plea bad, as not alleging that judgment had been entered on the verdict:—Held, also, that the second count of the declaration was good. *Twohy* v. *Armstrong*, 15 C. P. 269.

Goods Sold—*Damages.*]—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the superior court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery:—Held, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts and the right to recover them was not res judicata by the judgment in that action. *Hyde* v. *Lindsay*, 29 S. C. R. 595.

Action on a contract to make and deliver tweeds of a good merchantable quality. Plea, a former action by defendant for the price of the goods, in which the defective quality of the goods was set up and considered by the jury in their verdict in reduction of damages:—Held, on demurrer, that to the extent to which the now plaintiff obtained an abatement from the price he was precluded from recovering in another action; that the plea shewed sufficiently that the subject matter complained of herein was submitted to the jury, in abatement of the price to be allowed the now plaintiff in that action, and that they found for the plaintiff; that if the now plaintiff was allowed damages in the former action, in abatement of the price of the cloth, he would be precluded from recovering them again; and that if he was not allowed them, because the cloth was not inferior, it was likewise against public policy that the matter should be again litigated:—Held, also, that the claim for loss of profits, which could not have been considered in the other action, was not laid in the declaration as a substantive ground of action, but introduced incidentally at its conclusion:—Held, further, that the verdict in the former action was not conclusive until judgment, and therefore the plaintiff was not precluded from maintaining this action. *Gordon* v. *Robinson*, 14 C. P. 566.

A. wishing to procure a water-wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, C. undertook to put in a "four-foot Sampson turbine wheel," which he warranted would be sufficient for the purpose. The wheel was subsequently put in, but proving insufficient A. sued C. for breach of the warranty and recovered $438 damages. C. having subsequently sued A. for the price, A. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him:—Held, that such evidence was inadmissible, for that the facts offered in mitigation might have, and for all that appeared had, formed a ground for the recovery of damages in the action on the warranty, and therefore could not be set up in this action. *Abell* v. *Church*, 26 C. P. 338. Reversed, 1 S. C. R. 442.

Indorser.]—Where, in an action on a note against an indorser, the defendant pleaded in estoppel that the note was given as security for the performance of a certain agreement between the plaintiff and one M.; that the defendant indorsed as security for M. the maker; and that the plaintiff had brought an action against M. on the agreement in which action M. had pleaded non-assumpsit, and had judgment on the plea:—Held, that the plea was no answer to the declaration. *Squire* v. *Dreenan*, 13 C. L. J. 326.

Information of Intrusion—*Subsequent Action—Beneficial Interest in Land.*]—In proceedings on an information of intrusion exhibited by the attorney-general of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that Province. The Queen v. Farwell, 14 S. C. R. 392. The appellant having registered his grant and taken steps to procure an indefeasible title from the registrar of titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the attorney-general to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands:—Held, affirming 3 Ex. C. R. 271, that the judgment in intrusion was conclusive against the appellant as to the title. The Queen v. Farwell, 14 S. C. R. 392, and Attorney-General of British Columbia v. Attorney-General of Canada, 14 App. Cas. 295, commented on and distinguished. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Injunction—*Specific Performance.*]—Bill for injunction and specific performance dismissed:—Held, no bar to a subsequent suit for specific performance. *Simmons* v. *Campbell*, 17 Gr. 612.

Insolvent Act — *Charge of Fraud.*]—Where a judgment has been recovered for a debt without fraud being charged under s. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud, even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lightbound* v. *Hill*, 32 C. P. 249.

Insurance—*Quantum of Loss.*]—The defendant having been paid $50,000 insurance moneys under various policies issued to him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of $100,000;

the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him claiming that he was trustee for them for so much of the $100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded in the whole $150,000:—Held, that he was not concluded from so contending by the finding of the jury in the action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master. *National Fire Ins. Co.* v. *McLaren*, 12 O. R. 682.

Intervention.]—The plea of res judicata is good against a party who has been in any way represented in a former suit deciding the same matter in controversy. *Dingwall* v. *McBean*, 30 S. C. R. 441.

Items Disallowed.]—Where a plaintiff goes to a jury upon certain items of account and fails in recovering those items, he is concluded by the verdict, and cannot bring a second action for the same demand. *Proudfoot* v. *Lawrence*, 8 U. C. R. 269.

Joint Contractors.]—The plaintiff having sued one of two joint contractors, the other being out of the jurisdiction, and having recovered judgment against the one cannot afterwards sue the other. *Harris* v. *Dunn*, 18 U. C. R. 352.

Judgment against Two—*Action for Increased Interest.*]—Plaintiff sued defendant as maker and A. as indorser of two notes, adding a count for interest, and at the trial, to support this count, he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months' time. The learned Judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this and satisfied, he sued defendant on his undertaking, to recover twenty-four per cent., the balance of interest agreed to be paid by it:—Held, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay* v. *Fee*, 20 U. C. R. 268.

Justifying under Judgment.] — Trespass q. c. f., with a count for taking goods. Defendants justified as commissioners and bailiff of the court of requests, and the plaintiff replied that he was not duly summoned to attend at the court at which judgment was recovered:—Held, replication bad on general demurrer. *Stevens* v. *Cowan*, 5 O. S. 572.

Lease—*Covenant—Previous Declaration of Termination.*]—Action on defendant's covenant to pay rent, contained in a lease to him by plaintiff of a mill, for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging non-payment of three half yearly instalments of rent reserved. Plea, by way of estoppel, that previous to this action the lessee (now defendant) sued the lessor (the now plaintiff) in the county court, alleging in his declaration that by the lease, in the event of total destruction of the mill by accidental fire the term should cease, and the rent be apportioned; that upon such destruction on the 30th October, 1869, the said term ceased, and the lessor became liable to refund to the lessee such part of the rent paid in advance as on the apportionment should be found due, and the lessee alleged in such action that $137.50 thus became due to him, for which he sued therein; that the lessor pleaded in such action that the said lease was not his deed, and issue being joined thereon, the lessee recovered judgment for the said sum of $137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869. To this the plaintiff replied, that after such fire the defendant continued to hold and occupy, and still holds and occupies the premises under and by virtue of the lease, and would not and did not put an end to said term or surrender said premises:—Held, a good plea; for though the plea of non est factum did not put in issue the destruction of the mill and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, were admitted for the purpose of such action, and the lessor was now estopped from disputing them. *Taylor* v. *Hortop*, 33 U. C. R. 462.

See also, *Taylor* v. *Hortop*, 22 C. P. 542, an action against the surety of the lessee, in which it was held that the judgment recovered, being a bar to the recovery against the principal, was a good defence for the surety.

Libel.]—Case for libel in publishing a printed notice denying the plaintiff's title to certain land, of which the declaration alleged that he was seised in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in chancery to establish her undoubted right. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee; that the said indenture was given to secure usurious interest; that the said K. died intestate, and his heir gave to the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c., (as in the fourth plea.) The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious:—Held, on demurrer, plea bad, for omitting to justify the statement that a chancery suit was pending, that being a very material part of the libel. Semble, that the replication to the fifth plea shewed an estoppel. *Mair* v. *Cully*, 12 U. C. R. 71.

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Willcocks* v. *Howell*, 8 O. R. 576.

Mandamus to Arbitrate — *Action on Award.*]—On application to compel a railway company to arbitrate, the question whether the plaintiff's land was injuriously affected, under the admitted facts, was raised by return to the mandamus, and formally decided in the plaintiff's favour. An arbitration then took place, and an award was made, on which the plaintiff sued, and a trial was had resulting in a verdict for defendants, which was set aside after an appeal to the court of appeal. Defendants then applied to add a plea that the land was not injuriously affected, urging that when the mandamus was ordered there was no right of appeal in such a matter, and that they should be allowed to reopen the question by plea in order to obtain such right. The court, under the circumstances, refused the application. Quære, if the plea had been allowed, whether the decision on the mandamus could have been replied by way of estoppel. Ricket v. Metropolitan R. W. Co., L. R. 2 H. L. 175, and Beckett v. Midland R. W. Co., L. R. 3 C. P. 82, commented upon. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 29 U. C. R. 154.

Matters not Decided.] — Declaration, first and second counts for penning back water on plaintiff's land. The defendant by his plea set up the consent and acquiescence of the plaintiff's ancestor under whom the plaintiff claimed. The plaintiff replied that a former action had been brought by her against defendant for a similar penning back of the water; that defendant had filed his bill to restrain that action, and had in that bill alleged the same matters now alleged in the plea, which bill was dismissed. Rejoinder, that the court of chancery gave no judgment in respect of matters alleged in the plea, but dismissed the bill in respect of other matters:—Held, on demurrer, rejoinder good. *Dean* v. *Gray*, 22 C. P. 202.

Mortgage—*Usury.*]—Usury having been set up as a defence to ejectment on a mortgage, the plaintiff gave in evidence a decree between him and defendant in a foreclosure suit on the same mortgage, which upheld the mortgage, and in effect declared that it was not tainted with usury:—Held, conclusive in plaintiff's favour. *Scripture* v. *Curtis*, 11 C. P. 345.

Mutual Effect.]—Action for penning back water by a dam. Plea by way of estoppel, a verdict on the plea of not guilty in an action brought by the plaintiff against a tenant for years under a predecessor of the defendant in title, for erecting the said dam:—Held, on demurrer, that such plea shewed no estoppel, since, had the verdict been the other way, there would have been no estoppel, and estoppels must be mutual. *Smith* v. *Wallbridge*, 6 C. P. 324.

Necessity for Pleading.]—In an action against the sheriff and his sureties for not arresting a party at the plaintiff's suit:—Held, that defendants were not concluded with regard to the fact of the arrest being made, by the decision in that suit in the county court, no estoppel being pleaded, nor could such decision act as an estoppel, being res inter alios acta. *McIntosh* v. *Jarvis*, 8 U. C. R. 535.

In an action of dower:—Held, that the demandant could not, without specially replying

it, rely upon the tenant being estopped, by taking a conveyance from her husband after marriage, from shewing that the seisin of the demandant's husband was as joint tenant with his brother, and that he died first. *Haskill* v. *Fraser*, 12 C. P. 383.

Certain goods of H. were seized under an execution at the suit of defendant, and claimed by the plaintiff. The issue was decided in the plaintiff's favour, who then sued defendant for the seizure, which he had directed:—Held, that the action would lie, and that by the Interpleader Act (C. S. U. C. c. 30, s. 5), the result of the issue was conclusive as to the plaintiff's right to the goods, though not replied as an estoppel to defendant's plea that the goods were not the plaintiff's. *Harmer* v. *Gountlock*, 21 U. C. R. 260.

Under the Judicature Act of Ontario res judicata cannot be relied on as a defence unless specially pleaded. *Cooper* v. *Molsons Bank*, 26 S. C. R. 611.

Non-return of Conviction—*Dismissal against other Magistrate.*] — Action against one of two convicting magistrates for not returning a conviction. An action against the other magistrate for not returning the same conviction was tried at the same assizes, on the same day and resulted in a verdict for defendant, the jury finding that the return was "immediate," as required by the statute. On the trial of this case the defendant offered to put in as evidence the record of the other action with the verdict indorsed thereon, the object of which appeared to be to shew the return of the conviction by himself, and so indirectly to make him a witness on his own behalf:—Held, that the penalty not being a joint one as against the two magistrates, but several, each being individually liable for not making the proper return, the record and verdict in favour of defendant in the former case could not be evidence of the return made by the defendant in this case. *McLellan q. t.* v. *McIntyre*, 12 C. P. 546.

Nova Scotia Probate Act—*License to Sell Lands.*]—An executrix obtained from the probate court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still alleging the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon:—Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion. Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. *Clarke* v. *Phinney*, 25 S. C. R. 633.

Omitted Credit.]—Where two masons recovered a verdict for work and labour against

their employer for £60, it was held that the employer could not afterwards sue them for money paid them on account, which he had attempted to prove in the former action. *Hunt* v. *McCarthy*, 6 O. S. 434.

The plaintiff in this action having a contract with a township corporation for constructing drains, the defendant occasionally cashed cheques or orders on the corporation for him, and was also in the habit of supplying him with goods, on account of which the plaintiff gave him two orders. The defendant having sued the plaintiff on the common counts, the plaintiff pleaded payment. By the particulars in that action the now defendant claimed for goods sold and money lent, and gave credit for one item of $300, received upon an order for that sum. He had a verdict for $920, and the now plaintiff afterwards brought this action against him to recover back a sum of $300, which he alleged had been received by the defendant on another order, but had not been credited in the former action:—Held, that the plaintiff was estopped by the former judgment. Sedden v. Tutop, 6 T. R. 607; Chisholm v. Morse, 11 C. P. 589, distinguished. *Sorenson* v. *Smart*, 5 O. R. 678.

Partnership — *Pleading.*]—In an action upon the common counts for the price of certain timber delivered under a contract defendants objected to the non-joinder of J. R., the plaintiff's brother, as a plaintiff, and attempted to prove that they contracted with them both, as "Brown Bros.," by an exemplification of a judgment recovered by the defendants after issue joined in this suit, but not pleaded herein, in an action against the plaintiff and his brother for the non-delivery of part of the timber in question. To that action the plaintiff pleaded that he never was a member of the firm of "Brown Bros.," and both the defendants therein (the plaintiff and his brother) pleaded a denial of delivery of part of the timber by them as alleged, and a denial of the contract. The jury found all the issues in favour of the plaintiffs:—Held, that the judgment was not conclusive, as it had not been pleaded by way of estoppel puis darrein continuance, as it might have been:—Held, also, that if pleaded it would not necessarily have been conclusive, for it shewed only that the two brothers were jointly liable upon this contract, and the plaintiff might have been so liable as a member of the firm by holding himself out as such. The evidence, set out, tended to shew the plaintiff alone entitled to recover, and the court, on appeal from the county court, refused to interfere with a verdict in his favour. *Brown* v. *Yates*, 1 A. R. 367.

Perjury.]—In an action on a mortgage from defendant S., the defendant H. being in possession, the latter claimed that plaintiff was bringing the action for the benefit of S., who was therefore, as well as the plaintiff, bound by a judgment in a former action, in which H., claiming title by possession, had succeeded against S. in having a lease from the latter to him set aside, the plaintiff, however, not being a party to the action, and having acquired his title prior thereto. S. pleaded that the judgment in question was obtained by the perjury of H., stating the perjury:—Held, on demurrer, good. *Stewart* v. *Sutton*, 8 O. R. 341.

Personal Representative.]—Where an action is brought against the personal representative of a testator or intestate, the estate, as an estate, is bound by the result of the action brought, just as the deceased would have been bound if in his lifetime it had been prosecuted against himself; and the judgment stands at law as conclusive against all the property of the deceased, whether it be ultimately realized out of the goods or lands; as against the heirs, however, it is only primâ facie evidence. Where, therefore, in an action at law upon the covenant of the intestate against his administrator, judgment had been entered in favour of the plaintiff, who subsequently proceeded in the court of chancery to realize his judgment, the court held that it was not necessary for him to give any evidence as to the consideration upon which the judgment was founded; and the defendants, the heirs-at-law, having refrained from calling witnesses to impeach the judgment, resting on their objection that the plaintiff was bound to give evidence of the bona fides of the judgment, in consequence of which a decree was pronounced against them, the court on rehearing ordered a new hearing to take place with a view to affording the defendants an opportunity of disputing the validity of the judgment, upon payment by them of the costs of the hearing and rehearing. *Eccles* v. *Lowry*, 23 Gr. 167.

Personal Representative.] — A judgment against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands. Therefore where a judgment had been obtained against the executor of H. on certain promissory notes indorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the court the judgment creditor brought the judgment into the master's office and claimed upon it, and other creditors of H. thereupon asked to be allowed to adduce evidence as against the claim on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes upon which the judgment had been obtained:—Held, that they could not be permitted to do so. Semble, that such judgment is only primâ facie evidence as against heirs-at-law, and devisees of the deceased. Eccles v. Lowry, 23 Gr. 167, commented on. *Re Hague, Traders' Bank* v. *Murray*, 13 O. R. 727

Pleading.] — This action as originally brought was to take the plaintiff's accounts under a post-nuptial settlement, in which the plaintiff and the defendant D. J. R. were trustees, but after the hearing and before decree, a question was raised by amendment as to the liability of the defendant D. J. R. to pay certain moneys alleged to have been advanced by the plaintiff for the maintenance of his wife and children, and on the argument of this question, judgment was given directing a reference as to such claim. Before the argument judgment had been rendered in the superior court of Quebec on the same question in D. J. R.'s favour, and on the reference D. J. R. proved this judgment, contending that it concluded the matter, as being res judicata, though not pleaded:—Held, reversing 10 P. R. 301, that D. J. R. had had no opportunity of pleading such judgment, and that it was therefore conclusive when set up in the master's office without being pleaded. *Hughes* v. *Rees*, 9 O. R. 198.

Previous Decision.]—The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors. Held, that as the court in McGreevy v. The Queen, 18 S. C. R. 371, had, under precisely the same state of facts, held that the contractor could not recover, that decision should be followed, and the judgment dismissing the petition of right affirmed. *Ross v. The Queen*, 25 S. C. R. 564.

Promissory Note—*Agreement.*]—Declaration, that in consideration that the plaintiff, for the accommodation of the defendant, would sign a certain note made by C., payable to the defendant, for $100, defendant promised to obtain and deliver to the plaintiff accounts due to C. by different persons to that amount, as security; that the plaintiff signed the note, but the defendant did not obtain the accounts; by reason whereof the plaintiff was obliged to pay the note with interest, and the costs of a suit brought by the defendant thereon. Defendant pleaded, by way of estoppel, that in the suit by him on the note this plaintiff pleaded as a defence the same agreement now declared upon; that issue having been taken thereon the jury found that no such agreement was made, and that judgment entered on that verdict still remained in force:—Held, a good defence. *Campbell v. Holmes*, 21 U. C. R. 465.

Promissory Note—*Fraud.*]—Plaintiff being indebted to defendant on a promissory note for $106 and book debts, executed a mortgage to him for £50. The land in said mortgage comprised was sold by plaintiff, and after payment of the prior incumbrances thereon there was left the sum of $90 to be applied on defendant's mortgage, on payment of which sum defendant executed a discharge thereof. Defendant subsequently sued the plaintiff in the division court for a balance on said note and book debts, and recovered judgment. Plaintiff now sued for fraud in defendant having sued him for said note, alleging that when said mortgage was given defendant agreed to give up said note when the mortgage was satisfied:—Held, that the plaintiff could not, after failing in the division court suit, maintain the action. *Bigelow v. Staley*, 14 C. P. 276.

Promissory Note—*Indorser.*]—An action was brought against a firm in the firm name as makers, and an individual as indorser, of a note, and was dismissed as against the indorser on the ground that he had indorsed at the request of the holders for their accommodation, judgment being given against the firm:—Held, reversing 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the indorser was, as regards the plaintiffs, a partner by estoppel and therefore bound by the judgment against the firm. *Ray v. Isbister*, 22 A. R. 12; 26 S. C. R. 79.

Promissory Note—*Usury.*]—Where the payee of a note indorsed the same to A. upon a usurious consideration, and A. afterwards failed in an action against the maker upon the ground of usury:—Held, that such payee might still recover against the drawer; and, semble, that the ground of the failure, in the former action, might be proved by any person present at the trial; and it was not necessary to prove a re-indorsement by the usurer to the payee. *Bidwell v. Stanton*, Tay. 366.

Quantum of Damages.]—The plaintiff company having brought an action against I. on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises, at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the company was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co. v. Ireton*, 5 O. R. 47.

Quashing Search Warrant—*Justification.*]—A judgment on certiorari quashing a search warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceeding to set the warrant aside, and such judgment was a judgment inter partes only. *Sleeth v. Hulbert*, 25 S. C. R. 620.

Quebec Judgment.]—Under 22 Vict. c. 5, s. 58, consolidated in C. S. L. C. c. 83, s. 53, s.-s. 2, a judgment may be recovered in the Province of Quebec, on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on the merits. A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein. C. S. U. C. c. 42, requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured:—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quære, whether the personal service referred to in R. S. O. 1877 c. 50, s. 145, refers to personal service in Quebec. *Court v. Scott*, 32 C. P. 148.

Quebec Law.] — See *Muir v. Carter*, *Holmes v. Carter*, 16 S. C. R. 473; *Exchange Bank of Canada v. Gilman*, 17 S. C. R. 108.

Reasons for Judgment—*Premature Action—Second Action for Same Cause.*]—The plaintiff, a mortgagee, took from the defendant, a mortgagor, an assignment of the covenant of a purchaser of the equity of redemption to pay off the mortgage, and on receiving certain securities from him agreed not to sue him until certain other remedies against subpurchasers had been exhausted. The plaintiff then sued the defendant on his covenant in the mortgage, but failed in the action on the ground that the remedies mentioned had not been exhausted. In this action on the same covenant:—Held, that the court might properly examine the pleadings, evidence and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments might be looked at for the purpose of shewing what was decided; that the dismissal of an action on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection, and that the plaintiff having before this action was brought exhausted her remedies and made an arrangement with the purchaser of the equity of redemption by which she was placed in the same position with respect to him as she was in before she received the securities mentioned, was entitled to recover from the defendant in this action notwithstanding she had retransferred the securities to the purchaser and agreed not to sue on his covenant, such agreement having reserved the defendant's right to sue the purchaser of the equity of redemption should the covenant be reassigned by the plaintiff to defendant. *Barber* v. *McCuaig* (2), 31 O. R. 593.

Revocation of Letters of Administration.]—The letters of administration to an infant as administrator, were revoked after the judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was res judicata against P. in this administration proceeding:—Held, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in autre droit, such action was left without a plaintiff, and the judgment recovered was not under the circumstances an estopped against P. *Merchants' Bank* v. *Monteith*, 10 P. R. 467.

Right of Way.]—In an action for obstructing a right of way, the defendant denied the right of way claimed, and the plaintiff replied, by way of estoppel, a judgment in his favour in a former suit with the defendant, in which the same right was in question, averring the way claimed to be the same in both actions:—Held, a good replication, for if the right had been lost by anything occurring since the former action, the defendant should have shewn it. *Johnson* v. *Boyle*, 11 U. C. R. 101.

Right of Way.]—The third and fourth counts charged defendant with obstructing the plaintiff's right of way from his land over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land. To a plea denying plaintiff's right to the way, the plaintiff replied, by way of estoppel, a former recovery against defendant for obstructing a right of way then claimed by the plaintiff from her said land "over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land:"—Held, on demurrer, replication good, for that the issue was as to the existence of any right of way in plaintiff over lot 14, and that was determined by the former recovery. *Dean* v. *Grey*, 22 C. P. 202.

Set-off.]—Where A. is sued by B., and is seeking to set off a demand for which he has already obtained a verdict against B.:—Held, that he is estopped by such verdict from bringing the same identical demand a second time before the jury by way of set-off. *Russell* v. *Rowe*, 7 U. C. R. 484.

Sheriff—*Indemnity.*]—Action on a bond from one A. C., defendant, to S., (sheriff) indemnifying him, &c., by reason of his paying over to A. C. $390, alleged to be due to defendant for rent of the premises on which the goods out of which the money was made were seized, (the rent not having accrued due at the time of seizure,) assigning as a breach that defendant did not indemnify, &c., but permitted one J., an execution creditor, (whose writ of fi. fa. was in S.'s hands at the time of the seizure,) to recover a judgment against him S., (which he had to pay) for not paying over the amount paid to defendant for rent:—Held, that J.'s judgment (of which an exemplification was put in) was an estoppel upon the defendants, and that defendants were rightly prohibited at the trial from giving evidence of the time at which the rent accrued due. *Smith* v. *Cleghorn*, 10 C. P. 520.

Sheriff—*Sureties.*]—Recovery against the sheriff for a false return of nulla bona after money made:—Held, a bar to an action against the sheriff and his sureties on their covenant, for not paying over such money. *Miller* v. *Corbett*, 26 U. C. R. 478.

Slander.]—In an action by husband and wife, for slander of the wife in accusing her of adultery, it appeared that the husband had sued the person accused of the adultery for charging which this action was brought, and recovered a judgment against him in an action of crim. con., and judgment had been given in chancery against the wife on the ground of adultery, in a suit brought by her against the husband for alimony:—Held, that under the circumstances the verdict entered for the plaintiff must be set aside when the husband, if so advised, might raise the question whether he was not dominus litis. *Campbell* v. *Campbell*, 25 C. P. 368.

Technical Objection.]—A former suit had been instituted by the plaintiff which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not res judicata. *Adamson* v. *Adamson*, 28 Gr. 221.

Term of Credit not Expired.] — A plaintiff having failed upon a trial for a portion of his claim (goods sold) because the term of credit had not expired when he sued:

—Held, that the judgment recovered in the suit was no bar to a subsequent action for the same goods. *Chisholm* v. *Morse*, 11 C. P. 589.

Trespass.]—Trespass q. c. f. to the west half of lot twenty-three, 3rd con. of East Gwillimbury. The defendant pleaded, by way of estoppel, a recovery in a former action of the same nature, brought by him against the plaintiff, setting out the pleadings there, from which it appeared that the declaration contained three counts, and in the first the locus in quo was described only by metes and bounds, and by reference to visible boundaries; in the second, as the west half of twenty-two; and in the third, as part of the west half of twenty-three, setting it out by metes and bounds. The plea averred the identity of the premises in that action with the close in this:—Held, on demurrer, that there was no real or apparent repugnancy in this assertion, and that the plea was good. *Doan* v. *Richardson*, 13 U. C. R. 527.

Trespass for breaking and entering the south forty acres of the east half of lot twenty-two. Plea, judgment recovered by the now defendant against the now plaintiff and another in a former action of trespass brought by the now defendant for breaking and entering that part of the half lot lying north of the south forty acres, and averring that the trespass now complained of and the trespass complained of in the former action were committed on the same piece of ground; which piece the now plaintiff had contended in the former action formed part of the south forty acres, but which the jury in that action had found to lie north of the south forty acres:—Held, a good plea by way of estoppel. *Leinster* v. *Stabler*, 17 C. P. 532.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of lands not plaintiff's and liberum tenementum, is not a complete estoppel, preventing the defendant in another suit from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed. *Hunter* v. *Birney*, 27 Gr. 204.

Trustee's Accounts.]—Court of probate passing trustee's accounts does not bind in action in court of equity. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Use and Occupation—*Distress.*]—To an action for use and occupation defendant pleaded, by way of estoppel, that one C. sued the plaintiff for taking his goods on the same premises; that the plaintiff avowed under a demise to the present defendants for twelve months' rent in arrear; that issue was taken on such avowry, and C. recovered judgment against the now plaintiffs for £28, for such wrongful taking and costs; that C. was in possession at the time of said taking under and from the now defendant, and with his privity; and that the alleged arrears of rent distrained for were the amount now claimed for use and occupation:—Held, on demurrer, plea bad, as shewing no estoppel, for the judgment pleaded did not necessarily shew that no rent was due at the time of the distress mentioned, but might have been obtained on some other ground. *Crooks* v. *Bowes*, 22 U. C. R. 219.

Quære, whether judgment in replevin could be a bar to an action for use and occupation. *Ib.*

Quære, also, whether defendant in this case could plead the judgment recovered by C. as an estoppel in his favour. *Ib.*

Winding-up Proceedings.] — In the course of proceedings taken in Scotland for winding up the plaintiff company, an order was made by a Scotch court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose:—Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish court. And an order striking out the defence in the action on the ground that it was res judicata by the order of the Scottish court was rescinded. *British Canadian Lumbering and Timber Co.* v. *Grant*, 12 P. R. 301.

Withholding Claims.] — If a plaintiff could have given in evidence at a former trial the same matter which he subsequently sues for, but withholds it altogether, he is not absolutely barred from recovering afterwards. *Deacon* v. *Great Western R. W. Co.*, 6 C. P. 241.

Work and Labour.]—Semble, that a recovery on the common counts for work and labour, or for any part of the value of the work, would be taken to preclude any other action for the same work. *Turley* v. *Grafton Road Company*, 8 U. C. R. 579.

Yearly Payments—*Division Court Judgment.*]—In 1887 the plaintiffs sued the defendants in the division court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the county court for the surplus received in the five subsequent years. The defendants contended that the claim was res judicata by reason of the judgment in the division court:—Held, that the recovery in the division court being for a wholly distinct and separate cause of action, and not upon a balance of account under s. 77, or after abandonment of the excess under D. C. rule No. 8, was no defence to an action for surplus rates received by the defendants in the subsequent years. *Public School Trustees of Section No. 9 Nottawasaga* v. *Township of Nottawasaga*, 15 A. R. 310.

III. In Pais.

1. *In General.*

General Rule.]—Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have

been ignorant of the truth of the matter, and the representation must have been made with the knowledge of the facts, and the representation must be plain and not a matter of mere inference or opinion; and certainty is essential to all estoppels. *McGee* v. *Kane*, 14 O. R. 226.

Act of Parliament.]—The doctrine of estoppel can never interfere with the proper carrying out of the provisions of an Act of Parliament. *United Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 229.

Administration — *Proving Claim — Change in Position*]—A receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into court, which were to be paid out on the report of the master to the parties entitled as found by him. S. pursuant to advertisement for creditors, proved his claim. The master had not made his report. By 44 Vict. c. 61 (O.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of court was made on the application of the defendants, discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty cents on the dollar:—Held, that the position of affairs having altered since the time at which S. had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible. *Lee* v. *Credit Valley R. W. Co.*, 29 Gr. 480.

Arbitration—*Action on Award.*]—Suing on an award will estop a party from denying the authority of the arbitrators. *Black* v. *Allan*, 17 C. P. 240.

Arrest of Judgment.]—Estoppel against moving in arrest of judgment. See *Campbell* v. *Campbell*, 25 C. P. 368.

Assessment—*Objection not Taken in Previous Years.*]—A ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future years, that he is not a Roman Catholic. *In re Roman Catholic Separate Schools*, 18 O. R. 606.

A ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who has not given the notice required by R. S. O. 1887 c. 227, s. 40, is not (nor are other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. 1887 c. 227, s. 47. *Ib.*

Assessment — *Payment of Taxes under Protest.*]—The chamberlain of the city of St. John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution the bank of New Brunswick paid their taxes under protest:—Held, that such payment did not preclude them from afterwards taking proceedings to have the assessment qualified. *Ex parte Lewin*, 11 S. C. R. 484.

Assignee in Insolvency — *Fraudulent Cognovit.*]—The assignees of a bankrupt in suing the sheriff, represent the interest of creditors, and not merely the person or estate of the bankrupt. They, therefore, will not be estopped, as the bankrupt might be, from disputing the validity of a cognovit given by the bankrupt in fraud of the bankrupt law, on the ground of fraud. *Ponton* v. *Moodie*, 7 U. C. R. 301.

Assignment for Creditors — *Attack after Attending Meetings.*]—After the execution of a deed of assignment for creditors the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the inspectors to aid the assignee in winding up the estate; and a resolution was also passed to pay certain arrears of wages; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default, and issued execution, contending that the assignment was invalid:—Held, that the defendant had assented to the assignment and was estopped from denying its validity. *Gardner* v. *Kloepfer*, 7 O. R. 693.

Assignment—*Dividends after Attack.*]—A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors by an unsuccessful attempt to have such deed set aside as defective. *Kloepfer* v. *Gardner*, 14 A. R. 60, 15 S. C. R. 390.

See, also, *McKay* v. *Farish*, 1 Gr. 333.

Carriers — *Mixing Goods.*]—Declaration for breach of defendants' contract to carry 3,244 pounds of Canadian wool from T. to P. by rail, and thence to B. by steamboat or rail, and deliver there to plaintiff, certain perils and casualties excepted, with a count in trover for the goods. The evidence was, that on the 6th September, 1864, plaintiff delivered to defendants thirteen sacks of wool, weighing 3,244 pounds, addressed to the consignees in B., to be sent subject to defendants' tariff and to the conditions contained in the plaintiff's written request to defendants to receive same, defendants giving a receipt with similar conditions thereon. This wool was put into a car with wool from Michigan, consigned to one R., together with certain dutiable goods, and all arrived at Island Pond on the 18th September following, where they were detained by the customs authorities. The car subsequently took fire, and the sacks containing the wool were burnt. Some of the wool was also burnt, and some of it singed. In endeavouring to save it, the wool became mixed, and was carried in this state to P., where new sacks were obtained and the wool conveyed in them to B., and the thirteen sacks delivered to the consignees on 22nd October, but containing only 2,498, instead of 3,244, which the bill of lading shewed. On the delivery of four additional sacks, the weight being still short by twenty-nine pounds, an examination of the wool was made, when it was

found to consist of 873 pounds of Canada fleece, 1,160 pounds scorched Canada, and 1,168 pounds American fleece damaged by fire. This was sold on plaintiff's account, but did not realize as much, it was proved, as it would have brought had it arrived about a month earlier. It further appeared that 962 pounds Canada fleece had been delivered to R. The Judge charged the jury that defendants were not liable for the damage by fire, or for the delay at Island Pond, as they had not contracted to guard against this; and that the plaintiff was entitled to such damages as arose from defendants' neglect in delivering mixed instead of all Canadian fleece, and for the amount of short weight. The jury having found for the plaintiff:—Held, on motion for a new trial, that the plaintiff was not estopped by the taking of the American wool from shewing a conversion by defendants of the Canadian wool; but that had defendants pleaded that he took the latter in lieu of the former, or of so much thereof as was deficient, there was evidence to go to the jury to warrant a verdict for defendants to a certain extent, if not for all that really ought to have been delivered:—Held, also, that the proper direction to the jury would be, that defendants were not liable for the delay, or loss by fire; that they were liable for the wool belonging to plaintiff, which they carried to B. and did not deliver; but that if the plaintiff, with knowledge of all the circumstances, took the one kind for the other and sold it, when he might have had his own, and the damaged Canadian wool was delivered to the consignee of the American wool with plaintiff's consent, in consideration of his getting the American in lieu of it, then the plaintiff could not claim substantial damages either for breach of contract or for the wrongful conversion. *Milligan* v. *Grand Trunk R. W. Co.*, 17 C. P. 115.

Carriers — *Representation as to Residence.*]—The plaintiff was at Indianapolis when the goods which he had given to defendants to carry, (except the missing box sued for) arrived there, and remained until some time in the month following:—Held, that he was resident there within the condition in the defendants' contract relating to residents beyond their line, and that having named himself as the consignee at that place he was estopped from denying such residence. *La Pointe* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 479.

Certiorari.]—The defendant in this case having had the certiorari directed to the magistrate who convicted was held to be estopped from objecting that the conviction was in reality made by three as appeared from the memorandum of conviction which was signed by them. *Regina* v. *Smith*, 46 U. C. R. 442.

Chose in Action—*Admission of Funds.*]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, of which they were duly notified: "Pay to the order of D. the sum of $306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone:—Held, that there was a good equitable assignment in favour of D. of money due on the 1st June; and that defendants, by the payment of the other order, were estopped from denying that there were sufficient moneys then due to the contractor to cover his order. *Bank of British North America* v. *Gibson*, 21 O. R. 613.

Compromise of Claim.]—The compromise of a claim upon the plaintiff's assertion that it is the only one, will not of itself form an equitable defence to another claim, the right to recover in respect of which is not otherwise contested. *King* v. *Miller*, 22 C. P. 450.

Contract—*Boomage.*]—F. McC. brought an action against G. B. for $4,464 as due him for charges which he was authorized to collect under 36 Vict. c. 81, (Q.) for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his auteurs, and the interpretation put upon them by F. McC., the repairs to the booms were to be and were, in fact, made by him, and that in consideration thereof he was to be allowed to pass his logs free; and also pleaded compensation of a sum of $9,620 for use by F. McC. of other booms, and repairs made by G. B. on F. McC.'s booms, which by law he was bound to make:—Held, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to piers, &c., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect:—Held, further, that even if F. McC.'s right of action was authorized by the statute the amount claimed was fully compensated for by the amount expended in repairs for him by G. B. *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Criminal Prosecution—*Adjournment at Defendant's Request.*]—Held, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal. *Regina* v. *Heffernan*, 13 O. R. 616.

Cross-claims — *Settlement.*]—The plaintiffs sued defendant for $150, money lent, to which defendant pleaded a set-off against L., one of the plaintiffs, accepted by L. in satisfaction. It appeared that defendant having built a house for L., cross demands arose out of the contract, and their solicitors negotiated for a settlement; that the $150 was mentioned, and L.'s solicitor offered to pay $650 in full of all matters, taking this $150 into account as a credit to L. Defendant refused to take less than $700, and sued L., whose solicitor, before he was aware of the suit, paid $650, and afterwards paid $50 into court, which was taken out. The jury were asked whether L. or his attorney agreed absolutely to allow the $100 as a payment on the contract, or only for the sake of a settlement, which was not arrived at; to which defendant objected, that if the negotiations proceeded on the supposition that the $150 was to be so allowed, and L. afterwards paid the $700

on a different understanding, he was bound so to state at the time:—Held, that the direction was right, and a verdict for the plaintiffs was upheld. *Young* v. *Taylor*, 25 U. C. R. 583.

Crown.]—The doctrine of estoppel cannot be invoked against the Crown. *Humphrey* v. *The Queen*, 2 Ex. C. R. 386.

Crown — *Bond — Sureties—Mistake.*]—In a case arising in the Province of Quebec upon a postmaster's bond, it appeared that the principal and sureties each bound themselves in the penal sum of $1,000, and the condition of the obligation was stated to be such that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof the obligation should be void. The bond also contained a provision that it should be a breach of the bond if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum and that the sureties were not therefore bound to anything under the law of the Province of Quebec:—Held, that there was a primary obligation on the part of the principal insomuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody. (2) That as the bond conformed to the provisions of an Act respecting the security to be given by officers of Canada, 31 Vict. c. 37 (D.), 35 Vict. c. 19 (D.), and The Post-office Act, 38 Vict. c. 7 (D.), it was valid even if it did not conform in every particular to the provisions of Art. 1131, C. C. L. C. It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the post-office department:—Held, that it was part of the duties of the postmaster to receive the savings bank deposits and that the sureties were liable to make good all the moneys so coming into his custody and not accounted for. The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond is in force the postmaster was guilty of defalcations, and that such defalcations were not discovered or communicated to the sureties owing to the negligence of the post-office authorities. Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemnifying themselves. The Crown is not bound by the doctrine of Phillips v. Foxall, L. R. 7 Q. B. 666, inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of wrong doing to the principal amounts to fraud, and fraud cannot be imputed to the Crown. The statute 33 Hen. VIII. c. 39, s. 79, respecting suits upon bonds, is not in force in the Province of Quebec. *The Queen* v. *Black*, 6 Ex. C. R. 236.

Damages—*Attempts at Settlement.*]—A company, to whose rights in this behalf the Crown had succeeded, had paid damages to the claimant's predecessor in title for injury resulting to the property in question from the construction of a railway. At the time when such damages were assessed there was no intention to construct an overhead bridge, and they were assessed on the understanding that there was to be a crossing at rail level:—Held, that the defendant was not, by reason of such payment, precluded from recovering compensation for injuries occasioned by the overhead bridge. The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the chief engineer of Government railways and talked over the matter with him. The defendant, who did not appear to have taken any active part in the discussion, and the other persons mentioned, wished to have a crossing at rail level with gates; but the chief engineer declined to authorize such gates, and it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grade increased to one in twelve, as the interference with the access to his property would in that way be lessened. The prayer of the petition was not granted:—Held, that by his presence at such meeting the defendant did not waive his right to compensation. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

Damages to Property—*Claimant's Acquiescence.*]—The suppliant sought to recover damages for the flooding of a portion of his farm, resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water, and all damages past, present, and prospective arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that, although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that with respect to a part of them, he was present when it was being constructed and actively interfered in such construction:—Held, that he was not entitled to compensation. *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Election to Sue in Ontario.] — The plaintiffs having filed their bill in Ontario, must be taken to admit that the court has jurisdiction in respect of the matters therein embraced; and the practice of the court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if the objection were taken. *Exchange Bank* v. *Springer*, *Exchange Bank* v. *Barnes*, 29 Gr. 270.

Election of Remedies — *Inconsistent Remedies.*]—See *Wood* v. *Reesor*, 22 A. R. 57; *Rielle* v. *Reid*, 26 A. R. 54.

Evidence — *Reference in Will Filed.*]—The plaintiff having put in a will in which the testator spoke of H. as his wife, was held not estopped from denying the marriage. *George* v. *Thomas*, 10 U. C. R. 604.

Fictitious Sale — *Public Interest.*]—On an indictment for false pretences, it appeared that defendant held the title of certain land belonging to one A., who lived in the United States. A. exchanged it with H. (the prosecutor) for other land, and gave an order on defendant to convey to H. When H. presented this order, defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and defendant, that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, where the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance $1,150. Defendant instead of returning the money and notes ran away with them:—Held, the public interest being concerned, that the principle of estoppel would not apply, so as to prevent H. from asserting that the payment which he professed to make in good faith was in fact only a pretence. *Regina* v. *Ewing*, 21 U. C. R. 523.

Fraud — *Personal Representative.*]—An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts which such deceased person had given to his creditors during his lifetime. *Merchants' Bank* v. *Monteith*, 10 P. R. 467.

Guarantee—*Forgery—Attempts to Settle.*]—In an action on a guarantee to secure payment for goods furnished by plaintiffs to one W., alleged to have been made by defendant and one G., but afterwards proved to be a forgery, it appeared that the plaintiffs had had no communication whatever with defendant during the currency of the account sued for; but that W. afterwards becoming insolvent, one F. was sent to Kincardine, where W. lived, to represent certain creditors, amongst whom were plaintiffs, and at a meeting at which defendant was present, F. asked W. what claims were guaranteed, and by whom, to which W. answered that plaintiffs' note, with certain others, was indorsed by defendant and G., and although defendant heard this, he said nothing. F., however, did not then appear to have been aware of the guarantee. After this W. absconded, and some time afterwards defendant and G. went to plaintiffs' office and tried to make a settlement, for a less amount, of W.'s liability. This the plaintiffs refused to do, alleging that they were fully secured, and produced the guarantee. G. at once said that he did not believe it to be his signature; but defendant said nothing:—Held, that defendant was not estopped by his conduct from denying his liability. *Turner* v. *Wilson*, 23 C. P. 87.

Heirs Acquiescing in Continuance of Deceased's Business.]—Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his partner, were:—Held, precluded from objecting to payment by the estate of the losses incurred in continuing the business. *Lovell* v. *Gibson*, 19 Gr. 280.

Indemnity — *Right to Object to Judgment.*]—Where there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering: quære, whether, when sued, he can dispute the liability of the covenantee to the damages so recovered. *Spence* v. *Hector*, 24 U. C. R. 277.

Insolvency — *Composition.*] — As to suing an insolvent after his discharge for a debt for which imprisonment is permitted, by having proved it in the ordinary way and taken notes, &c., for the composition. See *McMaster* v. *King*, 3 A. R. 106.

Insolvency—*Discharge.*]—As to insolvent disputing a claim under an award after discharge, by attending the arbitration. See *Pidgeon* v. *Martin*, 25 C. P. 233.

Insolvency — *Disputing Assignee's Status.*]—Plaintiff having proved his claim before the assignee in insolvency, and having obtained an order in the Queen's bench to set aside the insolvent's discharge in the insolvent court, with costs to be paid to him out of the estate, is precluded from objecting that the assignee was not duly appointed. *Allan* v. *Garratt*, 30 U. C. R. 165.

Insolvency—*Proving for Debt not Legally Provable.*]—The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month an attachment in insolvency was issued by the defendant against the plaintiff. The decree dismissed the plaintiff's bill, with costs, in October, 1874. Defendant proved against the estate for the costs of the chancery suit, but did not take his dividend from the assignee in insolvency, and took no further steps for the recovery of his claim until after the order for discharge of the plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff, the Judge in chambers refused to set aside the execution, holding that defendant was entitled to issue it, and that the proving against the estate for the costs of the suit when the claim was not legally provable, did not operate as an estoppel in pais between the plaintiff and defendant. *Stevenson* v. *Scammith*, 8 P. R. 286.

Insolvency — *Receipt of Dividends—Adverse Claim by Insolvent to Land.*]—An insolvent had obtained his discharge, and had acquired, as he contended, a title by length of possession to certain land belonging to the estate as against the assignee. Having bought up the claims of most of his creditors, he took proceedings to compel the assignee to wind up the estate, and the assignee sold the land in question under an order of the court. The insolvent attended the sale, bid upon the land, and gave notice of his title to it. It was sold to the plaintiff, and the insolvent subsequently received the greater portion of the purchase money in dividends upon the claims:—Held, that he must be taken to have procured the action of the assignee, and could not be allowed to repudiate the sale, or to dispute the title which had passed to the purchaser. *Miller* v. *Hamlin*, 2 O. R. 103.

Insolvency — *Receipt of Dividends—Adverse Claim to Assets.*]—F. being about to indorse notes for the accommodation of B., conveyed his real estate to O., who then conveyed to the wife of F. Afterwards F. became an

insolvent under the Insolvent Act of 1875, and the assignee took proceedings to impeach the transaction, the result of which was, that it was declared fraudulent and void as against the assignee, who thereupon advertised the property for sale, and sold it as part of the estate of F. to the defendants. Pending these proceedings the plaintiff had obtained execution on a judgment against F.'s wife, on promissory notes made by her and F., under which the sheriff, after the sale by the assignee, sold all her right, title, and interest in the same property to the plaintiff. The plaintiff proved his claim on the notes and received a dividend in the insolvency proceedings against F.:—Held, (1) reversing 3 O. R. 523, that he was not estopped by the receipt of the dividend nor by the decree obtained in the suit of the assignee (to which he had not been made a party) from asserting that the property belonged to F.'s wife and was exigible under his execution against her; but (2) that the conveyance to her being in fact shewn to be fraudulent and void against the assignee in insolvency, the plaintiff had acquired no title by the sheriff's sale to himself under the execution, and that the title of the defendants who were in possession under the assignee could not be impeached by the plaintiff. Miller v. Hamlin, 2 O. R. 103, as to the effect of the receipt of a dividend, distinguished. *Beemer* v. *Oliver*, 10 A. R. 656.

Justice of the Peace—*Return of Conviction.*]—In an action against a justice of the peace for a penalty for not returning a conviction to the quarter sessions:—Held, that the defendant having actually convicted and imposed a fine, could not except to the declaration, on the ground that it did not shew that he had jurisdiction to convict. *Bagley q. t.* v. *Curtis*, 15 C. P. 366.

Landlord — *Abandoning Distress—Bond to Execution Creditor.*]—The fact of a landlord having joined in a bond that the goods distrained should be forthcoming to be sold upon a fi. fa., will not prejudice his claim for rent, nor will his having distrained as landlord, and afterwards having abandoned the distress, nor even his bidding at the sale of the goods. *Brown* v. *Ruttan*, 7 U. C. R. 97.

Law Society — *Maintenance of Osgoode Hall.*]—Held, affirming 20 C. P. 490, that the Law Society were not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall" for the accommodation of the superior courts of common law and equity; and that no estoppel arose in favour of the society against the Crown in consequence of the several Acts of the legislature that had been passed in relation thereto. *Regina* v. *Law Society*, 21 C. P. 229.

Lease.]—A tenant was held to be estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant. *Re Cockburn*, 27 O. R. 450.

Malicious Prosecution—*Informant Disputing Magistrate's Jurisdiction.*]—In a case for malicious prosecution before a magistrate:—Held, that defendant, by having caused the application to the magistrate as such, was not precluded from objecting that he had no jurisdiction, there being nothing to shew that defendant did not really believe him to have authority. *Hunt* v. *McArthur*, 24 U. C. R. 254.

Mandamus—*Demand.*]—Though the demand proved, on an application for a mandamus, was not in form sufficient, the defendants having resisted the application on other grounds, effect was not given to the objection. *Re Board of Education and Corporation of Perth*, 39 U. C. R. 34.

Married Woman—*Breach of Trust.*]—Quære, whether a married woman consenting to a breach of trust can afterwards complain of it; and, semble, if she make a representation and encourage another to act upon it, she will be compelled to make it good. *Hope* v. *Beard*, 8 Gr. 380.

Misnomer.]—Where a party, by his own conduct and admission, has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer. *Browne* v. *Smith*, 1 P. R. 347.

Nuisance.]—Held, that a person having come to live within the scope of a nuisance after the same had been created, did not prevent his complaining of it as a public nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

In 1861, while defendant was building a tannery on land adjoining the plaintiff's, the plaintiff encouraged defendant to proceed. The business was commenced the same year; in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint until 1868, though all this time the business had been carried on, and the plaintiff had resided on the premises adjoining:—Held, that he had debarred himself from relief in equity, on the ground of the tannery being a nuisance. *Heenan* v. *Dewar*, 17 Gr. 638; 18 Gr. 438.

Partnership — *Creditor's Knowledge.*]—When a person, not in fact a partner, authorizes his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorizing its use, but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor. Judgment below, 21 O. R. 683, reversed in part. *McLean* v. *Clark*, 20 A. R. 660.

Partnership.]—The defendant set up that the plaintiffs had elected to treat other members of his firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner:—Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray* v. *Ibister*, 24 O. R. 497.

See this case in appeal, on another point, 22 A. R. 12, 26 S. C. R. 79.

Patent — *Assignment—Re-assignment.*]—One C. assigned an undivided interest in a patent to B. with whom he entered into partnership. During the partnership B. retained the interest so assigned, and upon a dissolution re-assigned simply what he had received without giving any covenant and without asserting by recital or otherwise the validity of the patent:—Held, that B. was not estopped from disputing the validity of the patent. *Grip Printing and Publishing Co. of Toronto* v. *Butterfield*, 11 A. R. 145.

Patent—*Licensee Disputing Validity.*]—The holder of patents for improvements in certain agricultural implements agreed to assign to defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid for want of novelty, and the defendant having reassigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit:—Held, that owing to the agreement between the parties, and their dealings with each other thereunder, the defendant was estopped from questioning the validity of the patents. *Gillies* v. *Colton*, 22 Gr. 123.

Patent—*Licensor Disputing Validity.*]—During the existence of a license the licensor cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another. *Whiting* v. *Tuttle*, 17 Gr. 454.

Payment into Court.]—To an action of indebitatus assumpsit, defendant pleaded, 1. As to all but £106 1s. 11d., non assumpsit. 2. As to £28 12s. 6d. parcel, &c., payment; as to £77 9s. 5d., residue, &c., payment into court. Plaintiff took issue on the first plea; traversed the payment alleged in the second; and as to the third plea, took out the money paid into court:—Held, that it was open to the plaintiff on the general issue to prove a charge not covered by the other pleas; and that the defendant, having sworn that he had paid in nothing on account of that charge, was precluded from shewing that the other items which the plaintiff was entitled to would not cover the money paid into court. *Taylor* v. *Flood*, 10 U. C. R. 458.

Proceeding at Law and in Insolvency.]—Certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Insolvent Act of 1864. The defendant, subsequently to this deed, issued a writ of execution against the debtors, and then took proceedings in insolvency, under the Act of 1864, against their estate, for the general benefit of creditors:—Held, affirming 16 C. P. 445, that the assignment was an act of bankruptcy and void, and could not be set up, on the issue joined, for any purpose; and that, therefore, the defendant, the execution plaintiff, though petitioner in insolvency, could, notwithstanding his proceedings in insolvency, founded on his judgment at law and the assignment, enforce his execution against the debtor's estate, to the postponement of the rest of the creditors. *Thorne* v. *Torrance*, 18 C. P. 29.

Recognizance—*Disputing Commissioner's Status.*]—Defendants, who had gone before one A., who was bonâ fide supposed to be a commissioner for the county of Lennox, and acknowledged a recognizance, were:—Held, not estopped from disputing the authority of A. as commissioner. *Macfarlane* v. *Allan*, 6 C. P. 496.

Reference.] — As to objecting to reference to a local master in chancery, on the ground of interest. See *Cotter* v. *Cotter*, 21 Gr. 159.

River Improvements—*Joint User.*]—Where a riparian owner of lands on a lower level had been permitted by the plaintiffs, for a number of years, to take water necessary to operate his mill through a flume he had constructed along the river bank, partly upon the plaintiffs' land, connecting with the plaintiffs' mill-race, subject to the contribution of half the expense of keeping their mill-race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs, and their auteurs, had been parties, the plaintiffs could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race and a portion of the flume had been constructed. City of Quebec v. North Shore R. W. Co., 27 S. C. R. 102, and Commune de Berthier v. Denis, 27 S. C. R. 147, referred to. *Lafrance* v. *Lafontaine*, 30 S. C. R. 20.

Solicitor — *Practising without Certificate —Allowing Name to Appear as a Member of Firm.*]—M., a solicitor who had not taken out the certificate entitling him to practise in the Ontario courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice. He was not in fact a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shewn that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm:—Held, reversing 15 A. R. 150, that M. did not "practise as a solicitor" within the meaning of the Act imposing the penalties (R. S. O. 1877 c. 140), and that he was not estopped by permitting his name to appear as a member of a firm of practising solicitors, from shewing that he was not such a member in fact. *Macdougall* v. *Law Society of Upper Canada*, 18 S. C. R. 263.

Statutory Illegality.]—B. acted for the plaintiff, who owned a mare, which was matched to trot a race with another mare for $200 a side; and the match was made and the paper, stating the terms of it, signed by B., and by one C., who had no interest in the other mare. B. deposited $200 of the plaintiff's money with defendant as a stakeholder, for which the plaintiff sued:—Held, that the transaction was illegal, under 13 Geo. II. c. 19, C. not owning the horse to be run by him; and that the plaintiff was not estopped from shewing the other horse and the money to be his, for there could be no estoppel against shewing the illegality created by statute; and that he was entitled to recover. *Battersby* v. *Odell*, 23 U. C. R. 482.

Tax Sale—*Presence of Owner.*]—It was proved that the owner was himself present at the sale in question, and purchased one lot which was ten or eleven ahead of the lot in question, and also another lot three below it on the list: but it was not shewn that he was present when the actual lot in question was sold:—Held, that he was not estopped by conduct from complaining of the sale:—Held, also, that the fact that the owner was informed within three months after the sale of the lot having been sold, when he might have redeemed it, would not deprive him of his right of action. *Claxton* v. *Shibley*, 9 O. R. 451.

Trustees — *Misappropriation — Surety — Knowledge by Cestui que Trust.*]—*Bayne* v. *Eastern Trust Company*, 28 S. C. R. 606.

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2. *Bills of Exchange and Promissory Notes.*

Acceptance — *Disputing Signature of Drawers and Indorsers.*]—Although plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as indorsers, even though it was on the bill at the time of acceptance and payment. *Ryan* v. *Bank of Montreal*, 12 O. R. 39, 14 A. R. 533.

Forged Indorsements — *Negligence.*]—The plaintiff's valuator, one H., filled in the blanks in an application for a loan on statements of one S. who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the name of the payees, indorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgment of the correctness of the account was duly signed:—Held, that the plaintiffs were not estopped from recovering the amount paid on the forged indorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss. *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 A. R. 102, 45 U. C. R. 214.

See Sadcrquist v. *Ontario Bank*, 14 O. R. 586, 15 A. R. 609.

Forgery — *Ratification.*] — Y., who had been in partnership with the defendants, trading under the name of the H. C. Company, but had retired from the firm and become the general manager of the company, but with no power to sign drafts, drew a bill of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be indorsed by the company per J. M. Y. (one of the defendants), and the other defendant having seen it in the bank examined it carefully and remarked that J. M. Y.'s signature was not usually so shaky. J. M. Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day, but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so, and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J. M. Y. was forged, and on the trial the jury found that it was forged, and judgment was given for the defendants:—Held, affirming 15 A. R. 573, which reversed 13 O. R. 529, that though fraud or breach of trust may be ratified forgery cannot, and the bank could not recover on the forged bill against the defendants. Banque Jacques Cartier v. Banque d'Epargne, 13 App. Cas. 118, and Barton v. London and North-Western R. W. Co., 6 Times L. R. 70, followed. *Merchants' Bank of Canada* v. *Lucas*, 18 S. C. R. 704.

Indorsement — *Admissions of Prior Indorsement.*]—Plaintiff declared against L. and A. as indorsers of a promissory note, payable to the order of L., averring that the defendants duly indorsed the said note, and that A. delivered the said note so indorsed to the plaintiff:—Held, on demurrer, that A. must be taken to be the immediate indorsee of L. and could not deny L.'s indorsement. *Griffin* v. *Latimer*, 13 U. C. R. 187.

Indorsement before Indorsement by Payees.]—A., being indebted to the plaintiffs, offered them a note with an indorser. The plaintiffs agreed to accept one, and A. made a note payable to the plaintiffs, procured the defendant to indorse it in blank, and delivered it to the plaintiffs. The plaintiffs discounted the note, having indorsed it under the defendant's indorsement. The note having been dishonoured, the plaintiffs took it up, struck out their indorsement, and again indorsed it above defendant's name, adding to their own name "without recourse," and then sued defendant:—Held, that though the plaintiffs had not indorsed the note when defendant indorsed it, and though their indorsement, making them stand as first indorsers on the note, was not written on it until after action brought, yet that such indorsement was sufficient. Semble, also, that the defendant was estopped from denying that the plaintiffs' name was indorsed when it ought to have been. *Peck* v. *Phippen*, 9 U. C. R. 73.

Indorsement by Agent.] — Defendant held estopped from repudiating indorsements made by his agent. *Merchants Bank* v. *Bostwick*, 28 C. P. 450.

Indorsement — *Maker's Signature.*] — Quere, as to how far an indorser is estopped from denying the maker's signature. *Hanscome* v. *Cotton*, 16 U. C. R. 98.

Indorsement—*Signature and Competence of Drawer.*]—The indorser of a bill is estopped by the fact of his indorsement, from denying either the signature of the drawer or her competence, being a feme covert in this case, to draw the bill. *Ross* v. *Dixie*, 7 U. C. R. 414.

Indorsement without Authority—*Alleged Indorser Obtaining Time.*]—In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded of him, he had asked for time, and had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was, that he kept no memorandum of his indorsements, and supposed it was right:—Held, that the defendant had precluded himself by his conduct from disputing his liability. *Pratt* v. *Drake*, 17 U. C. R. 27.

Maker Admitting Signature.]—Defendant, sued as maker of a note by the indorsee, had before the indorsement admitted his making to the plaintiff, and induced the plaintiff to take it:—Held, that the subscribing witness need not be called, as defendant was estopped. *Perry* v. *Lawless*, 5 U. C. R. 514.

Partnership—*Partner using Firm Name.*]—Defendants and one M. were in partnership in the lumber business. M. took to the plaintiffs a note for $808, filled up in his writing and purporting to be made by the firm, payable to himself and indorsed by him, which the plaintiffs took from him for value. This note was made for his own private purposes in fraud of the partnership. The plaintiffs' manager swore that he relied on M.'s security, and did not inquire about the firm:—Held, that M., as between himself and his co-partners, was not authorized to sign the note in their name; and the plaintiffs having avowedly accepted it on the security of M., not of the firm, about whom they knew nothing and made no inquiries, the defendants were not estopped from setting up M.'s want of authority to bind them. *Canadian Bank of Commerce* v. *Wilson*, 36 U. C. R. 9.

Partnership—*Indorser.*]—See *Ray* v. *Isbister*, 22 A. R. 12, 26 S. C. R. 79.

Payment—*Sale of Collateral Security.*]—The plaintiffs held estopped from denying payment of certain notes sued on, when they had taken a mortgage as security for their payment, and under a power of sale therein had sold to third parties for the amount of the notes. *Bank of British North America* v. *Jones*, 8 U. C. R. 86.

Unstamped Note — *Acceptance in Payment.*]—The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal:—Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Baillie* v. *Dickson*, 7 A. R. 759.

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3. *Companies.*

Acting as Shareholder.]—The plaintiff in this case sought to have his name removed from the list of shareholders:—Held, that though as against the company the plaintiff, had he come before the court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed with costs. *Petrie* v. *Guelph Lumber Co.*, 2 O. R. 218, 11 A. R. 336, 11 S. C. R. 450.

Amotion of Corporator — *Defence of Illegal Meeting.*]—The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid. *Marsh* v. *Huron College*, 27 Gr. 605.

Bond—*Incorporation.*]—Semble, that defendants having joined in a bond to the plaintiffs as a corporation, would be estopped from denying the plaintiffs' incorporation. *Queen Ins. Co.* v. *Boyd*, 7 P. R. 379.

Calls—*Transfer.*]—To an action brought for two calls on stock, one made on the 9th December, 1858, and the other on the 17th June, 1859, defendant paid into court the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for, by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer, the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced in which the stock appeared in M.'s name since the 5th February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney:—Held, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer as agent for both parties, and recognized in their books; that it was unnecessary to produce the bond given by defendant; and that defendant was not estopped by having paid the call made in December, 1858, from asserting that he had transferred the stock before the other call was made. *Provincial Insurance Co. of Canada* v. *Shaw*, 19 U. C. R. 533.

Contributory — *Petition for Incorporation.*]—Where in winding-up proceedings it appeared that an alleged contributory joined in the petition for incorporation, where it was untruly stated that he had taken 250 shares of the capital stock, whereas the shares he held, had, after incorporation, been voted to him by a resolution of the directors as paid-up stock, for services in connection with the formation of the company:—Held, that in view of the provisions of the Ontario Joint Stock Companies' Letters Patent Act, he was liable to be held a contributory in respect of, at the least, the number of shares voted to him. Semble, he was liable for the full number of shares mentioned in the petition. *Re Collingwood Dry Dock Ship Building Co., Weddell's Case*, 20 O. R. 107.

Debentures Issued in Blank.]—Under the authority of the Act, 38 Vict. c. 47, the defendant company issued debentures in blank, which were handed to the managing director, who subsequently handed them to the plaintiffs as security for a debt of the railway. In an action for an account of what was due under the debentures and payment, or in default a sale, it was:—Held, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and that the company were estopped from relying on the fact that the name was not filled in until delivery to the plaintiffs. *Bank of Toronto* v. *Cobourg, Peterborough, and Marmora R. W. Co.*, 7 O. R. 1.

Director Indirectly Invalidating Bonds.]—Semble, upon the facts stated in the report of this case, that the plaintiff, one of the directors, should be estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Kiely* v. *Smyth*, 27 Gr. 220.

Incorporated Company—*Forfeiture of Charter.*]—In an action for repayment of tolls alleged to have been unlawfully collected by a river improvement company, it appeared that the plaintiff had treated the company as a corporation, used its works and paid tolls fixed by the commissioner, and the company had also been sued as a corporation:—Held, that the plaintiff was precluded from impugning the legal existence of the company by claiming that its corporate powers were forfeited. *Hardy Lumber Company* v. *Pickerel River Improvement Company*, 29 S. C. R. 211.

Invalid Calls—*Tender of Part.*]—A gas company incorporated under 16 Vict. c. 173, by resolution of the directors made certain calls, to be paid on particular days named, but by the notice published they were made payable on different days. Defendant had written to the company, enclosing his note for four of the calls, saying that for the balance he would send his note soon, and requesting them to accept this offer, as he had been absent in Europe, and had no knowledge of any of the calls. The company, however, declined:—Held, that the calls were illegal, being unauthorized by the resolution, and that defendant was not estopped from disputing them. *London Gas Company* v. *Campbell*, 14 U. C. R. 143.

Misappropriation by Superintendent—*Denial of Status.*]—Defendant being employed by plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts claiming in their particulars for goods furnished, but not for work and labour:—Held, that defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs under their charter could not sue on such a cause of action. *Northern R. W. Co.* v. *Lister*, 27 U. C. R. 57.

Share Certificates.]—A company incorporated under the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. 1887 c. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment indorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate:—Held, that the transfer to the plaintiff, in view of the provisions of s. 52 of the Joint Stock Companies' Letters Patent Act, R. S. O. 1887 c. 157, conferred upon him a mere equitable title which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares. *Smith* v. *Walkerville Malleable Iron Company*, 23 A. R. 95.

Shareholder.]—Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. A mortgagee of the shares and not an absolute owner, who takes a transfer absolute in form and causes it to be entered in the books of the company as an absolute transfer, is not estopped from proving that the transfer was by way of mortgage. *Page* v. *Austin*, 10 S. C. R. 132.

See COMPANY, VIII. 2, X. 3.

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4. Municipal Matters.

Acquiescence of Corporation.]—A corporation may be bound by acquiescence as an individual may. *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503.

Arbitration—*By-law not under Seal.*]—Debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made:—Held, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson* v. *Town of Port Hope*, 10 U. C. R. 405.

Assessment—*Error in Capitalization.*]—Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by defendants of the proportion to be raised by them. Plea, that in capitalizing the real property not actually rented, but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per

cent., as directed by law, and apportioned thereon among the several municipalities, whereby $1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up:—Held, on demurrer, a good defence, for such capitalization was contrary to the statute, and though it lessened the defendants' assessment they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the Act. *County of Lincoln* v. *Town of Niagara*, 25 U. C. R. 578.

By-law Incorporating Village—*Application by Voter to Quash.*]—The persons applying to quash a by-law incorporating a portion of a township as a village had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to:—Held, that the applicants were not estopped from moving to quash the by-law. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

Contest as to Site — *Restraining Payment.*]—On a motion for injunction by W., a ratepayer, against a town corporation to restrain them from paying for a site for a post-office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and for the purposes of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties; and the injunction was granted. *Wallace* v. *Town of Orangeville*, 5 O. R. 37.

Debenture—*Invalid By-law.*]—A debenture issued by a municipal council under their corporate seal, and signed by the head of such corporation, for payment of a debt due or loan contracted under a by-law which does not provide by special rate for the payment of such debt or loan, does not estop such municipal council from setting up as a defence to an action on the debenture the invalidity and nullity of such by-law. *Mellish* v. *Town of Brantford*, 2 C. P. 35.

Debentures — *Ultra Vires Agreement.*]—Defendants having received the plaintiffs' debentures for a bonus granted to them on the faith of an agreement, were held estopped from objecting that such agreement was ultra vires. *County of Haldimand* v. *Hamilton and North-Western R. W. Co.*, 27 C. P. 228.

Drainage—*Action by Person doing Work under By-law.*]—A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law, when such ratepayer has himself been a contractor for a portion of the work, and has received his share of the money voted for the work in excess of the amount expended. *Dillon* v. *Township of Raleigh*, 14 S. C. R. 739, 13 A. R. 53.

Drainage.]—Owner of land affected acting so as to lead municipality to believe jurisdiction was not disputed. *Gibson* v. *Township of North Easthope*, 21 A. R. 504, 24 S. C. R. 707.

Quashing By-law—*Applicant Expressing Opinion in its Favour.*]—The applicant in this case was held not precluded from moving against a by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck and Town of Galt*, 46 U. C. R. 211.

Quashing By-law — *Applicant Voting against it.*]—Held, that the applicant had not by voting against the by-law disentitled himself to apply to the court to quash it, or to the costs of his motion. *Re Armstrong and Township of Toronto*, 17 O. R. 706.

Registrar—*Receipt of Fees.*]—Held, in a suit against a registrar by a municipal corporation for the proportion of fees to which the corporation was entitled under R. S. O. 1877 c. 111, that having received the money in question under the above Act he could not deny that he received it for the purposes therein provided. *County of Hastings* v. *Ponton*, 5 A. R. 543.

Relator a Candidate in Irregular Election.]—Acquiescence of a candidate in an irregular election—how far it disqualifies him from afterwards becoming a relator. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Ch. 203.

Relator Voting for Person Attacked.]—The court will not set aside an election on the relation of a party who concurred in the election, and voted for the person whose election he afterwards attempts to set aside. *Regina ex rel. Rosebush* v. *Parker*, 2 C. P. 15.

A party cannot complain of the election of a candidate whom he has himself voted for, unless he can shew that he was at the time of voting ignorant of the objections which he desires to urge. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

Relator Waiving Objection Conditionally.]—A. had his dwelling house at Bowmanville, where his wife and family resided, but he had a saw mill and store, and was post-master, in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. After voting at Bowmanville he went down to Cartwright, and voted there also at the election for township councillor, which was being held at the same time. It appeared that the relator, one of the candidates for Cartwright, objected to A.'s vote there, but said that it should be accepted if he would swear that he was a resident; and that A. took such oath, and his vote was thereupon recorded:—Held, that the relator's conduct could not estop him from afterwards objecting to the vote. *Regina ex rel. Taylor* v. *Cæsar*, 11 U. C. R. 461.

School Tax—*Note to Trustees.*]—Replevin for horses. Plea, justifying the taking under a warrant for school taxes. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff, after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes:—Held, on demurrer, replication bad; for, the debt being due to the public, even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 U. C. R. 161.

School Trustees—*Agreement to Hold New Election.*]—Where certain persons were elected school trustees, and at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the board they acquiesced in the conclusion of the board to hold a new election, and became candidates again, and canvassed as such, until the twenty days allowed for disputing the first election had elapsed (the proceedings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election:—Held, they could not afterwards maintain a suit to have it declared they were the duly elected trustees. *Foster* v. *Stokes*, 2 O. R. 590.

School Trustee—*Attack on Co-trustee.*]—A trustee of a public school board is not precluded from becoming a relator in a quo warranto proceeding against another member of the board because he acquiesced in the payment of an account rendered for services which disqualified the member rendering the same from holding the office of trustee. *Regina ex rel. Stewart* v. *Standish*, 6 O. R. 408.

Successive Councils.]—As to how far the municipal council of one year can be estopped by the acts in pais of the council of a preceding year: see *Village of Ingersoll* v. *Chadwick*, 19 U. C. R. 286; *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 583.

Treasurer—*Accounts Adopted.*]—In an action by a municipal corporation against their treasurer on his bond, alleging non-payment of moneys received, it appeared that in an account rendered to the council by defendant a sum of money which was in question was charged as paid to one E., and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew this to be the case, but semble, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited. *Village of Ingersoll* v. *Chadwick*, 19 U. C. R. 278.

See MUNICIPAL CORPORATIONS.

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5. *Receipts.*

Bank—*Acknowledgment of Correctness of Balance.*]—The acknowledgment of the plaintiffs of the correctness of the account in their bank book at the end of the month, although a number of cheques drawn by them had been paid by the defendants on forged indorsements of the payees thereof, was held to be at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties. *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 A. R. 192; *S. C., sub nom. Agricultural Investment Co.* v. *Federal Bank*, 45 U. C. R. 214.

Bills of Lading—*Condition of Goods.*]—Semble, that the Bills of Lading Act, 33 Vict. c. 19 (O.), creates no estoppel as to the condition in which goods are when shipped. *Chapman* v. *Zealand*, 24 C. P. 421.

Carriers—*Mistake.*]—Defendants gave receipts to one B. for 7500 barrels of flour as in store for them at Brantford, subject to his order. B. drew on the plaintiffs at Montreal, through the Bank of Montreal at Brantford, to whom he handed these receipts, and the bank agent there forwarded the bills, with a certificate that he held such receipts, to the head office in Montreal, where the plaintiffs accepted and paid them. Plaintiffs having received from defendants only 7308 barrels, sued them as for false and fraudulent representations to B. that they had received in store for him 7500 barrels, which representations they alleged defendants knew by the course of trade would be relied upon by persons dealing with B., and on the faith of which the plaintiffs made advances to the full value of that quantity. The jury were directed that as between themslves and the plaintiffs, defendants were bound by their receipts, and liable in this action, though the error arose from mistake only:—Held, a misdirection: that their attention should have been drawn to the nature of the defendants' business, and the object of these receipts, and they should have been asked to say whether the error in this case arose from mistake or a design to deceive, or from such negligence as might lead to the conclusion of fraud. *McLean* v. *Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 448. See, also, *S. C.*, 24 U. C. R. 270, where a verdict for the plaintiffs was upheld.

Carriers—*Statement of Weight.*]—Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get them from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it, that "rates and weight entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship, or afterwards:—Held, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiffs. *Horseman* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 130, 31 U. C. R. 535.

Discharge of Mortgage.]—A certificate of discharge of a mortgage, not being under seal,—Held, no estoppel against the recovery of the debt if not in truth paid. *Bigelow* v. *Stalcy*, 14 C. P. 276.

Insurance—*Receipt in Policy.*]—Held, that defendants were not under the circumstances of this case bound by their admission on the policy of the receipt of the premium. *Western Assce. Co.* v. *Provincial Ins. Co.*, 5 A. R. 190.

Mortgage—*Part Payment — Re-advance.*]—Two years after a mortgage had been in part paid off, the mortgagor applied to the mortgagee to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so re-borrowed should be considered as of the original charge created by the mortgage. Some but not all of the receipts were returned to the mortgagee, and the money re-advanced by him upon the terms proposed by the mortgagor. Under this state of facts, the master in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage. On an appeal from the master's report:—Held, that the principle upon which he had taken the account was correct; and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. *Inglis* v. *Gilchrist*, 10 Gr. 301.

Railway Company — *Fraudulent Receipt.*]—Receipts issued by station agent for goods not received—Liability of company. See *Erb* v. *Great Western R. W. Co.*, 3 A. R. 446, 42 U. C. R. 90; *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 143.

Sale of Wheat—*Receipt by Defendant's Agent for Plaintiff.*]—The plaintiff agreed verbally with defendant to sell and deliver wheat to him, and on delivery he received a receipt, signed by defendant's miller, as follows:—"Received in store from —— for ——, 51 bushels fall wheat, at—, S. D.," &c.:—Held, that the words of the receipt expressing the wheat to have been received "in store," did not preclude the plaintiff from proving an absolute sale on the terms above set forth. *McBride* v. *Silverthorne*, 11 U. C. R. 545.

Warehouse Receipt.]—Defendants gave a receipt to C. H. & Co., stating that they had received and held on their (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff relying upon this receipt, and the representations made by C. H. & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiff. In fact, however, the defendants at the date of the receipt had only received some 270 bushels on account of C. H. & Co.:—Held, that defendants having given their receipt for 500 bushels of wheat, were estopped from setting up that they had not at the date thereof the quantity of wheat mentioned therein in store for C. H. & Co. *Holton* v. *Sanson*, 11 C. P. 606.

See, also, BAILMENT—CARRIERS.

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6. *Sheriff.*

Ca. Sa. after Return of Nulla Bona.]—To an action against a sheriff for a false return of nulla bona to a writ of fi. fa., the bare fact that the plaintiff after such return sued out a ca. sa. will be no defence, unless it be further averred in the plea that the plaintiff accepted the return of nulla bona with a knowledge at the time that it was false. *Bays* v. *Ruttan*, 6 U. C. R. 263.

Certificate.]—At the suit of one H. under a fi. fa. dated 28th April, 1859, the defendant (sheriff) seized the lands of W., deceased, and made his return "lands on hand to the value of £10." A ven. ex. was sued out, under which defendant sold and realized a portion of the amount: and under the same writ other lands were offered for sale, but there being no bidders, the sheriff, on the 1st May, 1860, indorsed a return on the writ, that he had made £238, lands on hand for want of buyers to value of £5, and "no lands" for residue, which writ, with the return thereon, was retained by the sheriff till 1st July, 1862. On the 28th January, 1862, a fi. fa. lands was sued out by the present plaintiffs, and indorsed for £221, &c., and on the same day the defendant gave his certificate that he had no execution or extent in his hands against the lands of said W. (deceased). On the 2nd February, 1862, a ven. ex. and fi. fa. residue was sued out and delivered to the defendant at the suit of H. above mentioned for £346, &c. Under this writ, defendant advertised, and the attorney of plaintiffs notified defendant that the plaintiffs claimed priority over H.'s execution. Defendant, notwithstanding such notice, duly sold under and applied the proceeds of sale upon H.'s execution. The plaintiffs' execution expired on 20th January, 1863, and was returned "no lands." B., the attorney for the plaintiffs, was the assignee of plaintiffs' judgment, and beneficially interested therein. In an action against the defendant, the sheriff, for a false return:—Held, that the defendant was not estopped by his certificate of 28th January, 1862, from setting up H.'s writ as an answer to this action. *Mein* v. *Hall*, 13 C. P. 581.

Escape—*Assignment of Bond.*]—The sheriff cannot admit a debtor to the limits except by statute. Where he does so on a bond not in accordance with the Act he is liable as for a voluntary escape, and a creditor by having required and taken an assignment of such a bond, is not estopped from looking to the sheriff. *Kingan* v. *Hall*, 23 U. C. R. 503.

Fi. Fa. Lands after Return.]—Case for false return of nulla bona to a fi. fa. Plea, that the plaintiff accepted such return knowing it to be untrue, and issued a fi. fa. lands upon it:—Held, no defence. *Markle* v. *Thomas*, 13 U. C. R. 363.

Invalid Sale.] — A sheriff having sold shares in a steamship company under execution, and received the money, can not return nulla bona on the ground that they were not properly saleable under the writ. *Hewitt* v. *Corbett*, 15 U. C. R. 39.

Official Capacity.]—There can be no estoppel on a sheriff, when sued as an individual, by reason of a deed executed by him exclusively as a public officer. *Kissock* v. *Jarvis*, 9 C. P. 156.

Prior Writ.]—In an action against the sheriff for a false return, it appeared that on the day before the plaintiffs' writ came in, he received a fi. fa. at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiffs' writ he did nothing. The plaintiffs' attorney wrote twice, urging him to act, and ruled him, and in February, 1866, he returned that writ nulla bona, K.'s writ having been previously renewed. The court being

left to draw inferences of fact:—Held, that as a matter of fact the sheriff never seized, or that as a matter of law, he abandoned the seizure; and that, though his acts might not affect K. in an action between K. and the plaintiffs, yet they prevented him from setting up the first writ as a justification for his return to the second. The plaintiffs were, therefore, held entitled to recover. *Foster* v. *Glass*, 26 U. C. R. 277.

Ven. Ex. after Return of Nulla Bona.]—To an action against a sheriff for falsely returning to a fi. fa. goods in hand to the value of 5s. and nulla bona as to the residue, when enough had in fact been seized to satisfy the writ, the defendant pleaded by way of estoppel, that the plaintiff requested him to return nulla bona and accepted and acted on that return, and took out a ven. ex., with a full knowledge of the facts:—Held, on demurrer, plea good. *Miller* v. *Thomas*, 11 U. C. R. 302.

See EXECUTION, SHERIFF.

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7. *Title to Property.*

(a) *Goods.*

Assessment—*Appeal — Seizure.*] — The plaintiff being in possession of a stock of goods, was assessed therefor in his own name, against which he appealed to the court of revision, and to the county court Judge, when an indenture of assignment of the goods upon trusts for creditors was produced, and the plaintiff's name was erased and that of the assignee substituted therefor. The plaintiff alleged, however, that his name was not struck out on his application, for that his ground of appeal was that the goods were not equal to the debts due upon them, and so were exempt. Defendants having distrained upon the goods, the plaintiff replevied, and defendants avowed as for taxes due to them by the plaintiff, whose name did not appear on the collector's roll. It was contended that the plaintiff having denied his title, and his name being erased from the roll, he was debarred from replevying the goods distrained; but—Held, that he was not estopped. *Sargant* v. *City of Toronto*, 12 C. P. 185.

Bailee.]—A bailee of goods held not estopped from disputing the bailor's title. *White* v. *Brown*, 12 U. C. R. 477.

Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but, notwithstanding, they contracted with the plaintiff to carry and deliver them as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the non-delivery:—Held, that defendants could not set up M.'s title to the goods as against the plaintiff, for a bailee setting up the right of a third person against his bailor, must be bonâ fide defending on the right and title of such third person. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

Chattel Mortgage and Confession of Judgment.]—R. being indebted to L. gave him a chattel mortgage and confession of judgment, and after the mortgage became due made an assignment for the benefit of creditors to W. and S., who took possession of the goods. L. then put a writ of fi. fa. in the sheriff's hands, directing him to levy and make the amount of his debt out of the goods of R.:—Held, that the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mortgaged to him as the goods of R., did not estop him from setting up his title under the chattel mortgage. *Wakefield* v. *Lynn*, 5 C. P. 410.

Chattel Mortgage—*Consent to Sale.*]—Sale by mortgagor without written consent—Mortgagee held estopped by verbal consent and conduct. See *Loucks* v. *McStay*, 29 C. P. 54.

Distress—*Bill of Sale.*]—A landlord, when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale. *Gibbs* v. *Crawford*, 8 U. C. R. 155.

Division Court Clerk—*Money Paid to him for Specific Purpose.*] — Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the division court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use. Quære, whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 U. C. R. 348.

Execution — *Abandoning Seizure.*]—The execution of defendant in an interpleader issue (the execution plaintiff) being in the sheriff's hands, the father of the execution debtor claimed the goods, whereupon the sheriff by direction of defendant's attorney withdrew. The plaintiff (the claimant in the issue) subsequently placed an execution in the sheriff's hands against both father and son, when the former gave him a mortgage on the goods, which the son had assigned to him, and the plaintiff thereupon withdrew his writ, and several months afterwards the sheriff again seized under defendant's writ. There was no evidence that defendant knowingly either did or said anything to induce plaintiff to alter his position. The jury were told that if defendant abandoned the seizure, and in consequence the plaintiff withdrew his writ and took the mortgage, defendant was estopped from disputing the validity of the mortgage:—Held, a misdirection, and that there was no estoppel. *Morse* v. *Thompson*, 19 C. P. 94.

Execution—*Claimant Purchasing at Sale.*]—Where the sheriff under a fi. fa. seized and sold certain goods claimed by plaintiffs:—Held, that the fact of one of the plaintiffs having attended and bid at the sale, did not estop them from complaining of the seizure of the goods as their own. *Lines* v. *Grange*, 12 U. C. R. 209.

The owner of goods may, to prevent them being sacrificed, buy them in at the sheriff's sale, which does not debar him from setting up his title against the sheriff for selling. *Haight* v. *Munro*, 9 C. P. 462.

Execution — *Withdrawing Claim.*] — In trespass against the sheriff for taking goods, the plaintiff called the bailiff who made the

seizure and sale. He swore that the plaintiff, after giving notice of his claim to the goods, withdrew it, and that the sale then went on. The plaintiff offered to disprove the withdrawal:—Semble, that if the plaintiff in fact withdrew his claim, and thus induced defendant to proceed with the sale, which was for the jury to decide, he would be estopped from recovering. *Robinson* v. *Reynolds*, 23 U. C. R. 590.

Fixtures — *Execution.*] — In trespass against the sheriff for seizing an engine and boiler under a fi. fa., it was held that the plaintiffs, having purchased them as chattels by verbal sale, were estopped from asserting that the execution did not attach because they were part of the realty. *Walton* v. *Jarvis*, 13 U. C. R. 616, 14 U. C. R. 640.

Fraudulent Representation of Title.] —Defendant went to England, leaving A., an agent, on his farm, who purchased corn from the plaintiff to feed defendant's cattle. Executions were issued against defendant, and A., to protect the cattle, assigned them to the plaintiff as if to pay the sum due to him for corn, but gave at the same time an undertaking that he would pay pasturage for them at the usual rates; and when the bailiff came to seize, the plaintiff claimed the cattle as his own:—Held, that he could not afterwards sue defendant for the pasturage for having concurred in the fraud by holding out the cattle as his own, he was estopped. *Bell* v. *Peel*, 15 U. C. R. 594.

In an action against the sheriff for goods seized and sold, the jury having twice found in plaintiff's favour:—Held, that although it seemed clear on the evidence that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as R. & Co., the execution plaintiffs and the real defendants in this action, had concurred in holding him out in false character, the court should not interfere. *Cinq-Mars* v. *Moodie*, 15 U. C. R. 601. The court on appeal intimated that they fully concurred in the view which the court below had taken. *S. C., ib.* 610, note (*a*).

Hire Receipt—*Possession.*] — The plaintiffs sold to one R. an organ on credit, and received from him a conditional hire receipt, which acknowledged the receipt of an organ on hire. It contained a stipulation that the signer might purchase the organ for $130, payable in two equal annual instalments on the 1st February, 1875, and the 1st February, 1876, with interest; and it provided that it should remain the plaintiffs' property on hire until fully paid for, and that they might resume possession on default, although a part of the purchase money might have been paid, or a note or notes given on account thereof. This receipt, and a note dated the 17th February, 1874, payable four months after date, were signed by R. Some days afterwards it was discovered the receipt bore no date, whereupon the plaintiffs' bookkeeper filled in the 25th February, 1874, the day on which the receipt and note were received by the plaintiffs. The plaintiffs discounted the note with their bankers, and at maturity obtained a renewal and returned it to R. The first instalment was paid, and renewals in whole or in part were given until September, 1875. In May, 1876, R. transferred the organ to G. & B. as security for a debt. He represented that he had paid the purchase money, and produced as evidence the note of February 17th, 1874, which had been returned to him on its renewal, and they acted upon this misstatement. The note bore marks of having been discounted, but there was nothing to connect it with the organ. While the organ was in the possession of J. W. B., it was seized by the plaintiffs' agent and removed to the express office, from which it was taken by G. B., the other defendant, under J. W. B.'s direction, and carried back to the house in which they both lived. Subsequently J. W. B. sold the instrument to G. B.:—Held, that the plaintiffs were not estopped, for there was no representation by the plaintiffs, and no neglect of any duty owing to the defendants. Held, also, that there was ample evidence of a joint conversion. Held, also, that the discounting of the note was not a waiver of the plaintiffs' right of property. Semble, that the insertion of the date in the receipt was an immaterial alteration. *Mason* v. *Bickle*, 2 A. R. 291.

Insurance — *Building — Chattel.*] — The plaintiff insured with defendants a barn as appurtenant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold, but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him:—Held, affirming 30 U. C. R. 472, that he was precluded from setting up such a claim, and that he could not be heard to say the barn was a chattel. *Sherbooneau* v. *Beaver Mutual Fire Insurance Co.*, 33 U. C. R. 1.

Mortgage—*Acquiescence.*] — A mortgagee having commenced proceedings under a mortgage, one H. C. S. professed to have a claim to some of the property as an alleged partner of the mortgagor. It appeared, however, that H. C. S. was present when the mortgage was given, and knew all about the transaction: that the money which the mortgage was given to secure was partly for the purposes of a printing office, in which he claimed to be interested as such partner; and that he had, at the time of the transaction, made no objection and asserted no claim:—Held, that, under these circumstances, he was estopped from setting up any right or title as against the mortgagees, whose title was the same as if he had joined in the mortgage. *Robinson* v. *Cook*, 6 O. R. 590.

Mortgage from Execution Debtor — *Claimant Purchasing at Sale.*]—One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to pay the interest and produce thereof to his widow during her life, for herself and his children. The widow after W.'s death remained on his farm, and in possession of the stock and personal property, some of which she sold, and the stock had been added to by breeding. An execution came into the sheriff's hands against her, and while it was there the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale; but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure:—Held, that they were not estopped by having purchased at the sale, but that having taken the mortgage from the

widow while the writ was in the sheriff's hands, they could not allege that the goods were not then hers; and therefore that they could not recover. Held, also, that the increase of the stock must be subject to the same rule as the stock. *Peers* v. *Carrall*, 19 U. C. R. 229.

Mortgage of Goods — *Claim by Mortgagor.*]—Action against the sheriff for seizing and selling goods. Pleas, not guilty, and not possessed. It appeared that the plaintiff had mortgaged the property to one M., and executions came into the sheriff's hands both against the plaintiff, who was in possession of the goods, and the mortgagee. The plaintiff told the sheriff that the goods were not his, but were under mortgage to M., and the sheriff seized and sold under the execution against M.:—Held, that the plaintiff was clearly not estopped from recovering, by having told the sheriff that the goods were not his,—that is, not his absolute property—but mortgaged to M., for he told only the truth, and the sheriff knew what M.'s interest really was. *Henderson* v. *Fortune*, 18 U. C. R. 520.

Mortgage of Goods by Wife—*Knowledge of Husband.*]—The plaintiff went to British Columbia nine years before this action, leaving his wife here to whom he wrote and occasionally sent money. She procured the defendant to indorse a note made by her for the price of furniture to carry on a boarding house, (which she subsequently carried on with the plaintiff's knowledge), and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money over due, the landlord distrained, and the defendant enforced his mortgage, and the plaintiff's wife not dissenting but rather assenting, the goods were sold and the balance, after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover:—Held, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage, which formed part of the whole arrangement:—Semble, that the wife standing by and permitting the sale of the property under the mortgage, was some evidence under the plea of leave and license. *Halpenny* v. *Pennock*, 33 U. C. R. 229.

Purchaser at Sheriff's Sale Claiming Goods as His Own.]—Assumpsit for goods bargained and sold by the plaintiff, as sheriff, to the defendant:—Held, that the defendant could not set up as a defence that the goods purchased by him as belonging to the execution debtor, were in fact his own. *Ruttan* v. *Weller*, 14 U. C. R. 44.

Rent—*Sheriff Acting on Landlord's Statement.*]—The sheriff having seized goods under a fi. fa., received a written notice from the plaintiff that there was then due to him "one-half year's rent" for the premises, not stating when the rent fell due, nor for what period it was claimed. The plaintiff afterwards went to the sheriff, and being asked when his rent fell due, said that he thought it would be on the following Monday or Tuesday. The sheriff thereupon ordered the goods to be removed and sold:—Held, that the plaintiff was bound by his own declaration, and could recover no damages from the sheriff, although it appeared that the rent was in fact payable quarterly, and that one quarter was due at the time of seizure. *Tomlinson* v. *Jarvis*, 11 U. C. R. 60.

Sale of Ship—*Oral Agreement Inconsistent with Written.*]—Assumpsit, on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial, the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it:—Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 U. C. R. 345.

Tax Sale—*Tenant's Acquiescence.*] — Two mill stones were seized and sold for taxes, the tenant of the mill, who was assessed as occupant, being present at the sale and making no objection. In replevin by the owner of the mill against the purchaser:—Held, that the tenant's acquiescence was immaterial; for his possession, when proved to be merely as occupant, was no proof of property, and the plaintiff therefore was not prevented from disputing the sale, which was clearly illegal, the stones being part of the mill. *Grimshawe* v. *Burnham*, 25 U. C. R. 147.

Trade Fixtures—*Acceptance of Lease.*]—Declaration, that defendants being in possession of certain premises (described), as tenants of the plaintiff, wrongfully pulled down and carried away certain fixtures. Plea, that the premises were occupied by defendants as scale makers, having long before been let to defendants and others for carrying on their trade; that defendants and others, for such purpose, during their tenancies, put up the fixtures (describing the fixtures put up by each), and the others, during their tenancies, sold and conveyed their part of the fixtures to defendants, who took possession thereof and used them on said premises in their trade; and being so possessed, they, during their tenancy, pulled down and carried away said fixtures, doing no unnecessary damage. The third replication set up, by way of estoppel, a surrender in law by defendants of the premises to one C., the then owner in fee, and an acceptance of a new lease from C., and that C. afterwards conveyed in fee to the plaintiff, who then saw the new lease, and was informed and believed that the said fixtures formed part of the freehold; and that defendants afterwards became plaintiff's tenants. Equitable rejoinder, that before the conveyance by C. to the plaintiff, the plaintiff knew that defendants were in actual occupation, claiming and using all said fixtures as their own, and was told by C. that he did not own or claim then, and only sold to the plaintiff the premises without them; and that the plaintiff by reasonable care could have obtained full information from defendants, but negligently omitted to do so:—Held, that the replication was good, and the rejoinder bad. *Pronguey* v. *Gurney*, 36 U. C. R. 53.

Trover—*Next Friend.*]—In trover, where the plaintiff sued by his mother as his next friend, the court held that the latter, by allowing herself to be made guardian for bringing this suit, did not waive any right she might have had to the goods sued for, and that the consent of the mother to become prochein ami was no legal estoppel on her. *Barker* v. *Tabor*, 5 O. S. 570.

Vendor Alleging Invalidity of Sale.]—In an action for seizing goods under division court attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer:—Held, that this plaintiff could not afterwards set up that the sale was void because fraudulent as against the plaintiffs' creditors, and maintain trespass for seizing the goods as if they were his own. *McPhatter* v. *Leslie*, 23 U. C. R. 573.

Warehouseman's Certificate.]—A. by artifice obtained an order from B., directed to his agent, to deliver wheat to A., which order A. presented, not to the agent, but to the defendant, a wharfinger in whose warehouse B. had wheat. The defendant thereupon gave him his certificate or bon for the wheat deliverable on demand, and A., after notice by defendant that he would not deliver, transferred his right to the wheat, but not the certificate, to the plaintiffs:—Held, that defendant was not estopped by his certificate from denying plaintiffs' title. *Davis* v. *Brown*, 9 U. C. R. 193.

(b) *Land.*

Acquiescence in Defective Deed.]—Divers lands having been devised to three sisters, P., A., and L., they in 1840 agreed to a partition, by which, amongst other things, P. was to have a certain lot 45, with the privilege of overflowing 46, and A. was to have 46, subject to that privilege. Conveyances were signed carrying out the partition, but the matter being transacted without professional advice, A. and L., who were married women, did not execute so as to pass any estate. All entered into possession of their several lands, and in 1841 P. executed to her son a voluntary conveyance of 45, with the privilege, and A. and her husband conveyed 46 to their son. The error in regard to the execution of the partition deed having been afterwards discovered, P., with A. and her husband and L.'s heir, (L. being dead,) in 1849 joined in a conveyance of all the lands to a trustee in order to carry into effect the previous partition; but by an oversight this new deed omitted to mention P.'s right of overflowing 46. A.'s son and P.'s son were active in getting this new deed executed, but were not parties to it. Immediately after its execution, A. and her husband executed to their son a new deed of 46; no new deed was executed to P.'s son. He thereafter, with the knowledge and acquiescence of A.'s son, built a mill in 1845, and placed his dam where it necessarily caused the overflowing of 46; he afterwards mortgaged 45, with his supposed privilege of overflowing 46; and the mortgaged property was sold at the mortgagee's suit, the two cousins alleging for the first time that the mortgagor had no right in respect of 46; the right was considered doubtful at the time, but the purchaser completed his purchase:—Held, in a subsequent suit by the purchaser against the mortgagor and his cousin, who owned 46, that the plaintiff had a right to overflow 46. *Boyle* v. *Arnold*, 16 Gr. 591.

Acquiescence in Agreement to Sell.]—Where the owner of an estate stands by and allows a third person to appear as the owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract. *Davis* v. *Snyder*, 1 Gr. 134.

Where the owner of an estate was present and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, who made improvements, and being afterwards ejected by the owner of the property filed a bill for payment of the value of those improvements, the court allowed a demurrer for want of equity. *Ib.*

Acquiescence in Grant by Another.]—A railway company took a deed from the plaintiff's father, by which, in consideration of the benefits which would result to him from the construction of the road, and of £27 10s., he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title to the land, but had merely been allowed by his father to occupy it; that he had admitted in presence of his father, that it was with his father, and not with him, that the company must settle; and that he had worked under the defendant, a contractor with the company, in making the fence along the line through this land. After the deed, the plaintiff and his father forbade the defendant from entering. Afterwards the defendant entered for the purpose of making the railway, and the fences along the line being insufficient, the plaintiff's wheat was injured by cattle getting in. For these injuries he sued in this action of trespass quære clausum fregit:—Held, that on legal grounds, independently of his own conduct, which in justice should estop him, the plaintiff could not maintain trespass against any one claiming under the company; for he was not at any time more than a tenant at will, and the deed determined the will and left him tenant at sufferance only, with a right to enter and remove the crop. *Nelson* v. *Cook*, 12 U. C. R. 22.

Where the registered owner of lands was present but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof. *Powell* v. *Watters*, 28 S. C. R. 133.

D.'s father died in 1847, having made his will, purporting to devise all his real estate to his wife in fee, but this will was not executed in the proper form, and therefore D. became entitled to the land as heir-at-law. Three months before D. became of age, he agreed with P. for the sale to him of the real estate for valuable consideration. A conveyance to P. was prepared by D., and executed by his mother, the devisee under his father's will, D. being the witness to it. P. afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. On a bill filed to restrain this action, it was shewn that

D. had, at various times acquiesced in the sale after he became of age:—Held, that D.'s conduct with reference to the sale to P., was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee, although he was then not of age; and that such conduct, and his subsequent acquiescence after his attaining majority, estopped him from denying the validity of the sale; and he was enjoined from proceeding with the ejectment, and ordered to execute a conveyance to the plaintiff, the vendee of P. *Leary* v. *Rose*, 10 Gr. 346.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting assurance of estates tail. The purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase without giving any notice of his title or the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. *Re Shaver*, 3 Ch. Ch. 379.

By a deed duly executed and registered, lands with a water frontage were vested in a man for life, remainder to his son in fee. The deed contained an agreement or stipulation that neither party should be at liberty to dispose of or incumber the property in any way without the consent of the other. The father, with the knowledge but without the consent of his son, sold portions of the water frontage, and the purchaser, with the knowledge of the son, improved thereon. After the death of the father, the son sold and conveyed the lands, including the water frontage, to W., whereupon a bill was filed by the vendee under the father against the son and W., claiming absolutely the part of the water frontage which had been conveyed by the father, on the ground of acquiescence by the son, and that W. had notice of the plaintiff's interest:—Held, that the registration of the deed under which the father and son claimed, was actual notice of the son's title, and that his acquiescence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest; and, semble, that under the circumstances, if even registration were not actual notice, the acquiescence would not bind his reversionary interest; and that even if the plaintiff had acquired any equitable interest arising out of such acquiescence, he could not enforce it against W. without proving actual notice to him of such equitable interest. *Bell* v. *Walker*, 20 Gr. 558.

Boundary Run by Consent.]—T. was the owner of lot 9, and C. was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T. being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed his northern boundary was. C. pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards T., with his architect and builder, went to the ground and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof and considerable money had been expended in building:—Held, that C. was estopped from disputing that the line run by the surveyor was the true line. *Grascett* v. *Carter*, 10 S. C. R. 105.

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

Dower — *Concealment of Marriage.*]—Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighbourhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Hoig* v. *Gordon*, 17 Gr. 599.

Dower—*Doubtful Will — Widow's Statement.*]—An intending purchaser of devised lands, doubting whether a provision made by the testator was in lieu of dower, asked the widow whether she had or claimed dower:—Held, that even if her answer was in the negative, it afforded no ground for the purchaser applying to this court to restrain her action for dower, brought on her being advised that under the will she was not put to her election. *Fairweather* v. *Archibald*, 15 Gr. 255.

Ejectment—*Admission of Possession.*]—In an action of trespass to land:—Held, that the plaintiff, having sufficient possession to maintain trespass, was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck* v. *Knapp*, 20 U. C. R. 360.

Entry by Leave—*Disputing Title.*]—A. entered into possession of land under the authority of and by permission of B. who made him a verbal promise for a deed to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died:—Held, that A. having entered under B., his heirs were estopped from disputing B.'s title, and that they could be ejected by B. *Armstrong* v. *Armstrong*, 21 C. P. 4.

Fraudulent Representation of Title.]—An insolvent person sold his land to his

brother; a creditor filed a bill impeaching the sale as fraudulent; part of the consideration was said by the defendants to be a pair of horses and waggon of the value of $200; but the parties had fraudulently given out after the sale that these horses were still the horses of the brother who had bought the land, and in this way had misled the plaintiff and other creditors:—Held, that this brother was estopped from afterwards setting up against the creditor that the $200 had been paid in that way, and, the plaintiff's debt being less than that amount, he was held entitled to a decree for payment, or in default a sale of the land. *McCarty* v. *McMurray*, 18 Gr. 604.

Invalid Sale at Instance of Heirs.]—In ejectment by the sons-in-law and daughters of an intestate, to recover possession of lands sold under an invalid fi. fa., it having appeared that the former, being tenants for life, had suggested and urged the sale in question for their own benefit; and that the party (a creditor of the estate of the intestate), for whose benefit the intended conveyance on such sale was made, had changed his position, and had assigned the judgment under which the sale took place, for the benefit of one of the male plaintiffs, and at his request:—Held, an estoppel in pais which barred the male plaintiffs, particularly after the lapse of nearly, if not quite, twenty years, from disputing the validity of said conveyance; and that the bar was not removed by their having joined their wives with them in the action in which the validity of such conveyance was questioned. Semble, that there was no evidence of conduct on the part of the female plaintiffs to establish an estoppel against them, and that on the death of their husbands the only estoppel created would cease to operate against them. *Ingalls* v. *Reid*, 15 C. P. 490.

Lease to Wife with Husband's Assent.]—Assumpsit for money lent and money had and received. On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of £79 paid (the money being the proceeds of the sale of her lands), obtained from the defendant a lease of certain premises to hold to her own use, during her natural life, the defendant covenanting at the expiration of the lease to pay Hannah Healey, her heirs or assigns, the sum of £50:—Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant; and that having assented to the demise to his wife, he could not now sue for the consideration money paid, or as money had and received to his use. *Healey* v. *Bongard*, 1 C. P. 212.

Married Woman—*Sale as Spinster.*]—A married woman, owner of real estate, representing herself to be, and selling it as a spinster, is not entitled in equity to set up that the sale was void because of the conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women. *Graham* v. *Mencilly*, 16 Gr. 661.

Mortgage—*Adverse Claim by Witness.*]—In 1870, the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, and remained in possession sixteen years. The exact nature of the agreement did not appear, but it pointed to the ownership in defendant of the portion occupied. In 1876, the father executed a mortgage of the whole of the farm to a loan company, which was witnessed by defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by defendant:—Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the loan company and its subsequent registration, under the circumstances, did not by virtue of s. 78 of the Registry Act R. S. O. 1877 c. 111, create an estoppel. *Western Canada Loan Co.* v. *Garrison*, 16 O. R. 81.

Possession—*Attempt to Purchase.*] — In ejectment:—Held, that it was no admission of the title of the party through whom defendant claimed, that the party through whom plaintiff derived title had, long after his title by possession had matured, filed a bill in chancery against the former for specific performance of an agreement for sale of the land in question to him. *Mulholland* v. *Conklin*, 22 C. P. 372.

Possession—*Invalid Title.*]—L., a married woman, about the year 1830 assumed to devise certain land to her daughter P. and her husband O. for their lives, and thereafter to their children. T. (one of the children) went into possession of part of it, at the instance of O., about 1855, and built thereon and remained in undisturbed possession for over twenty-eight years. Those who were entitled in remainder under the will (the life estate having expired) brought an action to have the land partitioned or sold, and T. claimed his part by length of possession:—Held, that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of L. (a married woman), made in 1828, before there was power to devise, and so void on its face, they had no title, and T. must succeed. Board v. Board, L. R. 9 Q. B. 48, and Paine v. Jones, L. R. 18 Eq. 320, distinguished. *Smith* v. *Smith*, 5 O. R. 690.

Possession—*Right to Assert Title.*]—In 1836, the plaintiff became the owner of and went to reside on lot 22, but by mistake occupied the four acres in question, being part of lot 23, as part of lot 22, and as such in 1838 cleared and fenced it. In 1868 the plaintiff's son, who had always resided on lot 22 with his father, and for many years had worked it, purchased with the plaintiff's knowledge and assent lot 23, which he worked jointly with lot 22, the whole crop going to the father to do as he liked with. In 1875 the son sold lot 23 to the defendant, the land in question still and for a long time thereafter continuing within the plaintiff's fence. There was some evidence given to shew that the plaintiff had warned his son that he would never own the piece in question, but it did not clearly appear whether this was at the time of or after the purchase:—Held, that there was nothing in the evidence, more fully set out in the case, to shew that the plaintiff by his acts or conduct had ever led to the belief that he did not intend to assert his possessory title to

the land in question, or that he had abandoned it, so as to estop him in equity from afterwards claiming it. *Junkin* v. *Strong*, 28 C. P. 498.

Land mortgaged by A., with the consent and approval of B., who was in possession. B. held estopped from setting up any title founded on his possession before the execution of the mortgage. *Boys* v. *Wood*, 39 U. C. R. 495.

In ejectment the plaintiff claimed the land as part of lot 3, and defendant as part of lot 4, each having a patent for their respective lots. It appeared, however, that the defendant, though his patent was subsequent to the plaintiff's, was the first to purchase from the Crown; and that he and the plaintiff had been occupying the respective lots for some years previous to the issue of either patent; that the piece in dispute was sold by the Crown lands agent to defendant as part of lot 4, and that he then took possession of it as such, continued to occupy it without any objection from plaintiff, and cleared a large portion thereof, and erected a house and barn thereon of much greater value than the land itself; that the plaintiff when applying for his patent, filed an affidavit made by defendant that there was no one in adverse possession of lot 3, upon which the lot, including this piece, was granted to the plaintiff:—Held, that the plaintiff was estopped in equity from setting up title to the land in question as being part of lot 3, and an equitable defence, setting out these facts, was directed to be added, and a verdict to be entered thereon for the defendant. *Stevens* v. *Buck*, 43 U. C. R. 1.

Tenant Acting as Arbitrator in Expropriation of Leased Land.]—The defendants' railway passed through certain land of which C. was owner and the plaintiff a tenant for years. In 1853 an arbitration was held to determine the sum to be paid to C., and the plaintiff being appointed arbitrator on his behalf concurred in making an award, saying nothing then of any claim on his own part; but in 1855, more than six months after the company had taken possession of the land, he brought trespass against them. Semble, that the plaintiff, by his conduct, had estopped himself from making any claim against the company. *Detlor* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 595.

Tenant—*Offer to Give up Possession.*]—Defendant had been tenant to the plaintiffs at a yearly rent, payable quarterly, for a term which expired on the 1st June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due, the plaintiffs distrained, but they afterwards abandoned the proceeding, and on the 17th September, 1860, the plaintiffs' attorney served a written demand of possession on defendant, who told him that was just what he wished, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant, besides denying their title, claimed to hold as their tenant:—Held, that the plaintiffs were entitled to recover, for, 1. The defendant, having denied their title, could not insist upon notice to quit; and 2. He was estopped by his offer to leave the place. *Cartwright* v. *McPherson*, 20 U. C. R. 251.

True Owner Allowing Title to be Claimed.]—If the true owner of goods so conduct himself as to enable another, who has the possession, but not the property, of such goods, to hold himself out to the world as the real owner, the true owner is estopped from denying the title of an innocent purchaser for value. The possession of property attached to the realty, which thereby becomes realty, is a sufficient indication of ownership to estop the real owner as against an innocent purchaser for value. *McDonald* v. *Weeks*, 8 Gr. 297.

Trust—*Denial of Interest.*]—A. took a conveyance as trustee for B. B., in answer to a bill by a person claiming the property against both, was induced by A. to swear that he (B.) had not any interest in the property:—Held, in a subsequent suit by B. against A., that B. was not precluded from shewing the trust. *Washburn* v. *Ferris*, 14 Gr. 516, 16 Gr. 76.

See CROWN, VIII. — PRACTICE — PRACTICE AT LAW BEFORE THE JUDICATURE ACT, VII.

ESTREAT.

See RECOGNIZANCE, II.

EVICTION.

See LANDLORD AND TENANT, XII.

END OF VOLUME ONE.

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